Time Running Out on Minority Preferences in Private Workplace

JAMES P. SCANLAN

Legal Times
Nov. 20, 1989

Sooner or later, the Supreme Court will be called on to re-examine a basic feature of affirmative action: voluntary practices by private employers that favor minority workers over white employees. That examination could yield a result that few have anticipated.

Some may consider the permissibility of private affirmative-action programs to be a matter of settled law. A decade ago, the Court ruled, in *United Steelworkers v. Weber*, 443 U.S. 193 (1979), that title VII of the Civil Rights Act of 1964 does not prohibit voluntary affirmative action in employment. The justices reaffirmed *Weber* just two years ago, in *Johnson v. Santa Clara County Transportation Department*, 107 S. Ct. 1442 (1987).

But this past term's decision in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), changes expectations – even though the case seemingly has nothing to do with the validity of private affirmative action. There, the Court struck down on 14th Amendment grounds, Richmond's minority set-aside for city contractors. Although the 14th Amendment does not apply to private employers, the hostility to affirmative action shown by a majority of the Court in *Croson* may be carried over to its interpretations of Title VII and similar statutes that cover both governmental and private actors.

Writing on the Wall

Indeed, the tendency is already apparent. In enlarging the burden of proof borne by Title VII plaintiffs in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), the Court emphasized Title VII's policy of disfavoring quotas. And in expansively interpreting the rights of whites affected by race-conscious actions taken pursuant to court decrees – *Martin v. Wilks*, 109 S. Ct. 2180 (1989) – the justices rejected the same arguments about the importance of voluntary settlement of Title VII claims that had formed the linchpin of *Weber*.

At the very least, *Croson* will prompt numerous constitutional challenges to affirmative-action programs in the *public* sector. Those challenges will commonly include claims under Title VII and 42 U.S.C. 1981, as in *Mann v. City of Albany, Georgia*, No. 88-8468 (Sept. 15, 1989), where the U.S. court of Appeals for the 11th Circuit recently ordered a District Court to reconsider its decision upholding a city's affirmative-action program. Such cases will provide many opportunities to look over *Weber's* reading of Title VII. And any qualification of overruling of *Weber* will apply to the *private* sector as well.

Ironically, it is a case that ostensibly had nothing to do with affirmative action, *Patterson v. McLean Credit Union*, 109 S. Ct. 2362 (1989), that may prove to be last term's most important decision with respect to reverse discrimination in the private sector. That case, of course, became highly publicized after the Court requested argument on whether to overrule its 1976 ruling in *Runyon v. McCrary*, 427 U.S. 160. *Runyon* held that 1981's prohibition of racial discrimination in the making and enforcement of contracts applies to private parties.

(The Court unanimously declined to overturn *Runyon*, but a 5-4 majority restricted the reach of the law by ruling that 1981 does not apply to racial harassment and other aspects of on-the-job employment discrimination.)

Patterson may have two significant implications for affirmative action in the private sector. The first concerns how *Patterson* might prompt a renewed attack on *Weber*. Given the current composition of the Court, the continued vitality of *Weber* probably rests on *stare decisis*, the doctrine by which the Court adheres to its prior (even erroneous) decisions. In *Johnson v. Santa Clara County Transportation Department*, where the Court reaffirmed *Weber*, Justice John Paul Stevens found the *stare decisis* principle compelling enough to require adherence to the earlier ruling – although in Stevens' view, *Weber* was wrongly decided. But Justice Antonin Scalia, joined by Chief Justice William Rehnquist, called vigorously for overruling *Weber*. Justice Byron White, a member of the *Weber* majority, agreed.

No Encouraging Word

Patterson, then, had stood as something of a test case that would illustrate the approach the new Court (with Anthony Kennedy replacing Lewis Powell Jr.) would take toward *stare decisis* as applied to arguably erroneous statutory constructions. To the surprise of many, the entire Court had little difficulty adhering to *Runyon*, and the majority gave limited attention to the *stare decisis* issue.

Nevertheless, Kennedy's opinion cannot have encouraged supporters of *Weber*.

Specifically, Kennedy rejected Justice William Brennan Jr.'s argument that Congress' failure to overturn a statutory construction should be read as a ratification of the construction. On this point, Kennedy relied on Scalia's dissent in *Johnson* urging that *Weber* be overruled. Thus, even though the adherence to *Runyon* must generally be termed an affirmance of *stare decisis*, the vulnerability of *Weber* seems at least as great as it was prior to *Patterson*.

Unforeseen Consequences

Patterson's ultimate impact on voluntary affirmative action, however, may stem not from its influence on *Weber's* longevity but from its reaffirmation of *Runyon's* ruling that 1981 applies to private conduct. For the greatest danger to voluntary affirmative action may lie in yet another 1976 case, *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, in which the Court held that 1981 prohibits discrimination against white people. Though largely ignored in the furor over *Patterson*, the Court had consistently interpreted 1981 and Title VII quite independently, despite contentions that to do so would cause one law to interfere with the other. The weight of Court authority militates for determining whether 1981 prohibits all preferential treatment of minorities without regard to the fact that Title VII has been interpreted *not* to prohibit all preferential treatment in employment.

But the critical point here does not concern the proper interpretation of 1981. Rather, it concerns the fact that a significant portion of the current Court is strongly opposed to affirmative action. *Stare decisis* – in the forms of *Weber* and *Johnson* – may prove an obstacle to ruling that Title VII disallows voluntary affirmative action. It should not stop such an interpretation of 1981.

If 1981 were held to forbid race-conscious affirmative action, that would have broader implications than would a reversal of *Weber* (although Title VII, at issue in *Weber*, applies to race and gender, while 1981 applies only to race). In addition to barring affirmative action in employment, such a reading of 1981 would prohibit racial preference4 in education and in contracting with minority enterprises, a major aspect of corporate affirmative action.

Thus, many who now regard the *Patterson* Court's adherence to *Runyon* as a victory of limited value may one day reappraise it as an unalloyed disaster.