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Legal Developments

Affirmative Action and Reverse Discrimination: *THE DEFUNIS Case*

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Various affirmative action programs around the country are not being met with praise or accolade by a growing number of people affected by them. In many cases people simply do not understand what affirmative action really is. Some people are absolutely convinced that it is a quota system that forces universities and business firms to hire incompetent women and minorities. While this belief is mistaken, it may have a solid basis as a result of the way some affirmative action plans are applied or perceived by those trying to implement them.

Affirmative Action

"Affirmative Action" is a concept begun and promoted by the Department of Health, Education and Welfare (HEW) and the Office of Economic Opportunity (OEO). The basic purpose of affirmative action is to lower traditional barriers against women and minorities in higher paying and status jobs. The statistical data clearly shows that women and minorities have been, and are now, clustered in the lower positions in the universities. (E.g., there are very few women who are full professors and most women are lecturers, instructors, or assistant professors. This is true even where educational degrees, publications and other qualifications are equal to men's who are associate and full professors.) Affirmative action was begun to remedy this situation. It does not require universities to "hire any but the most qualified people."[1] What it does require is that universities conduct a diligent search for *qualified* women and minorities and to have documented proof of that search. It is not a quota system and it does not require that unqualified people be promoted. It merely attempts to insure that women and minorities are given equal scrutiny for faculty positions. For example, in the University of Washington's affirmative action plan (which is in excess of 200 pages, excluding appendices), nowhere does it state a quota and there is not one single reference to giving preference to unqualified women or minorities. It simply says that persons who are hiring must make a diligent search to find qualified women and minorities to fill the appropriate positions.

Unfortunately, there is a definite backlash. Employers and supervisors are complaining that there are not enough qualified women and minorities so they are being forced to hire incompetent women and blacks. Women who attained high positions before affirmative action feel that their efforts and status are being downgraded because their superiors and colleagues think that any woman in a high position is there because she is a woman, not because of her efforts, qualifications or competency. The people who are hired under affirmative action are meeting with resistance and discrimination by superiors who are convinced that they are "quota bums". But amid all this grumbling one major theme seems to emerge: people will be glad to hire and promote qualified people whether they are female, black or any other minority group. (This contention, on the part of some, is a sincere one; for others, it appears to be lip service.) Even the most strident opponents of affirmative action suggest that more "appropriate emphases [be put upon] increasing the supply of well-prepared women and blacks with doctoral degrees."[2] One must come to the conclusion, then, that education is the key to raising the status of women and minorities. A recent Supreme Court case examined this problem when it heard a reverse discrimination case of a white male denied entrance to law school.

The DeFunis Case[3]

In 1971 Marco DeFunis, a white male, applied for admission to the University of Washington School of Law. That year the University of Washington Law School received 1601 applications for admission for about 150 available spaces. In order to fill these spaces, 275 applicants were offered admission. Thirty seven of those offered admission were minorities and eighteen of them actually entered law school. DeFunis was not offered admission.

The U of W admissions process is based upon an index called the "Predicted First Year Average." This average is computed by a formula giving various weights to the applicant's grades in the last two years in college, the score obtained on the Law School Admissions Test (LSAT) and a Writing Test Score. That year the admissions committee (comprised of faculty, administration and students) decided that the most outstanding applicants were those who scored 77 or above. The highest score was 81. By August 1971, 147 applicants with averages of 77 or better had been offered admission. All but a few of the applicants with an average below 74.5 were eliminated. (The few who were not eliminated were saved for committee consideration on the basis of information in their files that indicated greater promise than was suggested by their averages.[4])

Finally, the committee accumulated those applications with scores between 74.5 and 77 for consideration. DeFunis

was in this group with a score of 76.23. These applications were distributed randomly to the committee members who would consider the applications competitively, with rough guidelines as to how many could be admitted. The decisions were made on the basis of information in their files. After offering about 200 admissions, a waiting list was constructed and divided into four ranks. DeFunis was on this list in the lowest quarter. Ultimately, he was not offered admission.

Applications of blacks were handled differently. Whatever their averages, they were not passed on to the committee chairperson for rejection. Neither were these applications randomly distributed to committee members, they were instead given to two particular members: a black law student and a professor who had worked in a special program for disadvantaged students considering applying to law school. Other minority applications were assigned to an assistant dean. At no time were the minority applicants compared to the other applicants, but they were compared competitively with other minority applications. Thirty seven minority applicants were admitted, thirty six of whom had "Predicted First Year Averages" below DeFunis' average. (30 had averages below 74.5, meaning that, had they been white, they would have been rejected.) There were also 48 non-minority applicants admitted who had averages below DeFunis.[5] The University conceded that it placed less weight on black applicants' averages than upon those of white applicants. The Law School also stated that had the minority students been considered under the same procedure as other applicants, none of those who were eventually enrolled would have been admitted.[6]

DeFunis commenced suit in a Washington trial court, contending that "the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."[7] DeFunis brought suit on his own behalf (rather than as a class action suit) and asked the court to "issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September of 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission."[8] The lower court upheld his claim and he was admitted to the Law School in 1971. On appeal, the Washington Supreme Court reversed the lower court's verdict. DeFunis then petitioned the Supreme Court of the United States and the circuit judge "stayed the judgment of the Washington Supreme Court,"[9] pending the final Supreme Court decision.

The United States Supreme Court first considered his certiorari petition in the fall of 1973. Thus, DeFunis was in his last year of law school. Since it was not a class action suit, the case would have been rendered moot had the court not heard the case before DeFunis graduated. Neither DeFunis nor the University of Washington wanted the case dismissed as moot. The University of Washington indicated that "if the decision of the Washington Supreme Court were permitted to stand, the petitioner could complete the term for which he was then enrolled but would have to apply to the faculty for permission to continue in the school before he could register for another term."[10]

The case was finally argued on February 26, 1974 and the decision reached on April 23, 1974. By this time DeFunis had registered for his final quarter in law school.

The final decision of the Supreme Court was a disappointment to both the respondents and the petitioner as well as other people following the case. One writer said the justices "went mute by declaring the case moot, . . . [and wrangled] over why they should duck the case."[11] In a 5-4 decision, the Court declared the case moot and refused to consider the constitutional questions involved. The minority opinion (written by Mr. Justice Brennan) decided on the same narrow grounds as the majority, only the minority decided the case was not moot. In effect, then, the decision was a non-decision. The Justices bickered about whether or not there was some prospect that DeFunis would not graduate at the end of the quarter (and thus be required to re-apply) and the case was decided essentially on that point.

While some accused the Court of avoiding a painful decision and abrogating its duty, others felt there was no alternative for the Court. If they ruled against DeFunis, they would be advocating denial of constitutional rights. If they had ruled for DeFunis, there was some fear that all affirmative action plans would have been summarily abandoned by all universities. The Court may have to decide the issue because DeFunis (who has since graduated) is back in the Washington courts attempting to get the case changed to a class action suit.

Justice William O. Douglas was one of the dissenting minority but he felt so strongly about the case that he wrote a separate dissenting opinion.

The Dissenting Opinion

Justice Douglas took a rather historical approach in his lone dissenting opinion. He related how the philosophy in the early twentieth century was to allow each law student into school and prove him/herself in the first year. As spaces for students became more scarce, the pressure to use some sort of admissions test mounted. The LSAT was introduced in 1948 and has been the main common entrance criterion since then. He then proceeded to demolish its effectiveness by stating that the truly creative individual may do poorly on a "few hours' worth of multiple choice questions." He also raised the possibility of a cultural bias in the LSAT.[12] This contention has merit from other studies of other tests. For example, Robert Williams has developed the Black Intelligence Test of Cultural Homogeneity (the Bitch test) and has tested it on whites. To no one's real surprise, whites do quite poorly because the test measures whites' knowledge of the black experience (presumably the opposite of existing white-oriented I.Q. tests.)[13]

Justice Douglas next attacked the validity of prior college scores. He pointed out the obvious: that one school's "A" is another's "C" (which renders the grade point average, GPA, meaningless), and that since the late 1960's the average of all college grades has risen dramatically (presumably because of the Viet Nam War when a failing student might be drafted and because of a general raising of social consciousness about racial discrimination). As one author noted, these higher grades "infalted the students' grade point average and presented the law school with nearly meaningless data on which to predict the minority's chances at successfully surviving the rigors of law study."[14] Further, "there is no clear evidence that the LSAT and GPA provide particularly good evaluators of the intrinsic or enriched ability of an individual to perform as a law student or lawyer in a functioning society undergoing change. Nor is there any clear evidence that grades and other evaluators of law school performance, and the bar examination are particularly good predictors of competence or success as a lawyer."[15]

Finally, Justice Douglas noted that GPA and LSAT do not measure relative progress or motivation. A ghetto black who rises to a junior college has made more progress than, say, a Harvard student from an affluent (Harvard-educated) fam-

ily. "Because of the weight of the prior handicaps, that black applicant may not realize his [sic] full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his [sic] achievements may far outstrip those of his [sic] classmates whose earlier records appeared superior by conventional criteria."[16]

Justice Douglas' conclusion was that, under the Fourteenth Amendment, "separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his* [sic] *behalf.*"[17] He, therefore, would have upheld the University of Washington's Affirmative Action Plan and separate admission procedures for minorities.

The Aftermath and Applicability of DeFunis

The furor and indecision witnessed in Seattle and at the University of Washington as a result of the *DeFunis* case is interesting. The Law School is uncertain as to what to do (pending the outcome of Marco DeFunis' attempt to have the suit declared a class action one) so they are continuing their existing policies. Others are "choosing up sides." On the one hand, the liberals are pointing out that education itself has always been discriminatory: the affluent produce children who become affluent; alumni's children get preferential treatment; society's goals should not be to educate an elite few but to even out past injustices; and, anyway, there has always been discrimination (at taxpayer's expense) in favor of athletes, etc.

On the other hand, the other side is gathering substantive data supporting the view that the Law School should not use two admission policies. In a nutshell, "the law school has proportionally more minority students flunking out now than was the case five years ago, and no one is sure why."[18] The Law School is reacting by providing special re-admission (or retention) procedures for minority students who flunk courses and by providing special tutoring services for minorities.[19] Opponents are pointing out that "of the first group of 13 specially admitted minorities to take the bar [exam] last year, 10 passed. That's a passing ratio directly comparable to white students."[20]

In all of this activity, not one word has been said about women law students. However, the women's legal students' organization is becoming more verbal, pointing out that they, too, are a minority. As it stands, the University of Washington Law School uses exactly the same criteria for admitting women as it does white men (presumably on the premise that white women have roughly the same cultural biases as white men and, therefore, no special tests or admission policies need be applied).

Conclusion

While the decision in *DeFunis* was disappointing and did not result in definitive guidelines for affirmative action programs, it was of interest in its effects. Many are hoping that DeFunis is successful in his bid to change his suite to a class action one so that the Supreme Court of the United States will make a definite ruling in the future. Until then, each university must stumble along doing the best it can with existing affirmative action plans.

Footnotes

[1]Dr. John R. Hogness, quoted by Gene I. Maeroff, "Faculty Quota Quandry" *The New York Times*, reprinted in the *Seattle Post Intelligencer*, Wednesday, May 15, 1974, p. A-10.

[2]Dr. Richard A. Lester, *Report of Carnegie Commission on Higher Education*, to be published by McGraw-Hill this fall. This study concluded that affirmative action is undermining faculty quality because some programs "fail to take into consideration either the inadequate supply of qualified people among those groups currently underrepresented on our faculties or the characteristics of academic employment that distinguish it from employment in industry." It is amusing that the study had no pre-affirmative action studies of faculty quality with which to make a comparison of post-affirmative action faculty quality, yet it could conclude that the quality has decreased!

[3]*Marco DeFunis et al., V. Charles Odegaard, President of the University of Washington*, U.S. Supreme Court no. 73-235, April 23, 1974.

[4]*op. cit.*, p. B2428

[5]*op. cit.*, p. B2431

[6]*op. cit.*, p. B2432

[7]*op. cit.*, p. B2415

[8]*op. cit.*, p. B2415 and 2416

[9]*ibid.*

[10]*ibid.*

[11]Nicholas VonHoffman, "Discrimination in Reverse," *Seattle Post Intelligencer*, Tuesday, May 14, 1974, p. A-11.

[12]*Marco DeFunis, et al., op. cit.*, p. B2434.

[13]See "Try the SOB Test," *Psychology Today*, May 1974, p. 101. The author of the article took the exam and she scored very poorly, although on "normal" (i.e., White) I.Q. tests she scores quite highly.

[14]Solveig Torvik, "Righting Social Wrongs Worries Law Schools, "*The Seattle Post Intelligencer,*" *Sunday, May 26, 1974, p. A-11.*

[15]*DeFunis, op. cit.*, p. B2436

[16]*op. cit.*, p. B2437

[17]*op. cit.*, p. B2442

[18]Torvik, *loc. cit.*

[19]"Dean to Rule on Student Failures," *The Seattle Post Intelligencer*, Wednesday, May 22, 1974, p. A-8

[20]Torvik, *loc. cit.*

Reviews

(Continued from page 19)

ACCOUNTANCY AND ECONOMIC DEVELOPMENT POLICY, Dr. Adolf J. H. Enthoven; American Elsevier Publishing Company, Inc., New York, N.Y., 1973; 380 pages, paperback.

The author's experience in public accounting, academia, and with the World Bank leads him to believe that accounting is not serving its broader purposes. He visualizes that accounting should extend horizontally — i.e., report and measure economic data of business, government, and social accounting areas; vertically — i.e., value costs and benefits for indirectly related items in addition to the directly related items which are now reported; and in time — i.e., report prospective activities necessary to provide a framework for decision making. His hope is that countries may someday be able to consolidate corporate figures into sector figures and into national figures. From the point of view of the World Bank, this would enable better assessment of a developing country's present stance and its economic potential. Present handicaps are lack of any accounting in certain segments of some countries and the wide differences in accounting as it is practiced in some of the developed countries.

The book is very readable. Sentences are simple and one hardly notices that English is not the author's native tongue. Some chapters deal with national income accounting, and this may be somewhat unfamiliar to accountants more used to dealing with micro-economic reporting. However, chapters on taxation and accounting, uniform or standardized accounting, current value accounting and PPBS (planning-programming-budgeting systems) are familiar topics.

One may not agree with all Dr. Enthoven proposes. Some of his conclusions (current value, prospective information) are not too far removed from certain aspects of the Trueblood report. He encourages coordination and integration of the accounting discipline with other disciplines, especially economics. He also hopes it will become more goal-oriented.

In addition, his writings contain information about systems and societies in other countries — extremely valuable information for accountants in a world which is steadily shrinking and becoming more internationally minded.

M.E.D.