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Civil Rights–Employment Discrimination–Voluntary Affirmative Action Allowed

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NOTES

CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — Voluntary Affirmative Action Allowed. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

Pursuant to a collective bargaining agreement with United Steelworkers of America (USWA), Kaiser Aluminum and Chemical Corporation (Kaiser) implemented an affirmative action plan designed to eliminate racial imbalances in the company's almost exclusively white craft work force. Kaiser and USWA set craft hiring goals, and established on-the-job training programs to teach unskilled production workers the skills necessary to become craft workers. The plan reserved fifty percent of the openings in the training programs for blacks and established dual seniority lists from which black and white workers were to be selected alternately on the basis of seniority in their respective races.

Brian Weber, a white worker at Kaiser's plant in Gramercy, Louisiana, applied for the craft training program and was rejected even though he had more seniority than the most junior black accepted. Weber brought a class action suit in the District Court for the Eastern District of Louisiana, alleging that the affirmative action plan discriminated against white employees in violation of sections 703(a) and (d) of Title VII of the Civil Rights Act of 1964.[1]

The district court held that the Kaiser-USWA plan violated Title VII because it created a racial quota which was permissible only when imposed by a court to remedy past discrimination. The court granted a permanent injunction prohibiting Kaiser and the USWA from denying Weber access to on-the-job training programs on the basis of race.[2] The Court of Appeals for the Fifth Circuit affirmed.[3] The United States Supreme Court reversed, holding that Title VII's prohibition against racial discrimination did not condemn all private, voluntary, race-conscious affirmative action plans. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

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1. 42 U.S.C. § 2000e to § 2000e-17 (1976).
2. Weber v. Kaiser Aluminum & Chem. Corp., 415 F.Supp. 761 (E.D. La. 1976).
3. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977).

The Civil Rights Act of 1964 was enacted to achieve the integration of blacks into the mainstream of American society.[4] Congress intended Title VII of the Act to relieve the economic plight of black Americans resulting from discrimination in employment.[5] Section 703(a) makes it an unlawful employment practice for an employer to discriminate against or classify any individual in any way which would deprive him of employment opportunities because of race, color, religion, sex, or national origin.[6] Section 703(c) prohibits labor organizations from engaging in such practices.[7] Section 703(d) specifically forbids discrimination in training programs.[8]

Section 706(g) of Title VII sets out the remedies for violation of the Act and permits the district courts to "order such affirma-

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4. United Steelworkers v. Weber, 443 U.S. 193, 202 (1979).

5. 110 Cong. Rec. 6548 (1964).

6. Section 703(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976).

7. Section 703(c) of Title VII provides:

> It shall be an unlawful employment practice for a labor organization—
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> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (1976).

8. Section 703(d) of Title VII provides:

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

42 U.S.C. § 2000e-2(d) (1976).

tive action as may be appropriate."[9] Prior to the time *Weber* reached the United States Supreme Court, nearly every circuit had upheld court-ordered, race-conscious affirmative action as a remedy within the scope of section 706(g). Such measures included goals and quotas for hiring, promotion, and union membership;[10] hiring, admission to training programs, and promotion on an alternate one-white, one-black basis;[11] and other race-conscious treatment.[12]

Employers and unions had argued on appeal in the circuit courts that these court-ordered, race-conscious remedies amounted to preferential treatment which was impermissible under section 703(j) of Title VII,[13] and they insisted that the type of affirmative

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9. Section 706(g) of Title VII provides in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate. . . .

42 U.S.C. § 2000e-5(g) (1976).

10. *See, e.g.*, EEOC v. Contour Chair Lounge Co., 596 F.2d 809 (8th Cir. 1979); EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); Oburn v. Shapp, 521 F.2d 142 (3d Cir. 1975); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); United States v. Masonary Contractors Ass'n of Memphis, Inc., 497 F.2d 871 (6th Cir. 1974); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Local 53, Int'l Assoc. of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

11. Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973).

12. Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978) (freeze on white hiring); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973) (recruitment of minorities with insufficient experience to qualify); United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) (issuance of one hundred work permits to minorities); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969) (publication that membership open to all).

13. Section 703(j) of Title VII provides in part:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such

relief available under 706(g) was limited by 703(j). A majority of the circuits rejected this view,[14] holding that such remedies were permissible under the grant of authority to the district courts under 706(g) to apply "equitable" and broadly discretionary remedies,[15] and that section 703 defined violations, not remedies.[16]

Congress apparently approved the interpretation adopted by the circuit courts in 1972 when it amended Title VII.[17] During debate on the Equal Employment Opportunity Act of 1972, Senator Ervin, who followed the view that 703(j) forbade quota remedies, proposed two amendments to the Act which would have specifically prohibited court imposed quotas to overcome the effects of past discrimination.[18] The Senate rejected both Ervin amendments by a two-to-one margin.[19] The rejection of the Ervin amendments provided what the Third Circuit called "unusually clear evidence that Congress approved the pre-1972 federal court interpretation of the scope of §706(g) remedial power conferred by the 1964 Act."[20]

The courts of appeal, however, placed limitations on the circumstances under which race-conscious affirmative action was permissible. Race-conscious hiring and promotion goals were upheld only as interim goals rather than as permanent quotas to maintain a particular racial balance.[21] Courts considered racial quotas to be

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> individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer. . . .

42 U.S.C. 2000e-2(j) (1976).

14. EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheetmetal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

15. Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

16. United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976).

17. Equal Employment Opportunity Act of 1972, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1976)).

18. United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1019 (3d Cir. 1976).

19. *Id.*

20. *Id.* at 1019-20.

21. An *en banc* Fifth Circuit decision stated: "[The district court] may, within the bounds of discretion, order *temporary* one-to-one or one-to-two hiring . . . or any other form of affirmative hiring relief until the Patrol is effectively integrated." Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974). In an unusual decision, one court upheld in principle a percentage goal which the union was ordered to meet by a cer-

drastic relief[22] which demanded a close scrutiny of the statistics.[23] At least one court overturned a district court's order for quota relief because the order was so overbroad as to constitute an abuse of discretion.[24] As concern about "reverse discrimination" increased in the late 1970's, some courts imposed quotas only where there were no ascertainable victims of reverse discrimination, or where the effects of reverse discrimination would be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons.[25] Other courts declined to impose race-conscious goals where the employer had improved the racial balance in his work force after 1965 unless there was a showing of "compelling need."[26]

The courts of appeal generally refused to uphold racial quotas in the absence of past discrimination in employment. Some courts did not permit a race-conscious remedy in the absence of a judicially determined Title VII violation,[27] although other courts upheld quotas imposed under a consent decree[28] or upon a showing of

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tain date. Rios v. Steamfitters Local 638, 501 F.2d 662 (2d Cir. 1974). The *Rios* court distinguished between "quotas" and "goals" by stating that an order for a permanent racial balance was a "quota," and an interim, temporary order to achieve a particular percentage of minorities was a "goal." *Id.* at 628 n.3.

22. Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976).

23. Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

24. EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251 (2d Cir. 1977).

25. EEOC v. Local 638, Sheet Metal Workers Int'l Assoc., 532 F.2d 821 (2d Cir. 1976); Kirkland v. N.Y. State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied,* 421 U.S. 991 (1975). *Bridgeport Guardians* and *Kirkland* were both decided under 28 U.S.C. §§ 1981 and 1983 rather than under Title VII.

26. Patterson v. American Tobacco Co., 535 F.2d 257, 274 (4th Cir.), *cert. denied,* 429 U.S. 920 (1976).

27. Cox v. Allied Chem. Corp., 538 F.2d 1094 (5th Cir. 1976), *cert. denied,* 434 U.S. 1051 (1978); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); Watkins v. United Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Cent. Power v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *cert. denied,* 425 U.S. 998 (1976); Waters v. Wis. Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973). The principle was summarized in the Fifth Circuit opinion: "In the absence of prior discrimination, a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, § 703(a) and (d)." Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 224 (5th Cir. 1977), *rev'd sub nom.,* United Steelworkers v. Weber, 443 U.S. 193 (1979).

28. EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); United States v. Wood, Wire & Metal Lathers Int'l, 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

underutilization of women and minorities in a proceeding under Executive Order 11,246.[29] The correction of general societal discrimination, absent a judicial or administrative finding of specific employment discrimination, was not sufficient to support a race-conscious, court-ordered remedy.[30]

The requirement of past discrimination to justify race-conscious affirmative action placed employers and unions on the horns of a dilemma.[31] On the one hand, it appeared to be advantageous for employers and unions to set up voluntary affirmative action programs to eliminate discrimination and protect themselves against suits by minority workers.[32] The United States Supreme Court appeared to support this type of voluntary affirmative action in *Albemarle Paper Co. v. Moody* when it declared that Congress intended Title VII to act as a spur or catalyst to lead "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[33] Several lower courts also stated that voluntary compli-

29. Exec. Order No. 11,246 requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." Exec. Order No. 11,246, 3 C.F.R. § 202(1) (1974), *reprinted in* 42 U.S.C. § 2000e (1976). The Office of Federal Contract Compliance, the administrative agency charged with enforcing Executive Order No. 11,246, provides in its regulations that employers must set goals for hiring and promotion to overcome underutilization of women and minorities. "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 (1979).

Courts have upheld race-conscious affirmative action plans devised under Executive Order No. 11,246 in the absence of judicial determination of past discrimination. *See, e.g.*, Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* Schuwerk, *The Philadelphia Plan: A Study in The Dynamics of Executive Power*, 39 UNIV. OF CHI. L.J. 723 (1972).

30. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.*, United Steel Workers v. Weber, 443 U.S. 193 (1979); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

31. *See, e.g.*, EEOC v. Contour Chair Lounge Co., 596 F.2d 809 (8th Cir. 1979). There the Eighth Circuit upheld a voluntary affirmative action program under a conciliation agreement between the employer and the EEOC in the absence of a finding of racial discrimination. The court, however, noted that such programs had been attacked as reverse discrimination and that the current status of such systems was "doubtful to say the least." *Id.* at 814.

32. 57 N.C.L. REV. 695 (1979).

33. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

ance was preferable to court enforcement,[34] and some state and district courts actually imposed an obligation to fashion affirmative programs in the absence of a judicial finding of discrimination.[35]

Two governmental agencies charged with ending employment discrimination shared this preference for voluntary affirmative action. In its affirmative action guidelines, the Equal Employment Opportunity Commission (EEOC) took the position that an affirmative action plan based on reasonable self analysis by the employer or the union would protect the employer or union from a determination of reasonable cause in an EEOC proceeding.[36] The Office of Federal Contract Compliance Programs, which administers Executive Order 11,246 prohibiting discrimination by contractors dealing with the federal government,[37] required employers to set goals for hiring and promotion to overcome underutilization of women and minorities as determined by the contractor's work force analysis.[38]

On the other hand, such voluntary affirmative action in the absence of past discrimination exposed the employer and the union to charges of reverse discrimination by whites.[39] In *Regents of the University of California v. Bakke*,[40] a highly publicized reverse discrimination case, the United States Supreme Court held that the University of California's voluntary affirmative action plan was unconstitutional in that it violated the equal protection rights of Alan Bakke, a white applicant to the University's medical school. *Bakke*, however, was not dispositive of the issue of voluntary affirmative action by a private employer since the divided *Bakke* Court[41] addressed affirmative action undertaken by a governmental

34. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). In dictum, the Eighth Circuit observed: "[T]he presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." Carter v. Gallagher, 452 F.2d 315, 330 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

35. Chrapliwy v. Uniroyal, Inc., 458 F.Supp. 252 (N.D. Ind. 1977); Lindsay v. City of Seattle, 548 P.2d 320 (Wash.), *cert. denied*, 429 U.S. 886 (1976).

36. EEOC: Affirmative Action Guidelines, 29 C.F.R. 1608 (1979). A determination of reasonable cause to believe a discrimination charge is true enables the EEOC to make endeavors to eliminate the alleged discriminatory practice. 42 U.S.C. § 2000e-5(b) (1976).

37. 41 C.F.R. § 60-1.6 (1978).

38. 41 C.F.R. § 60-2.11 (1978).

39. Cramer v. Va. Commonwealth Univ., 415 F.Supp. 673 (E.D. Va. 1976). The United States Supreme Court has held that Title VII protects whites as well as blacks. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

40. Regents of the Univ. of Cal. v. Bakke., 438 U.S. 265 (1978).

41. Justice Powell announced the judgment of the Court, which affirmed in part and

employer in a context other than employment, and the case turned on constitutional grounds rather than Title VII principles. The private employer or union wishing to take voluntary race-conscious affirmative action after *Bakke* was still faced with the dilemma of either admitting past discrimination or facing reverse discrimination charges.[42]

It was this dilemma which the United State Supreme Court addressed in *United Steelworkers v. Weber.*[43] The majority opinion stated that Congress did not intend to prohibit all voluntary, race-conscious affirmative action.[44] The legislative history of Title VII and the historical context out of which the Act arose, according to the Court, made it clear that an interpretation forbidding all race-conscious affirmative action would bring about a result completely at variance with the purpose of the Act.[45] The majority reasoned that since the concern of Congress was " 'the plight of the Negro in our economy,' " the goal of the Civil Rights Act could not be achieved unless the economic position of blacks improved.[46] The Court pointed out that it would be ironic if Title VII were construed to prohibit all voluntary, private efforts to abolish the very patterns of racial segregation which triggered the Act.[47]

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reversed in part. Justices Brennan, White, Marshall, and Blackmun filed an opinion concurring in part and dissenting in part. Justices White, Marshall, and Blackmun filed separate opinions. Justice Stevens concurred in part and dissented in part and filed an opinion in which Justices Burger, Stewart, and Rehnquist joined. *Id.*

42. Judge Wisdom summed up the dilemma in his dissent in the Fifth Circuit opinion in *Weber*:

> The employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable. Their good faith in attempting to comply with the law will not save them from liability. . . .

Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.*, United Steel Workers v. Weber, 443 U.S. 193 (1979). *See also* Hollander v. Sears, Roebuck & Co., 450 F.Supp. 496 (D. Conn. 1978), where it was held that the voluntary adoption of an affirmative action program did not insulate the employer from a challenge of reverse discrimination. *See also* Note, *Employment Discrimination*—Weber v. Kaiser Aluminum & Chemical Corp.: *Does Title VII Limit Executive Order 11246?*, 57 N.C. L. REV. 695 (1979).

43. 443 U.S. 193 (1979).

44. *Id.* at 203.

45. *Id.* at 202.

46. *Id.*

47. *Id.* at 204

The Court analyzed both the language and the legislative history of section 703(j) and concluded that Congress did not intend to prohibit all voluntary, race-conscious affirmative action.[48] The language of section 703(j) states that nothing shall be interpreted to "require" any employer to grant preferential treatment; and the majority pointed out that Congress could have written that nothing shall be interpreted to "permit" voluntary affirmative action if that had been its intent.[49]

The majority opinion demonstrated that Congressional debate revealed that section 703(j) was designed to satisfy the concern of opponents who feared that Title VII would lead to undue governmental interference with business. The Court reasoned that prohibition of all voluntary, private, race-conscious affirmative action would defeat the desire of Congress to avoid undue federal regulation of private business by increasing the power of the federal government and diminishing traditional management perogatives.[50]

The Court did not define the demarcation between permissible and impermissible voluntary affirmative action plans in detail, but it did explain why the Kaiser-USWA plan fell on the permissible side of the line. First, the Court noted that the purposes of the plan mirrored the purposes of the Act: both were designed to break down old patterns of racial segregation, and both were intended to open employment opportunities for blacks in occupations traditionally closed to them.[51] Second, the Court reasoned that the plan did not unnecessarily interfere with the interests of white employees. The plan did not require the discharge of white workers and their replacement with blacks; it did not create an absolute bar to the advancement of white employees, since fifty percent of the workers admitted to the training program were white; and it was intended as a temporary measure not to maintain a racial balance, but simply to eliminate an existing racial imbalance.[52]

The majority held that such an affirmative action plan was permissible to correct a "conspicuous racial imbalance in traditionally segregated job categories."[53] This stringent standard nevertheless does not foreclose future reverse discrimination suits alto-

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48. *Id.* at 207
49. *Id.*
50. *Id.*
51. *Id.* at 208.
52. *Id.*
53. *Id.* at 209.

gether. Whites as well as blacks can still claim protection under Title VII.[54]

The *Weber* court emphasized the narrowness of its holding, leaving a number of questions unanswered.[55] The opinion applies to a race-conscious, voluntary affirmative action plan designed to correct discrimination against blacks and does not reach similar plans to eliminate discrimination against women, religious groups, or other minorities.[56] Whether the *Weber* rationale would apply to a voluntary, race-conscious plan which operated to dilute existing

54. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). The Court states that *Weber* is addressed to the issue of "whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences," a question the Court noted was expressly left open in *McDonald*. The Court also observed that Weber's reliance on *McDonald* was misplaced. United Steelworkers v. Weber, 443 U.S. 193, 200 (1979).

One court has interpreted *Weber* as severely limiting the application of *McDonald*. In Meyers v. Ford Motor Co., 480 F. Supp. 894 (W.D. Mo. 1979), a white automobile dealer brought suit against Ford Motor Co. to recover the amount of his initial investment after his dealership failed. Relying on *McDonald*, the plaintiff alleged race discrimination in that Ford had reimbursed a black dealer, but had denied reimbursement to him. The court granted defendant's motion for summary judgment on the ground that the *McDonald* principle was limited to "invidious and injurious discrimination." *Weber*, by contrast, was found to be expandable "to allow benefits to be distributed by private employers in less than even-handed fashion, at least where the purpose is benign with respect to the white person who has been denied the benefits." Meyers v. Ford Motor Co., 480 F. Supp. at 899.

The fact that *Weber* does not preclude successful reverse discrimination suits is illustrated in Harmon v. San Diego Co., 477 F.Supp. 1084 (S.D. Cal. 1979), where the district court held that the employer violated Title VII by refusing to hire a white male even though the personnel manager believed a consent decree required him to appoint a female. The court distinguished *Weber* on the grounds that in the case at bar there was no affirmative action plan, the purpose of the employer's action was to comply with his understanding of a decree rather than to break down old patterns of segregation, and the employer's view created an absolute bar to any white male's advancement.

55. The *Weber* Court gave the word "voluntary" a broader meaning than the facts required. The Kaiser-USWA plan was motivated by their concern that the Office of Federal Contract Compliance would impose sanctions against them under Exec. Order No. 11,246. It is therefore questionable whether the plan was truly "voluntary." Weber v. Kaiser Aluminum & Chem. Corp., 415 F.Supp. 761 (E.D. La. 1976). The Supreme Court, however, did not limit its holding to these facts, and stated that the disposition of the case made consideration of the point unnecessary. United Steelworkers v. Weber, 443 U.S. 193, 209 n.9 (1979).

Weber has been cited for its flexible definition of "voluntary" in a later case where an employer agreed to a plan under threat of strike from the union. Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979). *See also* Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1343 (9th Cir. 1979).

56. *Weber*, however, has been cited in a case concerning alleged discrimination against women and other minorities as well as blacks for the proposition that special efforts must be taken to correct past inequities and injustices in employment patterns. *See* United States v. New York, 475 F. Supp. 1103 (N.D.N.Y. 1979).

rights of white workers under a seniority system is not clear.[57] Since the decision is limited to voluntary, race-conscious affirmative action undertaken by a private employer, the Court does not reach constitutional violations that might result from such plans voluntarily established by governmental employers; and *Weber* does not overrule *Bakke,* which dealt with a voluntary affirmative action program undertaken by a state supported educational institution.[58]

The Court does not address the procedural question of whether the employer or the employee bears the burden of show-

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57. Section 703(h) of Title VII provides in part: "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . ." 42 U.S.C. § 2000e-2(h) (1976).

Although section 703(h) exempts bona fide seniority systems from the coverage of the Act, retroactive seniority is a permissible remedy for past, post-Act discrimination in accordance with the "makewhole" purpose of Title VII. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). Voluntary affirmative action in the form of stepped-up seniority for blacks might arguably be permissible under *Weber.*

However, the Supreme Court has also stressed the inviolability of existing contract seniority rights under a valid collective bargaining agreement. Trans World Airlines, Inc. v. Hardison, 432 U.S. 135 (1977). The Court has adopted the "rightful place" theory, under which retroactive seniority is deemed merely to place the victim of discrimination in the position he would have been but for the unlawful discrimination. Teamsters v. United States, 431 U.S. 324 (1977). Retroactive seniority is permissible under this theory only when white workers are not displaced by blacks. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.,* United Steel Workers v. Weber, 443 U.S. 193 (1979); United States v. Elevator Constructors Local 5, 538 F.2d 1012 (3d Cir. 1976). The Kaiser-USWA plan created a new training program and did not interfere with pre-existing rights Brian Weber may have claimed under a seniority system. No rights were taken away from white workers; rather, new rights were vested in both black and white applicants for the training program. Given this fact situation, it is not clear whether *Weber* would permit a voluntary, race-conscious affirmative action program that divested white workers of existing seniority rights.

Weber nevertheless has been applied to uphold a voluntary affirmative action plan which resulted in a seniority override in favor of minority workers in an existing seniority system. The court in that case noted that the decision represented "an extension of the *Weber* rationale, because here the issue of pre-existing seniority rights is squarely before this Court." Tangren v. Wackenhut Servs. Inc., 480 F. Supp. 539 (D. Nev. 1979).

58. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *Weber,* moreover, does not disturb the *Bakke* prohibition against affirmative action designed to correct societal discrimination. The *Weber* holding is limited not only to discrimination in employment, but to discrimination in "traditionally segregated job categories." United Steelworkers v. Weber, 443 U.S. 193, 209 (1979).

Since *Weber* on its facts is limited to private employment practices, courts have declined to apply its doctrine to cases involving state action. *See* Mosley v. Goodyear Tire & Rubber Co., 612 F.2d 187 (5th Cir. 1980); Spirit v. Teachers Ins. & Annuity Ass'n, 475 F.Supp. 1298 (S.D.N.Y. 1979).

ing that an affirmative action plan is designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories."[59] It is not clear from the opinion whether the employer must show that the plan *does* fall within the protected category or whether the employee must show the plan is *not* protected under *Weber*.

The *Weber* Court left open the question of what constitutes a "conspicuous racial imbalance" that will justify a race-conscious, voluntary affirmative action program. "Conspicuous racial imbalance" clearly embraces more than an "arguable violation" of Title VII[60] and appears to include the Executive Order 11,246 standard of "underutilization" of minorities.[61] *Weber* apparently eliminates the "strict scrutiny" and "compelling need" limitations set on court-ordered affirmative action by the circuit courts.[62] Since the *Weber* Court adopts much the same reasoning as the EEOC affirmative action guidelines, an employer or union appears to be safe in applying the EEOC standard of "reasonable self analysis" before undertaking a voluntary, race-conscious affirmative action program.[63]

The impact of *Weber* will ultimately rest on its application by the lower federal courts in employment discrimination cases.[64] A

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59. United Steelworkers v. Weber, 443 U.S. 193, 209 (1979).

60. In his concurrence, Justice Blackmun argued that voluntary affirmative action should be granted only on an "arguable violation" of Title VII. United Steelworkers v. Weber, 443 U.S. 193, 211 (Blackmun J., concurring). The "arguable violation" standard was also supported by Judge Wisdom in his dissent in Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977). The arguable violation standard would require that an employer or union impose voluntary, race-conscious affirmative action only when a prima facie violation of Title VII could be established. Such a prima facie showing does not amount to a violation of Title VII but creates a rebuttable presumption of discrimination which the employer or union can overcome. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Proponents of this arguable violation theory pointed out that since a prima facie inference of discrimination does not amount to an admission of a Title VII violation, the employer or union could justify a race-conscious affirmative action program without exposing himself to liability in discrimination suits by black workers. *See* Note, *Employment Discrimination-* Weber v. Kaiser Aluminum & Chemical Corp.: *Does Title VII Limit Executive Order 11,246?* 57 N.C. L. REV. 695 (1979). *But see* 12 GA. L. REV. 669 (1978).

61. 41 C.F.R. § 60-2 (1978).

62. Rios v. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

63. 29 C.F.R. 1608 (1979).

64. Lower court decisions since *Weber* illustrate the sort of protection employers and unions can expect under the *Weber* doctrine. In Detroit Police Officer's Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), the court reversed the district court's finding that a voluntary affirmative action plan providing for a fifty-fifty ratio of blacks and whites on the Detroit

recent case out of Arkansas, *Taylor v. Teletype Corp.*,[65] suggests that *Weber* may be given a broad reading in the Eighth Circuit. In *Taylor*, Judge Arnold cited *Weber* to support a finding that a black plaintiff had established a *prima facie* case of racial discrimination; neither voluntary affirmative action nor reverse discrimination were at issue. Rather, the court relied on *Weber* for the Supreme Court's statement of the Congressional purpose behind the Civil Rights Act of 1964.[66] The impact of *Weber* thus may rest in its reaffirmation of the commitment of our courts and legislature to end racial discrimination in employment.

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police force violated Title VII. The court noted that even in the absence of discrimination which would give rise to legal liability, the test of whether a voluntary plan was permissible under *Weber* was whether the action taken was consistent with the anti-discrimination policy of Title VII.

In Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979), the court held against white male employees who challenged affirmative action provisions of a collective bargaining agreement on Title VII grounds. Applying *Weber*, the court found that the collective bargaining agreement's seniority override provision in favor of minority workers mirrored the purposes of Title VII and did not unnecessarily trammel the interests of white employees.

The court in United States v. New Orleans Public Serv., Inc., 480 F. Supp. 705 (E.D. La. 1979) observed that in the light of *Weber*, the defendant could not argue that his adoption of affirmative action programs would expose him to possible reverse discrimination suits.

Weber has also been cited to support a finding of legality in a consent decree agreed upon by both parties. Carson v. American Brands, Inc., 606 F.2d 420 (4th Cir. 1979). The Fourth Circuit nevertheless has made it clear that *Weber* does not command any affirmative action not required by Title VII. Wright v. National Archives & Records Serv., 609 F.2d 702 (4th Cir. 1979).

Several courts have cited *Weber* for the proposition that voluntary affirmative action is commendable and within the spirit of the Civil Rights Act of 1964. *See, e.g.*, Hamilton v. Gen. Motors Corp., 606 F.2d 576 (5th Cir. 1979); Shaw v. Library of Congress, 479 F. Supp. 945 (D.D.C. 1979).

65. Taylor v. Teletype Corp., 475 F. Supp. 958 (E.D. Ark. 1979).

66. The opinion stated:

> [T]he Court is mindful of the Supreme Court's recent opinion in *United Steelworkers of America v. Weber*, ___ U.S. ___, 99 S.Ct. 2721, 61 L.Ed. 2d 480 (1979). The Supreme Court referred in particular to the remarks of Senator Clark during debate on the bill that included what was to become Title VII: high unemployment among blacks " 'is a social malaise and a social situation which we should not tolerate. That is one of the principle reasons why this bill should pass.' " . . . Yet, 15 years after the passage of the Act, the problem is still with us. Last year black unemployment was 129% higher than white unemployment. . . . Title VII may properly be construed with the purpose of Congress to redress that inequity in mind.

Id. at 964.