THE NATIONAL
LAW JOURNAL
WWW.NLJ.COM THE WEEKLY NEWSPAPER FOR THE LEGAL PROFESSION MONDAY, MAY 8, 2006 ALM

EMPLOYMENT LAW

Ad Hoc Affirmative Action

By Michael Starr and Adam J. Heft

In recent years, employers across all industries have increasingly recognized the value of a diverse work force and engaged in a variety of methods, some more well thought out than others, to attract and retain employees from diverse backgrounds. These efforts are often motivated by the desire to "do the right thing." No one would deny that women and minorities deserve the same opportunities for success as nonminorities and men have had.

But beyond the desire to do good or avoid legal liability for employment discrimination, achieving diversity is also good business. Shareholders and clients are more frequently demanding that an organization's payroll better reflect the make-up of its community. The Equal Employment Opportunity Commission (EEOC) has recognized the link between diversity and corporate achievement, concluding in its report, "Best Practices of Private Sector Employers," that for "the most successful companies... pursuing diversity and equal employment opportunity is just as integral a business concept as increasing market share or maximizing profits." See www.eeoc.gov/abouteeoc/task_reports/prac2.html.

Diversity decisions, reverse discrimination claims

Unfortunately, attempting to achieve the worthy goal of increasing workplace diversity through ad hoc decisions that advance women or minorities, often made in the absence of, or without strict adherence to, a formal affirmative action plan, can spawn claims of illegal reverse discrimination. Such claims appear to be on the rise. See, e.g., *Johnson v. School District of Philadelphia*, No. 04-4948 (E.D. Pa. April 12, 2006) (refusing to set aside a $2.66 million jury award to four white males who claimed they were unlawfully terminated and replaced by African-Americans). A particularly noteworthy example of this trend is *White v. Alcoa Inc.*, No. 3:04-CV-78, 2006 WL 769753 (S.D. Ind. March 27, 2006), where the plaintiff, a white male applicant for a security/paramedic position at an Alcoa plant in Indiana, filed an action alleging that he was passed over in favor of a less qualified female applicant.

Attempting to achieve workplace diversity through ad hoc decisions can spawn claims of illegal reverse discrimination.

In *White*, three male and one female candidate, all of whom had remained in contention after an initial screening, were interviewed and rated by Harold Grossman, the Alcoa employee directing the search, and the four team leaders who worked under him. The interviewers gave a score of 278 points to one male (Anthony Schneider) and 270 to the ultimate plaintiff (Brian White). The one female candidate (Tracee Evans) scored 264 points, and the last male candidate (Oscar Ross) received 259 points. The interviewers then met as a group to formulate final ranking. Evans, who had received the third-highest interview score, was ranked second overall, behind Schneider, but ahead of White.

Before an offer was made, however, Alcoa's human resources department intervened. Having determined that women were underutilized in the job category that encompassed the open position, H.R. representatives told Grossman that if the candidates were all qualified, Alcoa "would have to be seriously looking at" Evans. Grossman balked, insisting that while all four candidates were qualified, Schneider was his first choice. But human resources overruled Grossman and directed him to

Michael Starr *is a partner in the labor and employment group of Hogan & Hartson, resident in New York. He can be reached at mstarr@hhlaw.com.* **Adam J. Heft** *is an associate in that group. He can be reached at ajheft@hhlaw.com.*

offer Evans the job. This was ad hoc affirmative action par excellence.

In denying Alcoa's motion for summary judgment, the court rejected as "unconvincing" the interviewers' proffered reasons for not offering White the job—that he did not appear to care whether he received a job offer, and that he might not transition well from his current position—because the human resources manager had essentially ignored the interview process when she directed that the position be offered to Evans. The court said that because the interviewers' preferences were ignored, they could not be relied upon as legitimate reasons to justify Alcoa's decision not to offer White the job. And thus, even though Evans was ranked second and ahead of White before human resources intervened, his claim for sex discrimination, as an unsuccessful male candidate, was sustained.

The irony of *White*, and of many other "reverse" discrimination cases, is that one man's preference is another man's refusal to discriminate. If Alcoa had selected either of the two men who had "outscored" Evans in the interview, she could have had a viable claim for sex discrimination, perhaps a more viable claim than White's. Given that Grossman had stated that each of the four final candidates was qualified for the open position, that nearly all of the decision-makers were men and that women were underrepresented in the position, Evans would almost certainly have made out a prima facie case for sex discrimination. See, e.g., *Rossy v. Roche Products Inc.*, 880 F.2d 621 (1st Cir. 1989). Nor is it hard to imagine that, notwithstanding her nominally lower score and ranking, Evans might succeed in showing that her gender was at least a "determinative" factor in the decision, which would be enough for her lawsuit to prevail. See, e.g., *Hill v. Lockheed Martin Logistics Management Inc.*, 354 F.3d 277 (4th Cir. 2004).

Indeed, Evans could also attack the subjective decision-making process itself under the "disparate impact" theory of Title VII of the Civil Rights Act of 1964, arguing that her lower score and ranking reflected covert male bias (see *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988))—a task made easier by the 1991 amendments to Title VII, 42 U.S.C. 2000e-2(k).

While public-sector employers are governed by both Title VII and the more exacting standards of the Constitution's equal protection clause, private-sector affirmative action is governed only by Title VII. The standard for that was set by two Supreme Court decisions that seem to have faded into the hoary past: *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). Together, these two cases would seem to hold that a preference for minority (or women) candidates does not transgress anti-discrimination statutes if there was, at the time of the preference, a "manifest imbalance" of minority or female workers in a "traditionally segregated" job category and if the preference did not "unnecessarily trammel" on the interests of nonminority men. 443 U.S. at 208, 209.

Johnson is particularly relevant, as (like *White*) it concerned the selection of a woman ranked lower than a competing male candidate, whom the trial court had found to be more qualified. Nonetheless, in sustaining the employer's choice, the high court noted that the unsuccessful male candidate "had no absolute entitlement" to the position, but rather that the decision-maker was authorized to promote any one of the candidates who met the eligibility requirements. That is also the situation in *White*, where each of the final candidates was qualified for the position. Writing for the majority in *Johnson*, Justice William J. Brennan addressed this exact point: "It is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job." 480 U.S. at 639 n.17.

Even though Alcoa, a federal contractor, was required to maintain an affirmative action plan—a point ignored by the court—the selection of Evans over the male candidates who scored higher appears to have been an ad hoc decision that went beyond expanding the applicant pool to giving a preference to a woman who, though not less qualified, was not preferred by the predominantly male decision-makers. Under *Weber* and *Johnson*, such a preference does not appear to violate Title VII. Nor is there a requirement that an employer consciously apply a formal affirmative action plan in order for its minority preference to be permissible. See *Gilligan v. Department of Labor*, 81 F.3d 835 (9th Cir. 1996). This point can clearly be seen in *Johnson*, where the plan's only relevant provision was that decision-makers were authorized to consider a qualified applicant's sex as one factor when selecting for a position within a job classification in which women were traditionally significantly underrepresented.

Employers seeking greater diversity are now at risk

Increasing judicial approval for "reverse" discrimination claims against private-sector employers puts at risk those companies that seek greater diversity to achieve what the EEOC called "competitive advantage in the increasingly global economy." If companies like Alcoa are acting improperly by selecting a top- ranking female candidate from a group of four qualified candidates, then it is hard to see when it would ever be acceptable to exercise a preference to correct a "manifest imbalance" of minority or female workers in a "traditionally segregated" job category. If Alcoa had ignored the opportunity to hire a qualified female candidate in a job category in which women were underrepresented, that imbalance would have persisted.

It is a common and justified human resources responsibility to monitor an affirmative action plan, to caution against denying an employment opportunity to a qualified female or minority candidate and to suggest selecting a qualified female or minority candidate for an underrepresented job category. Yet doing so runs the risk of legal liability to the nonselected white male. As with so much in employment law, employers are "damned if you do and damned if you don't," at least until appellate courts give clear approval to ad hoc affirmative action in the private sector. NLJ

This article is reprinted with permission from the May 8, 2006 edition of THE NATIONAL LAW JOURNAL. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information contact, American Lawyer Media, Reprint Department at 800-888-8300 x6111. #005-05-06-0021