



1991

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Recommended Citation

Scott, Dow and Little, Beverly L.. Affirmative Action: New Interpretations and Realities. *Human Resource Planning Journal*, 14, 3: 177-182, 1991. Retrieved from Loyola eCommons, School of Business: Faculty Publications and Other Works,

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Affirmative Action: New Interpretations and Realities

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Executive Summary

Affirmative action emerged during the 1960s as a government-mandated strategy for rectifying the effects of past discrimination. Although the goal of providing equal opportunity for all citizens regardless of race or gender has never been questioned seriously, controversy has swirled around affirmative action with claims by non-minorities of "reverse discrimination" and complaints by employers of coercion to hire unqualified job applicants. This paper examines the relevance of affirmative action for the 1990s in light of changes in public policy and changes in society. It suggests that the judicious use of affirmative action can increase a company's competitiveness in increasingly diverse product and labor markets.

Two trends emerged in the 1980s that reshaped some of the basic tenets of corporate human resource (HR) planning. On the one hand, several 1989 Supreme Court decisions that addressed discrimination and affirmative action in the workplace sparked much discussion and controversy. It was argued that minority rights in the workplace (1) were gutted; others maintained that Equal Employment Opportunity (EEO) defenses were relying on the same standard as other civil cases. The Bush administration and Congress have responded to the shift in the courts by attempting to articulate the country's stance toward equal opportunity and affirmative action through new civil rights legislation.

On the other hand, reports such as "Workforce 2000: Work and Workers for the 21st

Century" (1987) apprised corporate America of ensuing changes in the work force and labor markets. The bulk of new entrants into the labor force during the 1990s are going to be older persons, or persons from a minority background, or immigrants, or females. Furthermore, there will be fewer qualified applicants from which to choose because far fewer people will be entering the labor force and those who do will be less skilled than the workers of the 1980s.

On the surface, these two trends appear to be contradictory. Simultaneous predictions of the death of affirmative action programs and projections of a work force composed primarily of women and minorities must have HR planners wondering which future scenario to address—one with less concern for women and minorities or one with more. Rather than ignoring one or both of these conflicting trends, HR planners should consider affirmative action as a creative solution to these dual problems. Affirmative action need not be viewed only as a response to judicial and legislative intrusions, but as a proactive tool for increasing a company's competitive posture in changing labor and consumer markets.

This article examines the legal imperatives and the business realities that imply that affirmative action is far from an obsolete concept. Suggestions are made as to how affirmative action can be incorporated into HR plans for the 1990s.

Inception of Affirmative Action

Laws concerning equal employment opportunity emerged in the 1960s as a way to ad-

dress discriminatory employment practices that were widespread in the United States. Title VII of the Civil Rights Act of 1964 made it unlawful for employers covered by the Act to discriminate in the hiring, discharging, or treatment of an employee with respect to that person's race, color, religion, sex, or national origin. The term "affirmative action" was coined by the Johnson administration in 1965 as part of Executive Order 11246, which stated that U.S. policy was to provide equal employment and to rectify the effects of past discrimination. This concept was based on the idea that merely ceasing to do harm does not undo the wrongs of the past; hence, affirmative action programs have as their goal the equalization of opportunities in employment and government programs for historically disadvantaged groups. This can be done by taking into consideration the characteristics (race, gender, etc.) which have been used to deny those groups equal treatment in the past.

Since their inception, affirmative action programs have been a lightning rod of sorts—leading, among other things, to charges of reverse discrimination by nonminorities who were denied admission, hiring, or promotion because of preferential treatment awarded to minorities. Suits were brought on the basis of the equal protection clause of the 14th amendment or Title VII, thus, ensuring that the direction of affirmative action's course would be shaped largely by the courts.

Affirmative Action as Defined by the Courts

Due to the absence of legislative direction, those in search of guidance concerning the use of affirmative action have referred to opinions of the U.S. Supreme Court. Such court watching has proven to be frustrating, for the Court has addressed each case individually and has refused to delineate "standards" for affirmative action plans that are applicable in every case. For example, the Court denied the use of a quota for admission to a medical school in the classic reverse discrimination case, *Bakke v University of California* (U.S. Supreme Court, 1978)

but later approved the use of quotas in admission to a training (in *Weber v Steelworkers*, U.S. Supreme Court, 1979) and in admission to a State Trooper force (in *U.S. v Paradise*, U.S. Supreme Court, 1987).

Until recently, even in those cases where quotas were disallowed, the use of race or gender as a "plus factor" in decision making was allowed by the Court. This concept was first endorsed in the *Bakke* case and was further strengthened in *Johnson v Santa Clara County Transportation Department* (U.S. Supreme Court, 1987), in which the Supreme Court upheld the promotion of a qualified woman over a more qualified man.

Although the Court has not been willing to delineate standards for all affirmative action plans, certain requirements have been applied in most cases and are viewed as comprehensive. Voluntary affirmative action plans that have withstood the scrutiny of the Court have incorporated the following characteristics:

1. The plan is remedial. (Although it may not admit prior discrimination, it does address a past or current deficiency.)
2. The plan does not unnecessarily trammel nonminority interests. (There is no displacement of current employees.)
3. The plan does not exclude uncovered groups. (Whites or males are not excluded from certain positions.)
4. The plan is flexible. (Waivers are possible if no minority candidates are available.)
5. The plan is temporary. (It does not seek to maintain a certain work force, only to obtain it.)
6. Seniority systems not designed to be discriminatory are not to be interfered with, in order to protect the jobs of newly hired persons. [See *U.S. Steelworkers v Weber* and *Memphis Firefighters v Stotts*, U.S. Supreme Court (1984), and *Wygant v Jackson Board of Education*, U.S. Supreme Court (1986).]

Several decisions handed down by the Supreme Court in 1989 have been interpreted as

weakening the basis for equal employment opportunity and affirmative action. In *Martin v Wilks* (U.S. Supreme Court, 1989) the Court upheld the right of white Birmingham firefighters to challenge a court-approved affirmative action consent decree because a "person cannot be deprived of his legal rights in a proceeding to which he is not a party." While this decision does not undermine affirmative action totally, it opens court-approved discrimination settlements and judgments resulting from trial (*EEO Reporter*, July 1989) to litigation. In the same session, in *Lorance v AT&T* (U.S. Supreme Court, 1989) the Court ruled against the plaintiff whose claim of a discriminatory seniority system was made not at the time of the implementation of the system but after she had been affected by the system. These cases, combined with *Antonio v Wards Cove Packing Company* (U.S. Supreme Court, 1989)—which did not address affirmative action but shifted the burden of proof in disparate impact cases—are viewed as placing a greater burden on minority plaintiffs.

Another landmark case of the 1989 session of the Supreme Court, *Richmond v J.A. Croson Company* (U.S. Supreme Court, 1989) overturned the Richmond, Virginia Minority Business Enterprise (MBE) set-aside program. This decision set forth a framework whereby discrimination must be proven before a state or municipality adopts racial preferences in contract awards. Although the case addressed only state and local government quotas, it sent a message—the Richmond plan was tailored after those used by many other states and municipalities.

In light of these changes in the judicial branch's attitudes toward affirmative action, one would expect companies to question their commitment to affirmative action, or at least their approach to it. But this commitment should not be abandoned hastily. The Civil Rights Act of 1990, which sought to alter the effects of some of the Supreme Court decisions of 1989, was not enacted, but the impetus behind it has not disappeared. President Bush, in his 1991 State of the Union address, reiterated his commitment to present an alternative version of the bill. A compromise position between that of the

Civil Rights Act of 1990 and that of the Supreme Court seems imminent.

Beyond legal mandates, however, there is another, perhaps stronger, reason for American businesses to consider affirmative action as a strategy for the 1990s. The need to be competitive for market share in an increasingly diverse consumer market and in an ever-tightening labor market may lead firms to turn to affirmative action as a strategic device.

Business Imperatives for Affirmative Action

The composition of the future labor force in the U.S. provides a major impetus for a commitment to affirmative action. It is estimated that during the 1990s the entry rates into the work force for women, blacks, Asians, and Hispanics will increase, resulting in these groups becoming a growing percentage of the total labor force. White, nonHispanic men will account for only 31% of new entrants into the work force during the decade (Fullerton, 1989). These predictions indicate that firms unable to attract women and minorities will have difficulty obtaining the necessary talent to do business. It would seem that firms with minorities and women well represented in the upper levels of the organization will have an advantage in attracting persons from these same groups into lower-level positions. A representative of the Association of General Contractors, a group long opposed to preferential hiring, recently said, "You would be cutting off your nose to spite your face if you didn't have an active outreach program today." (Dwyer, 1989).

In order to compete in this diverse labor market, employers will need to create environments that provide for growth and development of the various segments of the U.S. population, and be willing to invest in training programs to help new people acquire needed skills. In the words of Derek Bok (1985), implementing affirmative action means taking the "long view." A leading authority on cultural diversity, R. Roosevelt Thomas, predicts that affirmative action plans will be needed for at least twenty-five years more

before cultural diversity will be achieved in most American corporations. (Thomas, 1990a).

Another compelling reason for including diverse segments of society in a company's work force is to gain a competitive advantage in market share. Employers who have diversity in their work force may be able to better serve customers who come from the increasingly diverse U.S. population. Already, one in four Americans is defined as Hispanic or nonwhite (Henry, 1990). Major companies in the service industries have found that having service providers similar to their "customer base" increases their credibility. AT&T views everyone as potential customers; hence it realizes that it realistically cannot be an all-white, all-male company. Furthermore, diversity is important at higher levels of any firm, where important marketing and production decisions are made. For instance, if a major component of a market is women or a particular minority group, individual employees from one of these groups may be more sensitive to the needs of the targeted market group.¹

Affirmative action strategies in the 1990s will be dictated by both public mandate and by changes in the demographics of the labor force. Women and minority groups, who still feel the effects of discrimination, will continue to exert political pressure for affirmative action legislation. Interest in the new civil rights legislation demonstrates that the U.S. is not ready to back off of its commitment to equal employment opportunity; and, while the courts may have made it easier for companies to defend themselves against charges of unfair discrimination, the courts still recognize the need for protection. In addition, due to the future scarcity of labor and the changing demographics of the labor force, affirmative action programs can contribute to the overall success of an organization.

Affirmative Action Strategies for the 1990s

What will constitute effective affirmative action during the 1990s? Below are some general

¹For further discussion of AT&T, Avon, and other companies, see R. Roosevelt Thomas, "From Affirmative Action to Affirming Diversity," *Harvard Business Review*, (March-April, 1990):107, 1990.

guidelines and some specific suggestions as to how an affirmative action system might be approached in light of current trends.

First, the affirmative action plan must avoid "tokenism" and statistical schemes, both of which are irresponsible and do more harm than good (U.S. Commission on Civil Rights, 1981). Using affirmative action as an excuse to hire or promote unqualified job applicants not only jeopardizes the productivity of the company, but it also perpetuates stereotypes and prejudices. Preferential policies should benefit only those persons who are qualified. For example, in *Johnson v Santa Clara County Transportation Agency*, the Supreme Court upheld the promotion of a woman over a man with equal experience who scored two points higher on a 100-point qualifying test. They both met minimum qualifications, and gender was judged to be a legal plus factor.

Secondly, selection criteria and performance measures must be reexamined to ensure that qualified minorities and women are not excluded. Often, certain job requirements become selection criteria simply because a previous job incumbent possessed those attributes, not because they are needed to perform the job competently. In other cases, changes in technology or the structure of a job can make stated job requirements obsolete. For example, the stereotype of a big, burly male truck driver originated during an era when driving a truck required considerable physical strength. Today's trucks, equipped with power steering, power brakes, and automatic transmissions, make this job less physically demanding. Furthermore, basic competency is enough for many jobs. In competitive industries, organizations often cut costs by hiring minimally qualified people and developing them into effective employees. Finally, restrictive selection criteria may not serve the company's interests. Although an older employee may not be the fastest at a job, experience and dependability might make the older person the most qualified for the job overall.

Thirdly, rather than lowering standards to hire on the basis of quotas, the affirmative action plan should focus on expanding the pool of qualified applicants to reflect the diversity of the

market and the labor force relevant to the firm. Recruiting advertisements should be scrutinized carefully to eliminate subtle images that could discourage applications by minorities or women. (Paddison (1990) offers specific examples.) Aggressive recruitment of minorities and women can help ensure that qualified applicants are found. Making an extra effort to find qualified minorities and then screening them on the same criteria as other applicants demonstrates responsible affirmative action and a commitment to cultural diversity.

Fourth, good affirmative action plans will provide education and development opportunities for all new and existing employees. Filling in gaps left by prior education and providing industry- and company-specific knowledge help ensure that qualified applicants are available when promotional opportunities occur.

Fifth, a good plan will provide for monitoring the inclusion of and performance of minorities and females. Management needs to know if all groups are being recruited successfully into the organization and if they are being considered fairly for positions of higher responsibility. Traditional affirmative action planning can be an effective tool for this monitoring process. Such planning requires that goals (not quotas) be set, methods for accomplishing the goals be detailed, and a procedure for monitoring results be established. Affirmative action plans simply represent a sound technique for managing human resources.

Sixth, acculturation of employees at all levels will reinforce the values of fair treatment and validate the reasons for making extra efforts on behalf of minorities and women. In order to overcome the "revolving door" syndrome, organizations should communicate to all employees why it is a sound business practice to hire and promote minorities. Not only do managers, supervisors, and employees need to be held responsible for negative behaviors that could discourage integration of women and minorities, but positive behaviors should be rewarded. For example, at Gannett, managerial bonus pay is based partially on promotion and development of women and minorities in the manager's department ("Welcome to the Woman-Friendly Company," 1990).

Seventh, companies hoping to attract women and minorities should examine their employment policies to ensure they are offering applicants an attractive employment package, not just the benefits convenient to the company, or those benefits preferred by traditionally hired employees (such as white males with spouses who are not employed outside the home). In competitive labor markets, trying to outbid other employers with wages may be a very expensive solution to labor shortages. Rather, recognition that different employees place different values on the rewards that companies offer allows benefits to be used competitively. Many women, for instance, are more concerned than men with child care benefits, flexible work schedules, and time off, all of which help them balance work and family responsibilities.

Eighth, companies should reexamine their affirmative action efforts. Often, these efforts have met with considerable resentment because they were seen as benefiting a narrow constituency at the expense of others or as forced reactions to government mandates. The efforts of affirmative action should be refocused to encourage the development of all employees and to increase the cultural diversity of the firm. Further, because of the negative image associated with affirmative action, the refocusing may include even a new name for the program. Encouraging and utilizing cultural diversity may be a much more accurate portrayal of what this program is trying to accomplish, therefore "cultural diversity" can be a more inclusive term than affirmative action: cultural diversity focuses on outcomes rather than actions being taken.

Finally, it must be recognized that although increasing the cultural diversity within a firm has benefits, employees with different values and needs may be more difficult to manage. Training managers and supervisors to deal with such differences is essential. Even if everyone speaks English, differences in interpretation of terminology or body language can be a barrier to communication. Training in the skills of communication and cultural sensitivity can be carried out through the use of specialized programs such as the Copeland-Grigg videotape series *Valuing Diversity* (Haight, 1990).

Conclusion

To be competitive, firms in the 1990s must have affirmative action plans that are forward looking, not reactive. Although discriminatory practices of the past cannot be ignored, employers must focus on the best utilization of current employees and future talent. Minorities and women will be included in the work force not because they are minority members or women, but because they are absolutely essential to meeting the competitive challenges of the decade. Once fundamental changes have been made in organizations, hiring and promoting all types of people will be a self-perpetuating phenomenon, not just a response to a program.

Eventually companies should have only one focus on their HR program—to maximize each individual's opportunity to grow personally and to contribute to the organization. As long as an identifiable group of potential employees is not given the opportunity to participate fully, it is wise to engage in affirmative action efforts. Achieving cultural diversity does not come naturally for many firms, and, as was recognized in the 1960s, ceasing old patterns of behavior alone will not undo the past. Therefore, focusing on the historical intent of affirmative action and the lessons learned from its implementation will benefit those companies that wish to diversify their work forces for better competitive positions in the future.

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Biographical Sketch

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