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From: Briana King

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RE: Employment Discrimination

LEGAL QUESTIONS

Whether affirmative action policies are a form of discrimination in violation of Title VII of the Civil Rights Act of 1964 or a permitted excpetion? Whether hiring policies designed to increase diversity by considering underrepresented, minority classes more favorably violates Title VII is a form of discrimination or is legitamate form of affirmitive action?

BRIEF ANSWERS

Under Title VII, it is illegal for employers to make hiring decisions based off of a person's color, national origin, sex, race, or religion. However, affirmative action policies can be implemented if used as a temporary plan to correct past discrimination and does not unneccesarily restrict the majority. I recommend that all companies implement an affirmative action plan to correct past discrimination and use a holistic approach of appliacants with race as a factor. The companies should implement the plan with appropriate diversity programs, communication of the plan to the public, funded diversity training and programs, and all programs should be supported with qualified professionals.

BACKGROUND

The legal concept of affirmative action originated in 1961 when President John F. Kennedy issued an Executive Order 10925 which required that government contractors "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin" (Executive Order 10925). Signed by President Lyndon Johnson in 1965, Executive Order 11246 included sex as a protected class and further set requirements for non-discriminatory hiring and employment practices to ensure that: "its workforce represents its recruitment area, there is no disparate impact in employment processes, and action-oriented programs are implemented to meet established placement goals" (U.S. Department of Labor). Under these executive orders, the only employers that are required to have a written affirmative action plans are federal contractors or subcontractors which is administered by the Office of Federal Contract Compliance.

Similar to Executive Order 11246, Title VII of the Civil Rights Act of 1964 protects employment discrimination on the basis of sex, race, color, national origin, and religion. However, unlike the Executive Order, Title VII applies to all employers with 15 or more employees and does not require affirmative action programs. This law also created the Equal Employment Opportunity Commission

(EEOC) which is the administrative agency in charge of enforcing Title VII and other laws protecting against employment discrimination.

Before both the discussed Executive Orders and Title VII, it was not illegal to deny jobs to people based on their sex, race, color, national origin, and religion. In fact, discrimination was legalized in many instances. Historically, minority groups have been incredibly discriminated against. For example, the Jim Crow Laws, which were legally terminated by the Civil Rights Act of 1964, not only made racial discrimination intentional, but legal. The series of laws that were passed during the Jim Crow era were intended to make Blacks and Whites "separate but equal", but of course did not adhere to this philosophy. It instead, severely subjected Blacks after their recent liberation from decades of slavery.

Today, there remains an obvious discrepancy in the workforce. According to the Bureau of Labor Statistics, as of October 2019, the unemployment rate for Whites is 3.2% which is almost two times lower than that of Blacks (5.4%) and for Latinos which is 4.1%. This is primarily due to a lack of opportunity and discrepancy in education for minority groups due to the racial and poverty gaps that persist in America. Without leveling the playing field for these minority groups, it is substantially harder for these groups to prosper against the majority.

The Executive Orders strove to ensure equality for underrepresented groups in federally contracted positions by requiring that they implement an affirmative action plan. As stated by President Lyndon B. Johnson regarding the reasons for these action plans, "you do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with the others," and still justly believe that you have been completely fair." Additionally, Title VII ensured protection for all employees from experiencing discrimination in the workforce.

Affirmative action is a highly debated topic, especially when it comes to its implementation in university admissions programs. Due to the fact that most colleges and universities are considered federal contractors, they are required to have an affirmative action plan with targeted goals to address past discrimination. Affirmitive action in higher education can cause problems where the majority groups feel a sense of "reverse discrimination". In the case U.S. Supreme Court in Regents of the University of California v. Bakke, in 1977 Bakke, a white male, sued the University of California for it's admissions policy alleging that his rejection from the medical school was in violation of Title VI and the 14th Amendment's Equal Protection Clause. The university's affirmative action plan implemented a racial quota where out of 100 seats available, 16 were reserved for racial minorities. Bakke claimed that a less qualified minority student was admitted because of this quota system over himself because he is White, thus excluding him from the pool of applicants in violation of Title VI which prevents discrimination

under federally funded programs and activites. The court found this to be true and banned the use of fixed quotas in college admissions. After being examined under strict scrutiny, the court found it constitutional to consider race as a factor during admissions decisions among a qualified pool of applicants if the use is narrowly tailored to the purpose of achieving a level of diversity more representative of the larger population.

Additionally, although not all employers are required to have affirmitive action plans, many do in order to prevent workforce discrimination. These plans are frequently being reviewed under strict scrutiny. In the case of United Steelworkers of America v. Weber, The United Steelworkers of America and the Kaiser Aluminum and Chemical Corporation signed an affirmative action plan which reserved 50% of its openings for Black employees in its training program until the percentage of Black craft workers reflected the percentage of Blacks in the local workforce. Prior to Title VII, Kaiser had only 1.83% of skilled craft workers that were Black with a local population of 39% Black. This affirmitive action plan was set in order to correct past discrimination of Blacks in the plant workforce. Due to the fact that acceptance into the training program was based on seniority in the company, a Black worker with lower seniority than a White worker could earn a spot in the program over the White worker. Weber, a White worker who felt he had been unjustly denied entry into the apprentice program, claimed that the affirmative action program discriminated against him by using race as a factor in its hiring practices in violation of Title VII. The court found that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action"; holding that race-based affirmative action plans are permitted when for the purpose of correcting past discrimination (Legal Information Institue). However, the court ultimately sided with Weber's discrimination claim due to the use of quotas.

DISCUSSION

Title VII "prohibits employment discrimination based on race, color, religion, sex and national origin". Discrimination under Title VII is determined through examining five sub-elements: Whether there was (1) Unequal treatment, (2) of a protected class, (3) as to the terms or conditions of employment, (4) by an employer or union, (5) and there are no defenses or exceptions.

Unequal treatment can occur both intentionally and unintentionally. Disparate treatment refers to intentional different treatment provided with direct evidence. For example, only requiring Latino applicants applying for a job to take an entrance exam would be considered disparate treatment. Disparate impact refers to unintentional different treatment where a neutral act resulted in the different treatment. For example, requiring all applicants to take an entrance exam, but the results of this exam prove to eliminate Latino applicants. Frequently underpinning disparate impact is a historical or cultural fact that

explains the reason behind the impact. Disparate impact is often proven using the 4/5th rule which determines that if the selection rate for a protected class is less than four-fifths in comparison to that of the group with the highest rate, there is evidence of disparate impact. For example, if the selection rate of the Latino group is 20% and the selection rate for the highest group which is White is 50%, disparate impact would be found because the hiring rate of Latinos is only 40% of that for White applicants when it needs to be at least 80% according to the 4/5ths rule. Mixed motives disparate treatment occurs when the court finds that an employer both had lawful and discriminatory reasons for employment discrimination in which the employee must prove that the unlawful discrimination was the reason for the discriminatory action.

There are five protected classes under Title VII: race/ethnicity, color, sex, national origin, and religion. Additionally, pregnancy, age, and disability were added by amendments or separate statues and marital status, smoking, obesity, sexual orientation, appearance, politics and genetics are covered under state laws. These classes all recieve protection from discrimination in relation to the terms or conditions of employment. For example, hiring, recruitment, interviews, terms, pay etc. Title VII applies to all government employers and private employers with 15 or more employees. Additionally, unions, employment agencies and U.S. firms overseas (in compliance with foriegn laws) apply as well.

There are six defenses and/or exceptions to Title VII. Bona fide occupational qualification is a defense to intentional discriminination when a protected class of gender religion, age, national origin, or color is essential to the job (this does not include race). An example of this is the mandatory age of 21 to be able to drive for ride sharing apps such as Uber or Lyft. Although this policy seems to be discriminatory against 16-20 year old drivers, it is essential that drivers carrying passengers be as safe, experienced, and as mature as possible. For disparate impact, a similar defense is business necessity where a business requirement necessary for the job resulted in unequal impact. An example of this is the mandatory weight and health requirement for firefighters in order to perform as needed in the highly physical job. They must be a healthy weight for their height and pass a physical test. Although this requirement is for all applicants, the protected class of obesity under certain state laws could be impacted, certain disabilities may affect weight (in which they must be given a reasonable accommodation), and certain races like Latinos and Blacks are more affected by obesity (Center of Disease Control and Obesity). In addition, the physical ability test given would also be considered a legitimate, non-discriminatory reason for different treatment. Specifically for the classes of religion and disability, since these two classes require a reasonable accommodation, an employer can use the defense of undue hardship when the expense and or time to accommodate creates an undue hardship to the employer. For example, hiring a religious employee who needs an unreasonable amount of days off for a seasonal job to

deliver packages during the holidays may not be able to be accommodated for if it becomes extremely taxing and inconvenient to cover their days off. Another defense to a discrimination claim would be if the employer took prompt remedial action to change and rectify the problem once they became aware. For example, an employee was called a racial slur by their manager and reported it to HR. HR then immediately took action to reprimand the manager and open an investigation. They also required diversity training for the manager. This could be seen in court as a prompt remedial action and the company not be held liable.

Lastly, a remedy to discrimination and a exception is affirmative action. There are 3 elements to affirmative action where (1) it must be a temporary plan (2) to correct past discrimination (3) and does not unneccessarily restrict the majority. In the case of United Steelworkers of America v. Weber, The United Steelworkers of America and the Kaiser Aluminum and Chemical Corporation's affirmative action plan passed the first two elements because it was a temporary plan to correct past discrimination in their hired skilled craftsman, however, they failed to adhere to the third element as the use of racial quotas unneccessarily restricted the majority by directly excluding them from the applicant pool. The court sided with Weber, not because they used race-conscious affirmative action, but because their affirmative action plan and use of quotas violated Title VII by restricting the hiring of applicants based on their race.

Although affirmative action for the purpose of promoting diversity is legal for universities, employers are not able to make employment decisions based on one's race under Title VII unless its affirmative action plan is narrowly tailored with the purpose of correcting past discrimination of minoritiy groups. It is important to allow employers to implement race-based affirmative action due to the historical and current lack of minorities in specific industries. For example, there is a large racial gap in the STEM industry. According to the EEO-1 Report collected in 2014, Whites make up 68.03% of tech professionals while there are 5.27% of Blacks, 5.28% of Latinos, and 19.5% of Asian Americans. The study "noted that stereotyping and bias, often implicit and unconscious, has led to underutilization of the available workforce. The result is an overwhelming dominance of white men and scant participation of African Americans and other racial minorities, Hispanics, and women in STEM and high tech related occupations" (Funk, Cary, & Kim Parker). Having a diverse workforce especially in the fastest growing industry in America is extremely important to ensure a variety of perspectives, creativity, improve workplace performance and most importantly to promote economic and social success for underrepresented communities and victims of past discrimination which subsequently, limited future successs. With the discrepancies in our workforce and racism remaining within our society, affirmative action is important to open up opportunity, level the playing field, and create a diverse and inclusive workforce.

From a business perspective, I recommend that The United Steelworkers of America and the Kaiser Aluminum and Chemical Corporation not remove their affirmative action plan, but terminate their use of quotas. They should allow Weber into the training program and perhaps give a monetary remedy for wages he would have received had he been a skilled craft worker. They should send out a public statement apologizing and advising of their revised affirmative action plan and assurance that the quota system has been removed. In addition, they should invest in and hire a person to oversee a diversity management policy who is onboard through the hiring process from awareness, to recruitment and hiring to make sure that there is fair opportunity for all protected classes. All policies and implemented diversity programs should be clearly refined, communicated to the public, funded, and supported by professionals.

I recommend that they take a holistic approach to all applicants for their affirmative action plan. They should narrow it down among a pool of qualified applicants. However, when it comes down to a minority applicant and a majority applicant, their race be considered as a defining feature as it often times can explain why they may not be as qualified on paper as a majority applicant due to lack of opportunity and or socio-economic hardships.

As previously discussed, Affirmative action may have some consequences. Majority groups can feel as sense of “reverse discrimination” and thus resentment towards minority groups. It is extremely important to ensure racial representation of previously discriminated against groups in order to correct the disgusting hardships minorities faced and continue to face in a society that remains racially imbalanced. These hardships are so substantial that it has limited their ability to succeed. Due to the fact that America was built on the idea of a diverse and free world where all can succeed, it is important to uphold these standards for generations to come.

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