ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

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MAY 2006

The Eighth Circuit Court of Appeals overturns Affirmative Action Plan where plan was not narrowly tailored to remedy past discrimination and criticized the "rounding" method used by the employer to set hiring and promotion goals.

Employers May Not Use Affirmative Action Goals to Justify Hiring Preferences

By Alissa A. Horvitz and George E. Chaffey

On May 1, 2006, the United States Court of Appeals for the Eighth Circuit issued a decision in *Kohlbek, et al. v. City of Omaha*, No. 04-2060, involving the reverse discrimination claims of several firefighters who were passed over for promotion in favor of minorities who were ranked lower on eligibility lists.

The affirmative action plan at issue in this case was a 2002 Affirmative Action Plan, which the city developed "consistent with its interpretation of the Office of Federal Contracting [sic] Compliance Programs Guidelines on Affirmative Action Programs," citing the OFCCP's regulations at 41 CFR Part 60-2.1 et seq. The 2002 plan was the latest in a series of affirmative action programs that the City implemented as a result of a past finding of discrimination. Although admitting that the OFCCP's regulations were not binding on municipalities, the court acknowledged that the City calculated its availability estimates relying on OFCCP's regulations at 41 C.F.R. § 60-2.14(c). In addition, the city established placement goals, "[w]hen the percentage of minorities . . . employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group," citing 41 C.F.R. § 60-2.15.

The court was highly critical of the City's use of rounded numbers, however, in setting goals:

> Omaha determines that an underutilization exists whenever the minority representation in a particular position is less than the goal. If the number of individuals needed to meet a particular goal does not equate exactly to a whole number, the number is rounded, so that 0 to 0.4 does not constitute a person and 0.5 and above equates to a full additional person. This rule was referred to by Omaha's expert as a "half person rule," and is a hybrid of the "any difference" and "whole person" rules.

Finding that the City's 2002 Affirmative Action Plan was not narrowly tailored to remedy past discrimination, the court held that the relationship of Omaha's goals to the relevant labor market was not sufficiently precise to withstand court scrutiny. A disparity between actual hiring levels and expected hiring levels does not necessarily demonstrate discrimination, the court observed. Rather, numbers must be statistically significant before the court can conclude that any apparent racial disparity results from some factor other than chance.

The half person rule did not require a statistically significant showing of discrimination before triggering a racial preference. The half person rule triggered racial classifications in more situations than if a test of statistical significance were

used to determine whether discrimination occurred and thus was not sufficiently narrowly tailored to withstand scrutiny.

What is the Impact of this Decision on Government Contractors?

Public sector government contractors are left with one conclusion – they may not set goals and use any racial classifications unless there is a statistically significant difference between actual employment and availability estimates.

However, private sector government contractors still have more latitude. In preparing affirmative action plans, many contractors and their affirmative action preparers use tests other than those of statistical significance in determining when to set placement goals. Some contractors use the "any difference" rule, which is the test most favorable to the government, and others use the 80% rule, which is often perceived as an acceptable middle ground between the "any difference" rule and a test of statistical significance. Many employers are committed to improving the representation of women and minorities in their workforces and perceive that setting of goals using the most precise and narrow calculations – tests of statistical significance – will not serve the organization well in the long run. Setting goals using the 80% rule, with or without "whole person rules," enables employers to set goals more aggressively.

Those tests continue to be acceptable for non-public employers because the same level of scrutiny does not apply to them. But it would be a good time to refresh managers' recollections that it is never acceptable to make any employment decisions based on race or gender. The setting of a placement goal in an affirmative action plan means that *recruiters* have an added burden to try to ensure that *applicant pools* contain sufficient percentages of qualified women and minorities; it does not give a manager justification to hire someone because he or she is a minority, even if there is a goal in the job group. At all times, the most qualified person must be selected for the position, without regard to race, gender or any other protected category.

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