No. 76-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

v.

ALLAN BAKKE,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council (EEAC) is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its

[1] Their consent has been filed with the Court Clerk.

membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). In addition, those EEAC members, or their constituents, who are federal contractors are required to comply with Executive Order 11246 (amended by Executive Order 11375) and supporting regulations, which, in part, contain extensive affirmative action requirements. As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, which involve the legality of the Petitioner's preferential admissions policy under which minority applicants were admitted as students to the Petitioner's Medical School to the exclusion of allegedly better qualified nonminority applicants.

PRELIMINARY STATEMENT

THE IMPORTANCE OF THIS CASE TO PRIVATE EMPLOYMENT AFFIRMATIVE ACTION PLANS

This case, arising in the context of a university's minority preference admissions program, can be expected to have far-reaching consequences for employers who have entered into affirmative action plans

(AAPs) either voluntarily, or under compulsion from federal agencies or courts. This is the first case in which this Court has decided to address directly the constitutional validity of any type of affirmative action plan under which the administering entity, be it a university or employer, has made a decision to allocate limited educational or employment opportunities *solely on the basis of race* in order to rectify an underrepresentation of minorities in a student body or workforce.

Lacking directly applicable Supreme Court precedent, affirmative action programs in private sector employment are now governed by a confusing mixture of often inconsistent federal and state court decisions, government regulations and collective bargaining agreements. Lower court decisions and agency policy determinations dealing with employment discrimination often are based upon Supreme Court decisions in other subject areas, even though the standards for determining whether discrimination has occurred may differ under the Constitution or applicable statutory scheme.[2] It is reasonable,

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[2] *See, e.g., EEOC* v. *American Telephone and Telegraph Co.*, —— F.2d ——, 14 FEP Cases 1210, 1219 n. 7 (3d Cir. 1977) (Title VII consent decree case), and *Germann* v. *Kipp*, 14 FEP Cases 1197, 1206 & n. 23 (W.D. Mo. 1977), both citing this Court's recent decision on voting rights in *United Jewish Organizations of Williamsburg, Inc.* v. *Carey*, 97 S.Ct. 996, 45 U.S.L.W. 4221 (March 1, 1977). The latter court also relied upon this Court's school desegregation decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and other constitutional cases (*see* 14 FEP Cases at 1202) as did the courts in *Carter* v. *Gallagher*, 452 F.2d 315, 4 FEP Cases 121 (8th Cir. 1972), *cert. denied*, 406 U.S. 950, and *Associated General Contractors of Mass., Inc.* v. *Altshuler*, 490

therefore, to expect that the courts, federal agencies, employers and unions will look to the decision in this case for guidance in attempting to determine the extent to which this Court will permit affirmative action in employment.

The Court's ruling here could do much to resolve a dilemma now facing employers. Presently, employers who fail to adopt AAPs to increase the numbers of minorities and women in their workforces risk loss of their federal contracts, exposure to Title VII class actions and agency complaints, and widespread publicity of alleged discrimination. On the other hand, employers who do adopt affirmative action programs which give job preferences to minorities and/or women may be found to have committed "reverse discrimination" against nonminority or male employees, who can be expected to demand monetary or other relief.[3] Employers are thereby placed in the ironic and unfair position of facing liability to nonminorities and males because of good faith attempts to

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F.2d 9, 16 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). Similarly, both majority and dissent below in the instant constitutional case relied heavily on precedent arising under Title VII and Executive Order 11246. *See* 553 P.2d 1168-69 (majarity); and 553 P.2d at 1179-81 (dissent).

[3] For district court cases in which claims of affirmative action discrimination by white or male employees have been upheld, *see, e.g., McAleer* v. *American Telegraph and Telephone Company*, 416 F. Supp. 435 (D.D.C. 1976); *Cramer* v. *Virginia Commonwealth University*, 415 F. Supp. 673 (E.D. Va. 1976), *appeal pending* (4th Cir. No. 76-1937); and *Weber* v. *Kaiser Aluminum & Chemical Corporation*, 415 F. Supp. 761, 13 FEP Cases 1615 (E.D. La. 1976), *appeal pending* (5th Cir. No. 76-3266). *See also* the discussion, *infra*, pp. 27-31.

comply with requirements found in statutes, executive orders or other government directives intended to prevent discrimination.

This dilemma is compounded by a significant split in court opinion over the permissibility of preferential treatment of minorities or women absent a showing of discrimination by the particular employer involved. Also unclear is whether such a showing may be based upon statistical evidence alone, or whether, and in what circumstances, additional corroborating evidence may be required.

We recognize that the Constitutional and legal arguments for and against affirmative action will be thoroughly briefed to the Court by the parties and numerous other *amici curiae* in this case. EEAC does not take a position on that issue. We merely urge that, whatever conclusion the Court reaches, full consideration be given to the implications of this case for private employment affirmative action programs. To that end, we offer in this brief, for the Court's reference, an explication of the specific legal and practical contexts in which employment AAPs presently exist. It is hoped that, by framing its opinion herein with a full awareness of these implications, the Court may provide some answers to the quandary facing employers.

Several principles which the Court should clarify to provide needed guidance in this area are set forth below at pp. 32-39. In particular, we urge the Court to annunciate in its decision in this case a rule that, as a general matter, a defendant in a "reverse discrimination" suit will not be held liable to nonminority or male claimants if:

a. its affirmative action plan was adopted in a good faith attempt to comply with the requirements of Title VII, Executive Order 11246, a consent decree or other court or agency requirements, and

b. its actions in implementing the plan were reasonably related to these good faith objectives.

Furthermore, even if affirmative action pursuant to a good faith AAP is found to be illegal "reverse discrimination," we urge the Court to make it clear that any remedies should be *prospective* only and limited to injunctions against further implementation of the program. Preferential treatment undertaken at the behest of the government, against the background of unsettled and inconclusive legal precedents, and without any intention of victimizing a portion of society, should not subject employers to monetary liability. Any award of backpay in such circumstances should be explicitly forbidden, for it would penalize compliance with federal regulations.

Adoption of these clarifying principles would be consistent with prior holdings of the Court that potential defendants who must act in the face of unsettled legal principles will not be "charged with predicting the future course of constitutional law." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967).

ARGUMENT

I. CURRENT COURT DECISIONS AND FEDERAL AGENCY REGULATIONS EFFECTIVELY COMPEL EMPLOYERS TO ADOPT AFFIRMATIVE ACTION PLANS WHICH GIVE PREFERENTIAL TREATMENT TO MINORITIES AND WOMEN

A major portion of the employer community in the United States, including more than 300,000 federal contractors, have adopted and are currently implementing affirmative action plans designed to increase the numbers of women and minorities in their employ.

In general, AAPs are premised upon statistics showing that various job groups in the employer's workforce do not reflect a proportionate utilization of minorities or women potentially available from the appropriate surrounding labor market area. Although such "underutilization" may not necessarily subject the employer to liability under antidiscrimination statutes,[4] federal government agencies such as

[4] For example, such an imbalance may be caused by the working of an otherwise lawful bona fide seniority system whose only alleged defect is that it perpetuates the effects of *past* discrimination. *See T.I.M.E.-D.C.* v. *U.S.*, 45 U.S.L.W. 4506, 14 FEP Cases 1514 (1977), and *United Air Lines* v. *Evans*, 45 U.S.L.W. 4566, 14 FEP Cases 1510 (1977). The imbalance also may be due, in part, to factors occurring *before* the enactment of Title VII. *See T.I.M.E.-D.C.* v. *U.S.*, 14 FEP Cases at 1529 and n. 17; and *Hazelwood School District* v. *U.S.*, —— U.S. ——, 15 FEP Cases 1, 5 (1977). Additionally, as recognized by this Court, the statistical evidence of an imbalance may be questionable for several reasons: the numerical sample may be too small to have statistical validity; the figures may not accurately reflect the pool of "qualified" appli-

the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) nonetheless often rely upon such underrepresentation statistics as a basis for requiring employers to adopt numerical employment or promotional criteria such as "goals" and "timetables," [5] and to make "good faith efforts" (41 C.F.R. § 60-60.9, Part B, XII(B)(2)) to meet these criteria for utilization of members of an "affected class."

In addition, in a number of cases in which employer discrimination under Title VII of the Civil Rights Act of 1964 (Title VII) has been proven, courts have ordered the imposition of remedial quotas under which statistical imbalances must be rectified by hiring or promoting fixed ratios of minorities or women. Still other employers, in order to comply with Title VII and to diminish their potential liability to minorities and women, voluntarily have adopted AAPs to increase their utilization of women and minorities, either independently or through collective bargaining agreements with their employees' union representatives.[6]

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cants (*T.I.M.E.-D.C.*, 14 FEP Cases at 1521 n.2; and *Hazelwood School District*, 15 FEP cases at 4-5 & n.13); or it may be that the employer has "made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." *T.I.M.E.-D.C.*, 14 FEP Cases at 1529.

[5] *See* 41 C.F.R. § 60-60(B), "Establishment of present and future goals and timetables" [OFCCP requirements]; and Conciliation Standards for Compliance Personnel of the EEOC, EEOC Compliance Manual §§ 610, 620, 630.

[6] Inasmuch as voluntary compliance is the "preferred means" to eliminate employment discrimination (*Alexander* v.

As the cases discussed below indicate, the concept of affirmative action embodies a requirement that special consideration be given to such characteristics as race, sex or national origin. When race- or sex-based employment criteria are used, however, other persons not benefitted by the AAP may question whether such preferential treatment of minorities or women is legally permissible, especially when the program appears to have an adverse impact on their employment opportunities in a universe of finite employment opportunities.

It is important to bear in mind, however, that even if such preferential treatment of minorities and women impacts adversely on nonminorities or males, it is extremely unlikely that this result was invidiously intended by the entity enacting the plan.[7] It is more likely that the AAP was adopted as a good faith response to compelling pressures to eliminate traditional exclusionary discrimination against minorities and women. It is the position of the *Amicus*, EEAC, that the employer's good faith reasons for enacting an affirmative action plan must be given great weight

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Gardner-Denver Co., 415 U.S. 36, 44 (1974)), employers often engage in "self-examin[ation]" and "self-evalu[ation]" in order to rectify what may be discriminatory practices. *See T.I.M.E.-D.C.* v. *U.S.*, 14 FEP Cases at 1531, and cases there cited.

[7] It has been noted that none of these cases in which reverse discrimination has been found (see footnote 3, above) "deals with the blatant racism or sexism of the past." *See* Cohen, *An End to Affirmative Action?*, 28 Lab. L.J. 225 (1977).

when determining the extent of the employer's liability, if any, in "reverse discrimination" suits.[8]

A. Regulations Enforcing Executive Order 11246 Require Contractors To Develop and Implement AAPs to Remedy Any Statistical Underrepresentation of Minorities or Women Regardless of Its Cause

1. *Mere Statistical Underutilization Requires the Implementation of Goals and Timetables*

Presidential Executive Order 11246 (30 Fed. Reg. 12319 (1965)), as amended by Executive Order 11375 (32 Fed. Reg. 14302 (1967)) (the Order or E.O. 11246), requires that all nonexempt government contracts and subcontracts include an equal opportunity clause pursuant to which the contractor or subcontractor undertakes not to discriminate on the basis of race, color, religion, sex or national origin and also to take affirmative action to ensure that applicants and employees are treated "without regard" to these factors (Sec. 202(1)).[9]

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[8] As used here, "reverse discrimination suit" refers to the claim of a person, not a member of a protected class which is intended to be benefitted by the AAP, that he or she has been harmed by its implementation. Use of this term is not intended to imply that the particular employer involved previously has discriminated against minorities or women, or that discrimination against whites or males is governed by different standards than is discrimination against minorities. *Cf. McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 12 FEP Cases 1577 (1976); *Trans World Airlines*, v. *Hardison*, 45 U.S.L.W. 4672, 4674, 4677, 14 FEP Cases 1697, 1700, 1704 (1977).

[9] *See* 41 C.F.R. § 60-1.40, 41 C.F.R. § 60-2 (Revised Order No. 4) and 41 C.F.R. Part 60-60 (Revised Order No. 14).

The directives of the Order are implemented by rules and regulations issued by the Secretary of Labor,[10] which require (with limited exceptions) that *every* federal supply and service contractor or subcontractor develop a written affirmative action program. Each AAP must include statistical workforce and utilization analyses. If the employer's utilization of women or any minority group representing more than 2% of the area population is "deficient," the contractor must develop an affirmative action program which must include "specific and result-oriented procedures" (such as goals and timetables) to overcome the underutilization in any particular job group. 41 C.F.R. §§ 60-2.10, -2.12. *See generally Legal Aid Society of Alameda County* v. *Brennan*, 381 F. Supp. 125, 8 FEP Cases 178 (N.D. Cal. 1974).

"Underutilization" is defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-2.11(b). "Availability" is determined by consideration of "at least all" of eight factors—including data on minority and female population and unemployment, available skills and training facilities (41 C.F.R. § 60-2.11)—with respect to every grouping of jobs in every establishment of the employer. Every individual job title must be so scrutinized, with those which are similar in terms of wage rates, content and career opportunity grouped for such study.

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[10] The history and current implementation of the affirmative action requirements of E.O. 11246 are discussed in detail in K. McGuiness, *Preferential Treatment in Employment—Affirmative Action or Reverse Discrimination?* (1977,.

Once underutilization is identified in *any* job group at a particular contractor's facility, the responsible compliance agency[11] requires that goals and timetables be established to correct the deficiency by the contractor applying "every good faith effort." (41 C.F.R. § 60-2.12(B)). According to OFCCP, a *goal* is stated as a percentage of the total employees in the job group. Ultimate goals must be equal to the availability percentage or estimate. The *timetable* is developed so that the ultimate goal can be reached within the minimum feasible time. Unless it appears that the *ultimate* goal can be achieved within twelve months, the contractors must also establish *interim* or *annual* goals. These are described as "annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached.[12]

The statistical imbalances that trigger these affirmative action requirements *need not be connected to any showing of past or present discrimination.* Thus, shortly after the promulgation of OFCCP Order No. 4, Laurence H. Silberman, the Former Under Secretary of Labor, testified that:

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[11] The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) is responsible for monitoring the contractors' performance under E.O. 11246. While it retains general supervisory authority, OFCCP has delegated the day-to-day responsibility for enforcing the program to several compliance agencies in other Executive Departments, such as the Departments of Defense and Commerce.

[12] *See* Revised Order No. 14, 41 C.F.R. § 60-60.9 Part B § XII(B)(1)(c). Factors to be considered in setting these goals are found at 41 C.F.R. § 60-2.12.

> One of the things interesting about the [OFCCP's] affirmative action concept, it is not antidiscrimination. It goes beyond that . . .
>
> We and the compliance agencies put pressure on contractors to come up with commitments *even though those contractors are not guilty of any discrimination*, but because we think they are required under the Executive order to go beyond, to provide affirmative action.
>
> *Since they are not guilty of discrimination*, it is not exactly the kind of situation where you can go to an enforcement posture, but rather you say to that contractor, you have to make an extra effort beyond what the civil rights laws are in this country and go beyond that in order to get a Government contract. *Hearings on S. 2515, etc., Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92nd Cong., 1st Sess. 77 (1971) (hereinafter cited as *Hearings*) (emphasis added).

Accordingly, even employers who may be justified in asserting that a statistical imbalance is *not* the product of discrimination are nevertheless required to adopt an AAP or face the sanction proceedings described below.

The legality of these requirements has never been definitively established. Several courts have approved Labor Department affirmative action "Home Town" plans expressly addressed to remedying proven egregious and long-standing exclusion of minorities by various construction unions.[13] None of these cases,

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[13] *See e.g.*, The Philadelphia Plan, *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159,

however, directly sanctions the adoption of an AAP by an employer whose statistical imbalance is not established as the product of past discrimination through a full and fair administrative hearing procedure. As is noted below, moreover, several recent Title VII decisions have invalidated AAPs which were not premised on past discrimination by the particular employer involved, but rather were enacted to comply with government-required affirmative action. See *infra*, pp. 27-31.

2. ***Severe Sanctions for Non-Compliance with OFCCP Demands Effectively Compel Contractors to Engage in Preferential Employment Practices***

Sanction proceedings can be brought against a contractor for such discrepancies as failing to adopt an AAP at each of its establishments, substantially deviating from an AAP, or "failing to develop or implement an AAP which complies with the OFCCP's regulations." *See* 41 C.F.R. §§ 60-1.26(a), 60-2.2(b).

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3 FEP Cases 395, (3d Cir. 1971), *cert. denied*, 404 U.S. 854; the Newark Plan, *Joyce* v. *McCrane*, 320 F. Supp. 1284, 3 FEP Cases 111 (D. N.J. 1970); the Illinois-Ogilvie Plan, *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680, 5 FEP Cases 229 (7th Cir. 1972) (state plan); the Boston Plan, *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 490 F.2d 9, 6 FEP Cases 1013 (1st Cir. 1973), *cert. denied*, 416 U.S. 957; and the Cleveland Plan, *Weiner* v. *Cuyahoga Community College District*, 249 N.E.2d 907, 2 FEP Cases 30 (Ohio Sup. Ct. 1969). *But compare, U.S.* v. *Operating Engineers, Local 701*, 14 FEP Cases 1400 (D. Ore. 1977) (despite showing of past discrimination, the court refused to give preferential relief to minorities under E.O. 11246, holding that such relief would give rise to serious questions of "reverse discrimination.").

Thus, an allegation by a compliance officer that there is an underutilization of minorities or women in any job group may result in enforcement (i.e., sanction) proceedings against the contractor. *See* 41 C.F.R. § 60-1.26(a), amended in 42 Fed. Reg. 3460 (1977). If the agency determines to proceed to its own enforcement hearing procedures (set forth in 41 C.F.R. § 60-30, 42 Fed. Reg. 3462, *et seq.*),[14] the contractor faces cancellation or termination of all federal contracts (or any part thereof); withholding progress payments on a contract; or, debarment from future contracts.[15]

Other severe sanctions may be, and have been, applied to contractors even *before* any agency hearing on the alleged violation. Under 41 C.F.R. § 60-2.2 (b), amended in 42 Fed. Reg. 3460, when it comes

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[14] The alleged violation also may be referred to the Justice Department or the Equal Employment Opportunity Commission (EEOC). *See* 42 Fed. Reg. 3456.

[15] 3 C.F.R. 169, 173-174, § 209(a). A hearing on the question of contract compliance is fundamentally different from sanction hearings before other regulatory panels. The notice or charge is approved initially, in many instances, by the Director of OFCCP. The hearing is held before an administrative law judge, who can offer only recommendations as to the decision. The final decision or order is prepared by the compliance agency initiating the proceeding, subject to approval by the Director, or if the administrative proceeding was initiated by the Director, the final order is issued by the Secretary of Labor. 41 C.F.R. § 30-30. Thus, there is no division of prosecutorial and adjudicatory authority between a general counsel and a commission or board, the procedure that most regulatory panels follow. Rather, the proceedings are initiated and, in essence, tried and judged by the same federal body.

to the "attention" of the individual "contracting officer" that such underutilization exists, he "*shall* declare the contractor/bidder nonresponsible . . ." (emphasis added). Interested compliance agencies are notified of this "nonresponsibility," and are then required to withhold further contract awards from the alleged offending contractor.[16]

Such contract passover may occur when underutilization is alleged with respect to only one job group within a particular facility, even though the contractor may otherwise be in complete compliance with the Order. Protection from such "*de facto*" debarment without a hearing appears to be within the "sole discretion" of the Director, OFCCP. *See* 41 C.F.R. § 60-2.2(b), as amended 41 Fed. Reg. 3462.

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[16] Indeed, a study by the Administrative Conference of the U.S. found that ". . . in practice cancellation is rarely used." The more common sanction ". . . is the declaration of nonresponsibility of an employer." The Conference also noted that, unlike the procedures leading to other sanctions, such as debarment or cancellation of a contract, "no opportunity for prior hearing is afforded in connection with a declaration of nonresponsibility." *See* Recommendation No. 75-2 of the Administrative Conference of the U.S., 40 Fed. Reg. 27926 (1975). *Cf. Commercial Envelope Mfg. Co.* v. *Dunlop*, 11 FEP Cases 117 (S.D.N.Y. 1975).

Another factor which had impelled contractors to comply with OFCCP affirmative action requirements was a former provision in 41 C.F.R. § 60-1.26(b)(2)(i) that a copy of a notice of proposed sanctions which precedes a formal hearing be published in the Federal Register, thereby generating possibly unwarranted publicity over the contractor's compliance status. This provision was deleted in recent changes to the agency's regulations. *See* 42 Fed. Reg. 3455 (1977).

Because these sanctions for non-compliance are so severe and the opportunities to challenge OFCCP and compliance agency policies so restricted, compliance with the agency's affirmative action requirements is generally the only practical course available to employers whose business is directly or indirectly dependent to any substantial degree on government contracts.[17]

B. Inconsistent Judicial Use of Statistical Evidence Impels Many Employers to Adopt AAPs to Avoid Potential Findings of Discrimination Under Federal Statutes

Additionally, compelling impetus to develop and implement effective affirmative action programs results from court decisions under Title VII basing *prima facie* findings of employment discrimination upon statistical evidence. Even for those employers who have never engaged in any discriminatory practices, the

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[17] As former Under Secretary of Labor Silberman testified in describing the program:

> I did not say that we have not used enforcement proceedings. In my testimony, I indicated we started 500 show cause hearings which are the initial process leading to debarment and cancellation. In fact we have so much clout over government contractors that very few of them are willing to or want to fight that through litigation. They usually come into compliance. *Hearings, supra* at 89-90.

Later, Mr. Silberman added,

> I want to hasten to say that our program is not enforcement minded. The idea is that we have such tremendous sanctions that every time we go to use it, the contractor falls into compliance so we cannot come to you with x number of debarment actions. *Hearings, supra* at 90.

prospect of having to assume the burden to *prove* that statistical disparities in their utilization of minorities and women were *not* produced by discrimination is enough to cause most employers to take aggressive steps to eliminate such disparities as quickly as possible.

The lower courts have divided over the proper role that statistics play in determining Title VII liability. A number of appellate court decisions have found *prima facie* cases of illegal disparate treatment established *solely* by statistical evidence.[18] Other decisions, however, caution that the reliance upon unexamined statistics, unsupported by additional corroborating evidence of discrimination, often presents serious analytical difficulties.[19] Accordingly, these courts

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[18] *See, e.g., Kaplan* v. *Theatrical and Stage Employees*, 525 F.2d 1354, 1358 (10th Cir. 1975); *U.S.* v. *T.I.M.E.-D.C., Inc.*, 517 F.2d 299 (5th Cir. 1975), *aff'd in part and rev'd in part*, 45 U.S.L.W. 4506, 14 FEP Cases 1514 (May 31, 1977); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251, 1261 (5th Cir. 1975), *judg. vacated*, 45 U.S.L.W. 3786 (June 7, 1977); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 225 n. 34, 7 FEP Cases 1115, 1126 n. 34 (5th Cir. 1974) (numerous cases collected); *Reed* v. *Arlington Hotel Co.*, 476 F.2d 721, 723 (8th Cir. 1972), *cert. denied*, 414 U.S. 854 (1973); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Wetzel* v. *Liberty Mutual Ins.*, 508 F.2d 239, 259, 9 FEP Cases 211, 226 (3d Cir. 1975), *cert. denied*, 421 U.S. 972, 10 FEP Cases 1056.

[19] *See, e.g., Watkins* v. *Steelworkers*, 516 F.2d 41 (5th Cir. 1975); *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 14 FEP Cases 235 (4th Cir. 1976); *Western Electric Co.* v. *Stern*, 544 F.2d 1196, 13 FEP Cases 1352 (3d Cir. 1976); and *EEOC* v. *IUOE, Locals 14 & 15*, —— F.2d ——, 14 FEP Cases 870 (2d Cir. 1977); *Olsen* v. *Philco-Ford*, 531 F.2d 474, 12 FEP Cases 426,

have expressed a reluctance to base a finding of discrimination on statistics alone, without looking into whether the disparity might have a nondiscriminatory cause. *See also*, n.4 above, pp. 7-8.

This Court recently noted (*T.I.M.E.-D.C.* v. *U.S.*, *supra*, 14 FEP Cases at 1520-21 that:

> statistics [alleged to demonstrate a *prima facie* showing of Title VII liability] are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding circumstances.[20]

While this language suggests a balanced approach, it clearly implies that employers whose workforce statistics do not reflect full utilization of minorities and women will continue to face the potentially difficult burden of proving a negative—i.e., that the statistical disparities did not result from discriminatory causes. It is evident, therefore, that employers must continue

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428 (10th Cir. 1976); *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 11 FEP Cases 211, 221 (10th Cir. 1975); *Coopersmith* v. *Roudebush*, 517 F.2d 818, 11 FEP Cases 247 (D.C. Cir. 1975).

[20] In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175, 178 (1971), this Court held that proof of discriminatory intent was not necessarily required to prove a Title VII violation, and that a violation also could be founded upon employment practices whose consequences had a disparate impact on groups protected by the Act. Although apparently sanctioning some use of statistics to inquire into Title VII discrimination, the decision in *Griggs* gave little or no guidance as to the appropriate use, weight or type of statistics which could be used to establish or rebut a *prima facie* case of disparate impact. *Cf. Hazelwood School District* v. *U.S.*, *supra*.

to evaluate their employment practices from a statistical perspective and cannot rest assured that they will not be held in noncompliance with Title VII unless their work complements mirror the racial and sexual composition of the surrounding population.

Faced with these court decisions as they attempt to assess their potential Title VII liability, many employers understandably conclude that the only safe course is to attempt to hire and promote minorities and women at rates that would satisfy the most stringent of court-established standards by, in effect, factoring race and sex considerations into their selection criteria. Indeed, in many instances, preferential hiring policies may be the only effective method to achieve statistical parity within a foreseeable time span.[21]

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[21] In this respect, it is noted in *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, Harv. L. Rev. 1109, 1302 (1971), that:

> Even if an employer were in theory permitted to demonstrate that he had not discriminated, and that he had undertaken affirmative action although his employment figures were inadequate, the practicalities of proof might mean that statistical shortcomings are all but impossible to rebut. Indeed, even if actual litigation does demonstrate that the inference from statistical inadequacy can be overcome, employers may *believe* that the statistics will operate conclusively, that sanctions may attach, and that it is therefore safer simply to steer clear of trouble and meet the figures agreed upon through "preferential" hiring. It is even foreseeable that employers might find preferential hiring a wise means of avoiding the annoyance and cost of government investigations. Such investigations may be triggered by statistical shortcomings and do not constitute formal pro-

II. EXISTING COURT DECISIONS RAISE DOUBTS ABOUT THE VALIDITY OF OFCCP'S PREFERENTIAL TREATMENT REQUIREMENTS, BUT DO NOT PROVIDE SUFFICIENT GUIDANCE TO ENABLE EMPLOYERS TO DETERMINE THE PERMISSIBLE LIMITS OF AFFIRMATIVE ACTION

In attempting to discern the extent to which preferential treatment of women and minorities may be used to correct statistical imbalances in their workforces, employers are now confronted with differing agency and court interpretations of the governing laws and policies.

As set forth above, pp. 10-14, the OFCCP requires the implementation of goals and timetables to correct any statistical imbalance, *irrespective of the cause of such imbalance* and before any hearing has been held to determine whether the imbalance has been created by illegally discriminatory factors. This approach seems to contrast with two developing lines of judicial authority. First, unlike the OFCCP, the federal courts generally have exhibited extreme caution in approving, even as remedies, employment schemes that involve preferential treatment of minorities and/or women who cannot demonstrate that they are the individual victims of discrimination. Secondly, several recent district court decisions have held that employment practices favoring minorities or women constituted illegal discrimination against whites or males under Title VII. These cases have caused great concern among employers. At present, however, the state

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ceedings in which the evidentiary use of numerical objectives could be carefully limited (footnote omitted; emphasis in original).

of the law is such that employers cannot determine with any degree of assurance what kinds of affirmative action the law permits or what the government may validly require. The impact of these two lines of cases on employment affirmative action is discussed below.

A. Judicial Decisions Discussing the Propriety of Preferential Treatment to Remedy Proven Discrimination

Employers seeking guidance in determining the extent to which private preferential treatment is permissible have searched logically for analogous principles in federal court decisions in which preferential remedies have been awarded to remedy proven race or sex discrimination. In actual practice, however, the direction provided by such cases is lessened by the lack of consistency in the lower courts' pronouncements concerning the legality and extent of such remedies under the federal antidiscrimination laws.

Perhaps the most broadly-stated judicial approval of racially-based employment decisions appears in *German* v. *Kipp, supra,* 14 FEP Cases 1197, 1204-1205 (W.D. Mo. 1977), where the court permitted preferential promotions, even while acknowledging the absence of employer discrimination or identifiable victims thereof. And *see U.S.* v. *Elevator Constructors, Local 5,* 538 F.2d 1012, 13 FEP Cases 81, 88 (3d Cir. 1976), and cases cited therein; and *EEOC* v. *AT&T,* 14 FEP Cases 1210 (3d Cir. 1977).[22]

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[22] Many of the cases relied upon in these two decisions involved discrimination based upon great statistical disparities or egregious conduct. Moreover, often the respondents had

Most other appellate decisions, however, have expressed reluctance in granting quota relief, even where past discrimination has been proved. Indeed, the Third Circuit itself remarked in disapproving a quota remedy in a case where sex discrimination violative of Title VII had been found:

> Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm. *Ostapowicz* v. *Johnson Bronze Co.*, 541 F. 2d 394, 13 FEP Cases 517, 523 (3d Cir. 1976), *cert. denied*, 14 FEP Cases 266, *reh. denied*, 97 S. Ct. 1187 (1971).

The Fourth Circuit has urged similar restraint, again in a case where statutory violations had been proved:

> [T]he necessity for preferential treatment should be carefully scrutinized and . . . such re-

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been particularly intransigent in remedying discrimination by other means. For example, in *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), *cert. denied*, 406 U.S. 950, it was noted that the defendant city had had only one black fireman in 25 years. In *United States* v. *Ironworkers, Local 86*, 315 F. Supp. 1202 (D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), it was noted that less than one percent of the union membership was black. In *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974) (*en banc*), *cert. denied*, 419 U.S. 895, a temporary quota was authorized because no significant improvement in the number of blacks in the Mississippi Highway Patrol had been shown in the last two years since the entry of the district court's initial decree. In *United States* v. *Lathers, Local 46*, 471 F.2d 408 (2d Cir. 1973), a quota was ordered only after the union was cited for contempt in failing to comply with a court-approved settlement agreement.

> lief should be required only when there is a *compelling need for it. Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 274, 12 FEP Cases 314, 327 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (emphasis added).[23]

See also Harper v. *Kloster*, 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973).

Additionally, a number of decisions indicate that the preferential relief may go no further than to eliminate the identifiable lingering effects of previous discriminatory practices by the particular employer.[24] *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 8 FEP Cases 855 (1st Cir. 1974), *cert. denied*, 421 U.S. 910; *Western Addition Community Organization* v. *Alioto*, 514 F.2d 542, 10 FEP Cases 527 (9th Cir. 1975), *cert. denied*, 423 U.S. 994; *Morrow* v. *Crisler, supra*, 491 F.2d 1053, 7 FEP Cases 586 (5th Cir. 1974), *cert. denied*, 419 U.S. 895, 8 FEP Cases 1007.

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[23] Similar cautionary language was used by the court in *Crockett* v. *Green*, 10 FEP Cases 165, 173 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715, 12 FEP Cases 1078 (7th Cir. 1976):

> [R]atio hiring or quota relief is an unusual and extraordinary remedy and does not automatically follow from the finding of any kind of discrimination . . . [It] is appropriate . . . [where] . . . it appears to be the *only* possible means to provide relief for racial discrimination. (Emphasis added).

[24] As the court below noted, "[a]bsent a finding of past discrimination [by the particular employer], . . . the federal courts, with one exception, have held that the preferential treatment of minorities in employment is invalid on the ground that it deprives a member of the majority of a benefit because of his race." [footnote omitted]. 553 F.2d at 1168.

These cases indicate that even in the context of proven race discrimination, temporary, carefully circumscribed resort to racial criteria should be made only when "the Chancellor determines that it represents the *only* rational, non-arbitrary means of eradicating past evils." *NAACP* v. *Allen*, 493 F.2d 614, 7 FEP Cases 873 (5th Cir. 1974) (emphasis added).

The Second Circuit has shown particular reluctance to impose preferential treatment of minorities. In *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333, 5 FEP Cases 1344, 1349-50 (2d Cir. 1973) that court approved temporary racial hiring quotas for the city's police department, but disapproved promotion quotas because "[t]he impact of the quota upon [incumbent whites] would be harsh and can only exacerbate rather than diminish racial tensions." Moreover, the hiring quota was approved "somewhat gingerly" even though the city had persisted in using an archaic employment test, failed to seek minority recruits, and the quota was well below the minority population of the city and, presumably, did not suggest the concept of parity hiring. The court, indeed, found that "the most crucial consideration . . . is that this is *not a private employer* and *not simply an exercise in providing minorities with equal opportunity employment.*" 5 FEP Cases at 1350 (emphasis added).

In *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 427, 11 FEP Cases 38 (2d Cir. 1975), *rehearing en banc denied*, 531 F.2d 5, 11 FEP Cases 1253 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), the court criticized racial quotas as "repugnant to the basic concepts of a

democratic society" and observed that the Second Circuit had approved quotas only where there was a clear-cut pattern of long-continued and egregious racial discrimination and the absence of a showing of "identifiable reverse discrimination." 520 F.2d at 427, 11 FEP Cases at 43. The *Bridgeport Guardians* distinction between hiring quotas and promotion quotas was echoed in *Kirkland*, and repeated in *Chance* v. *Board of Examiners*, 534 F.2d 993, 11 FEP Cases 1450 (2d Cir. 1976), *mod. on other grounds*, 534 F.2d 1007, 13 FEP Cases 150 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3803 (May 14, 1977).

Finally, in *EEOC* v. *Local 638*, 532 F.2d 821, 12 FEP Cases 755 (2d Cir. 1976) the court interpreted its own *Kirkland* decision as having promulgated *two-fold requirements* for the imposition of temporary quotas of all kinds: *a clear cut pattern of long-continued and egregious racial discrimination, and the dispersal of the effects of "reverse discrimination" among a group of non-minority persons who are not "identifiable."* [25]

In sum, the lower courts, while not entirely consistent in their approaches to quotas and other pref-

[25] In a concurring opinion, Judge Feinberg reiterated his doubts about the legality of all racial quotas expressed in his concurring opinion in *Patterson* v. *Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, 514 F.2d 767, 775, 10 FEP Cases 349, 357 (2d Cir. 1975), and announced his agreement with Judge Hays' dissent in *Rios* v. *Enterprise Association Steamfitters, Local 603*, 501 F.2d 622, 8 FEP Cases 293 (2d Cir. 1974) where Judge Hays interpreted Section 703(j) of Title VII as prohibiting all quotas based upon prohibited classifications. For an analysis of the Second Circuit's approach to quota remedies for union discrimination, see *EEOC* v. *IUOE, Locals 14 and 15*, —— F.2d at ——, 14 FEP Cases at 871.

erential remedies in cases of employment discrimination, generally have been much more reluctant to require such remedies than the OFCCP. It is not clear at present whether these judicial discussions of the propriety of quotas to remedy proven, egregious discrimination are applicable at all to contractors who are ordered by the OFCCP to enact AAPs premised only on statistical underutilization. But certainly the courts' evident misgivings about the legitimacy of preferential treatment, even in the former context, create further cause for anxiety on the part of employers faced with agency pressures to bring their practices into compliance with the government's affirmative action requirements.

B. The "Reverse Discrimination" Decisions

The full extent of the dilemma confronting employers can be understood only by considering the agency requirements and court decisions discussed above in juxtaposition with the growing line of precedents holding employers' affirmative action efforts resulted in illegal "reverse discrimination" against nonminority or male employees or applicants.[26] Several

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[26] In addition to the decisions discussed below, affirmative action plans have been set aside in a number of contexts by federal and state courts. *See, e.g., Hollander* v. *Sears Roebuck & Co.*, 392 F. Supp. 90, 10 FEP Cases 475 (D. Conn. 1975) (racial employment quota); *Lige* v. *Town of Montclair*, 367 A.2d 833, 13 FEP Cases 1697 (N.J. 1976) (minority hiring quota); *State of Wisconsin* v. *DILHR*, 14 FEP Cases 1189 (Wis. Sup. Ct. 1977) (absolute civil service preference based upon race or sex); *Broidick* v. *Lindsay*, 39 N.Y. 2d 641, 385 N.Y.S.2d 265, 350 N.E.2d 595, 14 FEP Cases 38 (1976) (requirement that successful bidders employ spe-

federal district courts recently have invalidated AAPs which were adopted voluntarily and were *not* premised upon a showing of past discrimination by the particular employer. For example, in *Anderson* v. *San Francisco School District*,[27] the court permanently enjoined the school board from carrying out a voluntarily-adopted, five-year quota for the assignment, appointment, and promotion of minority school administrators. In a similar case involving a municipal government, the City of Berkeley was enjoined from discriminating against white applicants by its voluntary implementation of an AAP designed to correct an "underutilization" of minorities.[28] The city's plan was adopted in recognition of a "history of discriminatory employment practices throughout all segments of American society" without specifically acknowledging any such discrimination on the part of the city itself. The court stressed that "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." 12 FEP Cases at 939.[29]

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cific percentage of minority group apprentices); *Flanagan* v. *President & Director of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (scholarship AAP); *Hupart* v. *Board of Higher Education of the City of New York*, 420 F. Supp. 1087 (S.D.N.Y. 1976) (admissions AAP); *Krajco* v. *State Bureau of Personnel*, 13 EPD ¶ 11,602 (Wisc. S. Cir. Ct. 1977) (employment AAP).

[27] 357 F. Supp. 248 (N.D. Cal. 1972).

[28] *See Brunetti* v. *City of Berkeley*, —— F. Supp. ——, 12 FEP Cases 937 (N.D. Cal. 1975).

[29] But compare *Germann* v. *Kipp*, —— F. Supp. ——, 14 FEP Cases 1197 (W.D. Mo. 1977), in which the court approved an affirmative action plan that was adopted to cure a

A similar result occurred in *Weber* v. *Kaiser Aluminum & Chem. Corp.*,[30] in which Kaiser and the United Steelworkers Union enacted an agreement establishing goals and timetables to achieve a desired minority ratio in their apprenticeship programs. As openings occurred, one minority was required to enter for every nonminority. There was no showing that Kaiser had ever discriminated against blacks. Rather, the agreement was motivated by a desire to comply with OFCCP utilization requirements and to avoid litigation by minorities over their lack of workforce representation. In setting aside the agreement as violative of Title VII, the court indicated that courts, and not private parties, should grant affirmative relief and then only when it was necessary to eliminate the effects of past discrimination.[31]

Likewise, the Title VII reverse discrimination decision in *Cramer* v. *Virginia Commonwealth University*, 415 F. Supp. 673, 12 FEP Cases 1397 (E.D. Va. 1976), *appeal pending* (4th Cir. No. 76-1937), vividly demonstrates both the quandary facing employers who attempt to comply with federal AAP requirements, and the need for clarification of their

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statistical showing of underutilization of minorities and women, even though the court acknowledged that it was "not dealing with a situation of court-imposed affirmative action relief pursuant to a finding of discrimination against women and minorities. . ." 14 FEP Cases at 1203.

[30] 415 F. Supp. 761, 12 FEP Cases 1615 (E.D. La. 1976), *appeal pending* (5th Cir. No. 73-3266).

[31] For a decision upholding a similar AAP where past discrimination was proven, *see Barnett* v. *International Harvester*, 12 FEP Cases 786 (W.D. Tenn. 1976).

position by this Court. The court invalidated a voluntary AAP establishing hiring policies favoring women under which the university sought to recruit women for its faculty "in order to compensate for alleged past deficiencies in minority hiring, and *to attempt to bring the school's employee hiring practices into accord with prevailing federal guidelines.*" *Id.*, 415 F. Supp. at 675, 12 FEP Cases at 1398. (emphasis added). Those guidelines were found to include E.O. 11246, and directives pursuant thereto issued by the Department of Health, Education and Welfare. The university's reliance on federal agency requirements, however, was rejected as a defense by the court, which then criticized the federal government for "requiring employers to engage in widespread, pervasive and invidious sex discrimination through the implementation of the pervading affirmative action programs . . .", and for ". . . perpetuating the very social injustices which it so enthusiastically and properly seeks to remedy." See 415 F. Supp. at 680, 12 FEP Cases at 1402.

In light of these decisions finding reverse discrimination, the legality of employment decisions which grant preferential treatment based upon race or sex is now open to serious question, particularly in the absence of a court finding that such treatment is necessary to remedy specific, proven acts of past discrimination. Thus, given the present agency policies requiring an AAP when *any* statistical imbalance exists, federal contractors are regularly placed in the exceedingly vulnerable position of having to choose between (a) loss of contracts and other severe sanctions; or (b) adoption of an AAP which may not withstand scrutiny against a claim of illegal reverse

discrimination, and also which might go beyond that which a court would order if it were to determine an appropriate remedy under Title VII.[32]

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[32] One district court judge has expressed his puzzlement over this dilemma as follows (*Grebe* v. *Colorado State Board of Agriculture*, —— F. Supp. ——, 14 FEP Cases 1238, 1239-1240 (D. Col. 1977)):

> There is one fascinating aspect to this case which is not yet quite before me. As we all know, the Supreme Court has expressly reserved the question of the validity of affirmative action programs, but that question is squarely before the Court this term. If the Supreme Court were to throw out all affirmative action programs, the needs of the Equal Employment Opportunity Commission for employees would receive a body blow. Yet, in this [reverse discrimination] case, the EEOC found probable cause, which must mean that the EEOC says that when an affirmative action program results in sex discrimination, the discrimination which results from the affirmative action will support a Title VII lawsuit. We will just have to wait to see what the Supreme Court says, but the ruling of the EEOC in this case makes one ponder as to whether the Commission is now conceding that affirmative action programs are discriminatory. I hope the Supreme Court reaches the question before I have to face up to it. . . . When it comes to affirmative action programs being discriminatory, the Supreme Court itself has sidestepped the question, and now I am not sure that even the EEOC has an unwavering, understandable position. . . . If plaintiff's counsel has the answer for the educators of the nation as to what they should do, I am sure that they would appreciate receiving it. The way it is now, if an affirmative action program isn't energized, the educators get sued for not having one, and if they do establish an affirmative action program, they get sued for having it. They can't win for losing. Hopefully, the Supreme Court will give us a little guidance before the year is out.

III. THE COURT SHOULD FORMULATE PRINCIPLES THAT PROVIDE GUIDANCE FOR EMPLOYERS WHO MUST RECONCILE AFFIRMATIVE ACTION REQUIREMENTS WITH POTENTIAL REVERSE DISCRIMINATION LIABILITY

The *Amicus*, EEAC, submits that the dilemma of employers described above is intolerable and cries out for a resolution which only this Court can now provide. Accordingly, EEAC respectfully urges the Court to articulate in its decision in this case certain clarifying principles that will furnish guidance to help resolve the present quandary.

First, the previous discussion has demonstrated that, as a general rule, the courts impose goals or quotas only as remedies of last resort where there is a history of flagrant, long-standing discrimination on the part of an employer. See *supra*, pp. 22-27. In contrast, the OFCCP and other agencies routinely require goals that often have the effect of preferential quotas, even when statistical imbalances have not been connected with proven illegal discrimination. It is EEAC's position that preferential treatment should not be *required* to remedy underutilization of women or minorities in a student body or workforce until *after* full and fair hearing procedures establish that the imbalance was the result of illegal discriminatory causes. The existence of illegal discrimination should be the first, not the last, area of federal agency inquiry where preferential treatment is sought. Requiring government agencies to apply legal principles which parallel those established by the courts in Title VII cases would do much to eliminate the present confusion over this issue.

Second, further clarification is required by this Court to identify for the lower courts the limits of permissible preferential treatment of minorities and women. In this regard, the *Amicus* urges this Court to endorse the position that has been adopted by the Second Circuit in its opinions in *Kirkland* v. *New York State Department of Correctional Services* and *EEOC* v. *Local 638*, both *supra*, pp. 25-26. These cases conclude that preferential remedies, even to remedy egregious proven past discrimination, can pass constitutional and statutory scrutiny only when they operate in the absence of identifiable "reverse discriminatees." Thus, the Second Circuit has indicated that it would approve hiring goals and quotas only where the negative impact on innocent nonminorities or males will be diffused among an unidentifiable group of unknown potential applicants. On the other hand, that court has questioned quota remedies involving promotions and training, since in such cases, the "reverse discrimination" victims will be readily identifiable.[33]

Third, if the Court should affirm the court below and find that the University's AAP illegally discriminated against Plaintiff Bakke, it should be with the clear indication that the Court will not "charg[e]" potential reverse discrimination defendants "with predicting the future course of constitutional law."

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[33] Similarly, it should be noted that the courts generally have *denied* remedies which would have permitted proven discriminatees to "bump" incumbent white male employees from their positions. *See, e.g., Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270, 12 FEP Cases 314, 321-322 (5th Cir. 1976), *cert. denied*, 429 U.S. 920, and cases cited therein.

Pierson v. *Ray*, 386 U.S. 547, 557 (1967).[34] Fundamental principles of fairness require that until this Court delineates the permissible limits of affirmative action, the entity which enacts an AAP should not be held liable to nonminority or male employees if the plan was adopted:

a. in a good faith attempt to comply with the requirements of Title VII, Executive Order 11246, a consent decree or other court or agency requirements,[35] and

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[34] The holding of *Pierson* v. *Ray* has been cited specifically in several Title VII cases as authority for denying back pay claims when employers had acted in good faith attempts to comply with existing statutory requirements. *See, e.g., Ridinger* v. *General Motors*, 325 F. Supp. 1089, 1098 (S.D. Ohio 1971), *aff'd in rel. part after remand*, 7 EPD ¶ 9395 (S.D. Ohio 1973); *LeBlanc* v. *Southern Bell Telephone and Telegraph Co.*, 333 F. Supp. 602, 611, 3 FEP Cases 1083, 1089 (E.D. La. 1971), *aff'd*, 460 F.2d 1228, 4 FEP Cases 818 (5th Cir. 1972), *cert. denied*, 409 U.S. 990; *Wernet* v. *Pioneer Foods Co.*, 6 EPD ¶ 8799 (D. Ohio 1972), *aff'd sub nom., Wernet* v. *Amalgamated Meat Cutters and Butcherman Local 17*, 484 F.2d 403, 6 FEP Cases 602 (6th Cir. 1973); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 341, 2 EPD ¶ 10,001 (D. Ore. 1969). *See also Hupart* v. *Board of Higher Education*, 420 F. Supp. at 1108. *Cf. Wood* v. *Strickland*, 420 U.S. 308, 319-22 (1975), relied upon in *Grebe* v. *Colorado State Board of Agriculture*, —— F. Supp. ——, 14 FEP Cases at 1239.

[35] As this Court noted in *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 423 n. 17, 10 FEP Cases at 1189 n. 17, "Title VII itself recognizes a complete, but very narrow immunity for employer conduct shown to have been taken 'in good faith, in confirmity with, and in reliance on any written interpretation or opinion of the [EEOC].' 42 U.S.C. § 2000e-12(b)." It recently has been found that a consent decree and its ac-

b. its actions in implementing the plan were reasonably related to these good faith objectives.[36]

Fourth, remedies available to a "reverse discriminatee" should be *prospective* only and limited to in-

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companying documents "certainly constitute such an interpretation or opinion." *See EEOC* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 1022, 1055 n. 34, 13 FEP Cases 392, 418 n. 34 (E.D. Pa. 1976), *aff'd*, *EEOC* v. *American Telephone & Telegraph Co.*, —— F.2d ——, 14 FEP Cases 1210 (3d Cir. 1977).

[36] As previously discussed, AAP's often are implemented upon the insistence of federal agencies such as the OFCCP or the EEOC. This Court often has instructed employers that they and the courts must give "great deference" to the regulations and interpretations of federal enforcement agencies. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. at 431, 10 FEP Cases at 1192, *citing Griggs* v. *Duke Power Co.*, 401 U.S. at 433-34, 3 FEP Cases at 179. *See also Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d at 175, 3 FEP Cases at 407 ("The Labor Department interpretation of the affirmative action clause must, therefore, be deferred to by the courts.") When faced with judicial mandates of this nature, it is difficult for federally-regulated employers to question the legal interpretations of the appropriate agency.

It is recognized also that the courts are not required to give "total abdication" to administrative interpretations, and ultimately may disagree with the latter in their construction of substantive legal requirements. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 144-45, 13 FEP Cases 1657, 1664-66 (1976). The option of a private employer to disagree with an agency's interpretation, however, is extremely limited when it faces the prospect of immediate OFCCP sanctions or Title VII litigation should it not agree with an agency's affirmative action requirements.

junctions against further implementation of the affirmative action program. This Court should indicate that back pay or other monetary relief would unfairly penalize employers, universities, or others who have attempted in good faith to comply with what they perceived the law required as to their utilization of minorities and women.[37]

This Court has indicated that the award of back pay is discretionary, and equitable considerations may render it inappropriate in particular cases. *See Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. 405. The issues in question here readily meet the standards set forth in *Albemarle*. Much more is involved here than the "mere absence of bad faith" (422 U.S. at 422, 10 FEP Cases at 1189) on the part of a particular employer. At question is employer liability for affirmative good faith attempts to comply with what this Court has identified in other cases as the "primary" objective of Title VII—the removal of barriers to minorities "that have operated in the past *to favor* an identifiable group of *white* employees over other employees." *See Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429-30, 3 FEP Cases at 177 (emphasis added) cited with approval in *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 417, 10 FEP Cases at 1187.

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[37] Although Respondent Bakke seeks no monetary damages in this case, experience in other reverse discrimination suits has indicated that damages claims such as back pay are a foreseeable possibility. *See McAleer* v. *American Telephone & Telegraph Co.*, 416 F. Supp. 435, 12 FEP Cases 1473 (D.D.C. 1976); *Hupart* v. *Board of Higher Education*, 420 F. Supp. at 1108.

Additionally, the Fifth Circuit has suggested that where discrimination is "government imposed" by the OFCCP, a back pay order would work a "substantial injustice" and should be carefully scrutinized by the district court. *See Stevenson* v. *International Paper Co.*, 516 F.2d 1013, 10 FEP Cases 1386, 1395 (5th Cir. 1975).

Similarly, virtually all courts considering the issue have found back pay to be an inappropriate remedy where employers' good faith reliance upon a state protective statute ultimately was found to constitute unlawful Title VII discrimination.[38] These cases reveal several factors analogous to the affirmative action context. They consistently emphasize the "dilemma" [39] facing employers who did not have the benefit of a definitive judicial or even quasi-judicial determination

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[38] *See, e.g., Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240, 5 FEP Cases 1166 (3d Cir. 1973); *Manning* v. *Internat'l Union*, 466 F.2d 812, 4 FEP Cases 1282 (6th Cir. 1972), *cert. denied*, 410 U.S. 946, 5 FEP Cases 587 (1973); *Williams* v. *General Foods Corp.*, 492 F.2d 399, 7 FEP Cases 827 (7th Cir. 1974); *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 692, 3 FEP Cases 1083 (E.D. La. 1971), *aff'd*, 460 F.2d 1228, 4 FEP Cases 818 (5th Cir. 1972), *cert. denied*, 409 U.S. 990; *Tuma* v. *American Can Co.*, 373 F. Supp. 219, 7 FEP Cases 851 (D.N.J. 1974). *Accord, Stryker* v. *Register Publishing Co.*, 423 F. Supp. 476, 14 FEP Cases 748 (D. Conn. 1976), and cases cited therein at n. 2.

Although this Court indicated it was not ruling on this issue, many of these cases were cited in *Albemarle Paper*, 422 U.S. at 423 n. 18, 10 FEP Cases at 1189 n. 18.

[39] *See, e.g., Kober* v. *Westinghouse*, 480 F.2d at 249, 5 FEP Cases at 1172; and *Manning* v. *Internat'l Union*, 466 F.2d at 816, 4 FEP Cases at 1284-85.

as to the validity of their course of action.[40] They also point out that "[p]rior to a judicial determination, such as evidenced in this opinion an *employer can hardly be faulted* for following the explicit provisions of applicable state law." (Emphasis added).[41] Such equitable relief from monetary damage liability is *prospective* in application,[42] would be limited in nature,[43] and need not be extended to AAPs adopted *after* this Court ultimately determines the extent to which race- or sex-conscious employment decisions are constitutionally or otherwise permissible.

Until such determination is made, employers will be left in the untenable position of having to choose between lawsuits—suits filed by state or federal agencies, minorities or women for failure to establish a result- or goal-oriented affirmative action program, or suits filed by nonminorities or males for actions taken pursuant to such programs if they are adopted. Federal contractors and subcontractors face a similar problem. Approval of an AAP by a compliance agency carries no guarantee of immunity from claims of reverse discrimination, yet failure to be awarded such

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[40] *Kober* v. *Westinghouse*, 480 F.2d at 249, 5 FEP Cases at 1172; and *Tuma* v. *American Can Co.*, 373 F. Supp. at 231, 7 FEP Cases at 860-61.

[41] *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1227, 3 FEP Cases 604, 610 (9th Cir. 1971); *Williams* v. *General Foods Corp.*, 492 F.2d at 408, 7 FEP Cases at 833.

[42] *Burns* v. *Rohr Corp.*, 346 F.2d 994, 999, 4 EPD ¶ 7924, p. 6442 (S.D. Cal. 1972).

[43] *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1007, 4 FEP Cases 946, 949 (9th Cir. 1972).

approval can lead to severe penalties, including debarment from future government contracts, cancellation of existing agreements, and the possibility of additional lawsuits. Until the present situation is resolved, employers will continue to face the real prospect of defending themselves in court regardless of the employment practices they adopt.

CONCLUSION

In recognition of the facts and arguments presented to the Court by the *Amicus*, EEAC, it is respectfully submitted that the administration of the federal antidiscrimination statutes and executive programs would benefit greatly if this Court were to adopt the guidelines suggested by the *Amicus*. Such guidance from this Court would do much to eliminate the present confusion surrounding employers' obligations to undertake affirmative action to remedy instances of underutilization of minorities and women.

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