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Diversity at the Crossroads

Corporate clients cannot dictate the race and gender of their attorneys

There are many good policy reasons for implementing a strong diversity program, one that ensures that an employer's workforce composition reflects the broader community. To that end, employers have developed hiring and retention programs that use racial and gender preferences, and have asked law firms and other legal vendors to consider such preferences in hiring, promoting and assigning work to their lawyers. Some corporations have asked their law firms to report the race and gender of every attorney assigned to their matters.

The question to be addressed here is not the merits of a diversity policy, but rather its legal foundation; whether employers can use racial and gender preferences in furtherance of the otherwise laudable goal of racial and gender diversity, or to satisfy customer demand. A recent Appellate Division case, *Klawitter v. City of Trenton*, Docket No. A-208-5T5 (July 31, 2007), instructs that unless an employer's diversity program is part of an overall affirmative action plan, racial and gender preferences will not be lawful under either Title VII of the Civil Rights Act of 1964 or the New Jersey Law Against Discrimination.

In *Klawitter* the City of Trenton

allegedly used race as a criterion in selecting a black officer for promotion over two white officers. One of the white officers sued, alleging that she was rejected because she was white. In this "reverse discrimination" lawsuit, the plaintiff was initially required to establish that: (1) she is a member of a protected category, such as race, (2) she was qualified for the job in question, (3) she suffered an adverse employment action because of her race under circumstances from which an inference of discrimination may be drawn. The plaintiff also had to show that the city was "the unusual employer who discriminates against a member of the majority." See, e.g., *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 207 (1999). After a lengthy trial, the jury found race was a dispositive factor in the decision to reject the white officer for promotion. The city appealed.

The Appellate Division determined that the plaintiff presented enough evidence from which a jury could decide that race had been the deciding factor. Among evidence considered by the jury during trial was testimony from the mayor of Trenton, who testified that he "certainly knew that we needed more diversity, more women, more African-

Americans and Latinos in upper ranks" of the police department. He also acknowledged that "people may have known that [he] wanted more diversity."

Similarly, the court found there was no reason to reject the jury's finding that the city was the unusual employer that discriminates against the majority. In this regard, the testimony of the plaintiff, the police chief, and the mayor suggested that, in general, the city had a "reason or inclination" to discriminate against Caucasian police officers in favor of minority officers, and specifically had an agenda to promote the black officer based on his race.

The court also rejected the city's argument that it chose a black officer to encourage diversity within the police force, a goal consistent with the NJLAD. The city argued that it could properly use race as a "plus" factor. But, as was observed by the court, the city never said it used race as a plus factor. Indeed, it urged the jury to find that race was not a factor in any respect. More importantly, the use of race as a plus factor could only be used as a legitimate tool when used as part of an overall bona fide affirmative action plan to rectify racial imbalances. "Absent at least those basic ingredients, an employer would have the ability to invoke the purported "plan" in some employment decisions but not in others. This, the court noted, would constitute arbitrary action and would be inimical to the salutary purposes underlying affirmative action plans."

Thus, the *Klawitter* case stands for the proposition that race can be consid-

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ered in an employment decision only pursuant to and in accordance with an established affirmative action plan designed to correct a well-founded under-representation of minorities. Without such a plan in place, an employer would be in violation of Title VII and the LAD.

Klawitter is not a ground-breaking case. The U.S. Supreme Court permits the use of race-conscious decision making in educational admissions and in employment decisions, only if based on an established affirmative action plan and if race is used only as a "plus factor in an overall process." See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987).

The leading case in the Third Circuit Court of Appeals is *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996). In *Taxman*, the U.S. government brought a Title VII action challenging a school board's affirmative action plan of preferring minority teachers over nonminority teachers in layoff decisions where the teachers were equally qualified. The white teacher intervened as a plaintiff, asserting claims under Title VII and NJLAD. The district court ruled against the school board and the Third Circuit affirmed, holding that the board's nonremedial affirmative action plan was prohibited by Title VII and NJLAD. The plan was adopted for the purpose of promoting racial diversity, rather than to remedy discrimination or effects of past discrimination. It unnecessarily trampled nonminority interests, in that it was governed by the board's whim, was of unlimited duration and imposed job loss on tenured nonminority employees.

Similar precedent in New Jersey can

be found in *Jersey City Education Association Inc. v. Board of Education of Jersey City*, 218 N.J. Super. 177, 194 (App. Div.), certif. denied, 109 N.J. 506 (1987). There, the Appellate Division held that the law permitted a school board to implement a valid affirmative action plan. The plan included a list that categorized names "into three groups: (1) Hispanics; (2) Blacks; and (3) all others." The court upheld the board's use of the list because it identified an under-representation of minorities that was disproportionate to its student body, and took remedial steps through an affirmative action plan to correct such disparities. It specifically considered empirical evidence presented by the board that demonstrated an under-representation of Hispanics and Blacks proportionate to the student population in the Jersey City School District, as well as a resolution adopted by the board, which found an "under-representation of minorities and females and resolved to attempt to hire on a fifty-fifty minority-majority basis until such time as Affirmative Action goals are met."

Thus, Title VII and NJLAD do not prohibit racial preferences where they are implemented to overcome "manifest racial imbalances in traditionally segregated job categories." *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 197 (1979). This is known as the "Weber exception" to Title VII. To take advantage of the Weber exception, employers must demonstrate four things: 1) "traditional patterns of racial segregation" in the job category in which minorities are now being favored, 2) a manifest — that is, substantial — imbalance between the racial composition of employees in the

company and the racial composition of the qualified labor market, 3) that the discrimination is temporary and "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance," and 4) that the discrimination "does not unnecessarily trammel the interests of white employees." See *Taxman v. Board of Education Township*, 91 F.3d 1547 (3d Cir. 1996).

Given the current state of the law, it is hard to see exactly how most diversity programs could fit into the *Weber* exception. Although most employers might be willing to create an affirmative action plan that complied with the dictates of state and federal law, few, if any, would voluntarily concede that the plan was designed to remediate past discrimination in their own firms, or that there were significant racial or gender disparities.

Further to this point, legal vendors will find it difficult to defend against a "reverse discrimination" lawsuit by arguing that they were simply complying with customer preferences. Except in very narrow instances, this defense is simply not available.

Employers should not abandon their diversity programs. Minorities and women must be brought into the mainstream. Employers must, however, recognize that the legal foundation for these programs is suspect and needs to be reconsidered. Diversity programs must be temporary, and narrowly tailored to meet specific diversity goals while protecting the rights of nonminority workers and applicants. Programs should also be monitored to make sure that they are being administered in accordance with the law, and that there has not been any "goal drift." ■