

## Chapter VII Faculty and Staff Hiring

In the area of faculty and staff employment, both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 impose strict scrutiny requirements on almost all public and private institutions seeking to justify race-conscious affirmative action programs. Although *Grutter v. Bollinger* reaffirmed that student body diversity is a compelling interest in the context of student admissions, the Supreme Court has not addressed whether diversity is a compelling interest in the context of faculty or staff hiring. Moreover, other compelling interests have been rejected or are of limited use in the context of faculty and staff hiring.<sup>303</sup> This area of law is further complicated because federal employment discrimination law under Title VII of the Civil Rights Act of 1964 authorizes affirmative action programs that are designed to cure a manifest imbalance between minorities and non-minorities in a higher education institution's workforce or to remedy past discrimination that occurred within the institution's jurisdiction. The permissibility of other justifications, including diversity in employment, is unclear.

Public institutions and private institutions receiving federal funding should be aware that legal requirements under the Equal Protection Clause and Title VI are generally more restrictive than requirements under Title VII, and that pursuing policies that might be available to private employers under Title VII might *not* comply with the Equal Protection Clause and Title VI. Institutions that implement race-conscious affirmative action programs in employment, whether remedial or designed to promote diversity, must therefore be prepared to defend their policies under several federal laws, and must assess the risk of pursuing policies that might be permissible under one standard but impermissible under another standard. This Chapter outlines the existing federal law applicable to affirmative action in faculty and staff hiring, explores *Grutter's* applicability in this area, and provides general guidelines for the appropriate use of affirmative action hiring programs at both private and public institutions.

### A. Remedial Measures and Race-Conscious Hiring

#### 1. Requirements Under the Equal Protection Clause and Title VI

An affirmative action plan for faculty or staff hiring for a public institution or a private institution receiving federal funding is subject to the more stringent requirements of the Equal Protection Clause and must be narrowly tailored to meet a compelling interest, such as remedying its own past discrimination or dismantling a system of discrimination in which it is a "passive participant" or a "joint participant."<sup>304</sup>

Before instituting an affirmative action hiring plan based upon a remedial justification, a public institution must have a "*strong basis in evidence* for its conclusion that remedial action was necessary."<sup>305</sup> As discussed above, the Supreme Court has not explicitly defined "strong basis in evidence" beyond suggesting that it would be evidence "approaching a prima facie case of a constitutional or statutory violation."<sup>306</sup> (See Chapter V). Some courts have required

a “manifest imbalance” standard that is used under Title VII of the Civil Rights Act of 1964: “A public employer has the requisite firm basis for believing that remedial action is necessary if there is a statistical disparity between the racial composition of the workforce and the relevant, qualified employment pool.”<sup>307</sup> Other courts have determined that while “a prima facie case of intentional discrimination is sufficient to support a public employer’s affirmative action plan” it is also true that “less evidence is necessary to justify an affirmative action plan than is necessary to prevail on an individual or class action claim of intentional discrimination.”<sup>308</sup>

Many remedial affirmative action cases are decided on the basis of whether the employer has met the “strong basis in evidence” requirement. Therefore, it is crucial for the institution to gather both statistical and anecdotal evidence to support its conclusion that remedial race-conscious hiring is necessary. The strongest basis in evidence is direct evidence of past discrimination, including judicial findings and discriminatory laws and policies. However, because it is often difficult to show direct evidence of discrimination, as in the Title VII context, the most common form of evidence is statistical data evidencing disparities between the proportion of minority persons in the relevant labor pool and the proportion of minority persons in the institution’s workforce.<sup>309</sup> Despite the Supreme Court’s endorsement of the use of statistical data, many lower courts have rejected statistical evidence of disparities as inadequate when it is not buttressed by anecdotal evidence or when the court is unconvinced of the causation.<sup>310</sup>

## **2. Private Institutions and Title VII**

A small number of private institutions are not subject to the restrictions of the Constitution or Title VI in their employment decisions because they do not receive federal financial assistance. Instead, race-conscious hiring and other employment decisions at these private institutions are governed by Title VII of the Civil Rights Act of 1964.<sup>311</sup>

Title VII is not coextensive with the Constitution; it is generally more permissive than the Constitution in authorizing programs designed to remedy past discrimination.<sup>312</sup> Title VII employs a lower standard for determining if past discrimination has occurred and requires a lesser showing of racial imbalance.

A race-conscious hiring plan that favors minorities is valid under Title VII if it:

- (1) shares Title VII’s statutory goals, namely to break down old patterns of discrimination or to open employment opportunities to minorities that were once closed to them;
- (2) is designed to eliminate a manifest imbalance that reflects underrepresentation of minorities in traditionally segregated job categories; and
- (3) avoids unnecessarily trammeling the interests of nonminority employees or applicants.<sup>313</sup>

Title VII allows race-conscious affirmative action when a private institution can show that a “manifest imbalance” exists between the percentage of minorities in the relevant workforce and the percentage in the relevant labor market. This showing should be made before a plan is enacted.<sup>314</sup>

The relevant labor market is determined by the type of position in question. If the position is a staff job requiring no special expertise, or all necessary training is provided on the job, then the relevant labor market is the area labor market or the general population.<sup>315</sup> If the college or university generally promotes staff and faculty from within its ranks, then the relevant labor market for promotions is the group of employees within which promotions will be made.<sup>316</sup> For example, for tenured professors, the appropriate comparison would likely be minority representation in tenured positions and minority representation in tenure-track positions.

The Supreme Court has not squarely defined how large a discrepancy must be to constitute a “manifest imbalance.” The Court has merely noted that the standard is not as high as it ordinarily would be to establish a prima facie case for discrimination,<sup>317</sup> which would be a difference between the expected and observed percentages of minorities of at least two or three standard deviations.<sup>318</sup> In general, educational institutions will have less trouble when establishing affirmative action programs for larger departments because existing disparities are less likely to be a product of chance in those situations.<sup>319</sup>

Affirmative action plans are more likely to be found valid if they involve “preferential hiring” rather than “preferential layoffs.” In approving the affirmative action plans in *United Steelworkers of America v. Weber*<sup>320</sup> and *Johnson v. Transportation Agency, Santa Clara Cty.*,<sup>321</sup> the Supreme Court relied on the fact that neither plan required discharging nonminority employees.<sup>322</sup> The difference is that, “while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals.”<sup>323</sup>

Appellate courts are split on the severity of the burden imposed by “preferential promotion” policies. Some circuits view preferential promotions as more burdensome than preferential hiring, whereas others treat preferential promotions as imposing a lesser burden than preferential hiring.<sup>324</sup>

Although affirmative action plans are not required to have an explicit end date if the consideration of race is based on an individualized or case-by-case approach,<sup>325</sup> an institution should provide for regular review of affirmative action policies for hiring staff and faculty. Even when the policy in question is flexible, courts tend to weigh the duration of the program in assessing the burden it imposes on non-minorities.<sup>326</sup> An institution should also set short-term and long-term objectives for its affirmative action plans to demonstrate the temporary nature of those plans.<sup>327</sup> In setting these goals, an institution should frame its efforts as attempts to “attain” racial equality rather than to “maintain” racial balance, because the latter is seen as justifying a “permanent” plan.<sup>328</sup>

If an institution wishes to use affirmative action in some years but not others, the institution should implement a standing affirmative action program that is reviewed yearly.<sup>329</sup> A school should avoid operating without any program at all and then “resurrecting” an affirmative action plan when it finds the ratio of minority and nonminority faculty or staff to be skewed.<sup>330</sup> Although the approaches are very similar, courts appear more likely to view the latter approach as lacking a well-defined endpoint.

While fixed set-asides or quotas may be defensible under existing case law, recent judicial pronouncements against them have raised questions about the precedential value of that case law. Accordingly, institutions should adopt goals, which courts have more readily accepted as legitimate, rather than set-asides or quotas.

### **Practical Tips for Private Institutions in Complying with Title VII**

- Frame efforts in terms of “eliminating” inequalities, not “maintaining” racial balance.
- When possible, use “preferential hiring” policies instead of “preferential layoffs.”
- Set well-defined long-term and short-term objectives for the policy. Make clear that the affirmative action plan will end or be revised when those objectives are met.
- If using affirmative action in some years but not others, use a standing program that is reviewed yearly. Do not simply resurrect an undefined program on an ad hoc basis when it is deemed necessary.
- In evaluating the need for an affirmative action program for a faculty or staff position, follow this guide:
  - (1) If the position is unskilled, compare the percentage of minorities holding the position at the institution to the percentage of minorities in the local population.
  - (2) If the position is skilled, compare the percentage of minorities holding the position at the institution to the percentage of qualified minorities in the local workforce.
  - (3) If the position involves a promotion from within university ranks, compare the percentage of minorities holding the position at the institution to the percentage of minorities in the group from which promotions are made.
- It is easier to justify an affirmative action policy in a big department because racial imbalance is less likely to be viewed as a product of chance.

### **B. Diversity and Race-Conscious Hiring**

The Supreme Court has not directly addressed the question of whether faculty and staff diversity is a compelling interest. The *Grutter* Court’s emphasis on the educational benefits of student body diversity, however, may provide support for institutions wishing to develop diversity-based affirmative action plans to further the educational benefits of *faculty* diversity.

Drawing analogies to the rationales adopted by the Court in *Grutter* may prove useful in the equal protection context, but, as explained below, diversity may not provide a sufficient justification for affirmative action in hiring and promotions under Title VII. Until the law in this area becomes more settled, institutions should tread carefully.

### 1. *Grutter* as Applied to Faculty Hiring

As mentioned above, the *Grutter* decision provides language that may support an institution's interest in selecting a diverse faculty. In *Grutter*, the Supreme Court reaffirmed the First Amendment "academic freedom" of educational institutions to define their educational missions and to select students and faculty.<sup>331</sup> Just as an institution has a strong interest in selecting students that it believes will further its educational mission and commitment to diversity, it would seem to follow that an institution has a similar basis upon which to select faculty to further the same ends.

Like a diverse student body, a diverse faculty serves to enhance the educational experience of minority and nonminority students alike. In the same way a diverse student body makes for "livelier" and "more spirited discussion," so too does a diverse faculty. The benefit of diversity may be even stronger in the faculty context, since faculty facilitate and encourage classroom discussions. The *Grutter* Court also recognized that one of the substantial benefits that flows from a diverse student body is "cross-racial understanding" which "helps to break down racial stereotypes and 'enables [students] to better understand persons of different races.'"<sup>332</sup> Similarly, a diverse faculty, which includes instructors and professors from different backgrounds and with different points of view, will facilitate cross-racial understanding. Exposing students to minority faculty with differing perspectives will also help to break down racial stereotypes.<sup>333</sup>

### 2. Limitations

While an institution may be able to justify a diversity-based affirmative action hiring program, an institution should carefully define this justification to avoid invoking related rationales that the Supreme Court has rejected or is not likely to adopt.

The Supreme Court has explicitly rejected as a justification for remedial affirmative action programs the need for minority role models.<sup>334</sup> The Court rejected this theory because it "allows the institution to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."<sup>335</sup> Moreover, according to the Court, the theory bears no relationship to the harm caused by past discrimination. Finally, the Court found that, "carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the court rejected in *Brown v. Board of Education*."<sup>336</sup> Although the role model rationale was rejected in the remedial context rather than in the diversity context, it is advisable for an institution to distinguish clearly between the diversity rationale and the role model theory.

The “operational needs” rationale has been asserted successfully in the context of employment decisions regarding police and prisons. Under this rationale, lower courts have held that race-conscious hiring and promotions are permissible to advance the “operational need” of having a diverse police force that can serve a racially diverse population.<sup>337</sup> An educational institution similarly might argue that race-conscious hiring and promotion policies are necessary to further the operational need to have a diverse faculty that serves a diverse student body. Because the outcome of such arguments in the education context is unclear, however, an educational institution should use caution in advancing this argument.

### C. Title VII and Diversity-Based Affirmative Action

As discussed above, courts have generally upheld voluntary race-conscious affirmative action under Title VII. However, courts are divided over the use of the diversity rationale as a justification for affirmative action under Title VII.<sup>338</sup> In *University and Community College System of Nevada v. Farmer*,<sup>339</sup> for example, the Nevada Supreme Court upheld a race-conscious faculty hiring policy under Title VII, stating that “the desirability of a racially diverse faculty [is] sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body.”<sup>340</sup> In *Taxman v. Piscataway Board of Education*,<sup>341</sup> on the other hand, the Third Circuit Court of Appeals concluded that the language and legislative history of Title VII indicated a congressional intent to limit affirmative action only to remedial purposes.<sup>342</sup> The Third Circuit thus held that faculty diversity could not serve as a justification under Title VII to make a race-conscious faculty termination decision.<sup>343</sup>

Nonetheless, there is at least a colorable argument that diversity provides a permissible basis for employment affirmative action under Title VII. As the Supreme Court has stated, Title VII constraints are “not intended to extend as far as that of the Constitution.”<sup>344</sup> If diversity-based affirmative action in hiring is constitutionally permissible, then the diversity rationale should provide a permissible justification for affirmative action under the more lenient restrictions of Title VII.<sup>345</sup> Thus, it could be argued that Title VII allows an employer more discretion to implement race-conscious employment policies than does the Constitution.

Moreover, diversity-based affirmative action may in fact serve Title VII’s long-term goal of eradicating discrimination by helping to combat attitudes that give rise to future discrimination.<sup>346</sup> Indeed, in *Farmer*, the Nevada Supreme Court emphasized that “[t]he University’s attempts to diversify its faculty by opening up positions traditionally closed to minorities” mirror Title VII’s purpose.<sup>347</sup>