

2015

## How Diversity Can Redeem the *McDonnell Douglas* Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession

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### Recommended Citation

Stacy Hawkins, *How Diversity Can Redeem the McDonnell Douglas Standard: Mounting an Effective Title VII Defense of the Commitment to Diversity in the Legal Profession*, 83 *Fordham L. Rev.* 2457 (2015). Available at: <https://ir.lawnet.fordham.edu/flr/vol83/iss5/12>

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# HOW DIVERSITY CAN REDEEM THE MCDONNELL DOUGLAS STANDARD: MOUNTING AN EFFECTIVE TITLE VII DEFENSE OF THE COMMITMENT TO DIVERSITY IN THE LEGAL PROFESSION

Stacy Hawkins\*

## INTRODUCTION

This Article undertakes an analysis, both quantitative and qualitative, of the developing body of Title VII diversity law.<sup>1</sup> The jurisprudence of

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\* Assistant Professor, Rutgers School of Law–Camden. I would like to thank the Rutgers Camden Junior Faculty for their helpful comments and suggestions on an earlier draft of this Article, as well as the participants of the colloquium on *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* held at Fordham University School of Law. For an overview of the colloquium, see Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 *FORDHAM L. REV.* 2241 (2015).

1. The term “diversity law” or “diversity jurisprudence” is meant to refer to the developing body of law in which an interest in racial, ethnic, gender, and other types of demographic diversity as a means of achieving instrumental goals, such as improved student learning or better preparation for, or performance of, work, is asserted as a legal justification or defense for the consideration of race, ethnicity, and/or gender in contexts and under circumstances where such consideration would otherwise be prohibited by law. See Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 *COLUM. J. RACE & L.* 75 (2012) (discussing the development of the U.S. Supreme Court’s diversity jurisprudence in equal protection law). The two most common legal proscriptions on the use of race, ethnicity, and/or gender in response to which an interest in “diversity” has been asserted as a legal justification for permitting the use of race, ethnicity, and/or gender are the prohibitions on their use under the Equal Protection Clause and under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e to 2000e-17 (2012) (prohibiting the consideration of race, color, religion, sex, and national origin in employment); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (prohibiting gender classifications under equal protection except when justified by important government interests); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (declaring the uses of race and national origin constitutionally “suspect” under the Equal Protection Clause and generally proscribing their use). Generally, the most common justification for permitting the use of race, ethnicity, and/or gender in these contexts is remedying past discriminatory conduct. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 639–42 (1987) (permitting the use of gender in selection for employment to correct for past exclusionary practices); *United Steelworkers, Inc. v. Weber*, 443 U.S. 193, 208 (1979) (permitting the use of race in selection for a workplace training program to correct for past discriminatory practices); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 328 (1978) (Blackman, J., concurring) (acknowledging that remedying past institutional discrimination could justify the use of race in admissions); *Califano v. Webster*, 430 U.S. 313, 316–18 (1977) (permitting the consideration of gender in the calculation of social security benefits to

diversity was first developed by the U.S. Supreme Court in equal protection cases,<sup>2</sup> but it has not been confined to that context. In particular, lower federal courts have been adjudicating cases asserting an interest in diversity as a means of challenging or justifying race/ethnicity- or gender-conscious policies and/or practices under Title VII.<sup>3</sup> These cases have given rise to a body of Title VII diversity law that has remained largely unexplored in the scholarly literature.<sup>4</sup> Because these cases have gone largely unnoticed, they

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correct for past discrimination in employment). Under both of these bodies of law (equal protection and Title VII), courts have begun to develop a diversity jurisprudence adjudicating the permissibility of using race/ethnicity and/or gender as a means of achieving instrumental, rather than remedial, institutional goals. See *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003) (asserting that an interest in student body diversity should sustain the use of race/ethnicity in college and university admissions, notwithstanding the fact that race is a “suspect classification” and therefore generally proscribed under equal protection, because of the educational benefits that flow from such diversity); *Mlynczak v. Bodman*, 442 F.3d 1050, 1054 (7th Cir. 2006) (asserting that the interest in ensuring a diverse applicant pool justified active recruitment of women and minority candidates notwithstanding the prohibitions on the use of race and gender under Title VII); *Petit v. City of Chicago*, 352 F.3d 1111, 1114–15 (7th Cir. 2003) (asserting that an interest in a diverse police force, which enhances operational efficacy in racially and ethnically diverse neighborhoods, should permit the consideration of race in the selection of police offers by the Chicago Police Department notwithstanding the prohibitions on the use of race under equal protection). These cases form the body of developing “diversity law.”

2. See *Grutter*, 539 U.S. at 326; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990); *Bakke*, 438 U.S. at 281. In *Bakke*, a white male plaintiff challenged the race-conscious admissions program employed by the University of California Davis Medical School as a violation of his right to equal protection. *Bakke*, 438 U.S. at 269–70. Although a majority of the Court voted to strike down the race-conscious admissions program because it amounted to an impermissible racial quota system, Justice Powell’s plurality opinion suggested that race could be a legitimate factor in college admissions decisions if the purpose was to obtain the educational benefits that flow from student body diversity, if the consideration of race were sufficiently individualized, and if other safeguards ensured that its use was consistent with equal protection. See *id.* at 311–15. In *Metro Broadcasting*, a majority-owned broadcast station challenged the minority preference policies, adopted by the FCC to increase the diversity of programming content, as a violation of equal protection. *Metro Broad.*, 497 U.S. at 552. The Court upheld the minority preference policies finding that the interest in programming diversity was sufficiently important to justify the use of race under the Equal Protection Clause. *Id.* at 567–68. Although *Metro Broadcasting* has been overruled insofar as the Court applied an intermediate standard of review in that case, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (finding that the strict scrutiny standard of review applies to all uses of race under the Equal Protection Clause), the Court has not had any occasion to consider the question of whether the interest in programming diversity might satisfy the higher strict scrutiny standard of review. In *Grutter*, a white female plaintiff challenged the race-conscious admissions program employed by the University of Michigan Law School as a violation of her right to equal protection. *Grutter*, 539 U.S. at 316. Adopting the reasoning articulated by Justice Powell in *Bakke*, a majority of the Court found that the interest in student body diversity is sufficiently compelling to justify the use of race in college and university admissions so long as the use of race otherwise satisfies the strict scrutiny requirement that it be narrowly tailored to achieve that interest. *Id.* at 329–33. For further discussion of the jurisprudence of diversity developed in these three cases, see Hawkins, *supra* note 1.

3. See discussion *infra* Part II.

4. There are some student notes that, in trying to predict the impact of *Grutter* on Title VII law, analyzed some of the employment cases decided in the immediate aftermath of *Grutter*. See, e.g., Daniela M. de la Piedra, Note, *Diversity Initiatives in the Workplace: The Importance of Furthering the Efforts of Title VII*, 4 MOD. AM. 43 (2008) (discussing post-

have not been mined for any guidance they might offer to employers generally, and legal employers specifically, on how best to structure workplace diversity efforts to minimize the risk of legal liability under Title VII and, conversely, to maximize their Title VII defense. This Article surveys these cases and offers an analysis that seeks to: (1) situate this developing body of diversity law within the existing Title VII landscape, and (2) inform the development of legally defensible workplace diversity programs.

This analysis is motivated by, and responsive to, three intersecting concerns. The first concern is the continuing debate within the legal community about how we ought to define and justify the profession's commitment to diversity. Despite a longstanding commitment to diversity, we continue to debate the justifications for this commitment.<sup>5</sup> This debate often pits the "moral case" for diversity against the "business case" for diversity.<sup>6</sup> Notwithstanding this debate, an analysis of the decided Title VII diversity cases reveals that it matters less, in terms of legal defensibility, how diversity efforts are justified in principle than how they operate in practice.<sup>7</sup> In light of this, it bears considering whether we ought to refocus some of our deliberation away from the ongoing debate about *why* we should be committed to diversity in the profession and toward consideration of *how* we should operationalize that commitment. Rather than, or perhaps in addition to, focusing on why we pursue diversity, the suggestion here is that we engage ourselves more actively in exploring how we might pursue the commitment to diversity in the legal profession in ways that do not unnecessarily increase the risk of legal liability, which might dampen these efforts.<sup>8</sup>

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*Grutter* cases in defense of employer diversity efforts); Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091 (2006) (discussing post-*Grutter* cases addressing consideration of diversity interest under Title VII and suggesting limitation of Title VII to remedial rationale). However, legal scholars have not yet turned their attention to this developing body of law as a whole.

5. See, e.g., Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011); David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

6. See Wald, *supra* note 5, at 1081. The primary arguments in this debate are: (1) the legal profession should be committed to diversity in the profession because it is the "right thing to do" in view of the profession's long history of exclusion, particularly of women and racial/ethnic minorities, and (2) the legal profession ought to pursue diversity because it is the "smart thing to do" in view of a changing marketplace and increasing demands by corporate clients for diverse teams capable of responding to that changing marketplace. Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 9–10 (2009). These two arguments are often referred to in shorthand as the "moral case" for diversity, i.e., it is the "right thing" to do, and the "business case," i.e., it is the "smart thing" to do. *Id.* at 3 ("Moral arguments for diversity are shifting to market-based arguments. . . . that diversity is good for business.").

7. See discussion *infra* Part II.

8. See discussion *infra* Part II.

The second concern follows from the first. Regardless of how the commitment to diversity is justified, there is significant uncertainty and confusion about the legality of workplace diversity efforts as they have been articulated and/or adopted by the legal profession.<sup>9</sup> In particular, the commitment to diversity within the legal profession in large part entreats legal employers to adopt policies and practices that foster the hiring, retention, promotion, and advancement of women and minority attorneys, among others.<sup>10</sup> Attendant to this commitment, legal employers face increasing demands from external stakeholders to produce demonstrable evidence of success in achieving these diversity goals.<sup>11</sup> The need and/or

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9. In my twelve years of diversity practice prior to teaching law, I commonly encountered two extreme, contradictory, and almost certainly wrong perceptions about the legal defensibility of workplace diversity efforts generally. The first is that workplace diversity efforts are not subject to the prohibitions of Title VII, which are presumed to extend only to more traditional affirmative action efforts and otherwise remedial uses of race, ethnicity, and/or gender in the workplace, rather than the more instrumental uses of race, ethnicity, and/or gender proffered in support of diversity. See Hawkins, *supra* note 1, at 80–90 for a discussion of the difference between affirmative action and diversity. The second perception is that diversity efforts are categorically prohibited under Title VII unless they can be defended under the standards applicable to traditional affirmative action plans. See Curt A. Levey, *The Legal Implications of Complying with Race- and Gender-Based Client Preferences*, 8 ENGAGE 14, 16 (2007), available at [http://www.fed-soc.org/library/doclib/20080314\\_CivRightsCurtLevey.pdf](http://www.fed-soc.org/library/doclib/20080314_CivRightsCurtLevey.pdf). It seems likely that neither of these perspectives is entirely right but that the reality of the legal defensibility of workplace diversity efforts lies somewhere between these extremes. This Article attempts to respond to these opposing views by outlining the contours of the legal analysis applicable to workplace diversity efforts.

10. The American Bar Association (ABA) adopted Goal IX in 1986 to promote the “full and equal participation in the legal profession by minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities.” *Goal III Report*, ABA, [http://www.americanbar.org/groups/disabilityrights/initiatives\\_awards/goal\\_3.html](http://www.americanbar.org/groups/disabilityrights/initiatives_awards/goal_3.html) (last visited Mar. 25, 2015). Since that time, various state and local bar associations, as well as other professional associations of lawyers, have adopted similar commitments to enhance the full and equal participation by women and racial and ethnic minority attorneys, among others, in the legal profession, including, for instance, the Pennsylvania Bar Association, the Association of the Bar of the City of New York, the Bar Association of San Francisco, the Boston Bar Association, and the Colorado Bar Association, just to name a few. See, e.g., ASS’N OF THE BAR OF THE CITY OF N.Y., STATEMENT OF DIVERSITY PRINCIPLES (2003), available at <http://www.nycbar.org/images/stories/pdfs/diversity/statement-of-diversity-principles.pdf>. In 1999, then-BellSouth General Counsel Charles Morgan, on behalf of roughly 500 corporate counsel, urged outside law firms to embrace this commitment to diversity. See *Charles R. Morgan: Leading General Counsel—And Their Law Firms—Up the Path to Diversity*, METRO. CORP. COUNS., Mar. 2006, at 47. In 2004, then Sara Lee General Counsel, Roderick Palmore, extended this commitment by asking his fellow corporate counsel to “pledg[e to] make decisions regarding which law firms represent [their] companies based in significant part on the diversity performance of the firm” and, likewise, to “end or limit [their] relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.” RICK PALMORE, A CALL TO ACTION: DIVERSITY IN THE LEGAL PROFESSION I (2004), available at <http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074>. Within a year, seventy-two companies had signed on to the more aggressive proposal. See Melanie Lasoff Levs, *Call to Action—Sara Lee’s General Counsel: Making Diversity a Priority*, DIVERSITY & B., Jan./Feb. 2005, available at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803>.

11. These pressures emanate from a number of sources, including the organized bar (Austin Minority Bar Association Law Firm Diversity Report Card), law students (Law

desire to satisfy these external demands for diversity has created considerable pressure on legal employers, law firms in particular, and has sometimes caused them to engage in questionable diversity practices.<sup>12</sup> Some of these practices have generated widespread concern for, and in some cases outright threats of litigation challenging, their legality under Title VII.<sup>13</sup> So the second aim of this Article is to determine the legal defensibility of the various practices employed most often by law firms, among others, to increase their diversity.

The final aim of this Article is to engage those scholars who have criticized Title VII, in particular the prevailing *McDonnell Douglas* standard.<sup>14</sup> This critique condemns the *McDonnell Douglas* standard for its

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Students for a Better Profession), the legal media (The American Lawyer Diversity Scorecard), and in-house counsel (A Call to Action). For example, Wal-Mart, which is well known for its commitment to the diversity of outside counsel, has been both lauded and criticized for its requirement that each of its outside law firms identify both a woman and a minority for consideration as the relationship partner for its business. *See* Angela Brouse, Comment, *The Latest Call for Diversity in Law Firms: Is It Legal?*, 75 UMKC L. REV. 847, 848 (2007); Clare Tower Putnam, Comment, *When Can a Law Firm Discriminate Among Its Own Employees to Meet a Client's Request? Reflections on the ACC's Call to Action*, 9 U. PA. J. LAB. & EMP. L. 657 (2007). This demand is likely related to Palmore's Statement of Principle, *see* PALMORE, *supra* note 10, urging corporate counsel to make decisions about outside counsel based on their diversity performance. The proliferation of diversity surveys on behalf of bar associations and the legal media have also contributed to these external pressures, which are not necessarily limited to law firms. *See, e.g.*, PA. BAR ASS'N, COMMISSION ON WOMEN IN THE PROFESSION: 19TH ANNUAL REPORT CARD (2013), available at <http://www.pabar.org/pdf/PBAWIPReportCard19Apr2013.pdf> (reporting the gender diversity of various sectors of the legal profession, including the state and federal judiciary, the bar association, and private practice). There additionally have been calls by the organized bar and others for law firms to tie diversity management to partner compensation in an effort to ensure adequate accountability for improving workplace diversity. *See, e.g.*, PRESIDENTIAL DIVERSITY INITIATIVE, ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 16 (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf) (acknowledging with approval that "some law firms have begun to tie employees' compensation to their demonstrated commitment to diversity in recruiting, mentoring, and work assignments"); Roy Strom, *Strengthening the Business Case for Diversity*, CHI. LAW. (July 2012), <http://www.chicagolawyer.com/Archives/2012/07/Business-Case-For-Diversity.aspx> (indicating that a client request for production inquired whether outside counsel was willing to "tie a portion of your compensation to achieving diversity staffing commitments"). I discuss the legal defensibility of these various efforts below. *See* discussion *infra* Part II.

12. The pressure is particularly intense as the demand increasingly comes from clients. *See supra* note 10.

13. Curt Levey has sent letters to a number of law firms demanding that they refrain from certain diversity practices or risk the threat of litigation. *See also* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1035 (2004) (acknowledging that "EEOC filings increasingly challenge reverse discrimination").

14. *See, e.g.*, Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of the Law*, 106 AM. J. SOC. 1589, 1591 (2001) [hereinafter Edelman et al., *Diversity Rhetoric*] (citing diversity as both a potential benefit and a threat to the extension of legal protections for groups who have traditionally experienced discrimination in the workplace and for whose benefit civil rights laws, such as Title VII, were presumably enacted); Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 901 (2011) (studying the wide berth of judicial deference to

increasing failure to protect women and racial/ethnic minorities from workplace discrimination.<sup>15</sup> It also rejects the developing jurisprudence of diversity for its perceived inability to fill the growing gap between the workplace harms suffered by women and racial/ethnic minorities and the protection of law afforded to them under Title VII.<sup>16</sup> This Article attempts to redeem the *McDonnell Douglas* standard by demonstrating that it is a viable means of defending workplace diversity efforts, which are often viewed as beneficial for women and racial/ethnic minorities, against reverse discrimination challenges.<sup>17</sup> The successful defense of these voluntary workplace diversity efforts has become a critical strategy for vindicating the employment rights of women and racial/ethnic minorities as the success of more traditional litigation strategies has waned.<sup>18</sup>

This Article is divided into three parts. Part I provides an overview of the existing landscape of Title VII law, identifying those places where there is critical intersection with the developing body of diversity law. Part II then surveys the developing Title VII diversity law, offering both a quantitative and qualitative analysis of relevant cases in an effort to synthesize this area of the law before applying it to the issue of law firm diversity efforts. Part II then offers some practical guidance for how law firms might structure their diversity efforts to minimize the risk of legal liability and maximize their legal defense. Finally, Part III forecasts how this developing body of diversity law might redeem the *McDonnell Douglas* standard by altering the legal landscape of Title VII in a way that favors the interests of racial/ethnic minorities and women in the workplace.

### I. THE PREVAILING LEGAL STANDARDS

To situate the developing Title VII diversity law within the existing Title VII landscape, it is necessary to first survey the existing landscape. Title VII is the federal law that makes it an “unlawful employment practice” for any employer 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.”<sup>19</sup> A plaintiff alleging a violation of Title VII may prove discrimination by the direct

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employers in Title VII cases); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 315, 388 (2010) (complaining that “[p]laintiffs have a hard row to hoe in proving unlawful discrimination” and that “[c]ourts protect employers from the stigma of discrimination . . . [c]asting employers as inclusive, benevolent, and fair”).

15. See Martin, *supra* note 14.

16. See Edelman et al., *Diversity Rhetoric*, *supra* note 14.

17. Workplace diversity efforts are not universally viewed as beneficial for woman and racial/ethnic minorities. See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2223 (2013) (lamenting that diversity tokenizes minority groups for the sake of financial gain largely for the benefit of white male individuals and institutions). But see Stacy L. Hawkins, *Selling Diversity Short: An Essay Responding to Nancy Leong’s “Racial Capitalism,”* 40 RUTG. L. REC. 68, 74 (2013) (responding to Leong by arguing that diversity is, or at least has the potential to be, more beneficial than harmful to minorities).

18. See *supra* note 14.

19. 42 U.S.C. § 2000e-2(a)(1) (2012).

method of proof, in which case the plaintiff must offer evidence from which a trier of fact could conclude without inference that the challenged employment action was taken because of unlawful discrimination.<sup>20</sup> This direct method of proof, however, is difficult to sustain, and plaintiffs rarely pursue it.<sup>21</sup> Alternatively, the plaintiff may prove unlawful discrimination using the indirect method of proof. Pursuant to this method of proof, the plaintiff must offer evidence from which a trier of fact could infer that unlawful discrimination more likely than not motivated the challenged employment action.<sup>22</sup> If the plaintiff offers proof of unlawful discrimination under Title VII using the indirect method, the *McDonnell Douglas* burden-shifting framework applies.<sup>23</sup> This burden-shifting framework operates as follows. First, the plaintiff/employee is required to establish a prima facie case of discrimination.<sup>24</sup> This burden is minimal; the plaintiff/employee need only offer evidence that: (1) he/she is in a protected class or, in the case of some reverse discrimination claims, that background circumstances demonstrate that the defendant is the unusual employer who discriminates against the majority;<sup>25</sup> (2) he/she was qualified for the position sought (in the case of failure to hire/promote) or met the employer's legitimate expectations (in the case of termination or discipline); and (3) similarly situated employees were treated differently or

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20. See *Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2003); *Sinio v. McDonald's Corp.*, No. 04 C 4161, 2007 WL 869553, at \*7 (N.D. Ill. Mar. 19, 2007) (“The direct method of proving unlawful discrimination requires that the plaintiff offer evidence [that] . . . if believed, proves that the employer’s actions were motivated by discriminatory intent without reliance on inference or presumption.”).

21. See *infra* Table 1 (demonstrating that only three of forty-four cases studied involved claims of direct evidence of discrimination). However, as demonstrated by the survey of decided diversity cases below, plaintiffs were more likely to pursue this direct method of proof when there was evidence that the challenged employment action was taken pursuant to an affirmative action plan (AAP). See *infra* Table 1. This is because affirmative action plans, particularly when they arise from litigation resulting in a consent or settlement decree, often permit the conscious consideration of race/ethnicity or gender by employers in hiring or promotion decisions. See *Xerox*, 347 F.3d at 137 (“The existence of an affirmative action plan . . . when combined with evidence that the plan was followed in an employment decision is sufficient to constitute direct evidence of the unlawful discrimination unless the plan is valid.” (quoting *Bass v. Bd. of Cnty. Comm’rs*, 256 F.3d 1095, 1110 (11th Cir. 2001))); see also *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 693 (8th Cir. 2009); *Murray v. Vill. of Hazel Crest*, 2011 WL 382694, at \*4 (N.D. Ill. Jan. 31, 2011); *Rogers v. Haley*, 421 F. Supp. 2d 1361, 1365 (M.D. Ala. 2006).

22. *DeBiasi v. Charter Cnty. of Wayne*, 537 F. Supp. 2d 903, 921 (E.D. Mich. 2008) (“[T]he plaintiff must present evidence ‘which tends to prove that an illegal motivation was more likely than that offered by the defendant.’” (quoting *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994))).

23. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

24. See *id.*

25. Only some jurisdictions require that reverse discrimination plaintiffs demonstrate “background circumstances” in order to establish a prima facie case. See, e.g., *Mastro v. PEPSCO*, 447 F.3d 843, 851 (D.C. Cir. 2006) (holding that a reverse discrimination plaintiff “must show ‘additional background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority’” (quoting *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981))); see also *Sullivan*, *supra* note 13, at 1065–71 (discussing the origins of the “background circumstances” requirement and its adoption and rejection by various courts).



the adverse action was taken under circumstances giving rise to an inference of discrimination.<sup>26</sup> Assuming the plaintiff/employee establishes a prima facie case of discrimination, the burden then shifts to the defendant/employer, who must offer some legitimate, nondiscriminatory reason for the challenged employment action.<sup>27</sup> This is a burden of production, not of proof.<sup>28</sup> Thus, at this stage, the defendant/employer need only articulate a reason for the challenged employment action and need not convince the trier of fact that this was the real reason for the challenged action.<sup>29</sup> If the defendant/employer satisfies this burden of production, the burden shifts back to the plaintiff/employee, who must prove by a preponderance of the evidence that the reason articulated by the defendant/employer is a mere pretext for unlawful discrimination.<sup>30</sup> The plaintiff/employee maintains the ultimate burden of persuading the trier of fact that unlawful discrimination more likely than not animated the employer's action.<sup>31</sup> The plaintiff may satisfy this burden by once again proffering either direct evidence or indirect/circumstantial evidence of the employer's discriminatory intent.<sup>32</sup> As during the initial stage of proof, direct evidence of discriminatory intent, or the proverbial "smoking gun," is often lacking, and plaintiffs are forced to rely on indirect or circumstantial evidence of the employer's discriminatory intent at this third stage of proof.<sup>33</sup> Evidence that the employer's proffered legitimate, nondiscriminatory business reason for the challenged action is unworthy of belief, otherwise known as proof of "pretext," may be sufficient indirect evidence to infer discrimination.<sup>34</sup>

At the second stage of the *McDonnell Douglas* burden-shifting framework, the defendant-employer can assert as a legitimate, nondiscriminatory business reason for the challenged employment action either that some consideration other than race, ethnicity, and/or gender motivated the challenged action or that the employer acted pursuant to a valid affirmative action plan (AAP) when considering race/ethnicity or

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26. *McDonnell Douglas*, 411 U.S. at 802.

27. *Id.*

28. *Id.* at 803.

29. *Id.* at 804.

30. *Id.*

31. *Id.* at 807.

32. *Id.*

33. Here again, however, if plaintiffs have relied on the existence of an AAP as a basis for the challenged employment action, the plaintiff may well proffer the AAP as direct evidence of unlawful discrimination where the defendant/employer is unable to demonstrate the validity of the AAP pursuant to the *Weber* standard. *See Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2003) ("The existence of an affirmative action plan . . . when combined with evidence that the plan was followed in an employment decision is sufficient to constitute direct evidence of the unlawful discrimination unless the plan is valid." (quoting *Bass v. Bd. of Cnty. Comm'rs*, 256 F.3d 1095, 1110 (11th Cir. 2001))).

34. *McDonnell Douglas*, 411 U.S. at 806; *see also Plumb v. Potter*, 212 F. App'x 472, 479 (6th Cir. 2007) ("[Plaintiff] can show pretext . . . by showing that the proffered reason had no basis in fact; . . . did not actually motivate the [employer's] conduct; or . . . was insufficient to warrant the challenged conduct.").

gender.<sup>35</sup> If the defendant/employer asserts that it acted pursuant to an AAP, the defendant/employer will be required to prove the validity of the AAP by meeting the standard first set out in *United Steelworkers of America v. Weber*<sup>36</sup> and later affirmed in *Johnson v. Transportation Agency*.<sup>37</sup>

In *Weber*, a white steelworker was passed over for a union training program that reserved half of the available training slots for black steelworkers in an attempt to remedy past discriminatory union practices.<sup>38</sup> In upholding the voluntary affirmative action plan against a Title VII challenge, the Supreme Court declared that, notwithstanding the general prohibition on the consideration of race in making employment decisions, Title VII does permit employers to voluntarily adopt affirmative action plans that seek to eliminate traditional patterns of racial segregation in the workplace.<sup>39</sup> To do so, the employer must satisfy the predicate burden of proving that there is a “manifest racial imbalance” in the composition of the workforce.<sup>40</sup> Then the employer must demonstrate that such affirmative action has been undertaken in a manner that does not “unnecessarily trammel the interests of the [nonminority] employees.”<sup>41</sup> The *Johnson*

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35. See *United States v. Brennan*, 650 F.3d 65, 94 (2d Cir. 2011) (recognizing that “[t]he Supreme Court has explicitly stated that the ‘affirmative action’ defense . . . is properly raised at the second step of the *McDonnell Douglas* framework”).

36. 443 U.S. 193 (1979). *Weber* addressed the use of voluntary affirmative action to cure a racial imbalance in the employer’s workforce. *Id.* at 208.

37. 480 U.S. 616 (1987). *Johnson* extended to gender the principles announced in *Weber*. *Id.* at 627.

38. *Weber*, 443 U.S. at 198–99.

39. *Id.* at 208.

40. *Id.*

41. *Id.* In *Weber* the manifest imbalance was established by proving that despite a local labor force that was 39 percent black, the composition of the skilled workforce at Kaiser was only 1.83 percent black. *Id.* at 198–99. The Court found that the plan did not unnecessarily trammel the interests of nonminorities by reserving half of the skilled craft training slots for blacks, because it did not “create an absolute bar to the advancement of white employees.” *Id.* at 208. The Court further noted that the plan was permissible because it was only a temporary measure “not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.” *Id.* The *Weber* standard is analogous to the equal protection strict scrutiny standard applicable to race-conscious action pursuant to a voluntary AAP, and courts have often treated such claims arising under both Title VII and equal protection the same. See, e.g., *Oerman v. G4S Gov’t Solutions*, No. 1:10–1926–TLW–PJG, 2012 WL 3138174, at \*4 (D.S.C. July 17, 2012) (noting that, although the constitutional principles are stricter than those of Title VII, “some of the tenets overlap and they are often addressed together”); *Murray v. Vill. of Hazel Crest*, No. 06 C 1372, 2011 WL 382694, at \*2 (N.D. Ill. Jan. 31, 2011) (observing that “the standards for proving discrimination that apply to Title VII are essentially the same as those applicable to [equal protection] employment discrimination claims”); *Perrea v. Cincinnati Pub. Sch.*, 709 F. Supp. 2d 628, 646 (S.D. Ohio 2010) (determining that on an equal protection challenge to an AAP “a plaintiff asserting a Fourteenth Amendment equal protection claim . . . must prove the same elements required to establish a disparate treatment claim under Title VII” (quoting *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) (internal quotation marks omitted))). The strict scrutiny standard requires that any race-conscious action challenged under equal protection first be justified by some “compelling interest” and second be “narrowly tailored” to meet that interest. See *United States v. Paradise*, 480 U.S. 149, 167 (1987) (applying standards analogous to *Weber* despite the case being considered under equal protection rather than Title VII). For instance,

Court affirmed this standard and broadened the permissible scope of voluntary AAPs to include gender affirmative action.<sup>42</sup> Although the Supreme Court has consistently reinforced this standard, the likelihood of success in defending these voluntary AAPs has arguably diminished under the Court's most recent precedent.<sup>43</sup> Although the Court expressly disclaimed that the more rigorous standard of proof announced in *Ricci v. DeStefano*<sup>44</sup> was intended to eliminate voluntary, affirmative action such as

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the "compelling interest" proffered in support of a voluntary affirmative action plan under equal protection is usually an interest in "remedying past . . . discrimination," which is comparable in kind and proof to the "manifest imbalance" standard of *Weber/Johnson*. *Id.* at 166. Similarly, the "narrow tailoring" requirement under equal protection often has been defined as coextensive with the Title VII prohibition on "unnecessarily trammeling." *Id.* at 177–78 (finding that the one-for-one promotion requirement at issue was permissible because it was "flexible," not serving as a bar to the advancement of whites, and "temporary"); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 294 (1986) (considering the burden imposed on nonminorities from the preferential layoff policy at issue and finding the burden too heavy, especially where it was designed to "maintain" rather than attain racial balance). Thus the *Weber/Johnson* and equal protection standards can fairly be considered together when evaluating the legitimacy of an employer's voluntarily adopted AAP.

42. *Johnson*, 480 U.S. at 641–42. Johnson was denied a promotion by his employer, who defended the selection of a woman on the ground that the employer was operating pursuant to a voluntary AAP designed to cure the gender imbalance of its workforce. *Id.* at 619–24. The imbalance was proven with evidence that none of the positions in the job category sought by Johnson were held by a woman. *Id.* at 636. The voluntary AAP adopted to cure this imbalance satisfied the requirement that it not "unnecessarily trammel the rights of [other] employees" by not setting aside any particular number of positions for women, but fixing both long- and short-term goals for improving the gender representation of the workforce and only permitting the consideration of gender, among other qualifications, in selecting for the position. *Id.* at 637–38.

43. *See, e.g., Paradise*, 480 U.S. 149; *Wygant*, 476 U.S. 267. *But see Ricci v. DeStefano*, 557 U.S. 557 (2009). In *Ricci*, the Court ratcheted up the predicate burden of proof for sustaining an employer's race-conscious action, including arguably when such action is taken to avoid a manifest imbalance in the workforce. *Ricci*, 557 U.S. at 585. The New Haven Fire Department chose to adopt an affirmative, race-conscious remedy to redress what the employer believed would be a manifest imbalance in the promotion of firefighters to the positions of lieutenant and captain based on the administration of a written exam having a disparate impact on black and Hispanic candidates. *Id.* at 561–62. As a predicate for the race-conscious action, the Court in *Ricci* ruled that the fire department was required to both offer proof of a manifest imbalance between the composition of the workforce and those eligible for promotion based on the written exam, and also establish by a "strong basis in evidence" that the written exam, despite its racially disparate impact, was not job-related or consistent with business necessity and that there were less discriminatory means of selecting for the promotion which the fire department had failed to implement. *Id.* at 582. The *Ricci* Court acknowledged the intersection of its holding with the standard applicable to voluntary affirmative action by proclaiming that the heightened standard of proof announced in *Ricci* "leaves ample room for employers' voluntary compliance efforts" as sanctioned in *Weber* and *Johnson*. *Id.* at 583. In an attempt to sort out the distinction between the new standard announced in *Ricci* and the prevailing *Weber* and *Johnson* standards, the Second Circuit in *United States v. Brennan*, 650 F.3d 65 (2011), distinguished between prospective affirmative action, which that court said is governed by the *Weber/Johnson* standard, and retroactive affirmative action, which it said is governed by the *Ricci* standard. *Id.* at 102. Nevertheless, it remains to be seen whether the Supreme Court would similarly cabin the effect of its holding in *Ricci*.

44. 557 U.S. 557 (2009).

that permitted under the prevailing *Weber* and *Johnson* standards,<sup>45</sup> legal scholars have criticized this decision as leaving little room for employers to engage in voluntary affirmative action without incurring legal liability under Title VII.<sup>46</sup>

Within the context of this legal landscape, federal courts have begun to adjudicate claims challenging employers' efforts to improve the "diversity" of their workforces.<sup>47</sup> These challenges largely have been in the form of "reverse discrimination" cases prosecuted by white and/or male employees asserting that their employers' interest in diversity caused them to unlawfully consider race, ethnicity, and/or gender in hiring, termination, and/or promotion decisions.<sup>48</sup> These cases have been considered under the prevailing Title VII standards, including both the *McDonnell Douglas* and the *Weber/Johnson* standards.<sup>49</sup>

## II. ANALYSIS OF THE DECIDED DIVERSITY CASES

There have been forty-four cases challenging workplace "diversity" efforts decided by federal district and circuit courts since *Grutter v. Bollinger*.<sup>50</sup> Of these, twenty-two have been decided favorably to

45. *Id.* at 583.

46. *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73, 159–60 (2010); Ann C. McKinley, *Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 NEV. L.J. 626, 629 (2012). Some scholars have even suggested that *Ricci* is an ominous sign for the Court's treatment of diversity under Title VII. *See* Patrick Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1049 (2011) ("*Ricci* should chasten any expectation that the Court will take its next available opportunity to extend the diversity rationale for affirmative action to justify race-conscious employment action under Title VII.>").

47. For a discussion of the difference between the interest in "diversity" and traditional AAPs, see Hawkins, *supra* note 1.

48. Only four of the forty-four diversity cases identified did not involve a reverse discrimination challenge. *See* *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 539 (7th Cir. 2005) (involving suit by a Christian employee arguing that the employer's denial of a Christian affinity group constituted religious discrimination where the employer permitted affinity groups for women and minorities); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 601–02 (9th Cir. 2004) (involving argument by Christian employee that an employer discriminated against him on the basis of his religious beliefs by terminating him for condemning homosexuality in response to workplace diversity posters); *Frank v. Xerox Corp.*, 347 F.3d 130, 133 (5th Cir. 2003) (involving suit by black employees against Xerox alleging that their balance workforce program, which identified blacks as overrepresented in some job categories, resulted in unlawful discrimination against blacks in promotion and pay); *Sinio v. McDonald's Corp.*, No. 04 C 4161, 2007 WL 869553, at \*1, \*7 (N.D. Ill. Mar. 19, 2007) (involving suit by an Asian American female alleging that her employer treated black employees more favorably by providing affinity groups for black employees to assist in their professional development but not providing a similar resource for Asian American employees). The remaining forty cases involved reverse discrimination challenges by white and/or male employees alleging that the employer's interest in workplace diversity resulted in unlawful discrimination.

49. Some have also been considered under equal protection, but for the reasons previously discussed, these cases can be analogized to those considered under the Title VII *Weber/Johnson* standard. *See supra* note 41.

50. 539 U.S. 306 (2003); *see infra* Tables 1–2. A note on methodology: these cases were identified by conducting a Westlaw search of employment discrimination cases

defendants, and nineteen have been decided favorably to plaintiffs, with three having mixed results.<sup>51</sup> Of the twenty-two cases favorable to defendants, eighteen involved challenges to diversity plans pursuant to the *McDonnell Douglas* standard; while of the nineteen cases favorable to plaintiffs, fifteen involved challenges to voluntary AAPs (including those adopted pursuant to settlement/consent decrees), which are most commonly subject to the *Weber/Johnson* standard.<sup>52</sup> Nineteen of the twenty-two cases involving challenges to diversity plans under the *McDonnell Douglas* standard were decided favorably to the defendant, which represents an 86 percent success rate for employers.<sup>53</sup> By contrast, of the twenty cases

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involving challenges to or defenses of ostensibly race/ethnicity- or gender-conscious action on the basis of the employer's interest in workplace diversity. Because of the overlap between the legal standards applicable to cases involving AAPs under both Title VII and equal protection, as discussed *supra* note 41, equal protection cases were included in this analysis if they involved race/ethnicity- or gender-conscious actions challenged or defended on the basis of the employer's interest in workplace diversity. Multiple cases involving the same parties were counted only once. This analysis considers only those cases decided after the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, because that case marks an important point in the Court's diversity jurisprudence. It is also used as the point of demarcation because it is the standard against which many predictions about the Court's treatment of diversity efforts in the employment context have been measured. *See, e.g.*, Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D 215 (2004); Helen Norton, *Stepping Through Grutter's Open Door: What the University of Michigan Affirmative Action Cases Mean for Race-Conscious Government Decisionmaking*, 78 TEMP. L. REV. 543 (2005); Ronald Turner, *Grutter, the Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199 (2004); Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263 (2003).

51. *See infra* Table 1. This simple quantitative analysis does not account for any selection bias arising from cases settled before decision.

52. *See id.* Not all of these cases were decided exclusively under the *Weber/Johnson* standard. Some were decided under the *McDonnell Douglas* test, and still others were decided under equal protection. Nevertheless, all were understood to involve voluntary affirmative action and, therefore, invoke a more substantial burden of proof on the defendant employer to justify the use of race, ethnicity, and/or gender in the challenged employment decision than would otherwise be required under the *McDonnell Douglas* standard. One notable observation from this analysis is the discrepancy between courts in how they treat and analyze claims of employment discrimination arising under both Title VII and equal protection. It appears that, notwithstanding clear guidance and longstanding precedent in this area of law, there remain many courts that fail to fully comprehend how this law should be applied in individual cases. *Compare* *Rudin v. Lincoln Land Comm. Coll.*, 420 F.3d 712, 719 (7th Cir. 2005) (assessing reverse discrimination challenge under *McDonnell Douglas* standard even where evidence demonstrated the existence of an AAP), *with* *Rogers v. Haley*, 421 F. Supp. 2d 1361, 1369 (M.D. Ala. 2006) (applying *McDonnell Douglas* standard to reverse discrimination challenge to an AAP, but finding the AAP to constitute "direct evidence" of discriminatory intent), *and* *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 692–93 (8th Cir. 2009) (acknowledging that an AAP might constitute "direct evidence" under the *McDonnell Douglas* standard but also permitting defendant to demonstrate the validity of the AAP under the equal protection and/or *Weber/Johnson* standard), *and* *Finch v. City of Indianapolis*, 886 F. Supp. 2d 945, 961, 966 (S.D. Ind. 2012) (requiring employer to satisfy equal protection and/or *Weber/Johnson* standard to defend an AAP in reverse discrimination case). Notwithstanding these different standards of proof applied to the defendants, courts are uniformly more likely to hold the defendant/employer to a higher standard of proof in discrimination cases involving AAPs and are also more likely to sustain reverse discrimination challenges to AAPs when they allow for race- and/or gender-conscious action.

53. *See infra* Table 1.

involving challenges to AAPs (including settlement/consent decrees), fifteen were decided favorably to the plaintiff, which represents a 75 percent loss rate for employers.<sup>54</sup>

	<b>Plaintiff</b>	<b>Defendant</b>	<b>Mixed</b>
Favorable Decision	19	22	3
AAP	8	3	1
Consent Decree	7	0	1
Diversity Plan	4	19	1
Direct Evidence	2 (both AAP)	0	1
McDonnell Douglas	8 (5 CD/AAP)	18	1
Weber/Johnson	3	0	1
Other	6	4	3

Notably, eleven of the nineteen decisions favorable to plaintiffs were denial or reversal of summary judgment to defendant and not a final verdict or judgment in the plaintiffs' favor.<sup>55</sup> Whereas, twenty of the twenty-two decisions favorable to defendants were grants or affirmances of summary judgment/dismissal for defendants, and therefore reflect a more final disposition of the case in favor of defendants than those decisions favorable to plaintiffs.<sup>56</sup> It also is notable that each circuit (either by district or circuit court opinion) has adjudicated a case involving an employer diversity plan, whether analyzed as a voluntary AAP or otherwise considered pursuant to the *McDonnell Douglas* burden-shifting framework.<sup>57</sup>

	<b>Plaintiff</b>	<b>Defendant</b>	<b>Mixed</b>
Reverse SJ	6	0	0
Affirm SJ	0	7	0
Grant SJ	3	9	0.5
Deny SJ	5	1	1.5
Reverse Verdict	2	0	0
Sustain Verdict	3	1	1
Dismissal	0	3	0
Other Disposition	0	1	0
<b>TOTAL</b>	<b>19</b>	<b>22</b>	<b>3</b>

54. See *infra* Table 1.

55. See *infra* Table 2.

56. See *infra* Table 2.

57. See *infra* Table 3.

<b>Table 3: Circuit Decisions in Federal Cases Challenging Workplace Diversity Efforts</b>			
	<b>Plaintiff</b>	<b>Defendant</b>	<b>Mixed</b>
D.C. Circuit	0	2	1
1st Circuit	2	0	0
2d Circuit	1	3	0
3d Circuit	1	4	1
4th Circuit	1	1	0
5th Circuit	4	1	0
6th Circuit	1	4	0
7th Circuit	7	4	0
8th Circuit	1	0	0
9th Circuit	0	1	0
10th Circuit	0	1	0
11th Circuit	0	1	1
Supreme Court	1	0	0
<b>TOTAL</b>	<b>19</b>	<b>22</b>	<b>3</b>

There are several general observations to be drawn from these cases. First, employers must sustain a high burden of proof when defending diversity efforts (often pursuant to an AAP) that involve the explicit consideration of race, ethnicity, and/or gender,<sup>58</sup> whereas employers face a relatively low burden of proof when defending diversity efforts that are not explicitly race/ethnicity- or gender-conscious.<sup>59</sup> The former often must be defended under the rigorous *Weber/Johnson* standard, whereas the latter most often will be considered under the *McDonnell Douglas* burden-shifting framework, which requires the employer only to demonstrate some legitimate, nondiscriminatory business reason for the challenged action.<sup>60</sup> This difference in proof produces a disparity in an employer's likelihood of success when defending its diversity efforts against a reverse discrimination challenge, as demonstrated by the Tables above.

Take, for example, the case of *Finch v. City of Indianapolis*,<sup>61</sup> in which white police officers challenged the City of Indianapolis's promotion of three African-American police officers out of rank order as unlawful under

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58. Although the presumptive standard applicable to voluntary AAPs under Title VII is the *Weber/Johnson* standard, the lower federal courts have been inconsistent in their treatment of AAPs (including consent and settlement decrees) by applying the direct evidence standard, the equal protection standard, and sometimes even the *McDonnell Douglas* standard to these claims. *See supra* note 52. However, notwithstanding the inconsistency in the standard applied, courts have uniformly demanded more rigorous proof by employers in defense of these race- and gender-conscious efforts than the proof demanded in defense of diversity efforts that are not viewed or classified as voluntary AAPs and that do not involve race- or gender-conscious efforts.

59. *See infra* note 77.

60. *See supra* note 27 and accompanying text.

61. 886 F. Supp. 2d 945 (S.D. Ind. 2012).

Title VII.<sup>62</sup> The city attempted to defend the promotion decisions by pointing to a prior consent decree requiring that black candidates comprise at least 25 percent of appointments to officer training until parity is reached in the workforce.<sup>63</sup> The problem, however, was that the consent decree required the city to take affirmative steps to increase only the recruitment and hiring of minority officers, but not their promotion.<sup>64</sup> Declining to find the prior consent decree applicable to the challenged promotion decisions, the court instead required the city to establish a separate predicate under the *Weber/Johnson* standard for the race-conscious promotion decisions.<sup>65</sup> Finding that the city could not satisfy the high burden of proof required to validate the AAP as it related to the promotion decisions, the court granted summary judgment to the plaintiffs.<sup>66</sup>

*Finch* stands in contrast to *Mlynczak v. Bodman*,<sup>67</sup> which involved a challenge by white employees to certain hiring and promotion decisions favoring women and minority candidates. Although the plaintiffs in *Mlynczak* alleged that the hiring and promotion decisions were made pursuant to an AAP designed to promote workplace diversity, the outcome in this case was very different where the employer did not concede, as in *Finch*, that the promotion decisions were made on the basis of the race, ethnicity, and/or gender of the candidates.<sup>68</sup> Rather, the employer in *Mlynczak* asserted that the AAP, although designed to promote diversity, involved only efforts to expand the pool of candidates for hiring and/or promotion and explicitly prohibited decision makers from basing hiring and/or promotion decisions on the forbidden characteristics of race, ethnicity, and/or gender, even as it encouraged and rewarded managers for their efforts to improve workplace diversity.<sup>69</sup> The employer, therefore, was not subjected to the very high burden under *Weber/Johnson* of establishing the validity of the AAP, as the employer was in *Finch*. Instead,

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62. *Id.* at 952–53. The officers also challenged this employment action under the Equal Protection Clause, but the court’s analysis of these two claims relies on the same evidence and similar legal burdens insofar as the requirement to offer both predicate proof of a remedial justification for the implementation of a voluntary AAP and to demonstrate that the plan does not inflict undue harm to the interests of whites. *Id.* at 974–77.

63. *Id.* at 956.

64. *Id.* at 955–56.

65. *Id.* at 960 (requiring separate proof of a manifest imbalance regarding promotions to sustain the plan).

66. *Id.* at 976 (noting only a “carefully designed” AAP can be sustained as valid and finding that the defendant employed an AAP “with no tie to any perceived past discrimination, no analysis of the present effects of any past discrimination, no evaluation of its necessity as a remedial measure, and no careful consideration of its impact on white candidates passed over for promotion”).

67. 442 F.3d 1050 (7th Cir. 2006).

68. *Id.* at 1058.

69. *Id.* at 1058–59. The court noted that “[t]he existence of [an AAP] alone is not enough to permit a trier of fact to attribute [discrimination] to the decisionmakers,” finding instead that plaintiffs “must establish a link between the [AAP] and the [challenged] employment decision.” *Id.* at 1058. The court concluded that such a connection was lacking in this case, where the evidence demonstrated both that the policy prohibited the consideration of race, ethnicity, and/or gender in hiring and promotion decisions and that the candidates chosen were selected on the basis of their superior qualifications. *Id.* at 1058–59.



the employer in *Mlynczak* was only required to proffer some legitimate, nondiscriminatory business reason for the challenged promotion decisions under the *McDonnell Douglas* standard.<sup>70</sup> The employer was readily able to meet this standard by demonstrating the superior qualifications of the chosen candidates, notwithstanding the fact that they were all women and/or minorities.<sup>71</sup>

As these two cases demonstrate, an employer is much less likely to prevail in a reverse discrimination challenge when the employer is required to meet the high burden of proof under the *Weber/Johnson* standard, because it has taken race/ethnicity- and/or gender-conscious action pursuant to an AAP.<sup>72</sup> Conversely, an employer is much more likely to prevail in a reverse discrimination case when the employer is subject only to the *McDonnell Douglas* standard and is able to demonstrate that, notwithstanding an interest in improving workplace diversity, the challenged employment action can be defended on the basis of some legitimate, nondiscriminatory business reason unconnected to the candidate's race, ethnicity, and/or gender.

Another general observation that can be drawn from an analysis of the decided Title VII diversity cases is that even cases subject to the *McDonnell Douglas* standard are not immune from reverse discrimination liability if they involve impermissible race/ethnicity- or gender-conscious actions. In other words, it is the fact that an employment action is race/ethnicity- or gender-conscious, and not necessarily that it is taken pursuant to an AAP, that makes the action vulnerable to liability under Title VII. Although those cases involving general policies or practices of promoting workplace diversity that were subject to review under the *McDonnell Douglas* standard were much more likely to withstand challenge than those involving AAPs and adjudicated under the *Weber/Johnson* standard (82 percent decided favorably to defendant/employer versus the 75 percent of decisions involving race/ethnicity- or gender-conscious AAPs that were decided unfavorably to the defendant/employer), there were cases in which employers were held liable even under Title VII's *McDonnell Douglas*

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70. *Id.* at 1058.

71. *Id.* at 1059 (“[W]here an employer’s proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicant’s competing qualifications does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.” (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002))). This burden was easily met by the employer because courts have routinely declined to subject an employer’s legitimate, nondiscriminatory business reason to rigorous scrutiny, citing as a concern that “the court . . . not degenerate into . . . [a] super personnel department.” *Id.* at 1060.

72. This is true even when those efforts are styled as, or defended on the basis of, an interest in diversity. *See, e.g.*, *Decorte v. Jordan*, 497 F.3d 433, 441 (5th Cir. 2007) (affirming a jury verdict in favor of white plaintiffs challenging a diversity plan and finding it was not error for the trial court to treat the diversity plan as an invalid AAP because it was focused on achieving a desired racial balance within the workforce and took race-conscious action toward that goal).

standard for pursuing an interest in diversity in an impermissibly race/ethnicity- or gender-conscious way.<sup>73</sup> Most of these cases turn on whether the plaintiff can demonstrate that the employer's legitimate, nondiscriminatory business reason for the challenged action is a pretext for discrimination.<sup>74</sup> Consequently, ensuring that the reasons for employment decisions are well-supported in fact, even when they are not race/ethnicity- or gender-conscious, can substantially improve the likelihood of success in defending those decisions against a reverse discrimination challenge.

In addition to these general observations, there are several more discrete observations that are also worthy of note and that offer some practical guidance to employers, particularly law firms, on how to structure legally defensible workplace diversity efforts. The sections below address several practices that are commonly employed by law firms, among other employers, as a part of their workplace diversity efforts. These sections assess the likelihood of success in defending these practices against reverse discrimination challenges based on the decided Title VII diversity cases. After discussing their legal defensibility generally, I offer some additional guidance on how best to structure these practices to maximize a defense under Title VII and minimize the risk of employer liability associated with these practices.

#### A. AAPs

Employers, including law firms, might be obligated to maintain AAPs or may voluntarily adopt AAPs because of a commitment to diversity.<sup>75</sup>

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73. See, e.g., *Clements v. Fitzgerald's Miss., Inc.*, 128 F. App'x 351, 352–53 (5th Cir. 2005) (finding employer liable under Title VII *McDonnell Douglas* standard where no evidence black woman was more qualified than the white male the employer was contractually obligated to hire); *Sinio v. McDonald's Corp.*, No. 04 C 4161, 2007 WL 869553, at \*13–16 (N.D. Ill. Mar. 19, 2007) (denying summary judgment in part to the defendant/employer and finding that the plaintiff could proffer direct evidence of discrimination based on: (1) the suspicious timing of the employer's actions in terminating the plaintiff and replacing her with a black employee, (2) the systematically better treatment of black employees, and (3) the implausibility of the employer's asserted reason for termination); *Groesch v. City of Springfield*, No. 04-3162, 2006 WL 3842085, at \*6–16 (C.D. Ill. Dec. 29, 2006) (finding triable issues of fact, notwithstanding diversity interests, as to whether the reasons for disparate treatment of black and white officers in granting retroactive seniority upon rehiring was pretext for discrimination where circumstantial evidence included statements made in support of disparate treatment of an officer because of his race, additional evidence that the decision was made because of the officer's race, and evidence demonstrating that favorable treatment could have been given to white officers without impairing the interest in diversity), *rev'd on other grounds*, 635 F.3d. 1020 (7th Cir. 2011).

74. The suits in *Groesch* and *Sinio* were allowed to proceed to a jury on the question of the employer's liability for reverse discrimination. See *Sinio*, 2007 WL 869553, at \*6; *Groesch*, 2006 WL 3842085, at \*16. *Clements* upheld a verdict for the plaintiff where the employer, because of a contractual obligation to hire the plaintiff, was unable to proffer a legitimate, nondiscriminatory business reason for hiring a black woman in lieu of the white male plaintiff. See *Clements*, 128 F. App'x at 352–53.

75. A law firm, or other legal employer, may be obligated to maintain an AAP if it is a "government contractor," as defined in Executive Order 11,246, subject to oversight and

AAPs can be ordered along a continuum ranging from set aside programs, as in *Weber*, to expanded outreach and recruiting programs, as in *Mlynczak*, with varying degrees of legal proof and defensibility associated with each, as outlined above. Regardless of whether they are formally designated as AAPs, employment policies or practices that involve the conscious consideration of race, ethnicity, and/or gender in making employment decisions in an effort to achieve some identified numerical representation of women and/or minorities in the workforce must satisfy the very high *Weber/Johnson* burden of proof and are the least likely to be sustained against challenge.<sup>76</sup> AAPs, however, that merely involve expanding outreach and recruiting to women and/or minorities, regardless of whether the impetus is to cure a manifest imbalance in the workforce or simply to promote diversity, are likely to be subject to the relatively low burden of

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reporting by the Office of Federal Contract Compliance Programs (OFCCP). 41 C.F.R. § 60-2 (2014).

76. Recall that this burden arguably has been increased under *Ricci v. DeStefano*, 557 U.S. 557 (2009), for AAPs involving race- and/or gender-conscious actions as a means of achieving a desired representation of women and/or minorities in the workforce. *See supra* note 43; *see also* *United States v. Brennan*, 650 F.3d 65, 134–40 (2d Cir. 2011) (reversing and remanding the decision of the district court finding the AAP valid under the *Weber/Johnson* standard in order to apply the additional requirements of *Ricci* in determining whether the AAP is valid); *Dean v. Shreveport*, 438 F.3d 448, 456–65 (5th Cir. 2006) (reversing summary judgment for an employer that maintained separate, racial eligibility lists for entry-level firefighter positions, and finding that consent decree could not justify the AAP where there was no evidence of “lingering effects” during the relevant period to demonstrate predicate proof of a need for race-conscious hiring); *Lomack v. City of Newark*, 463 F.3d 303, 310–12 (3d Cir. 2006) (reversing judgment for the employer where the employer acted pursuant to a consent decree that was inapplicable to the challenged race-conscious transfer policy and could not otherwise demonstrate predicate for the AAP); *Mastro v. PEPCO*, 447 F.3d 843, 852–55, 860 (D.C. Cir. 2006) (reversing summary judgment for the employer where plaintiff proffered evidence of a prior consent decree and the employer admitted that it acted out of fear over controversy concerning black employees in terminating the plaintiff); *Rudin v. Lincoln Land Comm. Coll.*, 420 F.3d 712, 722–28 (7th Cir. 2005) (reversing summary judgment for the defendant and finding triable issues of fact where the employer acted pursuant to an AAP in hiring a minority candidate and failed to follow its own hiring procedures in doing so, resulting in inconsistent justifications for the hiring decision); *Frank v. Xerox Corp.*, 347 F.3d 130, 137 (5th Cir. 2003) (reversing summary judgment for the employer and finding the jury may consider the use of explicit racial goals as proof of an AAP, and placing the burden on the employer to demonstrate the validity of the AAP); *Oerman v. G4S Gov’t Solutions, Inc.*, No. 1:10-1926-TLW-PJG, 2012 WL 3138174, at \*7–9 (D.S.C. July 17, 2012) (denying the employer’s motion for summary judgment alleging that it acted pursuant to a valid AAP when using race as a “tiebreaker” in selecting a black employee over the plaintiff where both the AAP and OFCCP regulations expressly prohibited the use of race in hiring and promotion decisions); *Rogers v. Haley*, 421 F. Supp. 2d 1361, 1369–70 (M.D. Ala. 2006) (finding a triable issue on the plaintiff’s reverse discrimination claim where employer erroneously believed that it was required to promote a less-qualified black applicant over the white plaintiff pursuant to the consent decree); *White v. Alcoa, Inc.*, No. 3:04-CV-78 RLY/WGH, 2006 WL 769753, at \*1–3 (S.D. Ind. Mar. 27, 2006) (denying summary judgment to employer where evidence proffered by male plaintiff that woman was hired to cure the underutilization of women in the job category); *Travers v. City of Newton*, No. Civ.A.04-12635 RWZ, 2005 WL 3008660, at \*3–4 (D. Mass. Nov. 9, 2005) (granting summary judgment to the plaintiff where the defendant continued to adhere to race-conscious hiring under an AAP even after parity was achieved).

proof under the *McDonnell Douglas* standard and, as a result, are more likely to be sustained.<sup>77</sup>

### B. Tying Compensation to Diversity Goals

The practice of tying executive or partner compensation to diversity goals, while promoted by some within the legal profession, carries a danger of liability under Title VII.<sup>78</sup> In particular, employers can incur liability under Title VII if these compensation practices are viewed as impermissibly injecting the unlawful consideration of race, ethnicity, and/or gender into an employer's decision making. In *Frank v. Xerox Corp.*,<sup>79</sup> Xerox adopted a balanced workforce initiative (BWF) to "insur[e] that all racial and gender groups were proportionately represented at all levels of the company."<sup>80</sup> Black employees sued Xerox alleging that the BWF resulted in unlawful discrimination against black employees, who were determined to be overrepresented in certain job categories.<sup>81</sup> In reversing summary judgment for the employer, the Fifth Circuit held that the BWF was an AAP and that, unless the BWF was lawful, evidence that Xerox operated pursuant to the BWF in making the challenged employment decisions would constitute direct evidence of unlawful discrimination.<sup>82</sup> The court further held that evidence that managers were evaluated and compensated on how well they complied with the goals and objectives of the BWF could be considered in determining whether Xerox managers likely operated pursuant to the BWF in making the challenged employment decisions.<sup>83</sup> Thus, the practice of tying management performance evaluations and/or compensation to numerical hiring goals increased Xerox's exposure to liability under Title VII.

However, holding managers accountable for supporting the employer's diversity commitment, and evaluating them on that basis, is not per se unlawful. For example, *Xerox* stands in contrast to the outcome and reasoning in *Coppinger v. Wal-Mart Stores, Inc.*<sup>84</sup> In *Coppinger*, the white, male plaintiff alleged that Wal-Mart engaged in unlawful discrimination when it promoted a Hispanic female over him.<sup>85</sup> In support of his claim of

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77. AAPs that do not involve the conscious consideration of race, ethnicity, and/or gender, and do not seek to achieve a particular numerical representation within the workforce, are more likely to be sustained under the *McDonnell Douglas* burden. *See, e.g.,* Mlynczak v. Bodman, 442 F.3d 1050, 1058–59 (7th Cir. 2006) (affirming summary judgment for the employer where the AAP was only designed to expand the pool of candidates, not permit race/gender preference in hiring or selection).

78. *See supra* note 11.

79. 347 F.3d 130 (5th Cir. 2003).

80. *Id.* at 133.

81. *Id.*

82. *Id.* at 137.

83. *Id.*

84. No. 3:07cv458/MCR/MD, 2009 WL 3163211 (N.D. Fla. Sept. 30, 2009); *see also* Bajor v. Wal-Mart Corp., No. 08-12401, 2010 WL 779240, at \*6–8 (E.D. Mich. Mar. 8, 2010) (granting summary judgment to the employer on a reverse discrimination claim, finding no evidence that managers had their bonuses reduced for failing to meet goals).

85. *Coppinger*, 2009 WL 3163211, at \*1–2.

pretext under the third stage of the *McDonnell Douglas* burden-shifting framework, he asserted that, despite Wal-Mart's assertions that the woman chosen had superior qualifications, Wal-Mart's diversity policy and practices were the real reason for his non-selection.<sup>86</sup> He pointed in particular to two aspects of the diversity policy as motivating the unlawful promotion decision: (1) diversity placement goals and (2) the evaluation of managers on their good faith efforts to support diversity.<sup>87</sup> As to the latter, the plaintiff asserted that managers' evaluations were based, in part, on their achievement of the diversity placement goals.<sup>88</sup> However, in rejecting this evidence as proof of pretext, the court reasoned that, "[a]lthough ten percent of a manager's job evaluation was based on attending one annual diversity event," no evidence was presented demonstrating that managers were "influenced by [the diversity] policies" in making the challenged employment decisions.<sup>89</sup>

These cases demonstrate that, while tying executive performance and compensation to diversity goals is not per se unlawful under Title VII, doing so may carry an increased risk of liability for the employer if an employee can demonstrate that the incentives under the compensation policy caused a decision maker to impermissibly consider race, ethnicity, and/or gender when making a hiring, promotion, or termination decision.

### C. Affinity Groups/ERGs

Affinity Groups or Employee Resource Groups (ERGs) are an increasingly common feature of workplace diversity efforts.<sup>90</sup> These programs often serve as a valuable resource for employees and generally will not subject employers to Title VII liability in the absence of some other proof of discriminatory conduct by the employer.<sup>91</sup> However, if ERGs operate as a pathway to leadership, rather than merely fostering mutual support among employees and/or providing targeted training opportunities, they should be open to all employees, lest they increase an employer's risk of liability under Title VII for failing to provide equal access to resources

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86. *Id.* at \*6.

87. *Id.*

88. *Id.* at \*6-7.

89. *Id.*

90. See Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equality in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1069 (2011).

91. Compare *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 541-42 (7th Cir. 2005) (holding that a failure to permit a Christian affinity group was not unlawful where no religious groups permitted); *Filozof v. Monroe Comm. Coll.*, 583 F. Supp. 2d 393, 403-04 (W.D.N.Y. 2008) (finding that providing minorities and women with faculty development opportunities was "de minimis" and did not constitute disparate treatment), with *Sinio v. McDonald's Corp.*, No. 04 C 4161, 2007 WL 869553 (N.D. Ill. Mar. 19, 2007) (finding existence of African American employee resource group, when combined with other evidence of more favorable treatment of African Americans, sufficient to raise triable issue of fact on Asian American employee's disparate treatment claim).

bearing directly on employees' opportunities for advancement and promotion.<sup>92</sup>

#### D. Diversity Statements

The most common practice among employers committed to workplace diversity is publication of a diversity statement. These statements are often printed and published in various forms that are made available to both employees and the public.<sup>93</sup> In addition to publishing these statements in writing, these statements are often reinforced by leaders in remarks, both formal and informal, with employees, administrators, and even external stakeholders.<sup>94</sup> Although these diversity statements are likely to be cited in cases alleging reverse discrimination, they are very unlikely to constitute actionable proof of unlawful discrimination in the absence of a direct connection between the diversity statement and the challenged employment action.<sup>95</sup> In fact, diversity statements that are neither made by the relevant decision maker, nor connected to the challenged employment action, are most likely to constitute "stray comments/remarks" under Title VII and cannot serve as the basis for legal liability.<sup>96</sup> Moreover, general statements

92. See *Sinio*, 2007 WL 869553 (finding that the existence of an African American employee resource group, which was designed to help them achieve promotions, could support Asian American employee's claim for disparate treatment).

93. Examples include diversity statements on the employer's webpage, diversity brochures that might be distributed to prospective employees and others, and some employers even produce diversity reports containing detailed information about the employer's efforts to promote workplace diversity. All of these would qualify as "diversity statements."

94. See *supra* note 11 for a discussion of these external stakeholders.

95. See, e.g., *Johnson v. Metro. Gov't of Nashville*, 502 F. App'x 523, 535 (6th Cir. 2012) ("[S]tatements reflecting a desire to improve diversity do not equate to direct evidence of unlawful discrimination."); *Bissett v. Beau Rivage Resorts*, 442 F. App'x 148, 152–153 (5th Cir. 2011) (finding that a diversity policy did not support an inference of discrimination where the policy stated that the employer "values diversity and considers it an important and necessary tool that will enable [the employer] to maintain a competitive edge," and that the employer "is committed to maintaining a workforce that reflects the diversity of the community"); *Mlynczak v. Bodman*, 442 F.3d 1050, 1057–58 (7th Cir. 2006) (finding that comments not connected to hiring nor made by a decision maker were insufficient to establish discrimination); *Harkola v. Energy E. Util. Shared Svcs.*, No. 09-CV-6318 (MAT), 2011 WL 3476265, at \*11 (W.D.N.Y. Aug. 9, 2011) (finding that a general diversity policy was insufficient to raise an inference of discrimination); *Opsatnik v. Norfolk S. Corp.*, No. 06-81, 2008 WL 763745, at \*10 (W.D. Pa. Mar. 20, 2008) (holding that pointing to the defendant's diversity policy, without more, is not sufficient evidence of discrimination); *Keating v. Paulson*, 2007 WL 3231437, at \*9 (N.D. Ill. Oct. 25, 2007) (holding that a statement by one manager that "he used the announcement of the vacancy as a means of addressing [diversity] concerns . . . by itself . . . is insufficient to establish the requisite intent to discriminate"); *Jones v. Bernanke*, 493 F. Supp. 2d 18, 29 (D.D.C. 2007) ("[A]n employer's statement that it is committed to diversity 'if expressed in terms of creating opportunities for employees of different races and both genders . . . is not proof of discriminatory motive with respect to any specific hiring decision. Indeed, it would be difficult to find today a company of any size that does not have a diversity policy.'" (quoting *Bernstein v. St. Paul Cos.*, 134 F. Supp. 2d 730, 739 n.12 (D. Md. 2001))).

96. See, e.g., *Plumb v. Potter*, 212 F. App'x 472, 477–78 (6th Cir. 2007) (finding stray comments in support of diversity not direct evidence of discrimination). *But see Murray v. Vill. of Hazel Crest*, No. 06 C 1372, 2011 WL 382694, at \*4–6 (N.D. Ill. Jan. 31, 2011)

in support of diversity have been found to constitute neither direct evidence of discrimination, nor to raise an inference of discrimination sufficient to rebut an employer's legitimate nondiscriminatory business reason for a challenged employment action.<sup>97</sup> In fact, such general statements in support of diversity have been viewed favorably by courts as a demonstration of the employer's commitment to equal opportunity.<sup>98</sup> Consequently, diversity statements, by themselves and when unconnected to an individual employment decision, present very little, if any, risk of legal liability under Title VII.

#### E. Tiebreakers

Given the permissive use of race as a "plus factor" in the college and university admissions context, including in an effort to increase student body diversity as recognized by the Supreme Court in *Grutter*, the question is often posed whether such plus factor or "tiebreaker" considerations are permitted in the employment context under Title VII.<sup>99</sup> An analysis of the decided Title VII diversity cases suggests that consideration of race, ethnicity, and/or gender in making employment decisions, unless done pursuant to a valid AAP, carries a substantial risk of liability under Title VII and may only be permissible, if at all, as a tiebreaker when two candidates are virtually indistinguishable or so closely matched on objective qualifications that the selection decision is purely subjective and not subject to second-guessing by the court.<sup>100</sup>

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(holding that statements by the mayor that he wanted an African American promoted and more diversity in his administration generally, when combined with evidence of an AAP and testimony that race was considered in the decision making, were sufficient to constitute direct evidence of unlawful discrimination); *Groesch v. City of Springfield*, No. 04-3162, 2006 WL 3842085, at \*10 (C.D. Ill. Dec. 29, 2006) (finding that, while "statements relating to the City's increased efforts to recruit minorities in the Police Department are not direct evidence of discriminatory intent," they could provide circumstantial evidence where other evidence also supports inference of discrimination), *rev'd on other grounds*, 635 F.3d 1020 (7th Cir. 2011); *White v. Alcoa, Inc.*, No. 3:04-CV-78 RLY/WGH, 2006 WL 769753 at \*1-2 (S.D. Ind. Mar. 27, 2006) (holding that the plaintiff was entitled to submit evidence to the jury where reasons for hiring a female over the plaintiff were "unconvincing" and further that the "HR Manager . . . advised . . . that if there was an opportunity to hire a qualified female, they should do so").

97. See *supra* note 97.

98. See *Groesch*, 2006 WL 3842085, at \*11 ("Having a racially diverse [workforce] is a worthy goal."); *Bullen v. Chaffinch*, 336 F. Supp. 2d 342, 348 (D. Del. 2004) ("[A] generalized effort to achieve more minority representation in the [workforce] . . . may be admirable.").

99. See *Estlund*, *supra* note 50, at 219 (suggesting that employers could defend race-conscious hiring based on business justifications); *Shin & Gulati*, *supra* note 46, at 1049 (predicting that the Supreme Court would soon consider the possibility of whether an interest in diversity might justify race-conscious action under Title VII). *But see Rhode*, *supra* note 90, at 1068-69 (questioning "how far [the *Grutter*] rationale would extend to employment contexts").

100. See *Mlynczak*, 442 F.3d at 1054 ("Race or sex may be considered only in the unlikely event that two candidates are so equally qualified that there is no other meaningful distinction between them."); *Coppinger v. Wal-Mart Stores, Inc.*, No. 3:07cv458/MCR/MD, 2009 WL 3163211, at \*8 (N.D. Fla. Sept. 30, 2009) (finding that the fact that an employer bases a hiring or promotion decision on purely subjective criteria will rarely if ever prove

In structuring hiring and selection processes, therefore, it is important to ensure that, unless employment decisions are being made pursuant to a valid AAP, decision makers refrain from considering race, ethnicity, and/or gender in selecting candidates for hire or promotion. Instead, selection decisions should be made on the basis of objective and/or subjective considerations about the candidates' relative credentials and qualifications.<sup>101</sup> When selection decisions are made on these bases, they are most likely to withstand challenge under Title VII. This is particularly true, even when selection decisions are based on nominal differences in credentials or qualifications, or even entirely subjective considerations, because courts are loathe to second guess the decisions of employers when they involve no apparent consideration of such impermissible factors as race, ethnicity, or gender.<sup>102</sup> This limitation on the consideration of race, ethnicity, and/or gender in the hiring/selection process can be contrasted with the consideration of race, ethnicity, and/or gender in the recruitment process.

#### F. Expanded Recruitment—The “Rooney Rule”

Although expanded recruitment and outreach to women and minority applicants are often required components of formal AAPs, they are also common features of less formal diversity programs.<sup>103</sup> To the extent that these recruitment and outreach efforts are aimed at ensuring that women and minority candidates are well represented among those considered for

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pretext under Title VII); *Maples v. City of Columbia*, No. 3:07-3568-CMC-JRM, 2009 WL 483818, at \*6 n.6 (D.S.C. Feb. 23, 2009) (finding that, where a plaintiff asserts job qualifications that are similar or only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer). *But see* *Dietz v. Baker*, 523 F. Supp. 2d 407 (D. Del. 2007) (denying summary judgment to the defendant where a triable issue existed as to whether it may use race as a “plus factor” to support operational need and whether its use was narrowly tailored); *White*, 2006 WL 769753, at \*2–3 (finding the employer not entitled to summary judgment where the human resources manager advised an HR employee that she should hire a qualified female if the opportunity arose and told another manager to hire a female applicant over a more highly qualified male).

101. Overly subjective considerations may operate to the disadvantage of women and minorities in the selection process, thus giving rise to disparate impact and/or disparate treatment claims, and so ought to be limited in their use. *See* *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1180 (9th Cir. 2007) (finding that subjective criteria for promotion and compensation decisions could support liability for disparate impact), *rev'd on other grounds*, 131 S. Ct. 2541 (2011).

102. *See* *Opsatnik v. Norfolk S. Corp.*, No. 06-81, 2008 WL 763745, at \*10 (W.D. Pa. 2008) (“[W]e do not sit as a super-personnel department that reexamines an entity’s business decisions.” (quoting *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 332 (3d Cir. 1995) (alteration in original) (internal quotation marks omitted))). Critics might argue that this standard allows employers to engage in subterfuge to mask the real motives for their selection decisions. This deferential standard also operates in favor of employers when they are accused of engaging in unlawful discrimination against women and minorities rather than in their favor. *See* *Martin*, *supra* note 14, at 368. There is no reason to distinguish between these two circumstances in assuming employers are engaged in suppressing their real motives nor to apply differing standards of proof.

103. *See* 41 C.F.R. § 60-2 (2014) (requiring affirmative recruitment plans); *see also supra* note 10 and accompanying text (discussing voluntary recruitment efforts).



hiring and promotion opportunities, they are among the most legally defensible practices when challenged under Title VII.<sup>104</sup>

In fact, expanded recruitment and outreach is the practice most often encouraged as a part of the legal profession's commitment to diversity.<sup>105</sup> It is also a practice that, while it carries minimal legal risk, can generate demonstrable results when implemented effectively.<sup>106</sup> One of the most frequently cited examples of the efficacy of expanded recruitment and outreach from diversity hiring programs is the National Football League's (NFL) Rooney Rule.<sup>107</sup> Some commentators even have encouraged legal employers to adopt the Rooney Rule as a part of their own diversity commitments.<sup>108</sup> Even if legal employers do not formally adopt the Rooney Rule as a part of their recruitment and hiring practices, understanding how and why the Rooney Rule works, and in particular why it helps shield employers from legal liability under Title VII, might help inform the development of more effective and legally defensible recruitment and hiring practices.

The Rooney Rule was adopted by the NFL in 2003 in response to public criticism about the dearth of minority head coaches.<sup>109</sup> The Rooney Rule requires that NFL teams expand their recruitment of and outreach to minorities, and in particular requires that all teams interview at least one minority candidate for each head coaching or front office position.<sup>110</sup> This effort has been widely lauded for increasing the number of minority head coaches from one in 2002 (just before the rule was adopted) to an all-time

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104. *See Mlynczak*, 442 F.3d at 1053–54, 1061 (finding that an AAP that expanded the employer's applicant pool but did not permit preference in hiring was not sufficient to establish discrimination); *Rogers v. Haley*, 421 F. Supp. 2d 1361, 1366 (M.D. Ala. 2006) (“[W]hile ADOC may have operated an ‘expanded’ recruitment program . . . there is no evidence that it has operated a program that excluded . . . white applicants.”); *Bullen v. Chaffinch*, 336 F. Supp. 2d 342, 348 (D. Del. 2004) (“[A] generalized effort to achieve more minority representation . . . does not prove . . . that a quota was established. In fact, under certain circumstances such an effort may be admirable.”).

105. *See supra* note 10.

106. *See infra* notes 107, 111–12 and accompanying text.

107. *See, e.g.,* N. Jeremi Duru, *Call in the Feds: Title VI As a Diversifying Force in the Collegiate Head Football Coaching Ranks*, 2 WAKE FOREST J.L. & POL'Y 143, 148–49 (2012) (touting the success of the NFL's Rooney Rule in increasing the diversity of head coaches); *see also* Brian W. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 870 (2007) (explaining the basis for the Rooney Rule's “uncharted success”). The Rooney Rule, so named for Pittsburgh Steelers' owner Dan Rooney, who was its driving force, was adopted by the NFL in 2003 following allegations by high-profile plaintiffs' attorneys Cyrus Mehri and Johnnie Cochran that the hiring and termination of head coaches in the NFL was racially discriminatory. *See Duru, supra*, at 147–48. At the time the Rooney Rule was adopted there was one minority head coach in the NFL, within two years there were six, and as of 2011 there were an all-time high number of eight minority head coaches in the NFL, including five that had made Super Bowl appearances. *Id.* at 147–48 & n.21.

108. Allegheny Cnty. Bar Ass'n, *Could a Variation of the NFL's Rooney Rule Work for Law Firms?*, LAW. J., 2012, at 1.

109. *See Duru, supra* note 107, at 143. This was seen as a particularly troubling phenomenon given the significant concentration of minority players (70 percent) in the league. *Id.* at 147.

110. *Id.* at 143.

high of eight in 2011.<sup>111</sup> The reason why the Rooney Rule works is because it allows teams to expand the pool of candidates from which they select coaches, but the reason why it is lawful is because ultimately the coaches are selected on the basis of their credentials, not their color.<sup>112</sup> Expanding the pool of candidates to include more women and racial/ethnic minorities would similarly allow legal employers to identify both more diverse candidates and possibly those with a broader range of talents, skills, and abilities than might otherwise be identified when relying on narrow recruitment strategies. Selecting candidates from among this expanded pool on the basis of their unique skills, abilities, experiences, and perceived contributions, rather than on the basis of prohibited characteristics, is what helps shield the decision from legal liability.<sup>113</sup> This results in a win-win for legal employers, who are able to expand their diversity while also minimizing their legal risk.

### III. REDEEMING *MCDONNELL DOUGLAS*

Title VII's *McDonnell Douglas* standard has often been criticized for its failure to protect women and racial/ethnic minorities from workplace discrimination.<sup>114</sup> This critique focuses largely on the very low burden (of production) applicable to employers at the second stage of the *McDonnell*

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111. *Id.* at 148–49 (“[T]he rule has been more effective in expanding NFL head coaching opportunities than any other equal opportunity initiative in league history.”). It should be noted that this recruiting and hiring effort has not come at the expense of talent. Five of the eight head coaches in the league as of 2011 had made Super Bowl appearances in the previous five years. *Id.* at 148.

112. *Id.* at 149. Expanding the pool of candidates allows the teams to identify more candidates than might otherwise be identified using narrow recruitment practices. Within this expanded pool there are likely to be talents that had previously gone unnoticed.

113. *See* DeBiasi v. Charter Cnty. of Wayne, 537 F. Supp. 2d 903, 922 (E.D. Mich. 2008) (crediting defendant’s assertion that the woman selected was more qualified than plaintiff, and reasoning that, “in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant’s qualifications must be so significantly better than the successful applicant’s qualifications that no reasonable employer would have chosen the latter applicant over the former” (quoting *Bender v. Hecht’s Dep’t Stores*, 455 F.3d 612, 627 (6th Cir. 2006)); *Plumb v. Potter*, 212 F. App’x 472, 480 (6th Cir. 2007) (rejecting evidence that the plaintiff was objectively more qualified for the promotion than the woman chosen, even where the plaintiff alleged that he had more managerial experience, more education and training, and a higher pay grade, finding that their “qualifications . . . were comparable, and [the employer] chose [the woman] based on her better interview and her superior performance during the temporary detail”); *Jones v. Bernanke*, 493 F. Supp. 2d 18, 31 (D.D.C. 2007) (finding that the plaintiff had not even offered a prima facie case of discrimination where, notwithstanding the allegations by the plaintiff that he was more qualified than the woman chosen, “this [was] a situation in which the defendant chose between two equally qualified candidates,” and therefore the plaintiff did not raise any inference of discrimination); *see also* *Mlynczak v. Boldman*, 442 F.3d 1050, 1059 (7th Cir. 2006) (“[W]here an employer’s proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants’ competing qualifications does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff is clearly better qualified for the position at issue.” (citations omitted)).

114. *See supra* note 14 and accompanying text.

*Douglas* burden-shifting framework, when the employer need only proffer some legitimate, nondiscriminatory business reason for taking the challenged employment action, as compared to the very high burden (of proof) plaintiffs must satisfy at the third stage of this burden-shifting framework, when they must demonstrate that this reason is actually a pretext for unlawful discrimination, or must otherwise offer direct proof of the employer's discriminatory motive.<sup>115</sup> However, it is precisely these burdens that operate to the advantage of employers when defending their diversity efforts from reverse discrimination challenges. Given the increasing hostility by courts to traditional discrimination claims, litigation has become a less effective strategy for advancing the interests of women and racial/ethnic minorities in the workplace.<sup>116</sup> Conversely, voluntary efforts by employers to improve workplace diversity are growing.<sup>117</sup> As these efforts have grown, however, they too have encountered resistance, especially in the form of reverse discrimination litigation.<sup>118</sup> In order to sustain and promote these efforts, including within the legal profession, it is necessary that they be structured in legally defensible ways and that employers are aware of the most effective legal strategies for defending these efforts. For the reasons discussed herein, Title VII's *McDonnell Douglas* burden-shifting framework may ironically provide that strategy, redeeming Title VII as a vehicle for the protection of women and racial/ethnic minorities and for ensuring their effective participation in the workplace.

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115. See *supra* notes 23–31 and accompanying text.

116. See *supra* notes 14–15 and accompanying text.

117. See *Moranski v. Gen. Motors Corp.*, 433 F.3d 537, 540 (7th Cir. 2005) (“Employer-sponsored diversity initiatives have become increasingly popular.”).

118. See *supra* note 50 (noting that forty of forty-four cases challenging diversity efforts have been reverse discrimination cases).