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Supreme Court Decisions: Affirmative Action Plan Rejected

John Benjes

Dandridge v. Williams, 397 U.S. 485 (1970).

It was found that the State had two additional interests at stake. First, the granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. The employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop its rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever, increasing the pressure on an employer to settle a strike. The State chose to leave this lever in existence for situations in which the employer locked out his employees, but to eliminate it if the union made the strike move. The approach taken by Ohio was found not to be irrational. 97 S.Ct. at 1910. Secondly, the State had an interest in protecting the fiscal integrity of its compensation fund and the statute was rationally related to this interest.

The Court was unable to discern the basis for a claim that Hodory had been denied substantive due process of law and Hodory made no claim of denial of procedural due process.

Affirmative Action Plan Rejected

by John Benjes*

Voluntary affirmative action, called into question in the context of admission to professional schools in *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090 (1977), suffered a setback in the recent case of *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977). In *Weber*, the Fifth Circuit found that a joint program of affirmative action entered into by a union and employer violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2 *et seq.* The affirmative action before the court was a quota which was established for admittance into an on-the-job training program for entry into the craft positions in all Kaiser plants. Its effect was to create an entrance ratio of one minority worker to each white until the percentage of minority craft workers roughly approximated the proportion of minorities in the surrounding local population.

The district court found the training program defective on two grounds: One, only courts may implement quota relief and even then only with great caution; Two, under the facts of this case a quota system would not be warranted even if ordered by the court in light of the fact that those preferred workers were not identifiable victims of discrimination and there had, in fact, been no past discrimination by this employer. The circuit court affirmed on the second ground only, holding that while voluntary compliance with Title VII was laudable and preferable to litigation, the facts of this case did not warrant quota relief. Despite the court's support for voluntary compliance, the decision in *Weber* can be expected to discourage that remedy. Essential to the court's ruling was the finding by the district judge that there had been no proof of past discrimination by Kaiser, this despite an apparent disparity between the proportion of black craftsmen at Kaiser and the percentage of blacks in the local population. The court was unconvinced by the employer's argument that the the effects of past societal discrimination were far-reaching and could be remedied only through a "one-for-one" training program.

Equally unconvincing was the argument that the quota system was instituted at the behest of the Office of Federal Contract Compliance (OFCC) in its attempt to enforce Executive Order 11246, 30 Fed. Reg. 12319, which requires federal contractors to take affirmative action to obtain a fair percentage of minorities in their workforces. On this point, the district court had found that the collective bargaining agreement in question "reflected less of a desire on Kaiser's part to train black craft workers than a self interest in satisfying the OFCC in order to retain lucrative government contracts." 563 F.2d at 226. While the circuit court recognized the legitimacy of affirmative action plans implemented under Executive Order 11246, such as the "Philadelphia Plan", *see Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied* 404 U.S. 854 (1971), it held that in the absence of prior discrimination, the Executive Order may not override the contradictory congressional provision against quota hiring found in Section 703(d) of Title VII.

This decision places an employer in the bind of having to choose between awaiting litigation charging past racial bias against blacks or other minorities or initiating a plan to remedy the underutilization of minorities and inviting a reverse discrimination charge. It is difficult to conceive of employers who would be willing to admit a past pattern or practice of minority discrimination prior to implementing affirmative action plans voluntarily or with the encouragement of OFCC.

Judge Wisdom, in his dissent, pointed out that the majority in *Weber* requires the employer to guess what a district court might find in the event that employer is sued for discrimination. Should the employer guess that the district court would find past discrimination, and thus institute a voluntary affirmative

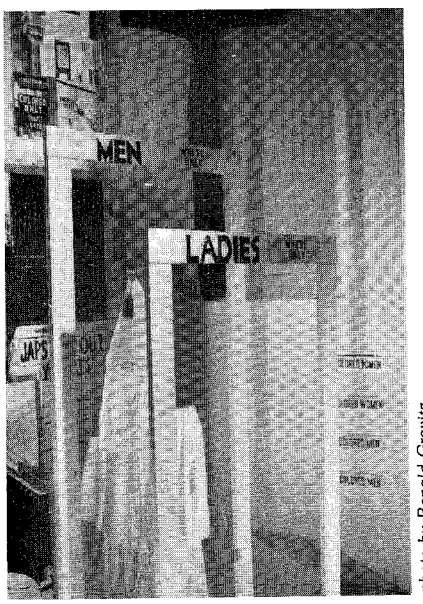

photo by Ronald Gravitz

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action plan, no reverse discrimination suit will lie. In the context of *Weber*, where the union and employer wrote a national contract covering fifteen different plants, each with its own employment history, the employer would have to predict how the federal courts in different districts would interpret each plant's employment history before proceeding with voluntary compliance. The dissent notes:

> Employers and unions would be liable unless they instituted exactly what a reviewing court felt should have been instituted. They could either bring declaratory judgment actions or wait to be sued. Under either alternative, our dockets would be filled with more Title VII suits, the congressional emphasis on voluntary conciliation would be frustrated, and the elimination of the blight of racial discrimination would be still further delayed.

563 F.2d at 230.

An example of the peril of anticipating what a district judge might find is *Detroit Police Officers Ass'n v. Young*, 46 U.S.L.W. 2463 (E.D. Mich. 1978). In this case, upon being sued for reverse discrimination, the defendants pointed to a history of unconstitutional treatment of blacks as reasonable justiication for a fifty percent racial preference plan. Judge Kaess held, however, that under the decision of *Washington v. Davis*, 426 U.S. 229 (1976), statistics alone do not show constitutional violation but must be proven to be the result of purposeful discrimination. When the employer in *Young* enacted its preference plan in 1974, it reasonably could not anticipate the Supreme Court's decision in *Davis* (that purposeful discrimination must be proven) which is seen by some as a clear departure from the trend of the Court's decisions under the Fourteenth Amendment. Even if the employer in *Young* had anticipated *Davis*, it would further have had to guess its application to a case where the past employment/promotion practice it attempted to remedy was *clearly discriminatory* in effect if not in purpose, but still not considered by Judge Kaess to be sufficient to legitimize affirmative action relief.

The dissent in *Weber* takes issue with the finding that Kaiser had not discriminated against blacks, pointing out that Kaiser may have used testing devices which adversely affected blacks, and prior to 1974 required that all employees have prior experience in the crafts in order to enter its training program.

While these two arguable violations clearly do not support a finding of discrimination, the natural reluctance on the part of an employer to admit discrimination is noted by Judge Wisdom. Rather than require such an admission of discrimination, the dissent would opt for a showing that the plan was a reasonable solution to prior discrimination, admittedly purposeful or not. This is similar to the approach taken recently by the EEOC in its proposed guidelines on remedial and/or affirmative action, 42 Fed.Reg. 64826 (12-28-77), which attempt to insulate an employer from reverse discrimination charges regarding plans adopted by employers who have a reasonable basis for concluding that they might be held in violation of Title VII if they fail to act. The dissent further would find that the past history of discrimination in the trades is so substantial as to support an affirmative action plan of the kind adopted by Kaiser. Again, Judge Wisdom would opt for a reasonable preference for a reasonable period of time, as was implemented here.

While Judge Wisdom does not reach that part of the majority's opinion dealing with the employer's defense of Executive Order 11246, he would remand the case for a determination as to whether the plan comports with the requirements of that Order. While the majority notes that executive orders cannot override legislative enactment, Judge Wisdom states that there have been legislative acts which implicitly exempt plans following the Executive Order "from the constraints of Title VII."

Other recent developments in the so-called "reverse discrimination" area do not bode well for the advocates of equal employment opportunity. In four recent cases, the score is "two to two" on the question of the constitutionality of a ten percent minority participation quota for local public works projects. The Minority Business Enterprise Amendment, Section 103(f)(2) of the 1977 Public Works Employment Act, has been found to be in violation of the Due Process clause of the Fifth Amendment by the United States District Court for Vermont in the case of *Wright Farms Construction, Inc. v. Kreps*, 46 U.S.L.W. 2372 (12-23-77), and held to be in violation of both the Fifth Amendment and Title VI of the 1964 Civil Rights Act by the Central District of California in *Associated General Contractors of California v. Secretary of Commerce*, 46 U.S.L.W. 2371 (11-2-77). As in *Weber*, these courts found that absent proof of prior violations, a quota system was illegal reverse discrimination. The Southern District of New York in *Follilove v. Kreps*, 46 U.S.L.W. 2229 (12-19-77), and the Western District of Pennsylvania in *Constructors Association of Western Pennsylvania v. Kreps*, 46 U.S.L.W. 2371 (10-13-77), found that in light of past discrimination in the construction industry, the ten percent set-aside was the only way to end the cycle of exclusion of minority contractors from construction projects. The Western District also points out that the December 31, 1978 termination date of the ten percent set-aside is an indication that there is little likelihood of its becoming an "entrenched entitlement" for minority businessmen, a principal objection of opponents of affirmative action.

Whether one calls this ten percent minority business set-aside and the training program in *Weber* reverse discrimination, benign discrimination, affirmative discrimination or simply affirmative action, it is clear that this area of the law will require substantially more attention by the appellate courts and the U.S. Supreme Court regardless of the decision in the *Bakke* case.

Bakke, while it may be decided under constitutional or Title VI grounds, does not reach the important issues of the legality of quota hiring of Title VII, nor the efficacy of affirmative action under Executive Order 11246, nor the constitutionality of legislative actions for a set-aside for minority contractors. Admittedly, although the decision in *Bakke* may provide an indication of the Supreme Court's perception of affirmative action of professional school admissions, the broad area of equal employment opportunity awaits decisions in cases such as *Weber*.

In this regard, see *E.E.O.C. v. A.T. & T.*, 556 F.2d 167 (3d Cir. 1977), *cert filed* 8-12-77 *sub nom. Alliance of Independent Telephone Unions v. E.E.O.C.*, #77-243, *Communication Workers of America v. E.E.O.C.*, #77-241, *Telephone Coordinating Council v. E.E.O.C.*, #77-242, --U.S.--.

Administrative Law: Practical Pointers

by Gary L. Crawford

In recent years, the field of administrative law has expanded in scope and significance. This growth has been caused by a number of factors but its impact is clear. Practitioners are now called upon to represent clients in proceedings which may vary widely from the more familiar practice of the courts. This article will suggest some practical pointers which should help chart the way through State Boards of Review proceedings.

In particular, this article will focus on the Boards of the Department of Licensing and Regulations. Within this regulatory agency are nineteen licensing boards which have been given the authority to regulate the activities of licensees. Consequently, the Boards have the power to suspend or revoke licenses. The Real Estate Commission also has the unique authority to order compensatory payment to an aggrieved complainant from its guaranty fund.

Typically, then, an aggrieved consumer or licensee will consult an attorney regarding the Board proceeding perhaps as a prelude to a civil suit. After a complaint is given to a Board, an investigation is made. If the Board's review panel votes to hold a hearing on the matter in question, a "charge" letter is sent to the licensee. The letter specifies the date of the hearing and the laws and regulations the licensee has allegedly violated. Prior to the hearing, the attorney should routinely do several things:

1. *Review the Applicable Statute and Regulations*—A number of lawyers appear at hearings and then request a mini-course on Board procedure. This approach, of course, does not impress clients or the Board. All regulations can be found in the Code of Maryland Regulations (COMAR), supplemented by new regulations found in the Maryland Register in conformity with Art. 41, Sec. 255 of the Maryland Code (Administrative Procedure Act). Some regulations outline the relevant Board procedures for pre-hearing discovery. Other regulations in fact provide for a pre-hearing informal meeting (*See e.g.*, Home Improvement Commission), at which time the dispute may be settled.

2. *Prepare Pleadings in Advance For a Guaranty Fund Claim*—Frequently, the Real Estate Commission will decide the merits of a case the same day. Therefore, evidence regarding the amount of the guaranty fund claim may be received during the course of the hearing. The combination of a claim from the fund and a subrogation agreement with other pleadings may obviate the need for a subsequent hearing on the amount of the claim which might be heard months later.

3. *Watch a Hearing Prior to Your Hearing Date*—Due to the wide range of businesses licensed, each of the various boards is unique in the way in which cases are handled. Most Boards schedule hearings at regular intervals. Consult the Daily Record, the Maryland Register, or call the Executive Director of the Board for hearing information.

At the hearing, it is important that several points be kept in mind.

1. *Procedure*—The complainant's case is argued by an Assistant Attorney General who is known as the Presenter of the Evidence. After presentation of the complainant's witnesses and case, the licensee is allowed to put on his case. During the hearing, the Board and both sides may ask questions of the witnesses. A closing argument which is brief is generally favored over a more lengthy presentation.

2. *Evidence*—It is well settled that hearsay is admissible due to the fact that the proceeding is administrative in nature. *See generally*, DAVIS, ADMINISTRATIVE LAW; *See also, Redding v. Bd. of County Comm. for Prince George's County*, 263 Md. 94, 282 A.2d 136, *cert. denied* 406 U.S. 923 (1971). It is important to remember that usually the members of the Board are very experienced in their field. Since the Board has a great deal of discretionary power, successful petitioners will argue the facts of the case rather than complex legal technicalities.

3. *Appeals*—After the hearing, the Board will issue its Findings of Fact and Conclusions of Law. If the decision of the Board is adverse, an aggrieved party may pursue an appeal under the statutory framework contained in the Administrative Procedure Act, *supra*. For a concise summary of the process of appeal from an Administrative Board see Mr. Henry R. Lord's article in the *Maryland Bar Journal*, Summer 1977, at page 49.

While the growth of administrative law provides new challenges and problems for the busy practitioner, the administrative hearing procedure also provides an effective structure for dispute settlement.

photo by John Clark Mayden