Chapter 4

Affirmative Action

Learning Objectives

After reading this chapter, you should be able to:

- **LO1** Discuss what affirmative action is and why it was created.
- **LO2** Name and explain the three types of affirmative action.
- **LO3** List the basic safeguards put in place in affirmative action plans to minimize harm to others.
- **LO4** Explain when affirmative action plans are required and how they are created.
- **LO5** Explain the arguments of those opposed to affirmative action and those who support it.
- **LO6** Provide the results of several studies indicating why there continues to be a need to take more than a passive approach to equal employment opportunity.
- **LO7** Define "reverse discrimination" and tell how it relates to affirmative action.
- **LO8** Explain the concept of valuing diversity, why it is needed, and give examples of ways to do it.

Opening Scenarios

SCENARIO 1

1 Scenario

Union has not permitted African-Americans to become a part of its ranks because of opposition from white union members. Black employees win when they sue to join. The court orders appropriate remedies. The union still resists African-Americans as members. Eventually the court orders that the union admit a certain number of African-Americans by a certain time or be held in contempt of court. Is this a permissible remedy under Title VII?

SCENARIO 2

2 Scenario

Employer is concerned that her workplace has only a few African-Americans, Hispanics, and women in upper-level management and skilled-labor jobs. Most unskilled-labor and clerical positions are held by women and minorities. Employer decides to institute a program that will increase the numbers of minorities and women in management and skilled-labor positions. Is this permissible? Do you have all relevant facts needed to decide? Explain.

SCENARIO 3

3 Scenario

An employer is found by a court to have discriminated. As part of an appropriate remedy, employer is ordered to promote one female for every male that is promoted, until the desired goal is met. Male employees who would have been next in line for promotions under the old system sue the employer, alleging reverse discrimination in that the new promotees are being hired on the basis of gender, and the suing employees are being harmed because of their gender. Who wins and why?

Statutory Basis

Except in the contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor 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 employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. [202, Executive Order 11246.]

If the court finds that 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 practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate. [Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, sec. 706(g).]

***2035** (a) (1) Any contract in the amount of $100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States

> take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of $100,000 or more entered into by a prime contractor in carrying out any such contract. [Jobs for Veterans Act of 2002, 38 U.S.C.A. § 4212(a)(1).]

Other pieces of more limited protective employment legislation, such as the Americans with Disabilities Act (which encourages, but does not mandate, affirmative action), the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act, as amended by the Jobs for Veterans Act of 2002, also address affirmative action.

The Design and Unstable History

Note: Several pieces of legislation contain affirmative action provisions, but we are here primarily devoting coverage to areas covered by Title VII of the Civil Rights Act of 1964 and Executive Order 11246.

affirmative action
Intentional inclusion of women and minorities in the workplace based on a finding of their previous exclusion.

Noise. There is a lot of it around the concept of **affirmative action**. It can be difficult to turn off the noise and determine what is real and what is not. Did you ever hear someone say, "We *have* to hire an African-American" or "We *have* to hire a woman"? Such a statement is likely rooted somewhere in the concept of affirmative action. While there may be truth somewhere in the statement, it is probably far from what it appears to be. Many, mistakenly, think affirmative action is a law that takes qualified whites or males out of their jobs and gives the jobs to unqualified minorities or females, or that affirmative action is an entitlement program that provides unqualified women or minorities with jobs while qualified whites or males, or both, are shut out of the workplace.

Imagine sitting at a nice upscale restaurant enjoying a great meal. At the table next to yours is what appears to be a mother and a daughter in her early twenties. Suddenly the mother raises her hand and slaps the daughter hard across the face. Everything stops. Everyone in the restaurant is shocked. You are appalled. You think the mother must be crazy for doing such a thing and you find yourself being angry with the mother for such a violent, heartless, embarrassing spectacle.

Imagine your surprise when you learn that from birth, the daughter has suffered violent seizures from time to time. She has managed to live a fairly normal life and is an honor student in her senior year of college, but occasionally, for no particular reason that doctors can discern, she will have a seizure. She gets a certain look in her eyes when the seizure is about to occur, and the only way it can be prevented is to immediately slap her hard across the face.

What a difference knowledge and context make. What may appear as one thing without knowing the facts and context can seem quite different if you do. We find that our students, and most employees we meet during consulting, dislike affirmative action. However, they rarely know what it actually is, and they know even less about its context. Seen from their experience of living in a post–Title VII world, and not giving a lot of thought to discrimination, it makes no sense at all to have race or gender play any part whatsoever in an employment or any other decision.

However, once they learn what it is and why it was created, they have a better foundation upon which to base their opinion. Whether it changes their opinion is up to them, but at least now they are basing that opinion on fact rather than misconceptions. This is extremely important for making workplace decisions.

Most of the anger around affirmative action stems from the issue of race. Despite the fact that white women have made the most gains under affirmative action, there is still the basic view that African-Americans are getting something others are not, just because they are African-American, and this makes people angry. Perhaps, as with our students and employees, viewing affirmative action in the context of a rough racial timeline will give you more information and a context for the law and thus a clearer view. It puts what nowadays appears to be a ridiculously unfair legal requirement into its proper context, thus making it more understandable.

1619—First slaves arrive in America. Slavery is a way of life for African-Americans who have virtually no other role in American society. They are considered property and necessary for the economic development of the South, in particular. Like a cow or dog, they have no rights, including the right to read or write, marry, keep their children, or even their own life. Some places have more slaves than whites (for instance, at one point, South Carolina was 80 percent slaves), and the safety of whites who fear slave revolts is a constant concern. Personnel are not available to constantly watch them, so methods are developed to keep them in line without constant supervision. Slave Codes, policies and actions that make them aware of their subjugation every minute of every day, accomplish this mental and physical enslavement. This approach continues for the next 246 years.

1865—The Civil War ends. The war had begun four years earlier in 1861 to prevent the South from leaving the United States and establishing its own country in which it could have slaves.

1865—The Thirteenth Amendment to the Constitution abolishes slavery. Shortly thereafter, Slave Codes are replaced by Black Codes. After federal troops, which had come to the South to make sure slavery actually ended, leave 11 years later (the period called Reconstruction), the Ku Klux Klan (KKK) rises and, through violence and intimidation, enforces Jim Crow laws codifying racial segregation and keeping African-Americans in very much the same position they had been in during slavery. Jim Crow is in force by law or social custom to some degree virtually everywhere in the country. Under Jim Crow laws, African-Americans are segregated from whites in every aspect of their lives, and under the policy of "separate but equal" are relegated to segregated and inferior housing, education, transportation, public accommodations, and the like. While the Constitution guarantees them the right to vote, African-Americans are not permitted to do so, and job discrimination, housing discrimination, and education discrimination are legal. Lynching African-Americans to maintain control is common and the federal government refuses to intervene despite repeated requests to do so. This continues for the next

100 years, except for public school segregation, which is outlawed by the U.S. Supreme Court in 1954 in the case of *Brown v. Topeka Board of Education.*[1] Most schools are not completely desegregated, however, until well into the 1960s and 1970s, and not without significant resistance and rioting by whites, including shutting down entire public school systems rather than integrate them. Two people are killed and 150 troops injured when the first African-Americans show up to attend the University of Alabama. Segregation is so strict and insinuated into every aspect of society that, in 1959, Alabama state librarian Emily Reed is fired for refusing to remove the children's book *A Rabbit's Wedding* from the library, despite demands of state senators who say it (and other books like it) should be removed and burned because the groom was a black bunny and the bride was a white bunny.

1964—Civil Rights Act of 1964 is passed, prohibiting discrimination on the basis of race, color, gender, religion, and national origin in employment, education, receipt of federal funds and public accommodations. The country is in turmoil over African-Americans not being able to vote. (See Exhibit 4.1, "Voting under Jim Crow.")

1965—Civil Rights Act of 1964 becomes effective; the Voting Rights Act of 1965 is passed, allowing African-Americans to vote. The country is to go from 346 years of treating African-Americans as separate and inferior in every way, to treating them as equals. To put this in perspective, 1964 is the year the Beatles burst onto the U.S. music scene.

1971—First important Title VII case decided by the U.S. Supreme Court, **Griggs v. Duke Power Co.**[2] The case is significant because since African-Americans have never been equal in the United States, and have always been treated as inferior, few know what this picture of equality under Title VII was actually supposed to look like. Is it enough to simply take down the "Colored" and "White" signs? The Supreme Court decision made it clear that equality meant equality in every way. Now the country understands that it must take Title VII seriously. For perspective, the Rolling Stones' "Brown Sugar" is a top hit for the year.

1979—First workplace affirmative action case decided by the U.S. Supreme Court. The Court determines that affirmative action is a viable means of effectuating the law and addressing present-day vestiges of the 346-year system that kept African-Americans subjugated. Perspective: The Village People's hit single, "Y.M.C.A.," sweeps the country.

1980s—Affirmative action is hotly debated between the presidents, who are opposed, and federal agencies responsible for enforcement of the laws, some of which oppose the law and others of which do not. Employers, seeing these very public disagreements, were confused about what they were required to do, but knew they were supposed to do something and that affirmative action meant they were supposed to have African-Americans and women. So, they often simply did what they thought they needed to do to try to protect themselves from violating the law. They determined how many minorities and

Exhibit 4.1 *Voting under Jim Crow*

In 1962, Fannie Lou Hamer, a sharecropper who worked on a plantation in Ruleville, Mississippi, tried to register to vote and could not. Hamer became a field organizer for the Student Nonviolent Coordinating Committee (SNCC), trying to register African-Americans to vote in the South. Hamer ran for Congress in 1964 with the help of the Mississippi Freedom Democratic Party formed by SNCC to expand African-American voter registration and challenge the legitimacy of the state's all-white Democratic Party. The MFDP attended the Democratic National Convention in Atlantic City in 1964 and Hamer appeared before the credentials committee in an attempt to unseat the Mississippi delegation or be seated with them. This is an excerpt from the speech she gave before the committee. It provides insight into how deeply race was ingrained in our culture at the time the Civil Rights Act was passed, and how deep-seated the prejudice against African-Americans was, which in turn necessitated taking more than a passive approach to prohibiting workplace discrimination.

> Mr. Chairman, and the Credentials Committee, my name is Mrs. Fannie Lou Hamer, and I live at 626 East Lafayette Street, Ruleville, Mississippi, Sunflower County, the home of Senator James O. Eastland and Senator Stennis [staunch Southern segregationists].
>
> It was the 31st of August in 1962 that eighteen of us traveled twenty-six miles to the county courthouse in Indianola to try to register to become first-class citizens.
>
> We was met in Indianola by policemen, Highway Patrolmen, and they only allowed two of us to take the literacy test at the time. After we had taken this test and started back to Ruleville, we was held up by the City Police and the State Highway Patrolmen and carried back to Indianola where the bus driver was charged that day with driving a bus of the wrong color.
>
> After we paid the fine among us, we continued on to Ruleville, and Reverend Jeff Sunny carried me four miles in the rural area where I had worked as a timekeeper and sharecropper for eighteen years. I was met there by my children, who told me that the plantation owner was angry because I had gone down to try to register.
>
> After they told me, my husband came, and said the plantation owner was raising Cain because I had tried to register. Before he quit talking the plantation owner came and said, "Fannie Lou, do you know—did Pap tell you what I said?"
>
> And I said, "Yes, Sir."
>
> He said, "Well I mean that." He said, "If you don't go down and withdraw your registration, you will have to leave." Said, "Then if you go down and withdraw," said, "you still might have to go because we are not ready for that in Mississippi."
>
> And I addressed him and told him and said, "I didn't try to register for you. I tried to register for myself."
>
> I had to leave that same night.
>
> On the 10th of September 1962, sixteen bullets was fired into the home of Mr. and Mrs. Robert Tucker for me. That same night two girls were shot in Ruleville, Mississippi. Also, Mr. Joe McDonald's house was shot in.
>
> And June the 9th, 1963, I had attended a voter registration workshop; was returning back to Mississippi. Ten of us was traveling by the Continental Trailways bus. When we got to Winona, Mississippi, which is Montgomery County, four of the people got off to use the washroom, and two of the people—to use the restaurant—two of the people wanted to use the washroom.
>
> The four people that had gone in to use the restaurant was ordered out. During this time I was on the bus. But when I looked through the window and saw they had rushed out I got off of the bus to see what had happened. And one of the ladies said, "It was a State Highway Patrolman and a Chief of Police ordered us out."
>
> I got back in the bus and one of the persons had used the washroom got back on the bus, too.

continued

As soon as I was seated on the bus, I saw when they began to get the five people in a highway patrolman's car. I stepped off of the bus to see what was happening and somebody screamed from the car that the five workers was in and said, "Get that one there." When I went to get in the car, when the man told me I was under arrest, he kicked me.

I was carried to the county jail and put in the booking room. They left some of the people in the booking room and began to place us in cells. I was placed in a cell with a young woman called Miss Ivesta Simpson. After I was placed in the cell I began to hear sounds of licks and screams, I could hear the sounds of licks and horrible screams. And I could hear somebody say, "Can you say, 'yes, sir,' nigger? Can you say 'yes sir'."

And they would say other horrible names.

She would say, "Yes, I can say 'yes sir.'"

"So, well, say it."

She said, "I don't know you well enough."

They beat her, I don't know how long. And after a while she began to pray, and asked God to have mercy on those people.

And it wasn't too long before three white men came to my cell. One of these men was a State Highway Patrolman and he asked me where I was from. I told him Ruleville and he said, "We are going to check this."

They left my cell and it wasn't too long before they came back. He said, "You are from Ruleville all right," and he used a curse word. And he said, "We are going to make you wish you was dead."

I was carried out of that cell into another cell where they had two Negro prisoners. The State Highway Patrolmen ordered the first Negro to take the blackjack.

The first Negro prisoner order me, by orders from the State Highway Patrolman, for me to lay down on a bunk bed on my face.

I laid on my face and the first Negro began to beat. I was beat by the first Negro until he was exhausted. I was holding my hands behind me at that time on my left side, because I suffered from polio when I was six years old.

After the first Negro had beat until he was exhausted, the State Highway Patrolman ordered the second Negro to take the blackjack.

The second Negro began to beat and I began to work my feet, and the State Highway Patrolman ordered the first Negro who had beat me to sit on my feet—to keep me from working my feet. I began to scream and one white man got up and began to beat me in my head and tell me to hush.

One white man—my dress had worked up high—he walked over and pulled my dress—I pulled my dress down and he pulled my dress back up.

I was in jail when Medgar Evers was murdered.

All of this is on account of we want to register, to become first-class citizens. And if the Freedom Democratic Party is not seated now, I question America. Is this America, the land of the free and the home of the brave, where we have to sleep with our telephones off the hooks because our lives be threatened daily, because we want to live as decent human beings, in America? Thank you.

Fannie Lou Hamer and the MFDP were not seated at the convention. Four years later, at the Democratic National Convention in Chicago, they were. Hamer received a standing ovation as she became the first African American official delegate at a national party convention since Reconstruction, and the first ever woman from Mississippi.

Source: Catherine Ellis and Stephen Drury Smith, eds., *Say It Plain: A Century of Great African American Speeches* (New York: The New Press, 2005).

women they needed to prevent a disparate impact and hired that number. This became transformed into the idea of a quota in society's eyes. Note that this was not imposed by the government but came about as a result of employers

trying to protect themselves and thinking this was the right way to do it. At the same time, politicians took advantage of the situation by using depictions of whites being fired from jobs in order to hire African-Americans—something that was always illegal under the law but that fed into constituents' worst fears. (See Exhibit 4.2, "1980s Media Statements Regarding Affirmative Action.") This is the time of Madonna's "Like A Virgin," Michael Jackson's "Thriller," and Cindy Lauper's "Girls Just Wanna Have Fun."

2004—The last Civil War widow dies.

2008—U.S. House of Representatives apologizes for slavery, Jim Crow, and its aftermath, joining five states that had already issued such resolutions.

Two things should become apparent in viewing this timeline: (1) affirmative action has not been around for nearly as long as we may think and (2) the under 30 years or so it has been on the country's radar screen is not a very long time compared to the 346-year history that created the *present-day* vestiges of race that the concept seeks to remedy.

Many people *hate* affirmative action. Most who do generally make that determination based on misconceptions about what it is. (See Exhibit 4.3, "Affirmative Action Myths.") You get to keep your feelings about it, whatever they are, but (l) you need to know what it actually is, rather than what you may have been told or gathered here and there, and (2) you need to know how and why it applies to the workplace.

In this chapter we will clear up the misconceptions. We will learn what affirmative action is, what it is not, what the law requires, and whom it affects. If you are like most of our students, what you learn may surprise you. As we go through learning what affirmative action is and what it is intended to do, try to think of what you would do if faced with finding a solution for the problem it was created to solve. Even the proponents of affirmative action would prefer that it be unnecessary at all, and tend to agree that it is far from a perfect solution. However, given what we have to deal with in ridding the workplace of discrimination, it is at least an attempt. Given all the factors we have to deal with, what would your solution be?

Affirmative action does not apply to all employers. For the most part, it applies to those with 50 or more employees who have contracts with the federal government to provide the government with goods or services worth $50,000 or more. This means it covers just over 20 percent of the workforce. As a part of that contract, the government requires the employer to agree not to discriminate in the workplace and, further, to engage in affirmative action if it is found to be needed (discussed later in the chapter). Contracts are completely voluntary agreements that we can choose to enter or not. Just as each of us has the choice to contract or not with businesses whose policies we like or don't like, so too does the federal government. It has decided that it does not want to contract with businesses that discriminate against employees in violation of the Title VII categories.

Despite what you think or may have heard, affirmative action does not require anyone to give up his or her job to someone who is not qualified to hold it. In fact, it generally does not require anyone to give up his or her job at all. It also does not require quotas. In fact, they are, for the most part, illegal. If you are like most of our students, this goes against everything you've ever heard.

Exhibit 4.2 *1980s Media Statements Regarding Affirmative Action*

After the seminal U.S. Supreme Court cases on affirmative action in 1978 and 1979, the concept was really shaped and molded by fallout from the Court's decisions in the 1980s. You can gather from the statements below how divisive the issue was, even for the federal administrators and others with responsibility in the area. Think about how recent this was—there are reruns on TV that go back much further!

3/4/85. "Department of Justice is asking public sector employers to change their negotiated consent decrees [which DOJ had previously pressed for] to eliminate preferential treatment to nonvictims of discrimination." (*BNA Daily Labor Report,* No. 42.)

4/4/85. "[Dept. of] Justice moves to eliminate quotas called 'betrayal' by Birmingham mayor, in testimony before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. Cites 'remarkable progress' made in bringing blacks into the city's fire and police departments." (*BNA Daily Labor Report,* No. 74.)

5/6/85. "Challenges Mount to Department of Justice's Anti-Quota Moves." (*BNA Daily Labor Report,* No. 87.)

9/16/85. "Congress recently ordered an audit of the U.S. Civil Rights Commission and the EEOC, headed by Clarence Pendleton, Jr., and Clarence Thomas, respectively, to find out if financial and personnel troubles are hurting the way both federal panels are enforcing civil rights laws." (*Jet* magazine, p. 16.)

10/17/85. "Attorney General Meese acknowledges that review of Executive Order 11246 is proceeding at Cabinet level, but dismisses charges that Administration officials are at odds over question of affirmative action." (*BNA Daily Labor Report,* No. 201.)

11/29/85. "Majority of Senate is on record as opposing efforts by Attorney General Meese and others in Administration to alter Executive Order 11246 to prohibit goals and timetables for minority hiring." (*BNA Daily Labor Report,* No. 230.)

5/12/86. "Business Applauded for Opposing Changes in Affirmative Action Order." (*BNA Daily Labor Report,* No. 91.)

7/7/86. "Civil Rights Groups Applaud Supreme Court [for *Cleveland Firefighters and Sheet Metal Workers* decisions upholding affirmative action]; Department of Justice Vows to Continue Bid to Revise Executive Order 11246." (*BNA Daily Labor Report,* No. 129.)

7/7/86. "Labor Department says 'we don't see anything in these cases to suggest a legal necessity to change either the executive order or the OFCCP program.'" (*BNA Daily Labor Report,* No. 129.)

6/4/87. "OFCCP Enforcement Activity Scored by House Labor Staff: Alleged Lack of OFCCP Enforcement Activity Criticized by House Labor Staff." (*BNA Daily Labor Report,* No. 106.)

6/5/87. "DOL Official Defends OFCCP's Performance Against Charges of Declining Enforcement." (*BNA Daily Labor Report,* No. 107.)

7/2/89. "Civil Rights: Is Era Coming to an End? Decades of Change Called into Question by [Supreme Court] Rulings." (*Atlanta Journal and Constitution,* p. A-1.)

LO1

At its simplest, affirmative action involves the employer taking steps to expand job opportunities in an effort to bring qualified women and minorities (or others statutorily mandated groups) into a workplace *from which it has been determined that they are excluded,* in order to make the workplace more reflective of their availability in the workforce from which the employees are drawn. This would

Exhibit 4.3 *Affirmative Action MYTHS*

Here are some common misconceptions about affirmative action gathered from students, employees, managers, supervisors, and business owners over the years. See if you recognize any of them.

- Affirmative action requires employers to remove qualified whites and males from their jobs and give these jobs to minorities and women whether they are qualified or not.
- Affirmative action prevents employers from hiring white males who are more qualified for the job.
- Under affirmative action, all an employee must be is a female or a minority to be placed in a job.
- Most employees who obtain jobs under affirmative action plans are not qualified for the job.
- Workplace productivity and efficiency always suffer under affirmative action plans.
- There should be no affirmative action because the best person is always the one who gets the job.
- If a female or minority is in a job pool with other nonminority or female candidates, the female or minority must be hired.
- Employers cannot apply to females and minorities the same job requirements they do for males and nonminorities.
- Minorities and females cannot be fired.

ordinarily happen on its own in the absence of discrimination or its vestiges. This intentional inclusion must be premised on one of several bases we will discuss in this chapter.

The actions an employer takes can include expanded outreach to groups the employer has not generally made an effort to reach, recruitment of groups the employer generally has not made an attempt to recruit, mentoring, management training and development, hiring, training, and other attempts to bring into the workplace groups that have tended to be left out of the employment process. The absence generally stems from attitudes about, or actions toward, such groups that resulted in their absence from the workplace or presence in very low numbers at odds with their availability in the workforce. The absence can just as likely have come from simply letting the status quo continue unabated, with no particularly negative feeling or even thought about excluded groups. Given the history of systemic discrimination we have discussed, it is clear why this would occur. (See Exhibit 4.4, "Life under Jim Crow.")

Intentionally including employees previously excluded from a workplace is quite different from saying that workplace discrimination is prohibited. The former is the active approach required by Executive Order 11246; the latter, Title VII's passive approach.

You may wonder why, in this day and time, decades removed from the Civil Rights Act of 1964 prohibiting discrimination, we would still need something like affirmative action to be in place. In order to understand why such a thing would still be needed in any form, you must understand the basis for the law in the first place. To do so, we cannot look at the law only from the perspective of today, which is how most students view it, for that is not what was in existence when the

Exhibit 4.4 *Life under Jim Crow*

In '64 we had a public hospital constructed, and at that hospital, blacks were segregated by rooms. Blacks in one room, Whites in another. Health, Education and Welfare came down and inspected the hospital and found out that it was segregated by race. [They] wrote a letter to the hospital telling them that they were violating federal law, and if they didn't correct the problem and admit patients to rooms regardless of color, federal funds would be withdrawn. Finally they were forced to integrate the rooms at the hospital, but the feds had to make a grand stand before that happened.

Nash General over in Nash county got around the problem by building a new hospital with all private rooms. There were no semi-private rooms in Rocky Mount. People have forgotten it now, but the reason was to get around integration. So health care was terrible.

There were two clinics staffed by white physicians and blacks could go to those clinics to see white doctors but the rules were different. You had to sit in a very, very small room bunched up together with very poor ventilation. You couldn't see out of the room very much. There was maybe an 18" by 18" hole that the receptionist would talk to you through. You were called by your first name. Whereas whites had this spacious, beautiful waiting room with plants and windows and the light. Black patients would always be last.

—George Kenneth Butterfield Jr.

I volunteered to go into the service. It was well segregated. We went one way and the whites went another. Each outfit was equipped with the same equipment and whatnot. After I went overseas we could see the segregated part. As a black soldier, you had truck drivers and laborers. I found it was much easier to stay out of trouble because they would court martial you if you didn't. The first trouble I really had was in London. We were getting ready for the invasion of North Africa, so the people were trying to show their appreciation toward black servicemen.

So they made up the passes to go to the dance that night, and I put them on [the commanding officer's] desk. He had signed four or five of them before he read the first one. So he looked and asked the first sergeant of the outfit, "What are these passes for?"

Sergeant Johnson said, "They are passes for the men to go to a party in Birmingham, England."

He says, "Birmingham, England?"

He said, "Yes."

My company commander was from Mississippi, and he didn't want his black boys fraternizing with the white girls in the area. He said, "Well, there ain't no black girls in Birmingham, England. None of my black boys are going to dance with no white girls." And so he began to tear the passes up. He tore all of them up.

—Henry Hooten

Source: William H. Chafe, Raymond Gavins, and Robert Korstad, eds., *Remembering Jim Crow: African-Americans Tell About Life in the Segregated South* (New York: The New Press, 2001), pp. 22, 25.

law was created. It is important to look at the law in terms of what existed at the time, what the law was made to accomplish and why.

It is essential to understand how absolutely divided this country was along the issues of race and gender; how thoroughly separated races and genders were; how deeply held the negative views about African-Americans in particular were; and how these all issues resulted in there not being the wholesale, instant total embrace of groups so long ostracized by society as soon as Title VII was passed. (See Exhibits 4.1 and 4.4.) While you, personally, may not hold them, negative

attitudes about those covered by affirmative action ran/run exceedingly deep and were/are closely held. It was going to take more than simply telling people not to discriminate to move the country toward what the antidiscrimination laws were created for. Evidence of these attitudes held both then and now lies in the statistics reflected in Exhibit 4.5 ("Employment Research Findings") and other information given in this chapter.

LO6

As you will see, however, affirmative action is used only when there is a *demonstrated* underrepresentation or a finding of discrimination. It is designed to remedy *present-day* employment inequities based on race or gender. It is about the past only in the sense that what happened in the past is what accounts for the present-day effects. Affirmative action is about remedying discrimination, not about punishing anyone. It makes little sense that if a system existed for 346 years, as slavery and Jim Crow did, there would be no vestiges of it 40+ years after the system ended. A seven-volume study released on October 1, 1999, by Harvard University and the Russell Sage Foundation found that racial stereotypes and attitudes "heavily influence the labor market, with blacks landing at the very bottom." The researchers found that "race is deeply entrenched in the country's cultural landscape—perhaps even more than many Americans realize or are willing to admit." Attitudes such as those found by the Harvard study find their way into the workplace and affect minority and female employees working there. That, in turn, leads to the need for assistance such as affirmative action to remedy the situation.

If we could think of one thing that bothers us the most about affirmative action, it is that we view our country as based on fairness and our achievement as based on the effort we put forth. Affirmative action seems to fly in the face of this because it appears that women and minorities get something without any effort when everyone else has to work for it. All they have to do is be born female or a minority, show up, and they get the job or get into schools or are granted contracts. Based on this premise, it makes perfect sense to resent affirmative action. However, as we have seen, research demonstrates this is far from reality. Despite antidiscrimination laws, minorities and women still lag behind in pay, jobs, and promotions. The statistics make sense since, as we have discussed, our history with race was one of institutionalized prejudices that were manifested in laws, regulations, policies, and funding. Congress recognized as much when, after many failed chances to do so, on July 29, 2008, it finally apologized for slavery and recognized that "African-Americans continue to suffer from the complex interplay between slavery and Jim Crow—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity, the frustration of careers and professional lives, and the long-term loss of income and opportunity." (See Exhibit 4.6, "U.S. House of Representatives Resolution Apologizing for Slavery.") Those institutionalized prejudices also have impacted full participation by all in the workplace and in receiving other benefits that, in turn, set the stage for the need for affirmative action of some sort to counteract the outcome of such discriminatory policies.

Before deciding if affirmative action has outlived its usefulness, keep in mind the timeline discussed earlier and the deep-seated attitudes that result in the

Exhibit 4.5 *Employment Research Findings*

Take a look at the items below and think about whether research indicates that affirmative action has outlived its usefulness.

- According to the U.S. Census, 23 percent of the workforce is minority, up from 10.7 percent in 1964.
- In 2006, white women's median weekly earnings were 77 percent those of white men. African-American women's earnings were 66 percent of the earnings of white men, and Latina women's earnings were 55 percent of white men's earnings.
- African-American women with bachelor's degrees make only $1,545 more per year than white males who have only completed high school.
- In an important longitudinal study of black and white women ages 34 to 44, only one-fifth of the gap between their wages could be explained by education and experience. The study found that while women are segregated into lower-paying jobs, the impact is greater on African-American women than white women.
- Research indicates that as the percentage of females and the percentage of minorities in a job increase, average pay falls, even when all other factors are held steady.
- African-American men with professional degrees receive 79 percent of the salary paid to white men with the same degrees and comparable jobs. African-American women earn 60 percent.
- A study conducted by the U.S. Department of Labor found that women and minorities have made more progress breaking through the glass ceiling at smaller companies. Women comprise 25 percent of the managers and corporate officers in smaller establishments, while minorities represent 10 percent. But among Fortune 500 companies, women held 18 percent of the managerial jobs, with minorities holding 7 percent.
- The federal Glass Ceiling Commission found that white women made up close to half the workforce, but held only 5 percent of the senior level jobs in corporations. African-Americans and other minorities account for less than 3 percent of top jobs (vice president and above).
- The Glass Ceiling Commission found that a majority of chief executives acknowledge that the federal guidelines have been crucial in maintaining their commitment to a diverse workforce. It is estimated that only 30 to 40 percent of American companies are committed to affirmative action programs purely for business reasons, without any federal pressure. Most medium-sized and small companies, where job growth is greatest and affirmative action gains biggest, have adopted affirmative action only grudgingly, and without guidelines, they are most likely to toss it overboard.
- Studies show that there is little correlation between what African American and white workers score on employment tests and how they perform in the workplace.
- A Census Bureau survey of 3,000 businesses asked them to list the things they consider most important when hiring workers. The employers ranked test scores as 8th on a list of 11 factors. Generally speaking, job testing did not come into wide usage in the United States until after Title VII.
- The Glass Ceiling Commission research reported that stereotyping and prejudice still rule many executive suites. Women and minorities are frequently routed into career paths like customer relations and human resources, which usually do not lead to the top jobs.
- Cecelia Conrad, associate professor of economics at Barnard College in New York, examined whether affirmative action plans had hurt worker productivity. She found "no evidence that there has been any decline in productivity due to affirmative action." She also found no evidence of improved productivity due to affirmative action.
- A study of Standard and Poor's 500 companies found firms that broke barriers for women and minorities reported stock market records nearly 2.5 times better than comparable companies that took no action.

Exhibit 4.6 *U.S. House of Representatives Resolution Apologizing for Slavery*

This is the actual text of the 2008 Congressional Resolution apologizing for slavery. The House was several times presented with the opportunity to pass such a resolution over the years, but it refused, out of fear of a call for reparations. Congress had apologized for its actions toward Native Americans, toward Hawiians for overthrowing their government, and to Japanese interred in World War II internment camps, including paying them money. The Resolution was presented by Rep. Steve Cohen (D-TN), the only white legioslator to represent the 60 percent black Congressional District in the past 30 years.

Whereas millions of Africans and their descendants were enslaved in the United States and the 13 American colonies from 1619 through 1865; (Engrossed as Agreed to or Passed by House)
HRES 194 EH

H. Res. 194
In the House of Representatives, U.S.,
July 29, 2008.

Whereas millions of Africans and their descendants were enslaved in the United States and the 13 American colonies from 1619 through 1865;

Whereas slavery in America resembled no other form of involuntary servitude known in history, as Africans were captured and sold at auction like inanimate objects or animals;

Whereas Africans forced into slavery were brutalized, humiliated, dehumanized, and subjected to the indignity of being stripped of their names and heritage;

Whereas enslaved families were torn apart after having been sold separately from one another;

Whereas the system of slavery and the visceral racism against persons of African descent upon which it depended became entrenched in the Nation's social fabric;

Whereas slavery was not officially abolished until the passage of the 13th Amendment to the United States Constitution in 1865 after the end of the Civil War;

Whereas after emancipation from 246 years of slavery, African-Americans soon saw the fleeting political, social, and economic gains they made during Reconstruction eviscerated by virulent racism, lynchings, disenfranchisement, Black Codes, and racial segregation laws that imposed a rigid system of officially sanctioned racial segregation in virtually all areas of life;

Whereas the system of de jure racial segregation known as 'Jim Crow,' which arose in certain parts of the Nation following the Civil War to create separate and unequal societies for whites and African-Americans, was a direct result of the racism against persons of African descent engendered by slavery;

Whereas a century after the official end of slavery in America, Federal action was required during the 1960s to eliminate the dejure and defacto system of Jim Crow throughout parts of the Nation, though its vestiges still linger to this day;

Whereas African-Americans continue to suffer from the complex interplay between slavery and Jim Crow—long after both systems were formally abolished—through enormous damage and loss, both tangible and intangible, including the loss of human dignity, the frustration of careers and professional lives, and the long-term loss of income and opportunity;

Whereas the story of the enslavement and de jure segregation of African-Americans and the dehumanizing atrocities committed against them should not be purged from or minimized in the telling of American history;

Whereas on July 8, 2003, during a trip to Goree Island, Senegal, a former slave port, President George W. Bush acknowledged slavery's continuing legacy in American life and the need to confront that legacy when he stated that slavery 'was . . . one of the greatest crimes of history. . . .The racial bigotry fed by slavery did not end with slavery or with segregation. And many of the issues that still trouble America have roots in the bitter experience of other times. But however long the journey, our destiny is set: liberty and justice for all.';

Whereas President Bill Clinton also acknowledged the deep-seated problems caused by the continuing legacy of racism against African-Americans that began with slavery when he initiated a national dialogue about race;

continued

Whereas a genuine apology is an important and necessary first step in the process of racial reconciliation;

Whereas an apology for centuries of brutal dehumanization and injustices cannot erase the past, but confession of the wrongs committed can speed racial healing and reconciliation and help Americans confront the ghosts of their past;

Whereas the legislature of the Commonwealth of Virginia has recently taken the lead in adopting a resolution officially expressing appropriate remorse for slavery and other State legislatures have adopted or are considering similar resolutions; and

Whereas it is important for this country, which legally recognized slavery through its Constitution and its laws, to make a formal apology for slavery and for its successor, Jim Crow, so that it can move forward and seek reconciliation, justice, and harmony for all of its citizens: Now, therefore, be it

Resolved, *That the House of Representatives—*

(1) acknowledges that slavery is incompatible with the basic founding principles recognized in the Declaration of Independence that all men are created equal;

(2) acknowledges the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow;

(3) apologizes to African-Americans on behalf of the people of the United States, for the wrongs committed against them and their ancestors who suffered under slavery and Jim Crow; and

(4) expresses its commitment to rectify the lingering consequences of the misdeeds committed against African-Americans under slavery and Jim Crow and to stop the occurrence of human rights violations in the future.

Attest:
Clerk.

imbalance of one group's presence in the workplace versus another. Also keep in mind that while African-Americans, women, and other minorities were being excluded from the workplace for 346 years, those who were in the workplace gained 346 years' worth of advantages that, whether they wanted them or not, benefited them. It was simply the way society was at the time. We often hear that affirmative action seems unfair because it seems like whites are being punished for something they had nothing to do with since it happened so long ago. This is the "sins of the father" argument. To have credibility, the sins-of-the-father position also must take into consideration the benefits the fathers provided for their progeny, many of which still exist today.

Since Title VII, it has become fashionable to think we treat everyone the same. What we may forget is that before that law came into existence, a law that has been around less than 50 years, a system was in place that provided advantages based on race and gender for 346 years. (See Exhibits 4.1 and 4.4.) Since an entire system was built around that premise, the system did not disappear as soon as Title VII was passed. (See Exhibit 4.7, "Institutionalizing Prejudice: The Mississippi Sovereignty Commission.") We are still struggling with it today. Recognition of this is why the courts uphold the concept of affirmative action.

For instance, the primary laws that set the stage for the middle class many of us now enjoy, including even things like suburbs, malls, college educations, business ownership, and so on, received its start with passage of legislation like the National Labor Relations Act in 1935, the Fair Labor Standards Act in 1938, and the GI Bill (Selective Service Readjustment Act) in 1944. The NLRA allowed for the power of collective bargaining by employees to gain employees more equitable,

Exhibit 4.7 *Institutionalizing Prejudice: The Mississippi Sovereignty Commission*

This is America and we have the right to feel however we want to about whomever we want to for whatever reasons we want to. We don't have to like everyone. Prejudice is prejudging someone before you know them and deciding you don't feel positively about them based on that prejudgment. We have a right to be prejudiced if we want to. Racism, however, is institutionalized prejudice. That is, it goes beyond the realm of mere personal feelings, and becomes actualized in policies and laws that effectuate that prejudice, and acts to exclude or harm a particular group. Knowing in your head that you do not like a particular group is one thing. Acting in ways to harm or exclude that group is quite another. Prejudice is personal; racism is not. This is particularly harmful when it is the government that is doing the harming or excluding. For instance, in 1924 Virginia passed laws for involuntary sterilization aimed primarily at African-Americans and the government administrator in charge of enforcing the law was in contact with, and a great admirer of, German eugenics officials of Hitler's Third Reich who were exterminating blacks also. He even wrote to the German official about the official's work, "I hope this work is complete and not one has been missed," "I sometimes regret that we have not the authority to put some measures in practice in Virginia." Virginia's law was not repealed until 1979. Yes, you read it correctly—1979. We know it may be hard for you to believe this could ever happen in America, but it did. In many ways. But we will here give you one example so that you can understand for yourself how deeply rooted the issues are that led legislators to believe that affirmative action was necessary if the purpose of Title VII was going to be effectuated.

In 1954 the U.S. Supreme Court outlawed racial segregation in public education. Two years later, in 1956, the Mississippi Sovereignty Commission was created to preserve segregation in the eleven southern states. The commission was charged to "protect the sovereignty of the State of Mississippi and her sister states from federal government interference." The commission, primarily an information-gathering agency, outwardly espoused racial harmony, but secretly paid spies and investigators to report on civil rights activists or anyone even remotely thought to be sympathetic to the cause. Such people were branded as racial agitators and communist infiltrators (a huge issue after the McCarthy era and during the Cold War with Russia). In addition, the commission contributed money to segregationist causes, acted as a clearinghouse for segregation and anti–civil rights information, and circulated segregationist rhetoric and ideals. The commission was a state government commission like any other, with members of the commission appointed by the governor. The governor served as chair of the commission and among the ex-officio members (members by reason of their office) were the lieutenant governor, the speaker of the house of representatives, and the attorney general. Commission members included state legislators and other high officials.

The commission had a budget, an executive director, and clerical staff, and its first investigators were a former FBI agent and a former chief of the Mississippi Highway Patrol. The public relations director devised projects to portray Mississippi in a favorable light. The commission was given subpoena power and had the authority to gather information and keep its files and records secret. There were a fine and jail time for divulging the commission's secrets. Information was gathered through spying, informants, and law enforcement agencies and by working with the Citizens Counsel, a white supremacist organization.

In 1973, Governor Bill Waller vetoed funding for the commission and it officially became defunct four years later. When the commission was officially closed in 1977, the legislature decreed that its records be sealed for 50 years, until 2027. The ACLU sued to open them and eventually won and they were opened in 1998.[1] The files contained over 132,000 documents. Among them were documents that shed light on the murders of the three

[1] The records can be found online at http://mdah.state.ms.us/arlib/contents/er/sovcom/.

continued

voting rights activists Schwerner, Chaney, and Goodman, whose story is the basis of the popular movie *Mississippi Burning.*

Sources: Mississippi History Now, http://mshistory.k12.ms.us/features/feature35/sovereignty.html; Facts about Mississippi Sovereignty Commission, http://www.mdcbowen.org/p2/bh/badco/missSov.htm.

stable working wages and conditions. The FLSA, for the first time, guaranteed a minimum wage that could lift employees out of poverty. The GI Bill provided returning veterans of World War II the right to receive financial assistance to go to college (something the vast majority of people could not afford to do) and low interest loans for homes and businesses. It was a big part of the post–World War II boom in housing and business that created the middle class as we know it. In fact, it helped to create a housing demand so strong that suburbs were born. And, of course, malls (and, thus, life as many of us know it) were not far behind.

What does all of this have to do with institutionalized racism that serves as a foundation for the necessity of affirmative action to counteract its effects? All of this legislation was passed with the help of a very strong southern voting bloc in Congress that was extremely powerful and interested primarily in keeping the South as it had been since after the Civil War—segregated and in the throes of Jim Crow. The southern legislators were wide and varied in their views, but they were all in accord on one: the South was to remain segregated and their way of life untouched by these new laws.

In return for their votes, they received provisions in the law that guaranteed what they wanted. Seventy-five percent of African-Americans in the South, and 60 percent nationwide, were agricultural workers at the time. Virtually the same was true of domestics. Those were the two top jobs African-Americans were permitted to hold in the Jim Crow years. Excluding these two jobs from the minimum wage laws was the exchange exacted by the southern legislators for their vote to pass the legislation. This meant that African-Americans working as domestics and agricultural workers—the vast majority of African-Americans—would not receive minimum wages and therefore would be kept in low wages that did not put them on par with whites.

We know it is probably hard for you to imagine, but at that time in our history, the idea of an African American in the South making the same wages as whites would have been unthinkable. Since many southern legislators employed agricultural workers, housekeepers, cooks, laundresses, and nannies to support their way of life largely unchanged since the Civil War ended, not only would minimum wages and overtime be against their own economic interests, but it would have put the African American employees on par with white workers and that was, in the minds of southern legislators, not possible. Even if they had wanted to do it, which they did not, their constituents would never have accepted it. Minimum wages and overtime under FLSA was designed for whites.

As for the labor laws, the South has always had a notoriously low rate of unionization, and now you can understand part of what accounts for that, given the

political and social landscape. Since, of course, agricultural workers and domestics were not unionized, this meant the vast majority of African-Americans also would not benefit by the improved working and wage provisions of the labor laws.

The GI Bill granting a host of benefits to veterans was proposed as a federally administered law. Southerners knew that if this happened, everyone would be governed by the same rules and it would mean African-Americans had the same rights under the law as whites. The trade-off for the southern bloc vote was that administration of the law would be local. In this way, when the African American veteran wanted to use the college benefits to attend college, he could be told that he was not allowed to attend the college because it was for whites only. When he went to borrow money from the local bank for a home mortgage or business loan at the favorable GI Bill rates, the local southern bank could deny the loan based on Jim Crow policies.

The super boost these laws gave to create the American middle class as we know it today left the vast majority of African-Americans well out of the loop. The prejudices of the southern legislators found their way into the laws and there they remain to this day.[3] That, combined with societal attitudes and mores, virtually assured that when the Civil Rights Act of 1964 was passed, African-Americans would need more than a passive approach to realizing the law's promise. This was provided by affirmative action.

Efforts to eliminate affirmative action in employment, government contracts, university admissions, and other areas come primarily from those who feel it has outlived its usefulness and causes only ill will among majority employees and students. Many think of it as "punishment" to redress slavery and feel they should not have to bear the burden of something for which they had no responsibility. And whites are not the only ones who complain about affirmative action. African American University of California regent and outspoken affirmative action critic Ward Connerly suggested in a *60 Minutes* interview that "Black Americans are not hobbled by chains any longer. We're free to compete. We're capable of competing. It is an absolute insult to suggest that we can't."

The first workplace affirmative action case did not reach the U.S. Supreme Court until 1979. Throughout the 1980s, government agencies and officials argued about it, and employers were confused. Note too that while many changes have come about since the passage of Title VII, statistics still show African-Americans and other minorities lagging behind in jobs, and even farther behind in promotions and pay. Think about the information we have discussed and the research items in Exhibit 4.5 and ask yourself if it appears that everything is now equal.

Throughout the chapter, keep this thought in mind: If Alaska is 99 percent Inuit (Eskimo), then, all things being equal, that will be reflected at all or most levels of their employment spectrum. All things being equal, it would look odd if Alaska is 99 percent Inuit but the Inuit hold only 5 percent of managerial-level jobs but 100 percent of the unskilled labor jobs. Of course, the reality is that it is rare to have a workforce that has so little diversity. Among other things, there also will be differing skill levels and interests within the workforce from which the employees are drawn. However, the example is instructive for purposes of

illustrating how a workplace should reflect the available workforce from which its employees are drawn. If there is a significant difference that cannot be accounted for otherwise, the difference between availability and representation in the workplace should be addressed. In essence, this is affirmative action. We believe that the more you understand what affirmative action actually is and what it is used for, the more likely you are to help your employer more effectively meet affirmative action obligations.

Affirmative action also arises in other contexts such as college admissions, granting of government contracts, and set-asides. However, except in limited cases, these are beyond the scope of this text, which only addresses the employment setting.

LO2

There are three ways in which affirmative action obligations arise: through Executive Order 11246; judicially as a remedy for a finding of discrimination under Title VII; and voluntary affirmative action established by an employer. Each will be discussed in turn.

Affirmative Action under Executive Order 11246

Though people tend to think of affirmative action as a part of Title VII, and, in fact, Title VII has an affirmative action component as part of its statutory remedies, affirmative action actually stems from a requirement imposed by Executive Order 11246 and its amendments. Under the executive order, those employers who contract to furnish the federal government with goods and services, called federal contractors, must agree not to discriminate in the hiring, termination, promotion, pay, and so on of employees on the basis of race, color, religion, gender, or national origin.

The first forerunner to E.O. 11246 was Executive Order 8802, signed by President Franklin D. Roosevelt on June 25, 1941. It applied only to defense contracts and was issued to combat discrimination during World War II "as a prerequisite to the successful conduct of our national defense production effort." This executive order underwent several changes before the present version was signed into law by President Lyndon B. Johnson on September 24, 1965.

E.O. 11246 Provisions

In addition to prohibiting discrimination in employment, for certain contracts the executive order requires that contractors who have underrepresentations of women and minorities in their workplace agree to take steps to ensure adequate representation. In cases where the employer refuses to remedy disparities found, he or she is **debarred** from further participation in government contracts. This is a rare occurrence since most employers eventually comply with OFCCP's suggestions for remedying disparities.

debar
Prohibit a federal contractor from further participation in government contracts.

The executive order is enforced by the Office of Federal Contract Compliance Programs (OFCCP) in the Employment Standards Administration Office of the U.S. Department of Labor. OFCCP issues extensive regulations implementing the executive order (41 Code of Federal Regulations part 60). OFCCP's enforcement addresses only the employer's participation in federal government contracts

and contains no provisions for private lawsuits by employees. Employees seeking redress must do so through their state's fair employment practice laws, Title VII, or similar legislation previously discussed. However, employees may file complaints with OFCCP, which the secretary of Labor is authorized to receive and investigate, and may sue the secretary to compel performance of executive order requirements.

Employers who contract with the federal government to provide goods and services of $10,000 or more must agree to comply with the executive order. In addition, contractors and subcontractors agree to

- Post in conspicuous places, available to employees and applicants, notices provided by the contracting officer setting forth the provisions of the nondiscrimination clause. You may have seen these in your workplace or university/college.
- Include in all the contractor's solicitations or advertisements for employees a statement that all qualified applicants will receive consideration for employment without regard to race, color, religion, gender, or national origin (although research shows employers with such notices are just as likely to discriminate in employment as those without such notices).
- Include a statement of these obligations in all subcontracts or purchase orders, unless exempted, which will be binding on each subcontractor or vendor.
- Furnish all information and reports required by the executive order and the implementing regulations, and permit access to the contractor's or subcontractor's books, records, and accounts by the contracting agency and the secretary of Labor for purposes of investigation to ascertain compliance with the executive order and its regulations.

LO4

Under the implementing regulations, Executive Order 11246 increases compliance requirements based on the amount of the contract. For the smallest contracts, the employer agrees that, in addition to not discriminating in employment, it will post notices that it is an equal opportunity employer. If a contractor or subcontractor has 50 or more employees and a nonconstruction contract of $50,000 or more, the contractor must develop a written **affirmative action plan** for each of his or her establishments within 120 days of the beginning of the contract.

affirmative action plan
A government contractor's plan containing placement goals for inclusion of women and minorities in the workplace and timetables for accomplishing the goals.

Affirmative Action Plans

Affirmative action plans must be developed according to the rules set forth in the Code of Federal Regulations (C.F.R.) part 60-2 that effectuates the executive order. According to the regulations, "an affirmative action plan should be considered a management tool—an integral part of the way a corporation conducts its business. . .to encourage self-evaluation in every aspect of an employment by establishing systems to monitor and examine the contractor's employment decisions and compensation systems to ensure that they are free of discrimination." (See Exhibit 4.8, "More Than a 'Numbers Game.'")

Affirmative action plans have both quantitative and qualitative aspects. The quantitative part of the plan examines the contractor's workplace to get a snapshot, of sorts, of who works there and in what capacity, as it relates to minorities and

Exhibit 4.8 *More Than a "Numbers Game"—Major Affirmative Action Regulation Overhaul: The Dog Now Wags the Tail, Rather Than Vice Versa*

Most people tend to think of affirmative action as a "numbers game" in which an employer tries to hire a certain magic number of minorities and women in order to avoid running into trouble with the "feds." That is *so* not the case. Actually, there may have been some basis for that view when set against the background of the 1980s discussed earlier. When much of the policy was hammered out, OFCCP may have seemed more interested in the bottom-line figures. But as affirmative action evolved, it became clear that numbers, alone, were not sufficient to accomplish what the law was designed to do. After all, it is equal employment *opportunity* that the law wanted to ensure, confident that if the opportunities were equal, that would be reflected in the bottom-line figures. With the numbers approach, OFCCP obviously found the managerial policies suffered at the hands of trying to achieve numbers and the intent of the law was not being met. The tail was wagging the dog, rather than vice versa.

In 2000, OFCCP issued the most comprehensive set of changes to its regulations since the 1970s. Not only did the new regulations make changes in a few significant ways affirmative action plans are to be developed, such as decreasing the number of availability factors it will consider from eight to two and permitting employers to replace the previously required workforce analysis with an organization profile that is usually simpler, but it also clarified and reaffirmed basic foundations of affirmative action. In recognizing this more balanced approach, OFCCP said that "Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action-oriented programs."

Probably most importantly, it was clear that OFCCP was moving from an approach that was perceived as being interested primarily in the mechanics of affirmative action plans submitted by employers, to one in which the plan is viewed as "a management tool to ensure equal employment opportunity." The agency said that "A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination."

Rather than being a numbers game, OFCCP envisions affirmative action plans as a way for contractors to take the opportunity to look at their workforces and see if they are reflective of the relevant population they are drawn from and if they determine they are not, to make a plan to work toward making that happen. This reflects the understanding that given the country's racial, ethnic, and gender history, without taking the time and opportunity to actually step back and take a look at the larger picture, employers may not be aware of the underrepresentation, and thus it will continue. In addressing its preferred approach, OFCCP noted that this analysis should not just be done in anticipation of reporting to OFCCP, but on a regular basis as part of management of the workplace in all aspects. "An affirmative action program also ensures equal employment opportunity by institutionalizing the contractor's commitment to equality in every aspect of the employment process. Therefore, as part of its affirmative action program, a contractor monitors and examines its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities."

continued

Exhibit 4.8 *Continued*

In this more holistic view OFCCP pronounced in its regulatory revisions, it said that "An affirmative action program is, thus, more than a paperwork exercise. An affirmative action program includes those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment. Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. OFCCP has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination.

"Pursuant to these regulatory changes, OFCCP will focus its resources on the action undertaken to promote equal employment opportunity, rather than on the technical compliance."

Sources: Department of Labor, Office of Federal Contract Compliance Programs, "41 CFR Parts 60-1 and 60-2; Government Contractors, Affirmative Action Requirements; Final Rule," 165 Fed. Reg. 68021, 68021–47 (November 13, 2000), http://www.dol.gov/esa/regs/fedreg/final/2000028693.htm.

underrepresentation or underutilization
Significantly fewer minorities or woman in the workplace than relevant statistics indicate are available or their qualification indicate they should be working at better jobs.

organizational profile
Staffing patterns showing organizational units, relationship to each other, and gender, race, and ethnic composition.

job group analysis
Combines job titles with similar content, wage rates, and opportunities.

availability
Minorities and women in a geographic area who are qualified for a particular position.

women. Minority categories include African American, Hispanic, Asian/Pacific Islander, and American Indians/Alaskan Natives. The qualitative part of the plan sets out a plan of action for how to address any **underrepresentation, underutilization**, or other problems found.

In order to get the snapshot of what the contractor's workplace looks like as it relates to minorities and/or females, employers must prepare an **organizational profile**. An organizational profile shows staffing patterns within a workplace, much like an organizational chart, showing each of the organizational units, their relationship to one another, and the gender, race, and ethnic composition of each unit. It is "one method contractors use to determine whether barriers to equal employment opportunity exist in their organization."

Another part of the snapshot is the contractor's **job group analysis**. Job group analysis combines job titles at the contractor's workplace that have similar content, wage rates, and opportunities. The job group analysis must include a list of the job titles for each job group and the percentage of minorities and the percentage of women it employs in each job group. This analysis is then compared to the availability of women and/or minorities for these job groups.

Now that the contractor has this snapshot of the workplace, the foundation of the affirmative action plan is laid. The purpose of the snapshot is to see if there is an underrepresentation of women and/or minorities based on the difference between their **availability** in the workforce from which employees are hired and their presence in the workplace. According to the regulation, availability is important in order to "establish a benchmark against which the demographic composition of the contractor's employees can be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups."

Availability is not based on the mere presence of women and minorities in a given geographic area. Rather, it is based on the availability of women and minorities qualified for the particular job under consideration. Simply because women

are 35 percent of the general population for a particular geographic area does not mean that they are all qualified to be doctors, professors, skilled craft workers, or managers. Availability for jobs as, for instance, managers would only consider those qualified to fill the position of managers, rather than all women in the geographic area. The regulations contain resources for finding out availability for various jobs in a given geographic area.

The two factors to be used in determining availability of employees (separately for minorities and women for each job group) are (1) the percentage of minorities or women with requisite skills in the reasonable recruitment area, defined as the geographical areas from which the contractor usually seeks or reasonably could seek workers to fill the positions in question, and (2) the percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization.

If the percentage of women and/or minorities employed in a job group is less than would reasonably be expected based on their availability in the area from which employees are drawn, the contractor must establish a **placement goal** that reflects the reasonable availability of women and/or minorities in the geographic area.

placement goal
Percentage of women and/or minorities to be hired to correct underrepresentation, based on availability in the geographic area.

By regulation, placement goals, which serve as objectives "reasonably attainable by means of applying every 'good faith effort' to make all aspects of the entire affirmative action program work," do not mean that the underrepresentation is an admission or a finding of discrimination. They are designed to measure progress toward achieving equal employment opportunity and "may not be rigid and inflexible quotas which must be met," nor a ceiling or floor for employing certain groups. "*Quotas are expressly forbidden.*"[4] In making decisions, employers are expressly *not* required "to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one."[5] In all employment decisions, the contractor must make selections in a nondiscriminatory manner.[6]

Once this quantitative part of the affirmative action plan is in place, if an underrepresentation or other problem has been found, the contractor must then develop and execute "action-oriented" programs designed to correct them. OFCCP believes that in order for the programs to be effective, they must be more than the contractor's "business as usual," which, of course, led to the underrepresentation in the first place. (See Exhibits 4.9, "Affirmative Actions," and 4.10, "Voluntary Affirmative Action Plan Considerations.")

OFCCP may perform audits of contractors to determine if they are complying with the regulations and providing equal employment opportunity. To withstand an OFCCP audit, contractors must show that they have made good-faith efforts to remove any identified barriers to equal employment opportunity, expand employment opportunities, and produce measurable results. As part of its action program, contractors must

- Develop and implement internal auditing systems that periodically measure the effectiveness of their affirmative action plans, including monitoring records of all personnel activity to ensure that the contractor's nondiscriminatory policy is being carried out.

Exhibit 4.9 *Affirmative Actions*

While there are guidelines as to what may or may not be legally acceptable as affirmative action designed to intentionally include women and minorities in the workplace, there are no specific requirements about what affirmative action must be taken. As a result, employers' means of addressing affirmative action have varied greatly. Keep in mind the Supreme Court's characterization of plans that are acceptable when viewing the following ideas employers have used. Just because employers have used these methods does not mean they are always legal. Sometimes they may simply be convenient.

- *Advertising for applicants in nontraditional sources.* Employers solicit minority and female applicants through resources such as historically African American colleges and universities; women's colleges; and minority and female civic, educational, religious, and social organizations, including the NAACP, National Urban League, La Raza, American Indian Movement, National Organization for Women, and other such groups.
- *One-for-one hiring, training, or promotion programs.* One minority or female is hired, trained, or promoted for every white or male until a certain desired goal is reached. This is usually only used in long-standing, resistant cases of underrepresentation, and is rarely used anymore.
- *Preferential layoff provisions.* As in *Wygant v. Jackson Board of Education,*[1] in recognition of the reality that recently hired female and minority employees would be lost if layoffs are conducted based on seniority and, thereby, affirmative action gains lost, employers institute plans that are designed to prevent the percentage of minorities and women from falling below a certain point. Some minorities and women with less seniority may be retained, while those with more are laid off. While the U.S. Supreme Court did not prohibit this approach, it did indicate an employer would have to overcome a very rigorous analysis to ensure protection of the adversely impacted employees.
- *Extra consideration.* Women and minorities are considered along with all other candidates, but extra consideration is paid to their status as women and minorities, and, all other factors being equal, they may be chosen for the job.
- *Lower standards.* Women and minorities may be taken out of the regular pool of candidates and given different, usually less stringent, standards for qualifying for the position. Natural questions are why the higher standards are imposed if the job can be performed with lesser qualifications and why someone who is not qualified under the higher, "normal" standards should be given the job? This is *not* a good approach, and would probably *not* pass judicial muster.
- *Added points.* Much like with a veteran's preference, the employer has a rating system giving points for various criteria, and women and minorities receive extra points because they are women or minorities. This was not permitted by the U.S. Supreme Court in the undergraduate admissions program at the University of Michigan.
- *Minority or female "positions."* In an effort to meet affirmative action goals, employers create and fund positions that are designed to be filled only by women or minorities. These positions may or may not be needed by the employer. This is not a smart approach for an employer and would not stand up in court.

Some of the approaches are more desirable than others because they are less likely to result in "reverse discrimination" suits or more likely to result in qualified minority or female employees. Affirmative action plans walk a fine line between not holding women and minorities to lower standards than other employees, while, at the same time, not permitting the standards to be arbitrary and likely to unnecessarily or unwittingly screen out female or minority candidates. The 1991 Civil Rights Act made it unlawful to "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests" on the basis

[1] 476 U.S. 267 (1986).

continued

of race, color, religion, gender, or national origin. Since there are few rules, employers can be creative, within the guidelines provided by law. Now that you have seen some of the affirmative action schemes employers have used, which seem most suited to accomplish the goals of affirmative action, while having the least adverse impact on other employees? How would you design an affirmative action plan?

- Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained.
- Review report results with all levels of management.
- Advise top management of the program's effectiveness and submit recommendations for improvement, where necessary.

corporate management compliance evaluation
Evaluations of mid- and senior-level employee advancement for artificial barriers to advancement of women and minorities.

In an effort to combat the glass ceiling, the regulations also require **corporate management compliance evaluations** designed to determine whether employees are encountering artificial barriers to advancement to mid- and senior-level corporate management. During such evaluations, special attention is given to those components of the employment process that affect advancement into these upper-level positions. The Glass Ceiling Commission found that it was easier for women and minorities to enter a business at the entry level than to progress up once there. This tool is used to address this phenomenon.

Each year, OFCCP conducts an Equal Opportunity Survey to provide the agency with compliance data early in the evaluation process so that it can more effectively and efficiently identify contractors for further evaluation, as well as acting as a self-evaluation tool for contractors. The survey requests brief information that will allow OFCCP to have an accurate assessment of contractor personnel activities, pay practices, and affirmative action performance. Employers are required to submit data on applicants, hires, promotions, terminations, compensation, and tenure by race and gender. (See Exhibit 4.10.)

Again, there is no requirement of quotas under Executive Order 11246 or under Title VII. In fact, as we saw previously, the law specifically says it is not to be interpreted as such. Virtually the only time quotas are permitted is when there has been a long-standing violation of the law and there is little other recourse. The *Sheet Metal Workers* case, discussed later in the chapter, demonstrated this with the union's resistance over an 18-year period, resulting in the imposition of quotas.

Placement goals to remedy underrepresentation should not be confused with quotas. As long as an employer can show a legitimate, good-faith effort to reach affirmative action placement goals, quotas are not required and will not be imposed as a remedy for underrepresentation.

Exhibit 4.10 *Voluntary Affirmative Action Plan Considerations*

According to the federal regulations governing voluntary affirmative action plans:

PART 1608 AFFIRMATIVE ACTION APPROPRIATE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Sec. 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) Adverse effect. Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) Effects of prior discriminatory practices. Employers, labor organizations, or other persons subject to title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) Limited labor pool. Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30290; 38297; 38299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

Source: 29 C.F.R. ch. XIV (7-1-04 Edition), § § 1608.1, 1608.3, http://www.access.gpo.gov/nara/cfr/waisidx_04/29cfr1608_04.html.

Penalties for Noncompliance

The secretary of Labor or the appropriate contracting agency can impose on the employer a number of penalties for noncompliance, including

- Publishing the names of nonconforming contractors or labor unions.
- Recommending to the EEOC or the Department of Justice that proceedings be instituted under Title VII.
- Requesting that the attorney general bring suit to enforce the executive order in cases of actual or threatened substantial violations of the contractual EEO clause.

- Recommending to the Department of Justice that criminal proceedings be initiated for furnishing false information to a contracting agency or the Secretary of Labor.
- Canceling, terminating, or suspending the contract, or any portion thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract (this may be done absolutely, or continuance may be conditioned on a program for future compliance approved by the contracting agency).
- Debarring the noncomplying contractor from entering into further government contracts until the contractor has satisfied the secretary that it will abide by the provisions of the order.

The Secretary of Labor must make reasonable efforts to secure compliance by conference, conciliation, mediation, and persuasion before requesting the U.S. attorney general to act or before canceling or surrendering a contract. While a hearing is required before the secretary can debar a contractor, it may be granted before any other sanction is imposed, if appropriate. As a practical matter, the more severe penalties are rarely used because contractors are generally not so recalcitrant toward OFCCP orders.

In making its compliance determinations for contractors' affirmative action plans, OFCCP will not make the judgment solely on whether the contractor's affirmative action goals are met, that is, "the numbers game." (See Exhibit 4.7.) That alone will not serve as a basis for sanctions under the executive order. What is important to OFCCP is the nature and extent of the contractor's good-faith affirmative action activities and the appropriateness of those activities to the problems the contractor has identified in the workplace. An assessment of compliance will be made on both statistical and nonstatistical information indicating whether employees and applicants are being treated without regard to the prohibited categories of the executive order. This is far from the law blindly requiring a certain number of places to be filled by a certain gender or race, as many think it does.

The affirmative action plan regulations clearly state that they prefer to have contractors perform ongoing monitoring of their workplaces to ensure that their policies and practices are consistent with nondiscriminatory hiring, termination, pay, and other workplace considerations. An employer would do well to heed that advice and catch any small problems before they become larger ones. Careful monitoring will address this quite well.

Judicial Affirmative Action

Rather than an affirmative action plan imposed by Executive Order 11246, an employee may sue for violation of Title VII and the affirmative action arises in response to a finding of workplace discrimination that must be remedied now that a court has found that discrimination does, in fact, exist and because of the nature of the violation, an affirmative action plan is the appropriate means to remedy

judicial affirmative action
Affirmative action ordered by a court as a remedy for discrimination found by the court to have occurred, rather than arising from Executive Order 11246.

the violation. Title VII gives courts fairly wide latitude in redressing wrongs. The courts' imposition of affirmative action as the means of redress is known as **judicial affirmative action**.

Courts have played an important role in shaping the concept of affirmative action. While there are no specific requirements as to what form an affirmative action plan must take (see Exhibit 4.9), if the plan is in keeping with the requirements set forth below, the employer has little to fear from such suits—although the monetary and energy costs in dealing with them are great.

The first affirmative action case to reach the U.S. Supreme Court, *Regents of the University of California v. Bakke,*[7] involved affirmative action in medical school admissions, rather than employment; however, the case is viewed as the one that opened the affirmative action debate, and much of its reasoning was used in subsequent employment cases. While endorsing the concept of affirmative action to further the educational goal of a diverse student body, the Court struck down the University of California's affirmative action plan because it set aside a certain number of places for "disadvantaged students," who also could compete for the other spaces. The Court said it was not fair to have the disadvantaged group have additional spaces open to them that were not available to others.

In *Local 28, Sheet Metal Workers v. EEOC,* included at the end of the chapter, the Court imposed one of the stiffer judicial affirmative action plans ever developed, but only after the Court's orders had repeatedly been ignored by the union. In the case, the question arose as to who can receive the benefit of affirmative action plans. Can the plan benefit individuals who were not the actual victims of the employer's discriminatory practices? The Supreme Court held that there need not be a showing of discrimination against the particular individual (employee, applicant, promotion candidate, and the like) as long as the affirmative action plan meets appropriate requirements (see Exhibit 4.10) and the individual fits into the category of employees the plan was designed to benefit. This approach recognizes that the employer's policy may result in discouraging certain people from even applying for a job because they know it would be futile, given the employer's history.

While the notion of providing relief for nonspecific victims of discrimination may appear somewhat questionable, the *Sheet Metal Workers* is exactly the type of situation that justifies such action. As you read the case, in addition to thinking about what the union or employer should have done, think of how you would have handled the situation if you were the court imposing the remedy. Also, think of whether you would have allowed the situation to go on for so long if you were the court. This case is the basis for opening scenario 1.

Would you believe that on January 15, 2008, 22 years after this case was decided, the EEOC announced that a federal court had granted final approval for a $6.2 million partial settlement in this case? Twenty-two years later! It had already been nearly 20 years when this case was heard and the above decision issued. And this most recent settlement covers only lost wages from 1984 to 1991, but the litigation covering post-1991 discrimination is still ongoing. "We hope that these developments are an indication with the recent changes in leadership,

the union has decided, after many years of costly litigation, to work with the court and the plaintiffs in obeying the court orders and begin to resolve outstanding claims against it," said Spencer Lewis, the district director of the EEOC's New York office. Considering the litigation has been going on for 40+ years, good luck with that.

Voluntary Affirmative Action

After the Court for the first time dealt with the issue of affirmative action in the *Bakke* case, the next big questions were whether a similar analysis applied (1) if the affirmative action plan involved private rather than state action, (2) if the plan involved a workplace rather than a university admissions program, and (3) whether voluntary affirmative action plans are permissible rather than only those required by Executive Order 11246 or imposed by a court to remedy prior discrimination that was found to have existed. The opportunity to have those important Title VII developmental questions answered came the year after *Bakke,* in the *United Steelworkers of America, AFL-CIO v. Weber* case. As you will see, at the conclusion of the chapter, in *Weber,* the answer to all three questions was yes.

Based on *Weber,* in addition to affirmative action plans required by Executive Order 11246 and those imposed by a court to remedy discrimination found in the workplace pursuant to a Title VII claim, there is also the possibility of voluntary affirmative action. Here, the employer decides to institute an affirmative action plan on his or her own, regardless of whether the employer is required to do so under the executive order, and despite the fact that no one has brought a Title VII case. Employers generally engage in voluntary affirmative action as a proactive measure to avoid discrimination claims after making a determination that there is an underrepresentation of minorities and women in the workplace, generally based on previous exclusionary policies or practices. However, an employer cannot simply unilaterally decide to institute a plan out of the goodness of his or her heart and run with it. Based on *Weber,* there are strict guidelines that must be followed if the plan is to withstand a reverse discrimination challenge by an affected employee alleging discrimination because of the plan's implementation. (See Exhibit 4.10.)

Many employers were surprised by *Weber* since the year before the Court struck down a voluntary affirmative action plan in *Bakke.* While both concerned affirmative action plans, there were considerable differences, beyond even employment versus school admissions. Some of these differences and the Court's reasoning got lost in news coverage. Both decisions endorsed the concept of affirmative action, but the requirements were not met in *Bakke* and were in *Weber,* thus giving different, though not inconsistent, outcomes. *Weber* is the basis for opening scenarios 1 and 3.

After reading *Weber,* you now realize that in opening scenario 2, it is permissible for an employer to have a voluntary affirmative action plan, but certain

factors must be present in order to justify the plan to a court. In opening scenario 2, we do not have all the relevant facts to determine if the employer can take the affirmative action measures the employer wishes. For instance, we do not know why there are such small numbers of minorities and women in upper-level management and skilled-labor jobs. We do not know if it is because there is a history of discrimination and exclusion, or that there simply are not sufficient numbers of women and minorities available in the workforce.

In opening scenario 3, we know from *Weber* that an employer can have a one-for-one affirmative action promotion plan as part of a judicial remedy for past discrimination, and if the *Weber* requirements are met, the employer is protected from liability for discrimination against employees alleging reverse discrimination; that is, that they are adversely impacted by implementation of the plan.

Seven years later, in the case of *Wygant v. Jackson Board of Education,*[8] and consistent with language in *Bakke* and *Weber,* the Supreme Court again upheld the concept of affirmative action, this time for protection against layoffs for public employees, though it held that the requirements of demonstrating a compelling state interest and narrowly tailoring the plan to meet the objective had not been met in this case. This answered the question of whether the Court's decision in *Bakke,* involving the admissions policy for a public university, also applied to an affirmative action plan in a public workplace. It did. It also answered the question left after *Weber* as to whether the acceptance of voluntary affirmative action in private employment also applied to public employment. It did.

Johnson v. Transportation Agency, Santa Clara County, California,[9] a 1987 Supreme Court decision discussed later, relied heavily on *Weber* to determine that, under circumstances similar to those in *Weber,* but involving a public employer, rather than private, and gender, rather than race, the employer could appropriately take gender into account under its voluntary affirmative action plan as one factor of a promotion decision. The Court said the plan, voluntarily adopted to redress a "conspicuous imbalance in traditionally segregated job categories," represented a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women." Consistent with *Weber,* the plan was acceptable because

LO3

1. It did not unnecessarily trammel male employees' rights or create an absolute bar to their advancement.
2. It set aside no positions for women (as did *Bakke*) and expressly stated that its goals should not be construed as quotas to be met.
3. It unsettled no legitimate, firmly rooted expectation of employees.
4. It was only temporary in that it was for purposes of attaining, not maintaining, a balanced workforce.
5. There was minimal intrusion into the legitimate, settled expectations of other employees.

Reverse Discrimination

LO7

reverse discrimination
Claim brought by majority member who feels adversely affected by the use of an employer's affirmative action plan.

So-called **reverse discrimination** has often been considered the flip side of affirmative action. When an employer is taking race or gender into account under an affirmative action plan in order to achieve an affirmative action placement goal, someone not in the excluded group alleges she or he is harmed by the employer's consideration of race or gender, or both, in hiring or promotion decisions.

For example, an employer finds an underrepresentation of women in managerial positions in the workplace and develops an affirmative action plan for their inclusion. As part of that plan, one qualified female employee is to be chosen for a managerial training program for each male chosen. The employer chooses one male, then one female. The male employee who feels he would have been chosen next if there were no affirmative action plan requiring a woman to be chosen sues the employer, alleging reverse discrimination. That is, but for his gender, he would have been chosen for the position the female received.

Despite what you may have heard, reverse discrimination accounts for only about 3 percent of the charges filed with the EEOC, and most of those claims result in no-cause findings.

As you learned in our discussion of the requirements for an employer to have an affirmative action plan, once the plan is deemed necessary because there is an underrepresentation that cannot be accounted for in virtually any way other than exclusion of certain groups, even unwittingly, then consideration of race or gender becomes a necessary part of the remedy. The law builds in protections for employees who feel they may be adversely affected by ensuring that the plan is only given protection if it complies with the legal requirements.

One of the arguments frequently made in reverse discrimination cases is that affirmative action requires the "sons to pay for the sins of the fathers" and that "slavery is over—why can't we just forget it and move on?" Affirmative action is not about something that happened nearly 150 years ago. It is about underrepresentation in the workplace *today.* Also keep in mind that it is not punishment in any way, but rather a *remedy* for discrimination, or its vestiges, *that has been found to exist.* As for the "sins of the fathers," keep in mind that to the extent that African-Americans and women were, for the most part, *legally* excluded from the workplace from the beginning of this country's existence until passage of the Civil Rights Act in 1964, and their intentional inclusion only began to become a significant issue in the late 1970s to early 1980s, this gave those groups who were in the workplace for all those years before a huge head start on experience, training, presence, trustworthiness, seniority, perception of appropriateness for the job, and so on.

These factors come into play each time an applicant or employee applies for a job, promotion, training, or other benefit. Without the applicant's intentionally doing anything that may ask for more favorable or less favorable consideration (depending on the group to which the applicant belongs) because of more than 345 years of ingrained history, as shown by study after study, it happens. While it may not be intentional, or even conscious, it has a definite harmful impact on groups traditionally excluded from the workplace—an impact that research has

Exhibit 4.11 *Opposing Views of Affirmative Action*

Affirmative action has been in place for years as the law, but for some reason, people still feel the need to debate it or to take sides, as if it is not actually the law. Despite the years, these two pieces still do one of the best jobs we've seen pinpointing the basic positions of those who are for or against affirmative action. Given what you now know about affirmative action, which side makes the most sense to you? Keep in mind that we said given what you *now* know because you should now have much more insight into what affirmative action actually is than before you read this chapter and only had what you had gathered from other, usually nonlegal, sources.

CON—CLARENCE PENDLETON, CHAIR OF THE U.S. COMMISSION ON CIVIL RIGHTS

Human resource management departments are "the major force companies have for getting rid of preference (hiring) plans and for not letting the 'new racism' take hold," Clarence Pendleton told his packed luncheon-time audience at a recent monthly meeting of the Metropolitan New York City American Society of Personnel Administrators.

"New racism," Pendleton explained, is a lot like old racism. New racists typically are vociferous supporters of civil rights, but want different treatment for minorities, such as goals, timetables and quotas. "New racists think of blacks as a commodity," he commented, "and, therefore, they set numbers as goals."

Preferential treatment, which Pendleton characterized as "neo-slavery," leads automatically to different results for classes of people. With no equality of results, he said.

Pendleton, who is often and loudly criticized for his conservative Republican beliefs, made no apologies for his work with the Reagan administration. He defended the civil rights record of the administration, claiming that "we are not turning our backs on civil rights. Discriminatory affirmative action programs are dead, but those who have been discriminated against should be made whole."

He suggested that a best-selling book could be a compendium of the Civil Rights Act of 1964. "Read it," he challenged his audience, "and you will find that nowhere does the Act call for preferential treatment. The faster we get preferential treatment out of politics, the faster we are going to get to a color-blind society."

Too many black leaders "are peddling pain with federal preference programs, but they don't demand education," Pendleton charged.

And that's where HR professionals come into Pendleton's plan. He challenged the audience to "develop a profile on what it takes to move into corporate America without preferences. Let us know what training and support is necessary to get minorities into the economic system. Tell us—'Here's what it takes to get prepared.' Pass that information on to educators."

He asked that professionals support schools and fight for a reduced minimum wage for teens. "Affirmative action without jobs isn't doing a thing for the 59 percent of black youth who are unemployed and are not qualified for jobs which exist."

"It's time to remove all the chains," he said. "And you in human resources play a major role in the development of public policy. We need a majestic national river of employees, and not these ethnic creeks."

PRO—RICHARD WOMACK, DIRECTOR, OFFICE OF CIVIL RIGHTS FOR THE AFL-CIO

It is all well and good to promote the concept of equality in hiring and promotion, but centuries of discrimination against minorities and women have put them at a disadvantage in the workplace that must first be corrected through aggressive action.

Addressing a June 5 plenary session of the 15th annual American Association of Affirmative Action conference, Womack told several hundred conferees that the challenge facing equal employment and affirmative action officers today is to decide how to proceed "until we reach the day when we can say we have a color-blind society."

continued

Womack likened the state of today's workforce to a football game where the dominant team, which has mounted a huge lead by cheating and putting 15 players on the field, decides to stop cheating and pare its team down to 11 players with just three minutes left to play. "For those three minutes the two teams may be equal, but the cheating that preceded the equality will doom the other team to certain failure," Womack said.

White males have had the advantage of preference in the workplace for years. "Now it's time to do the same thing for women and minorities." Noting that his remarks may be viewed by some as "harsh," Womack said that protected groups must be given preference in order to put all workers on the same level playing field. "After whites used race as a basis for slavery and a standard for the exclusion to education and advancement, why now should we be color-blind? There is too much damage to undo."

Womack urged the EEO officers to provide opportunity to minorities and women in the same manner that white males have in the past. "White males have historically taken care of other whites," Womack said.

Affirmative action is an "imperfect tool" to be used to correct past discrimination and suffers from a perception problem, Womack said. "You mention affirmative action to whites and they conjure up images of incompetent blacks who have been given jobs that should have gone to qualified whites," Womack told the conference. Blacks, on the other hand, view affirmative action as "a paltry effort of reduced bias—a dent in whites favoring whites," he said.

The concept and use of goals and timetables also face perception problems, Womack said. The federal government and corporations alike set goals and timetables for everything from collection of taxes to the implementation of new products or procedures, he noted. "So why are goals and timetables so horrible in the employment context?" Womack asked.

Sources: *Con*—reprinted with the permission of *HR Magazine,* published by the Society for Human Resource Management, Alexandria, VA; *pro*—reprinted with permission from *Daily Labor Report,* No. 107 (June 6, 1989), pp. A-10–A-11. Copyright 1989 by the Bureau of National Affairs, Inc. (800/372-1033), http://www.bna.com.

proved to be present time and again. For instance, despite the anecdotal evidence of seemingly omnipresent reverse discrimination situations we may hear about from our friends or colleagues, the U.S. Department of Labor's 1995 Glass Ceiling Report found that though antidiscrimination laws have made a significant impact in bringing women and minorities into the workplace in entry-level positions, there are still significant workplace disparities. Given that, it should come as no surprise that, according to the Glass Ceiling Commission Report, white men are only 43 percent of the Fortune 2000 workforce but hold 95 percent of the senior management jobs. Women are only 8.6 percent of all engineers, less than 1 percent of carpenters, 23 percent of lawyers, 16 percent of police, and 3.7 percent of firefighters. White men are 33 percent of the U.S. population but 65 percent of physicians, 71 percent of lawyers, 80 percent of tenured professors, and 94 percent of school superintendents. This was later borne out again in the Harvard study mentioned earlier.

LO5

While we would all love to live in a color-blind society where merit is the only factor considered in the workplace, the truth is, research shows that we aren't there yet. Affirmative action steps in as a measure to help remedy this situation. (For pro and con views, see Exhibit 4.11, "Opposing Views of Affirmative Action.")

Nevertheless, as you can see from the *Kane v. Freeman* case, included at the end of the chapter, reverse discrimination remains an important tool in effectuating rights under Title VII, as well as further defining its parameters.

Affirmative Action and Veterans

In November of 2002, President George W. Bush signed into law the Jobs for Veterans Act of 2002 (JVA), amending the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). The law applies to all contracts entered into on December 1, 2003, or thereafter. Contracts entered into prior to that date are still covered by VEVRAA. JVA raised the minimum contract threshold that required affirmative action for veterans from $25,000 to $100,000 and changed the veteran categories of the act. Contractors are required to take affirmative action demonstrating an active effort to hire and promote qualified disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans.

Contractors must disseminate all promotion information internally regarding promotion activities, including agreements to lease workers from temp agencies. JVA also requires federal contractors to report the total number of all current employees in each job category and at each hiring location and it is mandatory that contractors immediately list all job openings with state employment agencies or other employment outlets. Exemptions from such postings include positions that are to be filled in top management or executive staff, positions lasting three days or less, or positions that are to be filled from within the contractor's organization. In addition, veterans have priority service in Department of Labor job-training programs, allowing them to be given priority over nonveterans for receiving employment, training, and placement services provided in the program.

Federal contractors must file VETS-100 forms (termed VETS-100A for contracts after December 3, 2003) annually, verifying their plans have been followed and that no discrimination has occurred against veterans or other covered groups; demonstrating active recruitment of veterans and that information regarding promotion activities within their organization has been disseminated; and stating the numbers of veterans in their workforce by job category and hiring location and the total number of employees and the number of veterans hired during the reporting period.

Unlike the affirmative action requirements we have been discussing for Title VII categories that primarily require an employer to make an effort to be inclusive of heretofore excluded categories of employees, veteran affirmative action contains provisions for priorities for referring veterans for employment. That is, under the law, generally, "qualified targeted veterans are entitled to priority for referral to federal contractor job openings." This does not mean they must be hired, but they are given priority in job openings.

Valuing Diversity/Multiculturalism

LO8

Once affirmative action plans accomplished (at least to a limited degree) their purpose of bringing heretofore excluded employees into the workplace, employers discovered that this, in and of itself, was not enough to provide equal opportunity

Exhibit 4.12 *Cultural Differences*

Did you ever think about how much culture affects us, and how we differ culturally? Not only does it impact big things like our holidays, clothing, and so on, but it shapes much smaller things.

A recent list of tips to travelers abroad issued by the Chinese government warned: "Don't squat when waiting for a bus or a person. Don't spit in public. Don't point at people with your fingers. Don't make noise. Don't laugh loudly. Don't yell or call to people from a distance. Don't pick your teeth, pick your nose, blow your nose, pick at your ears, rub your eyes, or rub dirt off your skin. Don't scratch, take off your shoes, burp, stretch or hum."

conditions of employment for all. Employees coming into workplaces not used to their presence found the workplace often hostile in subtle, but very real ways.

While the hostility may have been subtle, the impact on their work lives was not. Employees found they did not move up as quickly as other, more traditional, employees. Many were not included in workplace activities, were reprimanded more often, did not receive the same opportunities, and thus had higher turnover rates. Even subtle differences in their treatment meant the difference between progressing in the workplace and remaining stagnant.

Faced with workplaces filled with new kinds of people, employers sought answers. The search became even more immediate after the release of the Hudson Institute's "Workforce 2000" study for the U.S. Department of Labor in 1987. According to the study, the United States was about to face its largest wave of immigration since World War II, and, unlike the last big wave that was 90 percent European, this one would be about 90 percent Asian and Latin American.

valuing diversity
Learning to accept and appreciate those who are different from the majority and value their contributions to the workplace.

The idea of **valuing diversity** began to take root. Valuing diversity is being sensitive to and appreciative of differences among groups that may be different from the "mainstream" and using those differences, yet basic human similarities, as a positive force to increase productivity and efficiency and to avoid liability for discrimination. For the past several years, employers all over the country have sponsored workplace programs to sensitize employees to differences among people in the workplace. Being made aware of these differences in various racial, ethnic, religious, and other groups has helped employees learn to better deal with them. Chances are, at some point in your career, you will be exposed to the concept of valuing diversity. It will greatly increase your value to the employer to do so. (See Exhibits 4.12, "Cultural Differences" and 4.13, "Valuing Diversity.")

Again, what employers can choose to do to bring more people into their workplace who have traditionally been left out (and, without some measure to include them, this pattern would continue) is not defined in the law. But as employers have warmed up to the idea of going beyond the status quo, they have been quite innovative. Sometimes, like with the NFL's Rooney Rule (see Exhibit 4.14, "The Rooney Rule: Affirmative Action Comes to Professional Football?"), all it takes is bringing into the consideration process someone who might not necessarily otherwise be included. In an effort to value diversity and ensure that, once employees

Exhibit 4.13 *Valuing Diversity*

Make a circle with your thumb and forefinger. What does it mean? In America we know it primarily as meaning "okay." But how many of us know that it may also mean the equivalent of "flipping someone the bird," "give me coin change," "I wish to make love with you," or "I wish you dead, as my mortal enemy"? The objective act has not changed, yet the meaning has. The interpretation the act is given depends on the cultural conditioning of the receiver. Welcome to multiculturalism. Knowing what is meant becomes a necessity in processing the act, otherwise the act has little meaning. Culture is what provides that information and, thus, meaning for virtually everything we do, say, wear, eat, value, and where and in what we live, sit, and sleep. Imagine how many other acts we engage in every day which can be misinterpreted based upon differences in cultural conditioning. Yet our cultural conditioning is rarely given much thought. Even less is given to the culture of others. That will not be true much longer.

In the fall 1992 issue of the magazine of the American Assembly of Collegiate Schools of Business, the accrediting body of schools of business, the cover story and lead article was "Teaching Diversity: Business Schools Search for Model Approaches." In the article, it stated that "without integrating a comprehensive diversity message into the entire curriculum, the most relevant management education cannot occur." *Multiculturalism* is learning to understand, appreciate, and value (*not* just "tolerate") the unique aspects of cultures different from one's own. The end product is learning to value others who may be different, for what they contribute, rather than rejecting them simply because they are different.

The concept of "culture" encompasses not only ethnicity, but also gender, age, disability, affinity orientation, and other factors which may significantly affect and in many ways, define, one's life. Multiculturalism is learning that "different from" does not mean "less than." It is getting in touch with one's cultural conditioning and working toward inclusion, rather than conformity.

Learning to value diversity opens people up to more. A major workplace concern is maximizing production and minimizing liability. Multiculturalism and valuing diversity contribute to this. To the extent that each person, regardless of cultural differences, is valued as a contributor in the workplace, he or she is less likely to sue the employer for transgressions (or perceived transgressions) stemming from not being valued. To the extent they are valued for who they are and what they can contribute in society, they are much less likely to end up engaging in acts such as the Los Angeles riots causing death and destruction in the spring of 1992 after the Rodney King verdict.

The U.S. Department of Labor's Workforce 2000 study conducted by the Hudson Institute and released in 1987 held a few surprises that galvanized America into addressing the issue of multiculturalism. According to the widely cited study, by the year 2000 we will experience the greatest influx of immigrants since World War II. At the same time, the percentage of women entering the workforce is increasing. The net result, according to the study, is that 85% of the net growth in the workforce will be comprised of women and non-Europeans. For the first time, white males will be a minority in the workforce. This need not be viewed as a threatening circumstance, but rather an opportunity for innovation and progress.

These factors, alone, reveal that the workplace (and by implication, schools, universities, recreational facilities and everything else) will be very different from before. It will no longer do to have a white, European, male, standard of operation. Others will be pouring into the workplace and will come with talent, energy, ideas, tenacity, imagination and other contributions the U.S. has always held dear as the basis for the "American Dream." They will come expecting to be able to use those qualities to pursue that dream. They will come feeling that they have much to offer and are valuable for all their uniqueness and the differences they may have from "the norm." And what will happen? There is no choice but to be prepared.

continued

It is a simple fact that the workplace cannot continue to operate in the same way and remain productive.

Studies have shown that when the same problem is given to homogeneous groups and heterogeneous groups to solve, the heterogeneous groups come up with more effective solutions. When people feel valued for who they are and what they can contribute, rather than feeling pressed into conformity as if who they are is not good enough, they are more productive. Energy and creativity can be spent on the task at hand, rather than on worrying about how well they fit into someone's idea of who they should be. A significant number of the problems we face as a society and on which is spent millions in precious tax dollars comes from rejecting multiculturalism and not valuing diversity. If people were judged for who they are and what they contribute, there would not be a need for a civil rights act, affirmative action plans, riot gear, human rights commissions, etc.

There are, of course, naysayers on the topic of multiculturalism such as those who think it is just an attempt at being "politically correct." It has been said that the term "politically correct" is an attempt to devalue, trivialize, demean, and diffuse the substantive value of the issues spoken of; that once something is deemed to be an issue of "political correctness," then there is no need to worry about the real import or impact of it, because it is only a passing fad which need not be taken seriously, as it will die its own natural death soon enough.

Multiculturalism is here to stay. People have evolved to the point where it will not go away. Self-worth and valuing oneself is a lesson that it takes many a long time to learn. Once learned, it is hard to give up. And, of course, why should it be given up? Again, "different from" does not mean "less than." Learning to value others as unique human beings whose culture is [sic] an integral part of who they are, rather than something to be shed at the work or school door, and learning to value the differences rather than to try to assimilate them, will benefit everyone.

Source: Reprinted with permission from the University of Georgia's *Columns.*

were hired, the employer maximized the opportunity, employers have done such things as the following:

- Organize workplace affinity groups such as for gays, female employees, Hispanic employees, and so on.
- Include diverse actors in advertising and commercials.
- Hold workshops for high-potential diverse employees.
- Institute formal procedures to handle complaints from diverse employees.
- Closely monitor the progress of diverse employees along the way.
- Tie performance reviews of managers to their measurable support for diversity inclusion.
- Organize business networking groups.
- Hold management diversity training.
- Provide for mentors for diverse employees.
- Have a chief diversity officer who reports directly to the chief executive officer (CEO).
- Have various employees in diversity focus on single issues such as diversity in philanthropy, recruiting, retention, supply contractors, and so on.
- Have diverse board of directors members have a "road show" to meet with diverse employees for networking.

Exhibit 4.14 *The Rooney Rule: Affirmative Action Comes to Professional Football?*

Ever wonder why so many African American football players are on the field playing extremely well, yet so few end up in the front office or as coaches? The NFL eventually did. In an attempt to provide more opportunities to minorities in the consideration of NFL football coaches, the NFL adopted the Rooney Rule (named for the Pittsburgh owner Dan Rooney, head of the NFL's Workplace Diversity Committee). The Rooney Rule requires a team with a vacant head coaching position to interview at least one minority candidate. The intent of the rule is to provide an opportunity for teams to look at candidates they might otherwise not interview. They are not required to hire him, only to interview him. The Pittsburgh Steelers interviewed former Vikings defensive coordinator Mike Tomlin when they were searching for a head coach. Tomlin ended up being the best candidate for the job, and got it, becoming the youngest head coach in the league. The Rooney Rule is still debated, with some saying it is too little to simply require that a minority candidate be interviewed, and some saying it is forcing the situations and making teams just go through the motions. Tomlin received his offer the same day that, for the first time ever, two African American NFL head coaches made it to the Super Bowl. At the historic Super Bowl XLI, on February 4, 2007, Coach Tony Dungy of the Indianapolis Colts beat out Coach Lovie Smith of the Chicago Bears in what most fans referred to as one of the best games ever. Coincidentally, the BCS national championship college football game between the University of Florida Gators and the unbeaten Ohio State Buckeyes also featured a historic matchup: two African American quarterbacks. Florida's Chris Leak beat out Heisman trophy winner Troy Smith, 41–14.

- Take the direct approach, like Wal-Mart did when, in 2007, it notified its 100 outside counsel law firms that it was only going to retain firms who made a concerted effort to be inclusive of women and minorities, as evidenced by them being on the liaison committee for business with Wal-Mart.
- Build diversity into everything the employer does, not just "Mexican food on Cinco de Mayo" or remembrance of Dr. Martin Luther King during Black History Month.
- Have scholarship and internship programs to groom diverse employees for eventual hire.
- Make personal phone calls and follow ups with diverse applicants to assure them of the seriousness of inclusion.
- Notify employees of inappropriate workplace behaviors toward others.
- Review workplace policies and practices and their impact on diversity.
- Make sure white males are included in the employer's concept of diversity.
- Seek the input of diverse groups in developing a workplace approach to diversity and inclusion.

Chapter Summary

- Affirmative action is intentional inclusion of women, minorities, and others traditionally excluded in the workplace after demonstrated underrepresentation of these historically disadvantaged groups.
- Affirmative action plans may arise voluntarily, as a remedy in a discrimination lawsuit, or as part of an employer's responsibilities as a contractor or subcontractor with the government.

Management Tips

Affirmative action can be a bit tricky. Keeping in mind these tips can help avoid liability for instituting and implementing an affirmative action plan.

- Ensure that the hiring, promotion, training, and other such processes are open, fair, and available to all employees on an equal basis.
- If an affirmative action plan is to be adopted voluntarily, work with the union (if there is one) and other employee groups to try to ensure fairness and get early approval from the constituencies affected to ward off potential litigation.
- Make sure voluntary affirmative action plans meet the judicial requirements of
  - —Being used to redress a conspicuous imbalance in traditionally segregated job categories.
  - —Being moderate, flexible, and gradual in its approach.
  - —Being temporary in order to attain, not maintain, a balanced workforce.
  - —Not unnecessarily trammeling employees' rights or creating an absolute bar to their advancement.
  - —Unsettling no legitimate, firmly rooted expectations of employees.
  - —Presenting only a minimal intrusion into the legitimate, settled expectations of other employees.
- Provide training about the plan so that all employees understand its purpose and intent. Try to allay fears from the outset to ward off potential litigation. The more employees know and understand what is being done, the less likely they are to misunderstand and react adversely. Even so, keep in mind that some employees will still dislike the plan. Reiterating top-level management's commitment to equal employment opportunity will stress the seriousness of management's commitment.
- Implement periodic diversity and related training. This not only provides a forum for employees to express their views about diversity issues, but it also provides information on learning how to deal with their co-workers as diversity issues arise.

- Employers should conduct voluntary periodic equal employment opportunity audits to monitor their workforce for gender, minority, and other inclusion. If there is underrepresentation, the employer should develop a reasonable, nonintrusive, flexible plan within appropriate guidelines.
- Such plans should not displace nonminority employees or permit people to hold positions for which they are not qualified, simply to meet affirmative action goals. This view should not be encouraged or tolerated.
- A well-reasoned, flexible plan with endorsement at the highest levels of the workplace, applied consistently and diligently, will greatly aid in diminishing negativity surrounding affirmative action and in protecting the employer from adverse legal action.

Chapter-End Questions

1. What is the monetary floor an employer/federal government contractor must meet to have Executive Order 11246 imposed?
2. Anne is employed by Bradley Contracting Company. Bradley has a $1.3 million contract to build a small group of outbuildings in a national park. Anne alleges that Bradley Contracting has discriminated against her, in that she has not been promoted to skilled craft positions with Bradley because it thinks that it is inappropriate for women to be in skilled craft positions and that most of the male skilled craftworkers are very much against having women in such positions. Knowing that Bradley Contracting has a contract with the federal government, Anne brings suit against Bradley under Executive Order 11246 for gender discrimination. Will she be successful? Why or why not?
3. Can employers lawfully consider race or gender when making hiring or promotion decisions? Explain.
4. If so, may it only be used to remedy identified past discrimination? Discuss.
5. Must such discrimination have been committed by the employer or can the discrimination have been committed by society in general? Explain.
6. Can affirmative action be used to benefit those who did not actually experience discrimination? Discuss.
7. Can race or gender be the only factor in an employment decision? Explain.
8. If race or gender can be the only factor in an employment decision, how long can it be a factor?
9. What is the difference between an affirmative action goal and a quota? Is there a difference? Explain.
10. What is the proper comparison to determine if there is an underrepresentation of women or minorities in the workplace?

End Notes

1. 347 U.S. 483 (1954).
2. 401 U.S. 424 (1971).
3. See Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W.W. Norton, 2005).
4. 41 C.F.R. § 60-2.16(e)(1).
5. 41 C.F.R. § 60-2.16(e)(4).
6. 41 C.F.R. § 60-2.16(e)(2).
7. 438 U.S. 265 (1978).
8. 476 U.S. 267 (1986).
9. 480 U.S. 616 (1987).

Cases

Case 1 Local 28, Sheet Metal Workers v. EEOC *478 U.S. 421 (1986)*

The union and its apprenticeship committee were found guilty of discrimination against Hispanics and African-Americans and were ordered to remedy the violations. They were found numerous times to be in contempt of the court's order and after 18 years the court eventually imposed fines and an affirmative action plan as a remedy. The plan included benefits to persons not members of the union. The Supreme Court held the remedies to be appropriate under the circumstances.

Brennan, J.

Local 28 represents sheet metal workers employed by contractors in the New York City metropolitan area. The Local 28 Joint Apprenticeship Committee (JAC) is a labor–management committee which operates a 4-year apprenticeship training program designed to teach sheet metal skills. Apprentices enrolled in the program receive training both from classes and from on-the-job work experience. Upon completing the program, apprentices become journeyman members of Local 28. Successful completion of the program is the principal means of attaining union membership.

In 1964, the New York State Commission for Human Rights determined that the union and JAC had excluded African-Americans from the union and apprenticeship program in violation of state law. The Commission, among other things, found that the union had never had any black members or apprentices, and that "admission to apprenticeship is conducted largely on a nepot[is]tic basis involving sponsorship by incumbent union members," creating an impenetrable barrier for nonwhite applicants. The union and JAC were ordered to "cease and desist" their racially discriminatory practices. Over the next 18 years and innumerable trips to court, the union did not remedy the discrimination.

To remedy the contempt and the union's refusal to comply with court orders, the court imposed a 29 percent nonwhite membership goal to be met by a certain date, and a $150,000 fine to be placed in a fund designed to increase nonwhite membership in the apprenticeship program and the union. The fund was used for a variety of purposes, including:

- Providing counseling and tutorial services to nonwhite apprentices, giving them benefits that had traditionally been available to white apprentices from family and friends.
- Providing financial support to employers otherwise unable to hire a sufficient number of apprentices.
- Providing matching funds to attract additional funding for job-training programs.
- Creating part-time and summer sheet metal jobs for qualified nonwhite youths.
- Extending financial assistance to needy apprentices.
- Paying for nonwhite union members to serve as liaisons to vocational and technical schools with sheet metal programs in order to increase the pool of qualified nonwhite applicants for the apprenticeship program.

The union appealed the remedy. Principally, the parties maintain that the Fund and goal exceeds the scope of remedies available under Title VII because it extends race-conscious preferences to individuals who are not the identified victims of their unlawful discrimination. They argue that section 706(g) authorizes a district court to award preferential relief only to actual victims of unlawful discrimination. They maintain that the goal and Fund violates this provision since it requires them to extend benefits to black and Hispanic individuals who are not the identified victims of unlawful discrimination. We reject this argument and hold that section 706(g) does not prohibit a court from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination. Specifically, we hold that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.

The availability of race-conscious affirmative relief under section 706(g) as a remedy for a violation of Title VII furthers the broad purposes underlying the statute. Congress enacted Title VII based on its determination that racial minorities were subject to pervasive and systematic discrimination in employment. It was clear

to Congress that the crux of the problem was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them and it was to this problem that Title VII's prohibition against racial discrimination was primarily addressed." Title VII was designed to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. In order to foster equal employment opportunities, Congress gave the lower courts broad power under section 706(g) to fashion the most complete relief possible to remedy past discrimination.

In most cases, the court need only order the employer or union to cease engaging in discriminatory practices, and award make-whole relief to the individuals victimized by those practices. In some instances, however, it may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII. Where an employer or union has engaged in particularly longstanding or egregious discrimination, an injunction simply reiterating Title VII's prohibition against discrimination will often prove useless and will only result in endless enforcement litigation. In such cases, requiring a recalcitrant employer or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the workforce may be the only effective way to ensure the full enjoyment of the rights protected by Title VII.

Further, even where the employer or union formally ceases to engage in discrimination, informal mechanisms may obstruct equal employment opportunities. An employer's reputation for discrimination may discourage minorities from seeking available employment. In these circumstances, affirmative race-conscious relief may be the only means available to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. Affirmative action promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices.

Finally, a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring or promotions, or continued use of a discriminatory selection procedure.

We have previously suggested that courts may utilize certain kinds of racial preferences to remedy past discrimination under Title VII. The Courts of Appeals have unanimously agreed that racial preferences may be used, in appropriate cases, to remedy past discrimination under Title VII. The extensive legislative history of the Act supports this view. Many opponents of Title VII argued that an employer could be found guilty of discrimination under the statute simply because of a racial imbalance in his workforce, and would be compelled to implement racial "quotas" to avoid being charged with liability. At the same time, supporters of the bill insisted that employers would not violate Title VII simply because of racial imbalance, and emphasized that neither the EEOC nor the courts could compel employers to adopt quotas solely to facilitate racial balancing. The debate concerning what Title VII did and did not require culminated in the adoption of section 703(j), which stated expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance.

Although we conclude that section 706(g) does not foreclose a court from instituting some sort of racial preferences where necessary to remedy past discrimination, we do not mean to suggest such relief is always proper. The court should exercise its discretion with an eye towards Congress' concern that the measures not be invoked simply to create a racially balanced workforce. In the majority of cases the court will not have to impose affirmative action as a remedy for past discrimination, but need only order the employer or union to cease engaging in discriminatory practices. However, in some cases, affirmative action may be necessary in order effectively to enforce Title VII, such as with persistent or egregious discrimination or to dissipate the effects of pervasive discrimination. The court should also take care to tailor its orders to fit the nature of the violation it seeks to correct.

Here, the membership goal and Fund were necessary to remedy the union and JAC's pervasive and egregious discrimination and its lingering effects. The goal was flexible and thus gives a strong indication that it was not being used simply to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge the union's efforts. Twice the court adjusted the deadline for the goal and has continually approved changes in the size of apprenticeship classes to account for economic conditions preventing the union from meeting its targets. And it is temporary in that it will end as soon as the percentage of minority union members

approximates the percentage of minorities in the local labor force. Similarly the fund is scheduled to terminate when the union achieves its membership goal and the court determines it is no longer needed to remedy past discrimination. Also, neither the goal nor the fund unnecessarily trammels the interests of white employees. They do not require any union members to be laid off, and do not discriminate against existing union members. While whites seeking admission into the union may be denied benefits extended to nonwhite counterparts, the court's orders do not stand as an absolute bar to such individuals; indeed a majority of new union members have been white. Many of the provisions of the orders are race-neutral (such as the requirement that the JAC assign one apprenticeship for every four journeymen workers) and the union and JAC remain free to adopt the provisions of the order for the benefit of white members and applicants. Accordingly, we AFFIRM.

Case Questions

1. Is it clear to you why a court would be able to include in its remedies those who are not directly discriminated against by an employer? Explain.
2. If you were the court and were still trying to get the union to comply with your order 18 years after the fact, what would you have done?
3. As an employer, how could you avoid such a result?

United Steelworkers of America, AFL-CIO v. Weber *443 U.S. 193 (1979)*

A white employee sued under Title VII alleging race discrimination, in that the union and employer adopted a voluntary affirmative action plan reserving for African American employees 50 percent of the openings in a training program until the percentage of African American craft workers in the plant approximated the percentage of African-Americans in the local labor force. The Supreme Court held that the program was permissible, in that Title VII did not prohibit voluntary race-conscious affirmative action plans undertaken to eliminate a manifest racial imbalance, the measure is only temporary, and it did not unnecessarily trample the rights of white employees.

Brennan, J.

In 1974, the union and Kaiser entered into a master collective bargaining agreement covering terms and conditions of employment at 15 Kaiser plants. The agreement included an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's craftwork force, which was almost exclusively white. The plan was to eliminate this racial imbalance by reserving for black employees 50 percent of the openings in in-plant craft-training programs until the percentage of black craftworkers in a plant is commensurate with the percentage of blacks in the local labor force.

This litigation arose from the operation of the affirmative action plan at Kaiser's Gramercy plant where, prior to 1974, only 1.83 percent of the skilled craftworkers were black, even though the local workforce was approximately 39 percent black. Pursuant to the national agreement, rather than continue its practice of hiring trained outsiders, Kaiser established a training program to train its production workers to fill craft openings. Pursuant to the master collective bargaining agreement, trainees were selected on the basis of seniority, with the proviso that at least 50 percent of the trainees were to be black until the percentage of black skilled craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. During the first year of the plan, seven black and six white craft trainees were selected, with the most senior black trainee having less seniority than several white production workers whose bids for admission to the program were rejected. Weber was one of those workers.

After being turned down for the training program when blacks with less seniority were admitted, Weber sued, alleging that, because the affirmative action program had resulted in junior black employees receiving training in preference to more senior white employees, Weber, and others similarly situated, had been discriminated against in violation of sections 703(a) and (d) of Title VII of the Civil Rights Act of 1964 which made it

unlawful to discriminate on the basis of race in the hiring and selection of apprentices for training programs.

The question is whether Congress, in Title VII, left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. We hold that Title VII does not prohibit such race-conscious affirmative action plans.

Weber argues that since *McDonald* [see Chapter 5] settled that Title VII forbids discrimination against whites as well as blacks, and since the affirmative action plan here discriminates against whites solely because they are white, the plan therefore violates Title VII.

Weber's argument is not without force. But it overlooks the significance of the fact that the plan is an affirmative action plan voluntarily adopted by private parties to eliminate traditional patterns of racial segregation. In this context, Weber's reliance upon a literal construction of sections 703(a) and (d) and *McDonald* is misplaced. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. The prohibition against racial discrimination in sections 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected.

Congress's primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." Before 1964 blacks were largely relegated to "unskilled and semi-skilled jobs." Because of automation the number of such jobs was rapidly decreasing. As a consequence, "the relative position of the Negro worker [was] steadily worsening. In 1947 the nonwhite employment rate was only 64 percent higher than the white race; in 1962 it was 124 percent." Congress considered this a serious social problem and feared that the goal of the Civil Rights Act—the integration of blacks into the mainstream of society—could not be achieved unless the trend were reversed. It further recognized that this would not be possible unless blacks were able to secure jobs "which have a future."

Accordingly, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them," and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.

It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem. The Report provides: "No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*" H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963); U.S. Code Cong. & Admin. News 1964, pp. 2355, 2393. (Emphasis supplied.)

Given this legislative history, we cannot agree with Weber that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history," cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."

At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as

soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.

We conclude, therefore, that the adoption of the Kaiser–USWA plan for the Gramercy plant falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. Accordingly, the judgment of the Fifth Circuit is REVERSED.

Case Questions

1. Does this decision make sense to you? Why? Why not?
2. If, because of discrimination, African-Americans were not in a workplace for as long as whites and, therefore, did not have as much seniority as whites, does it seem reasonable to allow African-Americans with less seniority than whites to join the training program? If not, can you think of an alternative?
3. As a manager in a firm that is thinking of instituting a voluntary affirmative action plan, what factors would you consider?

Case 3 Johnson v. Transportation Agency, Santa Clara County, California *480 U.S. 616 (1987)*

A female was promoted over a male pursuant to an affirmative action plan voluntarily adopted by the employer to address a traditionally segregated job classification in which women had been significantly underrepresented. A male employee who also applied for the job sued, alleging it was illegal discrimination under Title VII for the employer to consider gender in the promotion process. The U.S. Supreme Court upheld the promotion under the voluntary affirmative action plan. It held that since it was permissible for a public employer to adopt such a voluntary plan, the plan was reasonable, and since the criteria for the plan had been met, gender could be considered as one factor in the promotion.

Brennan, J.

In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its workforce, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the County labor force in both the Agency as a whole and in five of seven job categories. Specifically, while women constituted 36.4 percent of the area labor market, they composed only 22.4 percent of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women: women made up 76 percent of Office and Clerical Workers, but only 7.1 percent of Agency Officials and Administrators, 8.6 percent of Professionals, 9.7 percent of Technicians, and 22 percent of Service and Maintenance Workers. As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications." The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such

minorities in the County workforce, a smaller percentage of minority employees held management, professional, and technical positions.

The Agency stated that its Plan was intended to achieve "a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented." As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a workforce whose composition reflected the proportion of minorities and women in the area labor force. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency's aspiration was that eventually about 36 percent of the jobs would be occupied by women.

The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

The Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. Twelve County employees applied for the promotion, including Joyce and Johnson. Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from 70 to 80. Johnson was tied for second with a score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted.

James Graebner, Director of the Agency, concluded that the promotion should be given to Joyce. As he testified: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that. . .I believe it was a combination of all those."

The certification form naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well qualified for the job. The evaluation of Joyce read: "Well qualified by virtue of 18 years of past clerical experience including $3^1/_2$ years at West Yard plus almost 5 years as a [road maintenance worker]." The evaluation of Johnson was as follows: "Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago." Graebner testified that he did not regard as significant the fact that Johnson scored 75 and Joyce 73 when interviewed by the two-person board.

Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII.

In reviewing the employment decision at issue in this case, we must first examine whether consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." In determining whether an imbalance exists that would justify taking sex or race into account, 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 or training programs designed to provide expertise. Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefitting from the plan will not be unduly infringed.

It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation. The Agency Plan acknowledged the "limited opportunities that have existed in the past," for women to find employment in certain job classifications "where women have not been traditionally employed in significant numbers." As a result, observed the Plan, women were concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1—who was Joyce—of the 110 Road Maintenance Workers. The Plan sought to remedy these imbalances through "hiring, training and

promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented."

The Agency adopted as a benchmark for measuring progress in eliminating underrepresentation the long-term goal of a workforce that mirrored in its major job classifications the percentage of women in the area labor market. Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories. For positions requiring specialized training and experience, the Plan observed that the number of minorities and women "who possess the qualifications required for entry into such job classifications is limited." The Plan therefore directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. The Plan stressed that such goals "should not be construed as 'quotas' that must be met," but as reasonable aspirations in correcting the imbalance in the Agency's workforce. These goals were to take into account factors such as "turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area workforce who possess the desired qualifications or potential for placement." The Plan specifically directed that, in establishing such goals, the Agency work with the County Planning Department and other sources in attempting to compile data on the percentage of minorities and women in the local labor force that were actually working in the job classifications constituting the Agency workforce. From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention.

As the Agency Plan recognized, women were most egregiously underrepresented in the Skilled Craft job category, since none of the 238 positions was occupied by a woman. In mid-1980, when Joyce was selected for the road dispatcher position, the Agency was still in the process of refining its short-term goals for Skilled Craft Workers in accordance with the directive of the Plan. This process did not reach fruition until 1982, when the Agency established a short-term goal for that year of 3 women for the 55 expected openings in that job category—a modest goal of about 6 percent for that category.

The Agency's Plan emphasized that the long-term goals were not to be taken as guides for actual hiring decisions, but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories women were not qualified in numbers comparable to their representation in the labor force.

By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants . . . ."

The Agency's Plan emphatically did not authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs. The Agency's management had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision. The promotion of Joyce thus satisfies the first requirement since it was undertaken to further an affirmative action plan designed to eliminate Agency workforce imbalances in traditionally segregated job categories.

We next consider whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement. The Plan sets aside no positions for women. The Plan expressly states that "[t]he 'goals' established for each Division should not be construed as 'quotas' that must be met." Rather, the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified

applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. The Plan thus resembles the "Harvard Plan" approvingly noted in *Regents of University of California v. Bakke,* which considers race along with other criteria in determining admission to the college. As the Court observed: "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." Similarly, the Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.

In addition, Johnson had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of Johnson. Furthermore, while Johnson was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.

Finally, the Agency's Plan was intended to attain a balanced workforce not to maintain one. The Plan contains 10 references to the Agency's desire to "attain" such a balance, but no reference whatsoever to a goal of maintaining it. The Director testified that, while the "broader goal" of affirmative action, defined as "the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis," is something that is "a permanent part" of "the Agency's operating philosophy," that broader goal "is divorced, if you will, from specific numbers or percentages." The Agency acknowledged the difficulties that it would confront in remedying the imbalance in its workforce, and it anticipated only gradual increases in the representation of minorities and women. It is thus unsurprising that the Plan contains no explicit end date, for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time.

Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan's goals "[are] not being used simply to achieve and maintain. . .balance, but rather as a benchmark against which" the employer may measure its progress in eliminating the underrepresentation of minorities and women. In this case, however, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its workforce, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced workforce, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.

In evaluating the compliance of an affirmative action plan with Title VII's prohibition on discrimination, we must be mindful of "this Court's and Congress's consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and nonminorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, however, that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position. As both the Plan's language and its manner of operation attest, the Agency has no intention of establishing a workforce whose permanent composition is dictated by rigid numerical standards.

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's workforce. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is AFFIRMED.

Case Questions

1. What do you think of the Court's decision in this case? Does it make sense to you? Why or why not?
2. If you disagree with the Court's decision, what would you have done, as the employer, instead?
3. Are the Court's considerations for how to institute an acceptable affirmative action program consistent with how you thought affirmative action worked? Explain.

Kane v. Freeman *1997 U.S. Dist. LEXIS 4063 (M.D. Fla., March 17, 1997)*

In 1996, Tampa police officers sued the police department to prohibit the continued use of the affirmative action plan that had been in place since 1976 and was to expire in 1995. The court held that though there had initially been a basis for instituting the plan, since there was no longer an underrepresentation of African American police officers and blatant discrimination that created the need for the plan, it was no longer justified and must be stopped.

Kovachevich, J.

The City of Tampa's Police Department (TPD) has granted promotions, assignments and transfers pursuant to an Affirmative Action Plan since 1976. The TPD considers race as one factor in determining the propriety of individual promotions and assignments, and the determination of workforce promotional and assignment goals. The 1990 TPD Plan continues to be effective in 1996, notwithstanding its internal language indicating the Plan was to terminate in 1995.

In this case, there is a basis in the evidence for the Court to find that racial discrimination existed at the Tampa Police Department. Chief Bennie Holder testified that until the late 1970s it was not uncommon to hear derogatory speech toward black and female officers. Chief Holder further testified:

> . . .It's been necessary at times to explain to people why we have affirmative action. People don't understand. Some people, because they didn't experience it, or it predates them, they don't know about some of the discriminatory practices that existed in the past. . . . They didn't know that black officers made less money than white officers; and that there was an understanding that they didn't arrest white people, that if they needed to arrest a white person, they had to summon a white officer; that they weren't allowed to drive police vehicles; that they didn't have roll call with black [sic] police officers, they had theirs in the hallway.

Chief Holder also testified that to his knowledge none of the past discriminatory practices described above have existed at the Tampa Police Department for the last five years, and that he did not know the exact date these practices ended. The Court is certain that at one time an affirmative action plan was warranted, and must now determine whether present circumstances warrant the continuation or modification of the plan.

In order to satisfy the "compelling governmental interest" prong of the strict scrutiny test, TPD must show that racial preference guides the affirmative action plan and that some governmental interest allows this discrimination. One way TPD may satisfy the first prong is to demonstrate "gross statistical disparities" between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to do the work.

After reviewing TPD's statistical analyses, the Court concludes that no statistical evidence exists of present discrimination against blacks at the Tampa Police Department sufficient to support a "compelling governmental interest." The conclusions of two statistical analyses performed by the police officers demonstrate this point. The first statistical analysis performed by the police officers was the "rank below analysis of percentages." This analysis represents the overall percentages of blacks in each rank, compared to the percentages of blacks in each rank below (the next rank down). The studies found that black candidates for the rank of Lieutenant were promoted at rates that actually exceed the percentage of blacks in the rank of Sergeant, the eligibility rank below. This Court finds no statistical disparity.

The second statistical analysis performed by the police officers was the "Statistical Workforce Analysis." This test demonstrates the racial composition of supervisory sworn personnel compared with the relevant labor market in the relevant geographic area. When performed by the police officers, the test exhibited no statistically significant underrepresentation in each geographic area considered among the Department's supervisory personnel. In fact, the test revealed that black employees are significantly overrepresented among TPD's non-supervisory employees.

The desire to eliminate vestiges of past discrimination may support the "compelling governmental interest" requirement. However, as to the elimination of the vestiges of past discrimination, there is no duty to remedy an imbalance that is not caused by past discrimination so long as the current employment and promotional policies and practices are neutral with respect to race, gender, and ethnicity.

Chief Holder denied any specific knowledge that discrimination toward blacks in the Tampa Police Department continues to the present day. However, he did state "I'm not going to be so naive and say it's not occurring, but it certainly does not occur in my presence. And I would say, if it is going on, it's much more covert. It's just not prevalent because it's just not condoned." Anecdotal evidence may be used to document discrimination, especially if buttressed by relevant statistical evidence, but the Court looked for it in the supporting documents, and did not find it.

Defendants have not brought forth evidence of a compelling state interest sufficient to justify the continuation of the present Affirmative Action Plan. The Court concludes that the evidence presented of the necessity for the subject relief is not sufficient to justify continuation. At the very least, the parties must open discussions as to whether some modified plan may be necessary.

One must attempt to eliminate all vestiges of past discrimination through nondiscriminatory measures before one resorts to discriminatory measures. The TPD has not revealed any evidence that it used, or even experimented with, any viable or meaningful plans to promote black candidates without employing discriminatory measures. The door is therefore now open for the application of alternative means. Limiting the duration of a race-conscious remedy which clearly impacts adversely upon the suing police officers is a keystone of a narrowly tailored plan. The TPD's present plan is perpetual, and establishes "moving targets."

The police officers argue that TPD has not implemented measures to evaluate its affirmative action program to determine whether the Plan at the very least needs revamping. The Court agrees with the officers' contention that TPD fail to show any evidence that they reevaluate the Plan periodically. The methods used by the City of Tampa are critically in need of review.

The TPD's "availability percentage" is rigid. The most recent racial classifying plan developed before 1990 contained availability percentage data for each minority category. However, the TPD still uses percentages calculated before 1990 in 1996, even after the new census data was available. The police officers argue that TPD made no attempt to reassess or adopt available percentages to current data. According to the officers, TPD's calculation of the availability percentage for promotions has flaws. The Court agrees. TPD's calculation uses percentage data obtained from outdated pre-1990 census data when 1990 census data is available.

The Court finds that no compelling interest has been established as to the present Affirmative Action Plan of the Tampa Police Department, and the means employed by the Plan are not narrowly tailored. The Court enjoins the use of the present Affirmative Action Plan for promotions, assignments and transfers within the Tampa Police Department. There is "no universal answer to the problem of remedying racial discrimination." The choice of remedies to redress racial discrimination is a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court. Motion for partial summary judgment GRANTED.

Case Questions

1. Why do you think the police department was still using the plan even though the stated expiration date had passed?
2. What do you think the police officers who sued were feeling about the plan?
3. Assuming the suing police officers had their feelings before the expiration date of the plan, how would you have addressed them?