PUBLICATION

When Affirmative Action Goes Wrong

September 22, 2009

In *Humphries v. Pulaski County Special Sch. Dist.*, decided by the Eighth Circuit Court of Appeals on September 3, 2009, a white public school administrator was repeatedly denied promotion to assistant principal, allegedly because of the school district's affirmative action program and policies that favored promotion of African-American employees. Because the school district was legally compelled to engage in affirmative action efforts as part of a Consent Decree with the EEOC to remedy past discrimination against African Americans, the school district argued that its efforts to implement its court-approved affirmative action program could not be held against it.

In this case of first impression in the Eight Circuit, the Court of Appeals disagreed with the school district, concluding that "evidence that an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination" – *even when the affirmative action plan is required by law*! Accordingly, the plaintiff in *Humphries* was allowed to proceed to trial with her reverse race discrimination claim, pointing directly to policies, statements, and practices imposed in the name of the school district's affirmative action program as evidence of the alleged discrimination.

The Eighth Circuit (AR, IA, MN, MO, NE, ND, SD) is not alone in its holding. The federal appeals courts in the Fourth (MD, NC, SC, VA, WV), Fifth (LA, MS, TX), Ninth (AK, AZ, CA, HI, ID, NV, OR, WA), Tenth (CO, KS, NM, OK, UT, WY) and Eleventh (AL, FL, GA) circuits have reached the same conclusion. Accordingly, the problem faced by the defendant school district in *Humphries* is one that could exist for any affirmative action employer.

In this case, the school district made matters worse for itself by misconstruing its obligations under the affirmative action program. Specifically, the Court of Appeals found that several of the school district's diversity efforts – *which were not specifically required by the written program* – presented questions of fact regarding the school district's motives. These policies included the school system's use of biracial interviewing committees, its alleged policy of requiring black assistant principals at schools with white principals, and its implementation of racial hiring quotas for particular jobs.

In fact, many employers are obligated to engage in affirmative action in employment. In addition to court-sanctioned efforts to remedy past discrimination (the type of affirmative action program at issue in *Humphries*), several federal and state laws and regulations require affirmative action in employment. For instance, under Executive Order 11246, any employer that has a contract or *subcontract necessary to the performance of a contract* with a federal executive agency for supplies or services worth $50,000, and that has at least 50 employees, must have a written affirmative action program for the hiring and promotion of women and minorities. Other federal laws such as Section 503 of the Rehabilitation Act and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) impose affirmative action requirements for contractors and subcontractors related to the employment of disabled and covered veterans. Moreover, many state and local governments require affirmative action compliance by employers.

At the same time, Title VII of the Civil Rights Act of 1964 and other similar laws prohibit employment discrimination based on race, gender and other protected categories that are often the subject of legally-mandated affirmative action programs. This means that even an "affirmative action employer" must hire or

promote the most qualified candidate for a position, without regard to that candidate's race, gender, etc. Moreover, affirmative action employers should be even more sensitive to this fact, given the potential use of their programs against them. Affirmative action programs should be carefully crafted to accomplish the legally required purpose of affirmative action, without unduly providing ammunition for a reverse discrimination claim – a very delicate balance.

An employer's affirmative action program **MUST NOT**, in word or practice, provide for hiring or promotion quotas. Similarly, the policies or practices implemented to further the program should not be construed to provide preferential treatment to women and minorities in the hiring or promotion process. Instead, as noted by the *Humphries* Court, an affirmative action program should simply seek to increase the number of qualified women, minorities, or other targeted groups who may be eligible for selection as applicants for such positions, in an effort to eventually provide an incumbent workforce that is properly reflective of the availability of individuals within the targeted group in a reasonable recruitment area. An affirmative action program inconsistent with this purpose may effectively be used as a dagger against the employer in a reverse discrimination case brought by a disgruntled individual in a non-targeted group who is not selected for hire or promotion.

Humphries serves as a reminder of the importance of careful affirmative action planning. Given their potential for misuse by plaintiffs' lawyers, employers are well served to take the time and effort necessary to make sure that their affirmative action programs are carefully drafted and implemented. Baker Donelson can assist you with these and other employment-related challenges. For assistance, please contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville* and *New Orleans, Louisiana; Jackson, Mississippi;* and *Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee*.

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