

DIVERSITY IN THE AGE OF OBAMA: NEW DIRECTIONS OR STATUS QUO? (EMPLOYMENT CONTEXT)

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Introduction

The election of Barack Obama as President of the United States has reignited debates about affirmative action and diversity in employment and higher education in general. Opponents of race-conscious policies and programs argue that the election of an African-American to the highest office in the country proves that it is not necessary for race to be a factor in employment. The fact that his strongest competitor within his own party was a woman has led some people to say similar things about the role of gender-conscious policies and programs (although as this outline is being written, a debate is raging about whether President Obama should nominate a woman to a Supreme Court on which there is only one current female Justice). These significant breakthroughs have not, however, eliminated continuing disparities in higher education or in other segments of society. Top positions in higher education administration are still largely dominated by white males, as are the highest ranks of professorships in many fields at many colleges and universities. While our student bodies are rapidly becoming more diverse to reflect the changing demographics of our society, the faculties at most institutions lag well behind in this regard.

In the case of students, the higher education community banded together in 2003 in the University of Michigan admissions lawsuits to argue that student diversity produces important educational benefits for the entire student body that constitute a “compelling interest” under the law. *See Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003). This diversity is described as being directly relevant to the educational mission of most colleges and universities, especially as we prepare students to live in a diverse democracy and to compete in a global economy. But if the argument for diversity is compelling in the student body context, then shouldn’t the same thing be true with regard to the employment context—at least for certain types of positions? For example, if faculty and certain types of administrators interact with students in educational settings in and outside the classroom, and if they serve as authority figures on campus who influence student behavior and career choices, then shouldn’t the arguments regarding the compelling interest in diversity apply with equal force to them?

This is one of the key unanswered questions after the Michigan decisions—i.e., whether, and to what extent, factors such as race, national origin, gender, etc. can be taken into account in the employment context at educational institutions. There are many unanswered questions on this front, and relatively little clear recent guidance. In a recent decision, the Supreme Court suggested that an employer seeking to avoid or remedy an unintentional disparate impact on members of historically underrepresented groups based on the employer’s own practices faces a significant burden before taking race into account as a means to avoid or remedy such an impact. *See Ricci v. Destefano*, Nos. 07-1428 and 08-328 (June 29, 2009) (involving claims of “reverse discrimination” in promotional practices for firefighters in New Haven, Connecticut) (discussed below).

This outline will explore the question of whether diversity might be considered to be a compelling interest in employment (at least in higher education), as well as the broader issue of what colleges and universities can legally do to promote this interest in diversity in employment insofar as it relates to their educational mission. Some general rules of thumb can be articulated, and many other creative approaches have not necessarily been foreclosed by the case law to date.¹ Many of the strategies enumerated below focus on faculty, but these same approaches can often be adopted for staff searches at senior levels—particularly where extensive searches are involved. All of these strategies will have a much greater likelihood of success if they are backed up with strong leadership and accountability.

I. Diversity as a Compelling Interest in Employment?

In the University of Michigan cases, the University (with support from public and private institutions around the country) successfully argued that it had a compelling interest in achieving the educational benefits of a diverse student body. The Supreme Court noted in *Grutter v. Bollinger*, 539 U.S. 306 (2003), that “context matters” when applying strict scrutiny to determine whether a particular racial classification passes constitutional muster, stating that “strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.” *Id.* at 327. The Court made clear that it has “never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.” *Id.* at 328. Thus, the Court left open the possibility that some considerations of race at public institutions, beyond the strictly remedial context, may be able to survive constitutional muster.

The Court also reiterated its longstanding deference to the rights of colleges and universities to make educational decisions. In some of its seminal academic freedom/institutional autonomy cases, the Court has indicated that institutions are owed deference in part to decisions about “who may teach.” *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). At the same time, however, the Court has not given carte blanche to educational institutions in the employment arena. For example, in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Court indicated that colleges and universities may be required to divulge confidential peer review materials from the tenure process in cases alleging race or sex discrimination.

On its face, the Court’s decision in *Grutter* applies only to student body diversity. The Court did cite expansively to *amici* with broader interests, however, including corporations that argued that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” 536 U.S. at 330. In addition to discussing the skills need to compete in a global economy, the Court also talked about the importance of diversity in the leadership of societal institutions, and about the role of colleges and universities in preparing future generations of leaders for these institutions. The Court noted that the need for openness and clear equality of opportunity is especially important in the higher education setting, declaring that “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.” *Id.* at 332. Indeed, the Court cited the United States

¹ This outline will focus primarily on federal law. Note that some state laws may be more restrictive than federal law with regard to voluntary considerations by their public institutions of race, national origin, or gender. *See, e.g.,* Cal. Const. Art. I, Section 31 (California’s “Proposition 209,” which bans most race and gender-conscious programs in public employment). Similar ballot initiatives prohibiting voluntary race and gender-conscious programs and policies have been passed in Washington State (Initiative 200 in 1998); Michigan (Proposal 2 in 2006); and Nebraska (Proposal 424 in 2008).

government’s argument that “[n]owhere is the importance of such openness more acute than in the context of higher education.” *Id.*

With regard to narrow tailoring, certain aspects of the Court’s decisions in *Grutter* and *Gratz* would appear to be relevant to any context in which diversity is considered to be a compelling interest. Some of the general lessons from these cases include the following:

- Institutions that are pursuing an interest in diversity must be able to demonstrate that they are considering a wide range of attributes—not just race or national origin, but a whole panoply of other characteristics that contribute to the diversity of an educational environment (including factors such as socioeconomic background, geography, first generation within a family to attend college or graduate school, special skills and talents, unique life experiences, etc.).
- Applicants must be reviewed on an individualized, holistic basis. Everyone must be able to compete against the entire pool—there should not be separate tracks, committees, or processes based on race or national origin.
- Quotas are of course forbidden.
- Race cannot be used in a mechanistic or automatic way (e.g., by getting a specific weight in terms of points). It cannot be the predominant criteria in a process, but simply a “plus” factor.
- Race-neutral alternatives (or alternatives in which race is less of a factor) must be seriously considered – although an institution need not try and fail with every such alternative before employing race or gender-conscious measures.
- In any program in which race is taken into account, the burden on members of racial groups that do not receive a “plus” factor must be minimized so that such groups are not unduly harmed.
- Such programs must not be permanent, and should be reviewed periodically.

See generally id.

The Seventh Circuit Court of Appeals subsequently applied *Grutter* in an employment context outside of higher education to uphold a race-conscious affirmative action plan in the Chicago Police Department. *See Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2426 (2004). In that case, the Seventh Circuit found that “there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago.” *Id.* at 1114. The Court held that “the CPD had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.” *Id.* at 1115. In reaching this conclusion, the court relied largely on the views of experts and police department executives who said that affirmative action was warranted to enhance the department’s operations. The court also upheld standardizing scores on an examination by race to eliminate what would have otherwise been an advantage to white officers based on race.

The *Petit* case suggests that some lower courts will be willing to entertain the possibility that diversity is a compelling interest in the employment context, at least in special circumstances where a particular need can be articulated. The argument might be logically extended to campus police or

security guards, for example. For other staff positions, some context-specific rationale would need to be developed. Faculty is the other group for which many higher education commentators have argued in particular that diversity is a compelling interest, because of their special role in educating students. *See, e.g.,* Alger, Jonathan R., *When Color-Blind is Color-Bland: Ensuring Faculty Diversity in Higher Education*, 10 *Stanford Law & Policy Review* 191 (Spring 1999). At least one state court has previously found that faculty diversity is akin to student body diversity as a compelling interest. *See University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998) (applying Justice Powell’s reasoning about student body diversity from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) to faculty diversity). Although at least one other federal appeals court had rejected the diversity rationale in the employment context, *see Board of Education of the Township of Piscataway v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997), that case was decided before the Supreme Court made clear in *Grutter* that context matters and that the remedial rationale is not the only one that can justify considerations of race and national origin.

In a case decided after *Petit* in a different circuit, the Third Circuit Court of Appeals refused to apply the *Grutter* diversity rationale in the setting of a fire department. *See Lomack v. City of Newark*, 463 F.3d 303 (3rd Cir. 2006). In the *Lomack* case, the court rejected the argument that the city of Newark had a compelling interest in securing the “educational, sociological and job performance” benefits of diverse fire companies. The court distinguished *Grutter* on the basis of the respective missions between a law school and a fire department. Using an “operational needs” analysis, the court found that the fire department’s mission is not to educate but to fight fires. In construing the reach of *Grutter* narrowly so as to reach only the educational context, however, the court also used language that could be cited by institutions seeking to justify diversity-based faculty initiatives within the educational context: “[*Grutter*] stands for the narrow premise that the educational benefits of a diverse student body can be a compelling interest to an institution whose mission is to educate.” *Id.* at 310. One could certainly argue that this reasoning applies with equal force to a diverse faculty, given that the institution’s overall mission “is to educate.” The *Lomack* decision appears to open the door to this possibility at least a bit more than the Third Circuit’s previous decision in the *Taxman* case cited above (in which the Third Circuit rejected the diversity rationale altogether in the employment context).

If this line of reasoning is to be pursued in higher education, more research on the educational benefits of faculty diversity would be extremely helpful. In making its arguments before the Supreme Court in *Grutter* and *Gratz*, the University of Michigan was supported by a wide range of amici—including educational associations and researchers who conducted and analyzed research on the educational benefits of a diverse student body. There is a growing body of evidence that diversity in the workforce can have a variety of benefits—e.g., in fostering creative teamwork and problem-solving, *see, e.g.,* Page, Scott E., *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton University Press, 2007)—and the argument would seem especially compelling in an educational context.

II. Voluntary Affirmative Action in Employment: Other Governing Law

Employment policies and practices are covered by Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. Sec. 2000e *et seq.*), and for institutions that are federal contractors by Executive Orders 11246 and 11375, enforced by the Office of Federal Contract Compliance Programs (“OFCCP”) in the U.S. Department of Labor. To the extent that employment diversity programs implicate or affect terms and conditions of employment (including actions involving hiring, promotions, providing bonuses for meeting diversity goals, etc.), these programs are covered by Title VII as well as state or local equal

employment opportunity and antidiscrimination laws. In addition to the diversity rationale discussed above, affirmative action in employment has its own case law and standards that need to be considered in reviewing programs in this area.

For example, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), the Supreme Court held that under Title VII an employer could take gender into account in selecting applicants for promotions for a particular type of position (road dispatchers) due to the “manifest imbalance” of women in this “traditionally segregated” job category. In upholding the employer’s decision to select a female candidate, the Court applied the guidance it set forth in *Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding a voluntary affirmative action plan providing that 50% of new trainees were to be black until the percentage of black skilled craft workers in the plant approximated the percentage of blacks in the local labor force). The Court approved the plan as consistent with Title VII’s objective of “breaking down old patterns of racial segregation and hierarchy.” The Court noted several criteria in approving the plan:

- The plan did not “unnecessarily trammel the interests of white employees.”
- The plan did not create an “absolute bar” to the advancement of white employees” since one-half of the trainees were to be white.
- The plan was temporary and not designed to maintain a racial balance, but instead to “eliminate a manifest racial imbalance.”

See id.

Rather than “manifest imbalance,” the OFCCP regulations use the term “underutilization” of women and minorities as the trigger for establishing “goals” and initiating efforts to increase their presence in the workforce. *See* 65 Fed. Reg. 68,022, 68,033-34 (Nov. 13, 2000). The OFCCP procedures allow contractors to use a variety of methods to determine what constitutes “underutilization,” including: (1) any numerical difference between incumbency and availability; (2) a numerical difference of one person or more; (3) minority or female incumbency that is less than 80% of availability; and (4) a disparity between the actual representation and expected representation for minorities and women that is statistically significant. *See id.* When seeking to diversify their faculty and staff, colleges and universities that are federal contractors may want to consider taking advantage (in good faith, of course) of these approaches outlined in the OFCCP regulations, which provide at least as much flexibility as the standards set forth in *Johnson* and *Weber*. With the new presidential administration in place in Washington, employers will also want to watch carefully to see if the OFCCP issues any further guidance or clarification with regard to these standards.

III. Recent Supreme Court Decision in *Ricci v. DeStefano*, Nos. 07-1428 and 08-328 (2009)

Title VII prohibits policies or practices that are not intended to discriminate but in fact have a disproportionately adverse impact on minorities, 42 U.S.C. §2000e-2(k)(1)(A)(i) (disparate impact) as well as intentional acts of employment discrimination based on race, color, religion, sex, and national origin, §2000e-2(a)(1) (disparate treatment). In a recent decision, the Supreme Court balanced these provisions of Title VII in an instance in which the City of New Haven, Connecticut refused to certify promotion test results after learning that those results showed that white candidates outperformed candidates from racial groups that were traditionally underrepresented in higher-level positions within the fire department. The city argued that it could have faced Title VII liability for adopting a practice

that would have had a disparate impact on minority firefighters, while the (mostly white) plaintiffs argued that the city's decision amounted to deliberate "reverse discrimination" against their interests.

In a 5-4 decision, a sharply divided Supreme Court held as follows:

Under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a **strong basis in evidence** to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. (emphasis added)

The Court's decision suggests that institutions should choose selection criteria with care in the context of hiring and promotions. Much of the Court's analysis focused on the expectations that were created by the system that the city had put in place using the tests. Institutions of higher education may be unlikely to use easily quantifiable, "objective" criteria as the sole basis on which to hire or promote candidates—especially when it comes to faculty (although they might find that they are using more quantifiable measures with at least some other types of staff positions). Nevertheless, the decision should lead institutions to look carefully before setting specific numerical criteria (such as publication of a specific number of articles) from which they might subsequently decide to deviate. If institutional policies make clear that a variety of factors will be considered in a holistic manner (much like the admissions analysis under *Grutter* discussed above) in hiring and promotions—consistent with their educational mission—they can help to manage expectations of all parties involved and avoid the difficult position in which the City of New Haven found itself.

IV. Some General Points about Faculty and Staff Diversity

As a general rule in the employment context, it is easier to justify aggressive efforts at the front end of the employment process (e.g., in outreach and recruitment to expand the pool) than at the final stages of individual hiring or promotion decisions. See, e.g., *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997); *Shuford v. Alabama State Board of Education*, 897 F. Supp. 1535, 1553 (M.D. Ala. 1995). This is so because the burden is minimized on other applicants when an employer's efforts are geared first and foremost to identify as broad a group of potential recruits as possible, without excluding anyone from the pool.

One of the first challenges faced by institutions seeking faculty, staff, and student diversity is the need to define their objectives in positive terms that reflect educational values and needs. As with student diversity, faculty and staff diversity should not be equated with mere racial and/or gender balancing. Institutions must constantly reinforce the message that they care about all forms of diversity that reflect the broad range of human experience and that contribute to the robust exchange of ideas on campus—including such factors as religion, political perspectives, socioeconomic or cultural backgrounds, geography, special talents, etc.

In general, the most successful strategies to achieve faculty and staff diversity will be part of broader institutional commitments to diversity, access and inclusion. Consistent leadership from the top—including statements of support for diversity from the board, president, provost, deans, or other high-ranking officers (not just affirmative action officers) can reinforce the notion that diversity is an important institutional goal that contributes to the institution's educational mission, not just a mere platitude espoused on convenient occasions. Such top-level support is especially critical at a time when many colleges and universities are concerned about reverse discrimination lawsuits and challenges to affirmative action programs. The danger in such a legal environment is that institutions will bend over

backwards to demonstrate that they are not giving preferences to female and minority candidates, and that the only way to do so safely is not to hire women and persons of color.

As part of the overall institutional commitment to diversity, attention to student body diversity can help to reinforce faculty and staff diversity by broadening the range of what is taught and how, and developing opportunities for collaboration and the sharing of new ideas and pedagogies. See Antonio, a.l., *Diverse Student Bodies, Diverse Faculties*, 89 *Academe* 14 (Nov.-Dec. 2003). Thus, efforts to improve student and faculty/staff diversity can be related and mutually reinforcing.

Myths abound about diversifying the faculty in particular. See, e.g., Daryl G. Smith, Lisa E. Wolf, and Bonnie E. Busenberg, *Achieving Faculty Diversity: Debunking the Myths* (Association of American Colleges and Universities, 1996). For example, many people seem to believe that there is such a scarcity of faculty of color in the pipeline that many institutions must compete against one another to seek out and hire the few qualified minority candidates. In fact, Daryl Smith and others have shown that the experiences of most scholars of color contradict this myth. See Daryl G. Smith, *How to Diversify the Faculty*, 86 *Academe* 48 (Sep.-Oct. 2000). Statistics demonstrate that the academy lags far behind the society at large in terms of diversity, especially at the upper levels of faculty and administrative ranks. See C.S.V. Turner & S.M. Myers, Jr., *Bittersweet Success: Faculty of Color in Academe*, Allyn & Bacon (1999). Women and faculty of color are more strongly represented in lower ranking positions (e.g., as instructors, part-time and adjunct faculty, and in other non-tenure-track positions) than in upper-level positions. See, e.g., *id.*

Research suggests that strategies that interrupt usual search routines can and do yield diverse hires. See, e.g., Daryl G. Smith, Caroline S. Turner, Trevor Chandler, & Charles Henry, *Interrupting the Usual: Successful Strategies for Hiring Diverse Faculty* (Report submitted to the Spencer Foundation Small Grants Program, April 30, 2001). Accordingly, institutions seeking to make faculty diversity a priority are well advised to reexamine every phase of their faculty recruitment processes, identify these usual routines, and analyze the assumptions underlying them. In many cases, relatively simple but deliberate changes can yield important and lasting results.

V. Recruiting and Outreach

A. Position Descriptions: Many position descriptions are drafted in ways that do not reflect all of the actual needs or interests relative to a particular position, thus discouraging quality applicants who might otherwise apply. The wording of a position description can shape the applicant pool to a great extent. Some ideas to consider include the following:

- Tie the description closely to the actual skills needed for the position, and then be consistent in applying these criteria throughout the process. See, e.g., *Medcalf v. Trustees of Univ. of Pennsylvania*, 71 Fed.Appx. 294 (3d Cir. 2003).
- Think carefully about future needs related to the position and department. In many searches, the immediacy of current issues (e.g., the need to offer a particular course in a given semester) tends to overshadow longer-term needs and interests. In other cases, committees tend to compare candidates to the previous occupant of a position—rather than to think prospectively about how a position or department might change or evolve over time.

- Consider non-race-based criteria such as the ability to work with diverse students or colleagues, or experience with a variety of teaching methods and curricular perspectives. Studies suggest that many women and faculty of color use a variety of pedagogical techniques, and this kind of flexibility in pedagogy can be especially valuable to reflect and relate to the varying learning styles and increasingly diverse student bodies. *See, e.g., Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms*, American Council on Education & American Association of University Professors (2000).
- Think about possibilities for interdisciplinary/interdepartmental work, which could broaden the potential applicant pool.
- Don't delineate narrow or overly stringent criteria (e.g., requiring a certain number of years of experience) that are not necessary for the position. *See, e.g., Sadki v. SUNY College at Brockport*, 310 F. Supp.2d 506 (W.D.N.Y. 2004).

B. Advertising: Plans for recruitment can include advertising in publications that are likely to reach out to women and persons of color (e.g., *Diverse Issues in Higher Education*, *The Hispanic Outlook in Higher Education*), or newsletters or listservs of minority or women's groups. A list of such resources should be available centrally so that each new search committee need not reinvent the wheel.

C. Administrative Convenience: In many searches, institutions are anxious to fill open positions as quickly and economically (in terms of both time and money) as possible. When convenience is used an excuse to rely mostly upon preexisting contacts and networks in searches, however, candidates who do not already have inside contacts or knowledge can be effectively excluded from the process. Making the extra effort to talk to colleagues in the field who might have leads on promising candidates of color (e.g., who teach graduate students at other institutions) can pay significant dividends in enlarging your traditional pool, and in sending a welcoming message.

D. Use of Disciplinary Associations: Many national disciplinary and professional associations maintain directories or registries of candidates interested in teaching in their respective fields. Many associations also have caucuses or other groups devoted to issues of race or gender.

E. Consideration of Adjunct and Part-Time Faculty: Given that women and faculty of color are more strongly represented in the lower ranks of academe, one strategy for diversifying the faculty is to ensure consideration of adjunct, part-time, and other non-tenure-track faculty in the search process (instead of excluding them from the start). In some (although certainly not all) instances, such faculty members would welcome the opportunity to be considered for full-time, tenure-track positions. If an institution believes that such individuals are qualified enough to teach their students on a regular basis, it might make sense to consider them in the search process for full-time faculty.

F. Use of Visitor Programs: Many schools use visiting professorships as a way to get to know and evaluate candidates from other institutions in whom they might be interested. Such programs might be an especially good way to reach out to diverse candidates without immediately creating a long-term commitment on either end. Of course, you should always

make sure that the rules at both institutions involved permit you to make an offer at the end of a visiting stint.

G. Outreach to Candidates Not Currently on the Market: Recruiting can and should be an ongoing activity, even when a particular position is not currently open. Some schools have achieved success by asking their own faculty and staff (or perhaps other contacts) to identify possible recruits who are not currently on the job market, but who might be interested in the institution should a vacancy arise. If time is invested in getting to know such individuals even before a vacancy exists, it can make it much easier to recruit them successfully when the time comes.

VI. The Search Process

Search committees are typically used in filling full-time, permanent faculty slots. A search committee may not be the best way to select part-time or adjunct faculty, however, who will usually be recruited from the local community. See Cheryl A. Cameron, *Best Practices in Faculty Hiring*, National Association of College and University Attorneys: 40th Annual Conference Proceedings (June 26, 2000).

A. Composition of Search Committees: The law does not specify that search committees be composed entirely of faculty members from a particular department, or that only members of search committees can be involved in the search process. Often, the internal rules of colleges and universities present more barriers to institutional change than anything in the law. “Business as usual” is one of the greatest barriers to diversification of the faculty. As Daryl Smith and others have noted in their research on the subject, search committees tend to have a “cloning effect”—that is, they tend to choose candidates who look and think like themselves. See, e.g., Daryl G. Smith, *How to Diversify the Faculty*, 86 *Academe* 48, 51 (Sep.-Oct. 2000).

Thus, the composition of a search committee can be one of the most important components in determining the outcome of the search process. If institutions are seeking to diversity their faculties, they should give careful consideration to membership of individuals from outside the department on search committees, and to involvement of other institutional officials (such as affirmative action officers) at various stages in the process. The more diverse an institution’s search committees, the more likely they will produce diverse hires. Rutgers University is developing a website, through its Office of Faculty Diversity Initiatives, that is designed to increase the transparency of searches and attract diverse pools of candidates. The site will include a listing of all faculty and administrative searches and the membership of their respective search committees.

Of course, if an institution receives a reverse discrimination challenge, or if its affirmative action policy is questioned in litigation, it must be prepared for a thorough examination of the role of its affirmative action or equity office. See, e.g., *McHenry v. Pennsylvania State System of Higher Education*, 50 F. Supp. 2d 401 (E.D. Pa. 1999) (court found that although the Social Equity Office was involved at several stages of the process, its involvement was limited to approving the initial advertisement for the position, encouraging the search committee to interview minority and/or female applicants, and assisting in developing the broadest possible pool of applicants—rather than selecting the final candidate). The involvement of such offices or officials in the search process is a natural target for plaintiffs bringing reverse discrimination claims.

B. Training for Search Committees: Many institutions now have various forms of training to educate their own search committees about the hiring process. The autonomy of departments and units within colleges and universities means that many search committee members will have little familiarity with the institution’s overall diversity goals and policies, much less significant background in the law of discrimination or affirmative action.

Training might include overviews of the law (e.g., on topics such as discrimination/affirmative action and public records) and institutional policy (e.g., on records retention), meetings with affirmative action officers or other campus experts on these issues (including individuals from other departments or units that have been successful in recruiting diverse pools and candidates), and providing written guidelines for searches (including information about topics such as advertising, drafting position descriptions, questions to ask or not to ask in interviews, etc.). A search committee can be provided with a variety of resources. For example, it might be both fun and informative for a search committee to watch and discuss together the acclaimed 1997 PBS documentary, *Shattering the Silences: The Case for Minority Faculty*. Many good resources are now available to aid search committees. See, e.g., Turner, C.S.V., *Diversifying the Faculty: A Guidebook for Search Committees* (Association of American Colleges and Universities, 2002); “Building on Excellence: Guide to Recruiting and Retaining an Excellent and Diverse Faculty at Stanford University,” http://facultydevelopment.stanford.edu/reports_studies/Excellence.pdf (2008). In conjunction with human resources and affirmative action offices, institutional counsel can play an especially valuable role in developing training materials that provide practical tips for search committees—and in serving as resources for them at all stages of the process.

C. Accountability: In order for institutions to make real progress with regard to diversity efforts, some sort of accountability is essential. While rigid quotas in particular units or departments must of course be avoided, institutions can include a criterion related to diversification efforts in the performance evaluations of deans, department chairs, and other senior administrators. Units or departments that do especially well in this area might be rewarded in some fashion as an incentive. If search firms are used to assist in search processes, they too must be held accountable for efforts to ensure diversity in the pool and throughout the search process. This expectation should be reflected in writing.

VII. Hiring and Financial Incentive Programs

When any sort of incentive program is in place, an institution should ensure that the bases for the ultimate hiring decisions can be clearly articulated with regard to: (1) the stated criteria for the positions; and (2) the qualifications of the individuals selected. If the program is linked to a specific affirmative action plan, this relationship should be clearly set forth in the institution’s records.

With any of these types of programs, the more formal they become—and the more explicit any restrictions on participation based on race, gender, etc.—the more likely they are to be subject to legal challenge. If departments set specific targets based on race, national origin, or gender, and if these numerical targets appear to be the overriding basis for particular hiring decisions, such programs are especially susceptible to challenge. See, e.g., *Hill v. Ross*, 183 F.3d 586 (7th Cir. 1999) (holding that fact issues existed as to whether university, in absence of prior discrimination necessitating affirmative action plan, used sex as sole factor in its hiring decision in which a male professor was denied a tenure-track position and filed a Title VII sex discrimination action).

In many instances, just as with outreach efforts that seek to broaden the pool of possible faculty applicants without excluding anyone, the purposes of such programs can be accomplished without resorting to restrictions based on race or gender.

A. Central Support: Well-publicized and easily accessible support from the highest possible levels at the institution is essential in sending a signal that diversity efforts are valued and taken seriously. For example, Rutgers University has established a high-level President's Council on Institutional Diversity and Equity in part to advise both the senior academic administration and the faculty on effective strategies and best practices in faculty diversity recruitment and retention.

B. Target of Opportunity Programs: Many institutions have discretionary programs that allow them to target individuals who will contribute to overall faculty diversity and excellence. As discussed above, the more flexible such programs are so as to allow for the consideration of many candidates (i.e., they are not race or gender-exclusive), the less susceptible they are likely to be to legal challenge. In keeping with the *Grutter* analysis, to the extent that such programs are premised on the need to diversify the faculty, they will be easier to defend if a range of diversity-related criteria is considered. Such criteria might include, for example, unique experiences or expertise, interdisciplinary strengths, or unusual teaching styles.

C. Financial Incentive or Bridge Programs: Many institutions have developed programs under which departments are eligible for special funds if they hire faculty of color. If such plans merely provide incentives to hire faculty of color, or provide additional resources to departments to support such hires (e.g., by providing central funding for them so that a department does not pay the entire salary for a certain period of time), then they may pass constitutional muster if it can be shown that hiring committees are not specifically influenced to hire particular candidates in order to gain access to those funds.

In the case of *Honadle v. University of Vermont and State Agricultural College*, 56 F. Supp. 2d 419 (D. Vt. 1999), the plaintiff alleged reverse discrimination when an Asian-American candidate was chosen over her as chair of the newly formed Department of Community Development and Applied Economics. Using a "Faculty Incentive Fund," the university awarded incentive grants for the hiring of minority faculty or of faculty who would enhance multi-cultural curricula, and for providing financial assistance to increase the diversity of faculty candidate pools. The court upheld the plan against a Title VII challenge, finding that there was a manifest imbalance in the job group at issue, and that there was no evidence that the plan or anyone administering it dictated any hiring decisions. The plan was remedial and temporary (its goals were revised annually). The court noted that the plan operated only as an inducement, but also found that the university had not established a compelling interest (e.g., in remedying past discrimination)—therefore, the plan would not have passed muster under strict scrutiny if it were found at trial (which it was not) that the availability of incentive funds had the effect of influencing the decision to hire a candidate on the basis of his or her race.

These types of incentive programs must be managed carefully so as to avoid creating resentment from other faculty who perceive them to be a form of special treatment, or who perceive that faculty selected through such processes are less competent than other faculty. See Marjorie Fine Knowles & Bernard W. Harleston, *Achieving Diversity in the Professoriate: Challenges and Opportunities*, American Council on Education (1997), at 10. Another potential concern is that faculty members who are hired and supported in this fashion (i.e., with central

funds) will not receive the same level of support in other ways from their home departments as faculty members whose entire salaries come from those departments. As C. Aisha Blackshire-Belay recalls,

In an earlier job, I was shocked to discover that my salary had never been paid by the department. It had been set aside for the ‘minority’ hire and paid out of the provost’s office. In other words, I was never viewed as a regularly appointed faculty member within my department. A climate had been created in which I was never fully accepted or fairly reviewed by peers despite my outstanding achievements in my field. I was the first African-American to be hired in the department, and to my knowledge, it has yet to hire another minority faculty member.

The Status of Minority Faculty Members in the Academy, 84 *Academe* 30, 33 (July-Aug. 1998).

D. Bonus Hires: Some institutions have developed programs whereby departments can hire one or more additional faculty members if they hire a person of color. In *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), *cert. denied*, 523 U.S. 1004 (1998), the Nevada Supreme Court upheld such a plan, upholding the system’s use of the diversity rationale from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) as applied to faculty hiring. Shortly after a controversial affirmative-action case had been removed from its docket—involving the consideration of race in faculty layoffs in a secondary school (*Board of Education of the Township of Piscataway v. Taxman*, 91 F.3d 1547 (3^d Cir. 1996), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997))—the U.S. Supreme Court declined to review the *Farmer* decision, even though it presented an opportunity to review the consideration of race in the faculty hiring context. As in the *Honadle* case, these types of programs might also survive legal challenge if it can be shown that individuals and committees making actual hiring decisions were not swayed toward particular candidates by the existence of these programs.

E. Cluster Hiring: Another approach used by some institutions is to group two or more appointments together, thus giving them flexibility to look for a variety of characteristics among the individuals they hire. Among other things, this approach can be used to build specific program areas. Rutgers University has established a new President’s Faculty Diversity Cluster Hiring Initiative that seeks interdisciplinary proposals for faculty clusters that would strategically and significantly increase the diversification of scholarship and pedagogy at the institution. See <http://www.diversityandequity.rutgers.edu/president-faculty.shtml>. Of course, such programs must not include quotas or set-asides based on race, gender, etc. They do not necessarily have to use the same criteria for every hire, however. A willingness to experiment with appointments from time to time can further—rather than undermine—a commitment to overall excellence:

An institution appropriately concerned with its own continuing development may well wish to involve a component of experimentalism in its own staff policies—deliberately reserving discretion to depart from standards and criteria it generally employs precisely as a means of determining whether there may be important scholarly and educational functions to be served by standards different from those it ordinarily applies.

Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination, *AAUP Policy Documents & Reports* 193, 197 (9th ed. 2001). Of course, in cases where discrimination is alleged, courts will look carefully at whether institutions have followed

their own procedures consistently. Thus, institutions should ensure that their policies and procedures are sufficiently flexible so as to reflect the full range of needs and interests within their many academic programs.

Flexibility can be a key to cluster hiring, as it can be difficult to plan ahead for such opportunities. For example, successful clusters can arise unexpectedly in the course of more traditional faculty recruitment efforts, and clusters may be within particular departments or units or might span several departments, units, and disciplinary areas.

F. Pipeline Programs for Graduate Students: Some institutions have established programs that enable graduate students with opportunities to pursue research and scholarly activities before they are appointed to tenure-track positions (e.g., by establishing short-term post-doctoral positions or otherwise providing funding for such work). For example, Rutgers University is endowing two-year postdoctoral appointments for individuals who represent excellence in their scholarship and teaching and can contribute to the diversification of departments or units in various ways. Another model used by some institutions is to encourage students from other graduate schools to complete their graduate studies at the institution, so that the institution has an opportunity to try out the student as a potential faculty member.

Still other institutions focus on keeping promising undergraduates in the academic pipeline by identifying possible future scholars and encouraging them (with financial aid and other forms of support) to pursue graduate and professional programs. If institutions make such efforts with their own students, they may also want to look at their own hiring policies to ensure that they do not disfavor graduates of their own programs.

In its policy guidance on race-targeted financial aid, the U.S. Department of Education recognized the diversity rationale as articulated by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) as a legitimate basis for the awarding of student financial aid. In doing so, the Department also recognized a special interest in efforts to increase faculty diversity:

The Secretary believes that a college's academic freedom interest in the "robust exchange of ideas" also includes an interest in the existence of a diverse faculty and, more generally, in diversity of professors nationally, since scholars engage in the interchange of ideas with others in their field, and not merely with faculty at their particular school. A university could contribute to this interest by enrolling graduate students who are committed to becoming professors and who will promote the overall diversity of scholars in their field of study, regardless of the diversity of the students who are admitted to the university's own graduate program.

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, notice of final policy guidance, U.S. Department of Education, 59 Fed. Reg. 8756, 8761 n.8 (Feb. 23, 1994). This policy guidance is still in place and provides some reinforcement for efforts to support students pursuing academic careers who might contribute to diversity within their fields of study.

G. Partnerships with Other Institutions: Many institutions are now collaborating with other colleges and universities in various types of exchange programs to introduce promising students to themselves (and vice versa). For example, some consortia provide opportunities for

students from historically black colleges and universities to do summer internships at research universities. Other institutions (such as the University of Minnesota) have visiting scholar programs, which may provide funds to departments to support short or long-term visits by outstanding faculty of color from historically black institutions or other minority-serving institutions (such as tribal colleges). This type of partnership can build relationships among institutions and their faculties and student bodies, while posing little threat from a legal perspective because it does not exclude participants on the basis of race, gender, etc.

H. Interdisciplinary/Joint Appointments: Many colleges and universities are placing an increasing emphasis on interdisciplinary approaches in a variety of fields, but their traditional hiring processes have lagged far behind the flexibility and creativity demonstrated in their thinking about the curriculum. Interdisciplinary or joint appointments provide an opportunity for different departments to reach out to non-traditional candidates who can bridge the gaps between the languages and approaches of different disciplines. Due to the autonomy of individual schools and departments, however, support for such hiring must often come from the central administration.

VIII. Other Forms of Support

From the outset, successful recruitment of women and faculty of color can take place only if attention is paid to other considerations of importance to these individuals as they begin their careers at particular institutions.

A. Mentorship Programs: Numerous studies have suggested that mentors can be especially important for faculty of color, who face a variety of professional, social, and personal challenges in the academy. *See, e.g.,* Daryl G. Smith, Caroline S. Turner, Trevor Chandler, & Charles Henry, *Interrupting the Usual: Successful Strategies for Hiring Diverse Faculty* (Report submitted to the Spencer Foundation Small Grants Program, April 30, 2001). Mentors need not necessarily come from the same department, and of course do not need to have the same background in terms of race, gender, etc.

B. Spouse and Partner Support: Another factor that has been mentioned prominently for all new hires—including women and faculty of color—is the provision of support for trailing spouses or partners in identifying and interviewing for possible jobs. This form of support may be especially important for institutions in smaller job markets.

C. Personal Attention: For faculty of color who may face social as well as professional challenges in taking positions at institutions (and in communities) where those groups have historically been underrepresented, some personal attention can go a long way toward sending a welcoming signal and setting the stage for a hospitable environment. Telephone calls, personal notes and thoughtful social engagements (e.g., taking candidates to dinner, giving them campus or community tours) can all play a significant role in making choices among possible jobs and locations.

IX. Evaluation Criteria

Institutions that are committed to faculty diversity should look closely at the criteria they use to evaluate faculty candidates at all levels. Many traditional criteria, while facially race or gender-neutral, can have a disparate impact on women and minorities. *See [Affirmative Action in Higher Education: A](#)*

Report by the Council Committee on Discrimination, *AAUP Policy Documents & Reports* 193, 194 (2001 ed.). See also, e.g., C. Blackshire-Belay, *The Status of Minority Faculty Members in the Academy*, 84 *Academe* 32-35 (July-Aug. 1998). Similarly, some institutional policies having no direct relationship to the hiring process may nevertheless have a disproportionate impact on candidates of a particular sex or race (e.g., child-bearing and child-rearing policies can have a significant impact on women—especially as these policies relate to the “tenure clock”).

Institutions may not be well served by blindly following the same criteria over and over again in every search. Indeed,

[t]he overall excellence of a given department may be better assured by considering its existing strengths and weaknesses and, accordingly, varying the emphasis given to different kinds of individual qualification for appointment from time to time, instead of applying a rank-order of standards of fitness identically in every case. The failure to consider appointments in terms of a balance of qualities within a department may in fact result in less overall excellence than otherwise. Exactly as excellence of a total department is the goal, consideration of different kinds of skills and interests in different persons becomes important in order to maintain that kind of excellence and to liberalize the emphasis given to the appointment of persons stronger in certain respects than those in which the department is already very notable.

Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination, *AAUP Policy Documents & Reports* 193, 195-6 (9th ed. 2001).

- A. Rankings of graduate schools:** Traditional rankings of graduate schools and programs might shortchange historically black institutions and other minority-serving institutions. As described frequently in *Diverse Issues in Higher Education* and elsewhere, these institutions are producing a significant percentage of all graduates of color in a wide variety of doctoral programs.
- B. Publications:** An emphasis on publications in traditional, established journals within a particular discipline can hurt candidates who pursue new and emerging areas of scholarship. Narrow definitions of merit in scholarship will greatly reinforce the “cloning” effect in hiring and hamper diversity efforts. New forms of scholarship (e.g., interdisciplinary approaches) need to be evaluated by faculty who understand such work—and those faculty may not always be the senior, tenured faculty within a single department who might otherwise have primary responsibility for hiring in a given situation.
- C. Merit in Teaching:** Institutions should look at whether teaching ethnic studies or other courses that include minority perspectives are taken as seriously as other types of experience. In addition, institutions must be wary of subtle forms of discrimination that can creep into student evaluations (e.g., criticizing women or faculty of color for being aggressive in class when white males would not get criticized for the same teaching styles).
- D. Institutional Service:** If service is supposed to be an important part of a faculty member’s responsibilities, then it should be considered seriously. Many faculty members of color face disproportionate pressures to serve as representatives on campus committees, or to serve as mentors or advisors for students of color (often regardless of the students’ subject-matter interests). See, e.g., *Shattering the Silences: The Case for Minority Faculty*; produced and directed by Stanley Nelson and Gail Pellett; California Newsreel (1997).

E. Collegiality: This subjective criterion can lead to subtle forms of discrimination, as faculty may feel most comfortable with candidates from similar economic and social backgrounds, institutions, etc. If used as an independent criterion for evaluation (rather than as a quality inherent in the successful execution of the traditional functions of scholarship, teaching, and service), this factor can also be used against faculty members whose work and ideas challenge traditional orthodoxy in their departments and institutions.

Historically, “collegiality” has not infrequently been associated with ensuring homogeneity, and hence with practices that exclude persons on the basis of their difference from a perceived norm. The invocation of “collegiality” may also threaten academic freedom. In the heat of important decisions regarding promotion or tenure, as well as other matters involving such traditional areas of faculty responsibility as curriculum or faculty hiring, collegiality may be confused with the expectation that a faculty member display “enthusiasm” or “dedication,” evince a “constructive attitude” that will “foster harmony,” or display an excessive deference to administrative or faculty decisions where these may require reasoned discussion. Such expectations are flatly contrary to elementary principles of academic freedom, which protect a faculty member’s right to dissent from the judgments of colleagues and administrators.

On Collegiality as a Criterion for Faculty Evaluation, *AAUP Policy Documents & Reports* 39 (10th ed. 2006). See also, e.g., *Univ. of Baltimore, et al. v. Iz*, 123 Md. App. 135, 716 A.2d 1107 (1998), cert. denied, 351 Md. 663, 719 A.2d 1262 (Md. 1998). The whole notion of academic freedom is premised on the assumption that such challenges are necessary and healthy for the academy.

F. Making Stereotypical Assumptions about Candidates: In many cases, search committees make assumptions about candidates based on their race, gender, age, etc. For example, some committees might assume that an African-American candidate will feel uncomfortable or isolated in a rural, mostly-white community and institution. Other committees might assume that a married female candidate of a certain age will want to have children, and perhaps be unwilling or unable to work full-time.

One way to lessen the chance that these sorts of stereotypes and assumptions will enter the process, consciously or subconsciously, is to ask the same questions of, and apply the same criteria to, every candidate in a particular search. For example, if a committee is concerned about the long-term commitment needed for a particular position, then they should ask every candidate about that factor. The same idea generally holds true for reference checks as well: references should generally be asked the same questions about candidates. Similarly, within the same search, the specter of discrimination might be raised if some candidates are evaluated on the basis of their future “promise,” while others are evaluated on the basis of their experience.

The question of stereotyping can also occur in conjunction with particular fields of study or expertise. For example, a search committee should not assume that someone needs to be African-American to be an expert on Africa or African-American studies—any more than they should assume that a candidate needs to be white to teach European history. In the case of *Stern v. Trustees of Columbia Univ.*, 131 F.3d 305 (2d Cir. 1997), the Second Circuit ordered a jury trial to review charges that Columbia University discriminated against an instructor because he was not of Hispanic descent. The plaintiff, who had taught Spanish and Portuguese at Columbia

for many years and even served as interim director of the university's Spanish language program for two years, was allegedly not seriously considered for the permanent directorship because he was a white male of Eastern European descent. The university claimed that though the plaintiff was a finalist for the position, it chose another candidate based on qualifications, not bias. The candidate selected (who was Hispanic) allegedly had less teaching and publishing experience than the plaintiff, and was also not proficient in Portuguese. The university claimed that the candidate chosen had performed better than the plaintiff in teaching "tryout" classes.

G. Commitment to Diversity: While institutions may certainly consider the ability and willingness of faculty members and others to work with students from diverse backgrounds, they should also take care to distinguish such conduct from requirements that could appear to mandate that faculty or staff have a particular point of view that supports diversity efforts of a particular type. At a public institution, such requirements could raise concerns related to free speech and compelled speech. At both public and private institutions, such requirements raise issues related to academic freedom and freedom of conscience. A controversy recently erupted at Virginia Tech when the university announced new guidelines on tenure and promotion that required professors to show an "active involvement in diversity." The requirement was subsequently removed after complaints from the Foundation for Individual Rights and other groups who had characterized the requirement as a political litmus test. The institution indicated that it was merely trying to encourage faculty members to pursue activities related to diversity, not to require them. *See Wilson, Robin, Virginia Tech Drops Diversity Requirement from Tenure Policy, The Chronicle of Higher Education (April 15, 2009).*

Conclusion

Close examination of the policies, procedures, and criteria used in the faculty and staff recruitment process with diversity in mind should not be viewed as a watering down of the concept of merit or excellence in higher education. Indeed, many entrenched policies and practices can be improved for the benefit of everyone involved (the institution, departments, and all candidates) if they are periodically reexamined in light of changing needs and priorities.

Daryl Smith has compared the institutional need for faculty diversity in the new millennium with the continuing need for current technology:

Colleges and universities should treat diversity in the same way they do technology. Many campuses have started to seek radically new kinds of qualifications and experience in prospective faculty because of the increasing importance of technology in many disciplines. Technology's growing prominence has also prompted a rise in interest in candidates with work experience in industry.

The parallel to diversity is apt in that a diverse faculty can bring new kinds of scholarship to an institution, educate students on issues of growing importance to society, and offer links to communities not often connected to our campuses.

How to Diversify the Faculty, 86 *Academe* 48, 51 (Sep.-Oct. 2000).

While the law imposes certain restraints on institutional policies and practices, many of the most persistent barriers to faculty and staff diversity are instead matters of institutional tradition, stubborn

resistance to any reexamination of notions of merit in the academic context, individual attitudes and assumptions, and lack of exposure to (and experience with) diversity in many forms.

SOME USEFUL RESOURCES

Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination, *AAUP Policy Documents & Reports* 193, 194 (9th ed. 2001).

Affirmative-Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties, *AAUP Policy Documents & Reports* 237 (10th ed. 2006).

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