

# Desperately Seeking Diversity

## *What Law Firms and Legal Recruiters May Not Do to Create a Diverse Workplace*

**A** legal search company telephoned me asking for help in locating an attorney to fill a position as director of diversity for a law firm. The caller said that the firm was looking for “an African-American woman attorney” to implement the firm’s diversity program. Did I know anyone who fit that description? Is it lawful for the search firm to seek only African-American female candidates for a position? What about the law firm? Is it discriminatory to make being African American and female a requirement for the position? Does the client’s preference make a difference?

What were they thinking? A laudable purpose, but this is per se unlawful employment discrimination by both the legal recruiters and the law firm if the search and hiring decisions are based on identifying and considering only African-American women attorneys for the position. The conduct of legal recruiters and law firms, when they are acting as employers, is highly regulated. While law firms focus their attention on increasing diversity, the law requires, with extremely limited exceptions, that employment decisions be neutral with respect to factors such as race and gender. Moreover, the preferences of the law firm and its clients do not constitute defenses to a claim of race discrimination.

Title VII of the Civil Rights Act of 1964, the federal anti-discrimination statute, prohibits employment discrimination on the basis of race and sex. The statute makes it unlawful for an employer “to fail or refuse to hire” ... any individual or “to limit, segregate, or classify ... in any way which would deprive or tend to deprive any individual of employment opportunities” on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a).

Earmarking a position within a firm, such as the director of diversity, to be filled on the basis of the race and gender of the

applicants, falls outside the scope of permissible conduct under the law.

There is no exception or defense to a claim of discrimination where the conduct is undertaken in the name of “diversity.” Diversity is not required by any law. It is an approach to making business decisions

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that values individual differences and attempts to include distinct contributions and opinions that result because of an individual’s personal characteristics such as race and gender.

Many methods that firms may use to achieve diversity fall well within the scope of acceptability with respect to employment laws. Others may be permitted only where the firm elects to acknowledge past discrimination and institute a voluntary affirmative action program for remedial purposes or is required to have an affirmative action plan because it is a federal contractor or subcontractor.

The U.S. Supreme Court hasn’t directly addressed the issue of employers’ efforts to

attain or maintain workforce diversity when these circumstances are not present. This is a different issue from that faced by the court in the University of Michigan admission cases.

The U.S. Court of Appeals for the Third Circuit has acknowledged that an employer has a right to be concerned about the diversity of its workforce as long as those efforts adhere to equal employment opportunity laws. See *Iadimarco v. Runyan*, 190 F.3d 151 (3d Cir. 1999).

In *Taxman v. Board of Education of Piscataway*, 91 F.3d 1547 (3d Cir. 1997), the court was faced with a school board’s policy that preferred a minority teacher over a non-minority teacher in a layoff decision where the two teachers were equally qualified. The school board believed it important for the staff to reflect the diversity of the student population and the community. The court rejected the board’s reasons and held, “[a]lthough we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through non-remedial discriminatory measures.” *Id.* at 1567.

Significant to the application of this case to law firm diversity efforts, Judge Timothy K. Lewis, in a dissenting opinion in which Judge Theodore A. McKee joined, admonished the majority to be mindful of the effects of the opinion on “legitimate, thoughtful efforts to redress the vestiges of our Nation’s history of discrimination in the workplace” that have helped to “open, and keep open, the doors of opportunity to those who have ‘been excluded from the American dream’ ... This, after all, is what I had always thought Title VII was intended to accomplish.” *Id.* at 1577.

As an example of the impact of the majority’s decision, Judge Lewis specifically references the difficulties faced by law firms:

“Somewhere out there in the real world, for example, there is a law firm with a racial make-up (a workforce) akin to Piscataway High School’s; a firm which lacks a history of intentional discrimination in hiring, but, due to economic concerns, must decide between retaining one of two attorneys—the first and only black associate to work in its prestigious anti-trust department, or his equally qualified white counterpart. The firm’s management committee may decide

that to layoff the black associate would be an unwise and potentially damaging business decision because it would negate the large investment of time, effort and money spent trying to recruit and retain minority lawyers. In other words, the firm may believe that diversity would be good for business and good for itself, so, everything else being equal, it decides to layoff the white associate.

"In a situation such as this, the firm's reliance upon race as one among many factors in making its decision is the type of management prerogative which is totally consistent with the goals and underlying purpose behind Title VII ... After it reads the majority's decision, however, it seems clear that the firm will be forced to disregard its own better business judgment, forsake its recent recruiting successes among minorities and, I suppose, flip a coin on its own future as well as the young associates', all in order to avoid the specter of Title VII liability and an enormous damage award.

"... in my view, Title VII was not enacted to prevent the thoughtful, deliberative processes employed by such a law firm ... I believe the majority's decision eviscerates the purpose and goals of Title VII."

*Id.* at 1577-78 (Circuit Judge Lewis, with whom Judge McKee joined, dissenting) (emphasis added, citations omitted).

What about the recruiting firm? It's not hiring anyone. Does the law prohibit it from meeting the needs of its law firm client?

The recruiting firm cannot pass the buck by saying that it was merely fulfilling its client's wishes. Legal search firms are not exempt from Title VII's reach even where they do not hire or employ but merely seek candidates to fill positions identified by their clients. Title VII specifically addresses this issue, making it an "unlawful employment practice" for an employment agency to "fail or refuse to refer for employment" or to "classify or refer for employment" any individual because of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(b).

What about the law firm's need or desire for a diverse attorney workforce to meet the expectations of its business clients as identified by general counsels at the law firm's clients or potential clients? The law firm and the recruiters appear to be pursuing the

laudable goal of achieving greater integration of minorities and women attorneys within the firm by seeking to hire a director of diversity.

Despite these good intentions and the need to respond to the law firm's clients, hiring based on customer or client preference is a well-established unlawful practice. *See, e.g., Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971) (airline's no-marriage rule for stewardesses was not justified by passenger preference); *Vigars v. Valley Christian Center of Dublin*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (fellow employees' and customers' preferences do not constitute bona fide occupational qualifications). The U.S. Equal Employment Opportunity Commission (EEOC) guidelines on sex discrimination also reject preferences of clients or customers. *See* 29 C.F.R. § 1604.2(a)(1)(iii).

The seminal case concerning the conflict between discrimination laws and customer preference is *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971), where the U.S. Court of Appeals for the Fifth Circuit held that Pan Am's practice of hiring only female flight attendants was unlawful discrimination against males despite the fact that Pan Am's customers purportedly preferred women flight attendants, then called "stewardesses."

And then there is the "Love Airlines" case, *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tx. 1981), where the evidence was undisputed that Southwest's enormous success was in no small part due to its marketing image characterized by its all-female personnel dressed in high boots and hot pants. Their sex appeal had been used successfully to attract male customers to the airline. The court, nevertheless, found that the preferences of Southwest's customers did not trump Congress' purpose in enacting Title VII of preventing employers from making employment decisions based on stereotyped notions of the sexes. The court held that hiring both sexes would not alter or undermine the essential function of Southwest's business of transporting its customers despite the preferences of its customers.

Title VII and the EEOC regulations recognize a narrow exception to the general prohibition against discrimination on the basis of sex where sex is a "bona fide occupational qualification" (BFOQ), "reasonably necessary to the normal operation of a particular business." 42 U.S.C. § 2000e-2(e)(1); 29 C.F.R. § 1604.2. In certain circumstances, therefore, sex discrimination may be justified if it qualifies as a BFOQ.

It is unlikely that the race and gender-based qualifications for the law firm's director of diversity would pass muster as a BFOQ. The EEOC regulations specify that the BFOQ is inapplicable where the refusal to hire is based on "the preferences of coworkers, the employer, clients or customers." Moreover, the BFOQ defense is not available as a defense to race discrimination.

Even if this were not the case, is it reasonably necessary or justifiable as a business decision for a law firm that employs a director of diversity to limit the job to an African American or a female attorney? The law firm may believe that it will be more successful in recruiting and retaining African-American and female attorneys if the person charged with achieving that success is an African-American woman. That person will be more successful at recruitment because applicants will view the law firm as friendly toward African Americans and women. This apparently was a common view in business in the earlier years where a disproportionate number of minorities were hired as human resources directors.

The larger corporate community apparently abandoned this type of thinking long ago, presumably after recognizing this rationale may be naïve and perhaps itself borne of prejudice. Would a minority or female candidate really conclude they would be treated more fairly by an employer because the director of diversity was an African-American woman? Statistics reflecting a law firm's diversity are readily available to applicants. Moreover, these candidates can easily look around the firm and see for themselves whether or not the workforce is diverse and whether or not minorities and women are well represented in the ranks of the partnership and management. ■