BYU Law Review

Volume 1979 | Issue 4 Article 3

11-1-1979

Employment Discrimination-Reverse Discrimination- Privately Instigated Racial Quotas as Acceptable Affirmative Action-United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

Employment Discrimination—REVERSE DISCRIMINATION—PRIVATELY INSTIGATED RACIAL QUOTAS AS ACCEPTABLE AFFIRMATIVE ACTION—*United Steelworkers v. Weber*, 99 S. Ct. 2721 (1979).

Between 1969 and 1974 Kaiser Aluminum & Chemical Corp. had been hiring blacks and whites one-for-one at the hiring gate in an effort to balance the racial makeup of the production work force at each of its plants with the racial makeup of the work force in each community where a plant was located.[1] This practice would eventually have balanced both production lines and seniority lists, and would also have infused some black workers into Kaiser's craft positions under normal seniority bidding practices over a period of years. However, the hiring practice resulted in increasing production force minority representation by only about 1% a year at the Gramercy, Louisiana, plant. Roughly 15% of that plant's work force was made up of blacks by 1974,[2] while 39% of the available work force in the community was black. Racial balance in craft positions was almost nonexistent at the Gramercy plant by 1974.[3]

In 1974 the United Steelworkers and Kaiser agreed upon an affirmative action plan aimed at balancing the percentage of black craft workers more effectively with the percentage of blacks available in the local work force.[4] Prior to the instigation of the plan neither blacks nor whites had been able to train for craft positions on the job at Kaiser. The new program afforded both racial groups a new opportunity, in the form of on-the-job craft training. Craft trainees were to be selected from among production workers on a seniority basis, but at least fifty percent of the trainees were to be black. This meant that a different seniority standard would be allowed for blacks, permitting them to bid for the craft program with less seniority than that required of white workers.[5]

During 1974 Kaiser selected thirteen employees for the program at its Gramercy plant.[6] Seven of the selected trainees were

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1. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 228 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

2. *Id. See also* 99 S. Ct. at 2725. Prior to 1974 only 1.83% of the skilled workers in craft positions at Gramercy were black.

3. Record at 62, Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976).

4. 99 S. Ct. at 2725.

5. *Id.*

6. *Id.*

black and six were white. Brian Weber, a white production worker who had bid on three trainee positions, was rejected for admission even though he had more seniority than the most junior black selected. Weber instituted a class action in the United States District Court for the Eastern District of Louisiana on behalf of himself and all similarly situated white workers, alleging violation of sections 703(a) and (d) of title VII of the Civil Rights Act of 1964.[7]

The district court held that Title VII prohibits racial quotas for on-the-job training programs except where such quotas are court-ordered remedies for proven discrimination.[8] In *Weber v. Kaiser Aluminum & Chemical Corp.*[9] the United States Court of Appeals for the Fifth Circuit affirmed. The United States Supreme Court, however, reversed the Fifth Circuit and upheld the affirmative action plan.[10]

I. BACKGROUND

A. *Title VII and the "Make Whole" Doctrine*

Title VII of the Civil Rights Act of 1964 forbids unequal treatment of employees and prospective employees on the basis of race, sex, religion, or national origin[11] and applies to both the private and public sectors.[12] The Equal Employment Opportunity Commission (EEOC) has power to promulgate and enforce equal employment guidelines under Title VII.[13]

Title VII and the EEOC guidelines both seek to place victims of discrimination in the position of employment they would have reached if there had been no discrimination.[14] This concept, known as the "make whole" doctrine, has been limited to those situations in which some definite, intentional, and discriminatory act by the employer is shown,[15] or to instances where in the ab-

7. Civil Rights Act of 1964, § 703(a), (d), 42 U.S.C. § 2000e-2(a), (d) (1976).

8. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976).

9. 563 F.2d 216 (5th Cir. 1977).

10. United Steelworkers v. Weber, 99 S. Ct. 2721 (1979). Justice Powell and Justice Stevens did not participate in the decision. Five justices voted to validate the Kaiser plan; Chief Justice Burger and Justice Rehnquist dissented. Justice Blackmun wrote a separate opinion in which he concurred with the majority's opinion and result.

11. 42 U.S.C. §§ 2000e-1 to 9 (1976).

12. Morton v. Mancari, 417 U.S. 535, 546-47 (1974); 42 U.S.C. § 2000e-16 (1976).

13. 42 U.S.C. § 2000e-4 (1976). The guidelines are located at 29 C.F.R. §§ 1600.735-1610.36 (1979). Part 1608, dealing with race and affirmative action, was added Jan. 16, 1979. 44 Fed. Reg. 4425 (1979).

14. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975).

15. *Id. See also* Comment, *How Far Can Affirmative Action Go Before it Becomes*

sence of definite discrimination, statistical disparity provides a prima facie finding of racial animus under Title VII.[16] Even where the disparity is the result of a lack of experienced craft workers, which was the case at Kaiser's Gramercy plant, it can form the basis for a finding of employment discrimination.[17]

B. Executive Order No. 11,246

Following the passage of the 1964 Civil Rights Act, President Johnson issued Executive Order No. 11,246, which mandated affirmative action by any employer holding or operating under a government contract.[18] Broadened by President Nixon,[19] Executive Order No. 11,246 is now enforced by the EEOC and the Office of Federal Contract Compliance.[20] Since the Executive Order requires government contractors to affirmatively develop plans for achieving racial equality in employment practices, it created a potential conflict for those employers in light of Title VII's apparent ban against race-conscious remedies other than those ordered by a court.[21] On one hand, a contractor risked the loss of his government contracts if he failed to comply with EEOC guidelines. On the other hand, he risked liability for reverse discrimination if compliance resulted in race-conscious action that violated the rights of white employees under Title VII.

Under pressure from the Office of Federal Contract Compliance, Kaiser would have had reason to fear the loss of valuable government contracts. Kaiser's effort to achieve racial balance by hiring one-for-one at the gate might well have been interpreted

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Reverse Discrimination?, 26 CATH. U.L. REV. 513, 541-45 (1977).

16. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336-38, 360 (1977). *See also* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977) (statistical disparities subject to rebuttal by employer).

17. 41 C.F.R. § 60-2 (1979). *See also* Record at 92-93, Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976); Clark, *The Creation of the Newark Plan*, 23 CATH. U.L. REV. 443, 466-67 (1974); [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 1380.

18. Exec. Order No. 11,246, 3 C.F.R. § 339 (1965), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976).

19. Exec. Order No. 11,478, 3 C.F.R. § 803 (1969), *reprinted in* 42 U.S.C. § 2000e app., at 1236 (1976).

20. 41 C.F.R. § 60-1.1 (1979).

21. 563 F.2d at 228-30 (Wisdom, J., dissenting). For a concise analysis of the conflict between Title VII and Executive Order No. 11,246, see Note, Weber v. Kaiser Aluminum & Chemical Corporation: *Does Title VII Limit Executive Order 11246?*, 57 N.C.L. REV. 695 (1978).

The conflict between Executive Order No. 11,246 and Title VII was not immediately apparent. *Weber* is the first case in which the Supreme Court has directly faced the issue of reverse discrimination in light of voluntary private affirmative action programs.

as an insufficient effort under the guidelines, since only limited opportunities for blacks were available in the crafts by 1974.

C. *Title VII and Majority Rights*

Prior to *Weber* there were indications that Title VII might prohibit some voluntary private affirmative action plans. Two Supreme Court cases indicated that Title VII was not necessarily limited to the protection of minority employees. In 1971, in *Griggs v. Duke Power Co.*,[22] the Court considered the validity of ability tests for employees under section 703(h) of Title VII. Although *Griggs* did not involve an affirmative action program, the Court did note that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" in Title VII.[23]

An even clearer indication came in *McDonald v. Santa Fe Trail Transportation Co.*[24] In *McDonald* two white employees of the Santa Fe Trail Transportation Co. were fired for stealing cargo, but a black employee charged in the same incident was not fired. The discharged white employees subsequently accused the company of discrimination under Title VII. Again no affirmative action program was at issue, but in holding for the white employees the Court stated:

> [T]he EEOC, whose interpretations are entitled to great deference, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites . . . . This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans . . ." and create an "obligation not to discriminate against whites." We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson [the black employee] white.[25]

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22. 401 U.S. 424 (1971).

23. *Id.* at 431. Both Chief Justice Burger and Justice Rehnquist cited this language from *Griggs* in their dissenting opinions in *Weber*. 99 S. Ct. at 2735 (Burger, C.J., dissenting); *id.* at 2736 (Rehnquist, J., dissenting). Justice Rehnquist also cited language to the same effect from Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). 99 S. Ct. at 2736 (Rehnquist, J., dissenting) (quoting 438 U.S. at 579). This language from *Furnco* was based upon the language from *Griggs*.

24. 427 U.S. 273 (1976).

25. *Id.* at 279-80 (citations and footnotes omitted).

Neither *Griggs* nor *McDonald* forced the Court to weigh affirmative action designed to correct discrimination against rights and expectations of white workers, but the rationale of those two cases set the stage for such a confrontation.

II. INSTANT CASE

Weber presented the issue of whether Title VII prohibits all voluntary, private racial quotas designed to hasten the elimination of the effects of past societal discrimination.[26] In holding that Title VII did not prohibit all such quotas, the Court reasoned that the intent of Congress in enacting Title VII was to hasten minority equality in employment opportunities. The Kaiser plan, it held, was consistent with this purpose.[27] The Court further justified its holding by pointing out that the Kaiser plan "does not unnecessarily trammel the interests of the white employees" by requiring their discharge or completely barring their advancement.[28] In addition, the Court noted that since Kaiser's preferential selection of blacks was to end when the desired percentage of black craft workers was reached, the plan was only temporary and was not intended to "maintain racial imbalance."[29]

Concurring, Justice Blackmun viewed the Kaiser plan with approval because "the craft training program [was] new and [did] not involve an abrogation of pre-existing seniority rights."[30] In his view, the Kaiser plan was a justifiable response to statistical disparities that arguably constituted a Title VII violation.[31] Furthermore, Justice Blackmun saw a need to resolve the conflict created by Title VII and the EEOC guidelines. While he would have preferred a different approach—one of allowing restrictive, private, voluntary affirmative action programs only when an arguable violation of law was present—Justice Blackmun was still willing to join the majority to resolve the conflict.[32]

Justice Rehnquist was joined by Chief Justice Burger in a dissent that focused upon congressional intent.[33] Unable to agree that Congress endorsed in Title VII *any* form of race-conscious action except as a remedy for a specific finding of discrimination,

26. 99 S. Ct. at 2724-25.
27. *Id.* at 2730.
28. *Id.*
29. *Id.*
30. *Id.* at 2734 (Blackmun, J., concurring).
31. *Id.* at 2731-32 (Blackmun, J., concurring).
32. *Id.* at 2734 (Blackmun, J., concurring).
33. *Id.* at 2734-53 (Rehnquist, J., dissenting).

Justice Rehnquist reasoned from *Griggs* and *McDonald* that Title VII did not permit employers to voluntarily prefer racial minorities.[34] In his view the only intent of Title VII was to present "a flat prohibition on discrimination 'against any individual . . . because of such individual's race . . . .' "[35]

III. ANALYSIS

The Court did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but merely held that the Kaiser "affirmative action plan falls on the permissible side of the line."[36] Nevertheless, an analysis of the Court's justifications for its holding sheds some light on where that line might ultimately be drawn.

A. Justifications

The *Weber* majority relied on the fact that the goal of the Kaiser plan was to achieve racial balance with haste.[37] It viewed this goal as consistent with congressional intent in Title VII.[38] Thus a voluntarily adopted plan instigated to "hasten the elimination"[39] of the effects of past societal discrimination would likely comport with the Court's view of permissible affirmative action.

In order to achieve racial balance rapidly, the Kaiser plan created a new, dual seniority system, which arguably disrupted the seniority expectations of white employees and diluted the plant-wide seniority to which white workers had looked for upward mobility. Since Title VII might prohibit the disruption of such expectations because of race, and since the courts have tended to protect Title VII rights against disruption by the collective bargaining process,[40] the Court in *Weber* attempted to further justify its potentially harsh result by concluding that the

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34. *Id.* at 2736-37, 2748 (Rehnquist, J., dissenting).

35. *Id.* at 2748-49 (Rehnquist, J., dissenting) (quoting 42 U.S.C. § 2000e-2(a) (1976)).

36. *Id.* at 2730.

37. *Id.* at 2728.

38. The opinion cited comments by Senators Humphrey, Carlson, Javits, Miller, Dirksen, Allott, Kennedy, and Clark to illustrate its view of congressional intent in Title VII. *Id.* at 2727-29 (citing 110 CONG. REC. 6547 *passim* (1964)). The majority also examined the language of Title VII and the accompanying House report. *Id.* at 2728 (citing H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963)).

39. *Id.* at 2728.

40. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974). *See also* TWA v. Hardison, 432 U.S. 63, 79 (1977).

plan was merely temporary.[41] This conclusion deserves a closer look.

The union claimed that the fifty percent quota, which necessitated a dual seniority system, would end when racial balance was achieved.[42] The Court appears to have accepted this claim without careful consideration. It is likely that some quota for black craft trainees will remain long after racial balance is initially reached. The percentage of blacks entering the training program will be higher in relation to the in-plant black work force than the percentage of white trainees in relation the the in-plant white work force. This will perpetuate a black seniority deficiency in the non-craft, in-plant work force.[43] As a result, black workers in a collapsed single seniority system would be unable to compete effectively with whites and the proportion of black craft trainees would soon fall below acceptable EEOC guildeline levels. It

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41. Both the majority and concurring opinions took comfort in the temporariness of the plan.

> Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force.

99 S. Ct. at 2730. "[T]he program . . . ends when the racial composition of Kaiser's craft work force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance." *Id.* at 2734 (Blackmun, J., concurring).

42. In its brief the union stated:

> We italicize the word "temporary" to assure that there is no misunderstanding as to the nature of the program at issue. Respondent's [Weber's] brief states that the 1974 agreement mandates quota selection even after the existing imbalance has been eliminated. But the 1974 agreement expressly provides that this procedure shall apply only "until the goal is reached." Thus the program is addressed to *eliminating an existing racial imbalance,* not to establishing racial balance as a permanent criterion. What is at stake here is the legality of this program and not the legality of a program which establishes a racial quota as a permanent selection criterion.

Reply Brief for United Steelworkers of America at 5, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979) (footnotes and citations omitted). The union failed to explain how Kaiser would be able to continue compliance with EEOC guidelines and regulations without maintaining some quotas indefinitely. The assumption was that at some time in the future the problem would simply be corrected by the plan.

43. To illustrate, suppose Kaiser had 100 employees, 10 of whom were black. If it separated its employees into two seniority lists, with 90 whites in one list and 10 blacks in the other, and if it drew equally from each list, the shorter list would be reduced by one-tenth when the first worker was taken from it, while the longer list would be reduced by one-ninetieth. After ten years, taking one man from each list per year, the black list would be completely turned over, and the black with the most seniority on the list could have no more than ten years of seniority. The white list, however, would have lost only ten workers out of ninety, and many of the remaining white workers could easily have accumulated much more than ten years of seniority.

would then be necessary to reinstitute a quota system. Kaiser itself recognized this possibility:

> If and when the goal is reached, a percentage quota reflecting the percentage of minority workers in the overall labor force will be established for the training programs. This quota is expected to be used indefinitely to assure perpetual "minority representation in the plant that is equal to that representation in the community work force population."[44]

There is a measure of irony in the Court's validation of the Kaiser plan. Evidence at trial established that employees hired at the 1974 gate would amass enough seniority under the old seniority system in fifteen to twenty years to compete for craft training.[45] Assuming the competitive position of blacks hired in 1969 was similar, those blacks might be able to bid on craft training slots effectively by 1984. Thus the Kaiser plan begins to place blacks in the crafts perhaps no more than ten years earlier than the old system, but by Kaiser's own admission, it established a race-conscious system that will last at least thirty years, and could last much longer. In the words of Mr. Justice Rehnquist's dissent, in order to achieve haste in eliminating the last vestiges of past societal discrimination, the Court has "introduce[d] into Title VII a tolerance for the very evil that the law was intended to eradicate."[46]

B. The Future of Voluntary Affirmative Plans

The impact of Title VII on future affirmative action plans concerns both employers and employees. *Weber* offered beleaguered employers some relief from the apparent conflict between Title VII and Executive Order No. 11,246 by allowing employers to use statistical disparity and racial imbalance as a justification for creating racial quotas in training programs.[47] *Weber* left employers, however, with a significant measure of uncertainty, and employers planning new affirmative action programs must still be cognizant of the rights of white workers.

At least three questions remain after *Weber:* (1) Would the

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44. Brief for Respondents at 4, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979) (quoting Record at 66 (testimony of Dennis E. English, Industrial Relations Superintendent at the Gramercy plant, Apr. 1, 1975)).

45. Record at 92-93.

46. 99 S. Ct. at 2753 (Rehnquist, J., dissenting).

47. *See id.* at 2729 (Congress intended to allow affirmative action plans designed to correct racially imbalanced work forces).

Court construe Title VII to prohibit a voluntary plan that required the discharge or absolutely barred the advancement of white employees? (2) Would a plan that provided a manifestly permanent quota be unacceptable under Title VII? (3) Would a plan that altered an established seniority system be prohibited?

Since the Kaiser plan actually offered both black and white workers a new chance for advancement,[48] a plan that required the discharge or barred the advancement of white employees would probably be viewed differently by the Court.[49] Given the plain language of Title VII[50] and the Court's language in *McDonald* and *Griggs*,[51] it is likely that the Court would find such a plan unacceptable.

What the Court would do with a permanent quota is less clear. The argument that the Kaiser plan would not be permanent[52] seemed to affect the Court's decision in *Weber*.[53] Since the Court was apparently not influenced by the longevity of the plan and its effect upon a full generation of white workers, it is difficult to predict just how the Court would view a manifestly permanent quota system.

Given the implicit policy in Title VII of achieving racial balance,[54] however, the Court should find a manifestly permanent quota system unacceptable. Nothing in Title VII requires or even implicitly condones the permanent unequal treatment of blacks and whites.

The third question, dealing with change in seniority systems, presents a difficult problem. Seniority patterns were unquestionably changed at Gramercy, but the change was in a completely new training program.[55] The Court apparently felt that old expec-

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48. *See* text accompanying note 5 *supra*.

49. *See* 99 S. Ct. at 2730.

50. The statute declares:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide . . . training.

42 U.S.C. § 2000e-2(d) (1976).

51. 427 U.S. at 279-80; 401 U.S. at 431.

52. *See* notes 41-42 *supra*.

53. The only place where the temporariness argument was pointedly argued was in the union's reply brief. That both the majority and concurring opinions mention the issue as partial justification for the holding indicates that the union's argument was somewhat persuasive. *See* 99 S. Ct. at 2730; *id.* at 2734 (Blackmun, J., concurring).

54. *See id.* at 2728-29.

55. *Id.* at 2734 (Blackmun, J., concurring).

tations had no force in a new program. A plan that deprived white workers of seniority expectations in an established program would likely violate Title VII.

IV. Conclusion

The *Weber* majority saw the Kaiser plan as a reasonable response to the problem of employment discrimination, consistent with Congress' purpose in enacting Title VII. The goal of hastening minority participation in employment areas previously closed to minorities and the supposedly temporary nature of the plan were seen by the Court as justifications for its holding.

Weber only gives general guidelines as to which voluntary affirmative action plans might be permissible, and many questions remain unanswered. However, it seems that Title VII would prohibit race-conscious quotas in private, voluntary affirmative action plans if the imposition of quotas would unduly trammel established majority rights. New plans must therefore continue to tread lightly where the employment expectations of white workers are involved.

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