

4-1-1996

Legal issues in affirmative action: Recent developments on executive, judicial, and legislative fronts

Stan Malos

San Jose State University, stanley.malos@sjsu.edu

Follow this and additional works at: https://scholarworks.sjsu.edu/org_mgmt_pub



Part of the [Business Commons](#)

Recommended Citation

Stan Malos. "Legal issues in affirmative action: Recent developments on executive, judicial, and legislative fronts" *Tip: The Industrial-Organizational Psychologist* (1996): 57-62.

This Article is brought to you for free and open access by the School of Management at SJSU ScholarWorks. It has been accepted for inclusion in Faculty Publications, School of Management by an authorized administrator of SJSU ScholarWorks. For more information, please contact scholarworks@sjsu.edu.

Member Survey Results

In from ASAP (Atlanta Society of Applied Psychology) and Chuck Lance are results of their most recent member survey. In summary, the modal member of ASAP is a consultant who received a degree in I-O between ten and 15 years ago who has been an ASAP member for five or more years. S/he is a Licensed Psychologist who has chosen not to be a member of the Georgia Psychological Association.

In descending order, topics which are of most interest to ASAP members are (a) organizational change and development, (b) management/executive assessment/development, (c) work teams, and (d) selection and assessment.

All Good Things End

I have moved from God's garden of Colorado to Ohio. From elk to Elsie, and mountains to maples. Call me to extend your sympathies or congratulations or to get involved. Contact *Practice Network* by calling **Thomas G. Baker** at Columbia Gas in Columbus, Ohio at (614) 460-4713. FAX to (614) 460-4736. My email address remains VTCJ69A@prodigy.com.

(P.S. I actually like it here, besides my kids will grown up knowing their grandparents.)

LEGAL ISSUES IN AFFIRMATIVE ACTION: RECENT DEVELOPMENTS ON EXECUTIVE, JUDICIAL, AND LEGISLATIVE FRONTS

Stanley Bryan Malos, J.D., Ph.D.
San Jose State University

The controversy over affirmative action has gained new intensity during the past year, and continues to be an important topic of concern for I/O and HR professionals. That the controversy persists is clear. On one hand, the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Peña* (June, 1995) is seen by some as signalling an erosion of support for affirmative action at the federal level, while at the state level, the University of California president nearly lost his job over refusal to promptly implement an executive ban on affirmative action in admissions and faculty hiring, which will now take effect as planned. On the other hand, President Clinton continues to emphasize an ongoing commitment to affirmative action, and federal and state legislative efforts to end race- and gender-based affirmative action programs appear to be at least momentarily stalled. This article reviews fundamental sources of affirmative action obligations, and recent affirmative action developments on the executive, judicial, and legislative fronts.

SOURCES OF AFFIRMATIVE ACTION OBLIGATIONS AND EXECUTIVE DEVELOPMENTS

The term "affirmative action" enjoys no clear and widely shared meaning. However, a 1995 Presidential Review Commission has adopted the definition, "any effort to expand opportunity for women or racial, ethnic, and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration." Interested readers can browse the Commission's report online at <http://www.whitehouse.gov/WH/EOP/OP/html/aa/aa-index.html>.

Aside from individual court orders and consent decrees, Executive Order 11246 and related provisions of federal law remain the primary sources of specific affirmative action obligations. Under Executive Order 11246 and Revised Order No. 4 (41 C.F.R. Sec. 60-2.1 et. seq.), federal government contractors or subcontractors with more than 50 employees and contracts worth more than \$50,000, as well as banks and certain federal construction and other contractors with contracts worth more than \$10,000, are required to prepare written affirmative action programs (AAPs), and maintain ongoing compliance programs, to eradicate discrimination in employment practices based on race, color, sex, religion, or national origin. Regulations implementing these orders direct that women and minorities shall receive

efforts targeted at eliminating their "underutilization." There are similar requirements with respect to disabled individuals under the Rehabilitation Act of 1973, and Vietnam War era veterans under the Vietnam Era Veterans Readjustment Assistance Act of 1974.

At the administrative level, the Office of Federal Contract Compliance Programs (OFCCP) is responsible for enforcing these requirements, and has audited (via compliance reviews) more strongly and consistently since the 1992 elections than in previous administrations. Under new directorship since 1994, the OFCCP has initiated projects in various regional offices to enhance compliance with affirmative action obligations in universities (Chicago), the construction industry (Denver), the entertainment industry (San Francisco), corporate management (Atlanta, New York), and certain other primary employers. These projects may be continuing at varying levels of intensity, however, as the agency strives to implement President Clinton's post-*Adarand* directive (July 19, 1995) that any AAP be evaluated, reformed, or eliminated to the extent that it creates quotas, preferences for unqualified individuals, reverse discrimination, or persists after its EEO purposes have been achieved. Nevertheless, the OFCCP continues to assert that its regulations do not require quotas, but only good faith efforts to achieve equal employment opportunity. Under these regulations, an acceptable AAP is one which includes an analysis of areas within which minority groups and women are underutilized, and goals and timetables under which good faith efforts will be directed to correct any utilization deficiencies. Although it is not clear how strictly these regulations are enforced, and the OFCCP has undertaken internal reviews to simplify reporting and reduce the amount of routine, less-meaningful work, penalties for noncompliance include cancellation of the affected government contract, and ineligibility for future contracts.

One of the most intensive areas of recent scrutiny concerns the so-called Glass Ceiling Initiative, origins of which can be traced to a 1988 OFCCP policy directive which required certain multi-establishment corporations to address upper managerial positions in their written AAPs. The Initiative refers to a 1989 Department of Labor program to investigate "artificial barriers based on attitudinal or organizational biases that prevent qualified individuals from advancing upward in their organization into management level positions." Following a 1991 DOL report which found evidence of a glass ceiling in many companies for women and minorities, the OFCCP issued formal guidance for evaluating the extent to which an employer has made "good faith efforts to ensure equal employment opportunity in developing, selecting, and treating mid-level and senior corporate managers." These "corporate management reviews" involve establishing the point (if any) at which there is a marked decline in participation of women and minorities in management, and examining potential remedial measures with respect to processes such as outside hiring, internal development, performance reviews, compensation, and

terminations. Where compliance reviews create problems with potential disclosure of sensitive or proprietary information (e.g., succession, bonus, or stock option plans), exceptions to disclosure requirements may be found in the regulations, or may be negotiated with the OFCCP based on individual circumstances.

Pending possible changes in the Administration as a result of upcoming elections, there appears to be strong and continuing executive support for federal affirmative action programs which are not tied to quotas or other problematic preferences. The OFCCP continues to assert that the essence of affirmative action is self-evaluation and self-correction. Practitioners should watch for promised internal reviews and revisions of OFCCP regulations regarding the development of AAPs, clarification of the term "underutilization," simplification of job groupings for compliance purposes, and development of special rules for small establishments. It will also be interesting to see if other states follow California's lead, and administratively undermine or abolish affirmative action programs with respect to educational or other types of institutions.

JUDICIAL DEVELOPMENTS

Lawsuits based on AAPs typically involve either allegations by minorities that an employer failed to adopt or implement an AAP, or allegations by non-minorities that an employer complied with an AAP to his or her detriment (i.e., reverse discrimination). Most recent judicial activity in this area has continued to involve the latter category: complaints by non-minorities that they have been unfairly excluded from some benefit or program (e.g., scholarships, government contracts) because of preferential treatment afforded to a member of a protected class.

For example, in *Kirwin v. Podberesky*, 38 F.3d 147 (4th Cir. 1994), a federal appellate court held that the University of Maryland had denied Podberesky, a Hispanic white male, equal protection of the laws by excluding him from consideration for a race-based scholarship for African American students. This was apparently the case despite the existence of specific regulations which require federally funded institutions to take affirmative action to overcome the effects of prior discrimination, and permit them to establish voluntary programs to overcome continuing effects of factors which have contributed to historic underrepresentation of minorities (34 C.F.R. Sec. 100.3(b)(6)). The 4th Circuit's decision has been criticized (108 Harvard L. Rev. 1773 (1995)), and was appealed to the U.S. Supreme Court, which nevertheless declined last year to review the lower court's decision. Not surprisingly, this action has been viewed by civil rights activists as a judicial retreat from support for affirmative action initiatives.

In perhaps the most significant recent judicial development (at least in terms of the amount of activity generated on behalf of commentators and

government agencies), the Supreme Court held in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (June, 1995) that federal affirmative action programs which use racial and ethnic criteria as bases for decisionmaking are subject to strict judicial scrutiny. *Adarand* involved a challenge by a nonminority subcontractor which had submitted a low bid on a Department of Transportation contract. The subcontract was awarded to a higher-bidding minority subcontractor, due to a DOT program which pays prime contractors additional funds if they hire subcontractors controlled by "socially and economically disadvantaged" individuals. The 10th Circuit Court of Appeals affirmed a district court ruling that the DOT program passed muster under then-existing standards of judicial review. The Supreme Court reversed and remanded the case for a finding as to whether the program would pass muster under standards of strict scrutiny, which require that an affirmative action program be "narrowly tailored" to effectuate a "compelling government interest."

There are a number of concurring and dissenting opinions in *Adarand* which make its long-range impact complicated to predict, and it should be noted that the opinion involved a DOT preference or "set-aside" program, not an employment-related AAP under Executive Order 11246. (Readers interested in the *Adarand* decision who do not have access to Lexis or Westlaw online services and wish to avoid a trip to the law library can find a thorough Justice Department analysis of the case appended to the Presidential Review Commission report cited in the first section of this article.) Some commentators have concluded that the case does little more than bring the standards for evaluating federal AAPs into line with those previously applicable to state and local programs developed in earlier court cases such as *United Steelworkers v. Weber*, 433 U.S. 193 (1979) and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Others would see, in the broad language of Justice O'Connor's majority opinion with respect to the very process of classification (as opposed to preferences based on those classifications), the likelihood that cases under the Order would receive similarly strict judicial scrutiny. Because cases challenging AAPs adopted under Executive Order 11246 typically settle within the Labor Department's administrative review mechanisms, it is possible that such programs may escape direct judicial pronouncement. In any event, it appears that the Clinton administration's July, 1995 directive was designed to address basic concerns that might arise were such programs challenged in the court system. AAPs will therefore likely continue to pass muster if they are shown to be flexible and temporary, do not result in reverse discrimination against unprotected groups, and are designed to correct a "manifest imbalance" or other evidence of past discrimination when examined under strict judicial scrutiny.

There are other indications that affirmative action initiatives may continue to be eroded in the judicial arena. For example, in *PUC v. Bras* (1996; Case

No. 95-767), the Supreme Court recently refused to overturn a 1995 Court of Appeals decision which relaxed the "standing" rules for affirmative action plaintiffs, rules which require a showing of actual harm before a lawsuit can be filed. In *Bras*, a white architect's challenge to a California directive which had steered more than \$1.1 billion a year toward minority-owned businesses was dismissed on summary judgment by the District Court because the architect could not show that he had lost a contract due to the directive. The 9th Circuit reinstated the case (59 F. 3d 869), holding that white men can challenge a policy that "effectively encourages, if not compels [state agencies] to adopt discriminatory programs," i.e., those that favor women and minorities. As political winds continue to shift, and Court compositions shift with them, practitioners should be on the lookout for these and similar signs of increasing agreement with Justice Scalia's apparent sentiment that affirmative action should be all but banned, perhaps on a constitutional basis.

Finally, it should be noted that the scope of future challenges to affirmative action initiatives is constrained only by the creativity of litigants (and their lawyers) in particular circumstances. For example, a case is pending at the trial court level in Florida (*Lopez v. Miami*, USDC Miami, No. 87-2456) alleging essentially that the wrongful death of individuals involved in a drug raid occurred due to the negligent hiring of unqualified police officers pursuant to an AAP. We'll keep you posted.

LEGISLATIVE DEVELOPMENTS

Shortly after the *Adarand* decision, legislation was introduced in the Senate (by Bob Dole) and in the House of Representatives (by Charles Canady, R-Fla.) which would eliminate all federal AAPs to the extent they afford gender and minority preferences based on mandatory quotas, numerical goals, or specific timetables (general outreach or recruitment efforts would still be allowed). In essence, the bill attempts to set forth standards which would define "compelling government interest" for purposes of judicial review of AAPs. It is not clear that this legislation has widespread support even among Republican leaders, and a presidential veto might sustain possible override attempts. The bill appears to be a potential political hot potato, and is probably stalled pending any changes brought about in the upcoming November elections. However, practitioners should note that, if passed, this legislation would probably lead to revisions in current federal guidelines for AAPs which go beyond the parameters of the general review ordered in President Clinton's July, 1995 directive.

At the state level, California appears to be a national testing ground for erosion or repeal of affirmative action, based on highly publicized support for an initiative expected to be on the November 1996 ballot. However, once regarded as a near "sure thing," and despite belated support from Governor Pete Wilson (who no longer has to focus on his now-defunct presidential

campaign), considerable doubt remains as to whether the initiative will obtain the requisite number of signatures to make it onto the ballot (as of late January, 1996, the campaign fell some 400,000 signatures short). Reports of complaints about strong-arming at Republican caucuses have accompanied sentiments from some state legislators that they fear eliminating favorable aspects of AAPs along with reported abuses. It thus appears that state legislative activity on affirmative action will also have to await determination of its fate at a later time.

SUMMARY AND CONCLUSION

At least for the time being, affirmative action guidelines under applicable federal law and executive orders will probably remain largely unchanged, subject to the elimination of quotas and other improper preferences pursuant to President Clinton's July, 1995 directive. However, Republican presidential hopefuls Alexander, Buchanan, Dole, and Gramm have all come out in favor of affirmative action's repeal to the extent that quotas or numerical goals are involved, and recent court cases and legislative efforts make clear that the affirmative action controversy, if anything, is likely to continue to heat up. At a minimum, it will surely persist.

CORRELATION AND REGRESSION: PRINCIPLES AND APPLICATIONS IN INDUSTRIAL/ ORGANIZATIONAL PSYCHOLOGY AND MANAGEMENT

Philip Bobko, Rutgers University

Intended for students in both the social sciences and business administration, this new text makes correlation and regression accessible to the student. The goal is practical, the style is conversational, and the technique is commonsensical. The underlying philosophy recognizes that the application of correlation and regression techniques is often not necessarily straightforward. A wealth of applied real-world examples from a variety of fields explains how statistical techniques work and demonstrate under what circumstances creativity and critical thinking are necessary. Some of the text's distinctions include:

Chapter-length applications of statistical techniques: While some chapters cover the traditional topics in correlation and regression, other chapters are written entirely as examples of applications issues drawn from research and real-world experience. For example, Ch. 4 covers the application of correlations to measurement and Ch. 7 covers utility analysis, regression to the mean, and partial correlation.

Expanded explanations of interactions in regression (Ch. 9) and a full chapter on the effects of range restriction (Ch. 5). Discusses unexpected idiosyncrasies, problems, and pitfalls that may occur when statistical techniques are applied in social science research. For example, see properties of the correlation coefficient in Ch. 2 and validity shrinkage in Ch. 10.

Fully worked-out examples and exercises are included throughout the text and numerous problems and thought-provoking questions are included which test students' understanding of the concepts and of their ability to apply them.

ISBN #: 0-07-00623-4 Cloth 283 pages

For more information, please contact your local McGraw-Hill sales representative, or write to:

McGraw-Hill College Division, Comp Processing & Control,
P.O. Box 442, Hightstown, NJ 08520-0442