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Diversity Programs and Affirmative Action

A great success in the struggle for civil rights in employment is that the basic ideas of equality and opportunity have become accepted by the employer community. Businesses have adopted the belief -- some verbally, some at the level of action -- that workforce diversity, in terms of race, ethnicity, and gender, is a valuable goal. In fact, the Supreme Court's decision in favor of the University of Michigan's affirmative action admissions process was based, in part, on the briefs filed by the business community supporting affirmative action in colleges and law schools as a method to diversify the workforce. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("These [educational] benefits [of a diverse student body] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

Diversity in a workforce should be the goal of all businesses because, quite simply, it is the right thing to do. In addition, as the briefs filed on behalf of the Michigan affirmative action plans show, it makes good business sense. Achieving meaningful diversity in the workforce requires vigilance, planning, commitment, and a willingness to question the regular way of doing business and what we value in employees.

It is not enough to simply instruct recruiters and the personnel office to open up an application process. Recent social science research has shown that Black applicants, either in person or on the internet, routinely are denied opportunities that are granted to similarly situated whites. Using paired testers to examine the employment markets of Milwaukee, San Francisco, Boston, and Chicago, researchers found strong prejudices against Black applicants. In Milwaukee, the study examined the effects of race and a criminal record on getting a second interview in entry level, lower wage positions. Each pair of testers contained two men of the same race with similar resumes; one of each pair was assigned to include a drug conviction and an 18-month prison sentence in his work history. While finding a marked preference within each race group for the applicant without a conviction, the study also found strong race effects. Blacks without a conviction were less likely to progress in the employment process than whites with a conviction. Devah Pager, "The Mark of a Criminal," *American Journal of Sociology*, Volume 108 Number 5 (March 2003): 937-975 (*available at* www.princeton.edu/~pager/pager_ajs.pdf). *See also* Devah Pager, "Discrimination in Low-Wage Labor Markets," Princeton University (March 2005) (*available at* <http://paa2005.princeton.edu/download.aspx?submissionId=50874>) (preliminary study in New York City finding similar results).

In the San Francisco and Los Angeles studies of temporary staffing firms, the paired testers were white and minority, and the minority tester's resume was of slightly higher caliber. Despite the minority's higher credentials, the white testers routinely received more favorable treatment—job offers sooner, offers that paid more money, quicker service, and more assistance. The

Discrimination Research Center, “Racial Preferences: The Treatment of White and African American Job Applicants by Temporary Employment Agencies in California” (December 2003) (available at <http://www.impactfund.org/DRC%20December%202003%20Report.pdf#search=discrimination%20research%20center%20%20testers%20study>). See also The Discrimination Research Center, “Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies in California” (October 2004) (available at http://drcenter.org/staticdata/pdfs/name_resume_study.pdf) (job applicants with minority names were less likely to receive a response from temporary employment agencies than applicants with Caucasian names).

In the Boston and Chicago studies, the testers were fabricated resumes submitted over the internet. In each pair of resumes, one had a name traditionally associated with Blacks, and one did not. The Black named resume also had slightly higher credentials than the non-Black named resume. The study found that non-Black named applicants were fifty percent more likely to be contacted for a follow up interview. Marianne Bertrand and Sendhil Mullainathan, Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, November 18, 2002 (available at http://www.cjc.net/publications/01_Resources_Cultural-Comp/Race_names_employment.pdf). So the first step of creating a more diverse workforce has to be clear rules about how applicants will be treated.

Where a business conducts its recruitment obviously impacts who the applicants will be. Diversifying recruitment sources should create a more diverse applicant pool. Most job seekers find their positions through connections and word of mouth recruitment. A workforce that is not diverse, if left on its own, will simply replicate itself. Conversely, if you have a diverse workforce, you should use it for outreach and recruitment.

Of course, recruitment will not improve an employer’s diversity if the job application process is not a thoughtful, complete one. Really improving diversity requires an employer to question what is valued and how we define merit. Written employment and education tests are an easy example. While the tests are efficient because they screen large numbers of applicants without requiring individual assessments, they predict, at best, a small portion of job or school performance. Therefore, who is screened in or out by the tests may not reflect who would be the best employee or student. For example, the EEOC recently settled a case against Ford Motor Company because the test used by Ford to screen applicants for its apprenticeship program had an adverse impact on Blacks. In addition to monetary relief, the consent decree provides that 276 Black applicants who did not pass the original examination will be given the opportunity to become apprentices at Ford and that Ford will develop a new examination. See *e.g. Lewis v. City of Chicago*, 2005 WL 693618 (N.D. Ill. 2005) (use of firefighter examination not justified because those score differences on the test did not predict differences in performance); *US v. Delaware*, 2004 WL 609331 (D.Del) (rejecting written test used to select candidates for State Police in part because the cut-off score used disqualified applicants with successful law enforcement careers); Susan Sturm and Lani Guinier, “Promoting Diversity in Education and Employment Requires Us to Rethink Testing and Meritocracy” *Boston Review*, December 2000/January 2001 (available at <http://aad.english.ucsb.edu/docs/bostonreview.html>) (questioning the standards used in employment and education to measure qualifications and recommending revising how merit is defined and how ability is assessed). See also “Who Gets In? The Quest for Diversity After Grutter” 52 Buff. L. Rev. 531, 536-537 (2004) (describing the

Boalt Law School initiative to create new examinations for law school entrance that will measure more of the qualities for successful lawyers than the LSAT currently does (outline of initiative available at <http://www.law.berkeley.edu/boaltgradsurvey>); *Castenada v. University of California Regents*, C-99-0525 SI (N.D. Cal. 1999) (replacing UC Berkeley's heavy reliance on standardized test scores and advance placement classes with a comprehensive evaluation of applicants) (consent decree available at <http://www.naacpldf.org/content.aspx?article=54>).

As our country, markets, and customers become more diverse, employers should put more emphasis on promoting individuals who have a demonstrated ability to work with people of other races, sexes or backgrounds ("diversity ability"). For an employer, this new merit definition could be quantified by giving added points or additional consideration to candidates with proven diversity ability—ability to get along with people different than yourself. Given the continued racial segregation in society and the extent of gender segregation in the workforce, women and minorities, especially those who are being considered for promotions, will have shown their diversity ability because they will have worked with people different from themselves—white men. White males would also be able to receive the credit for diversity ability, if their professional experience included successful interaction or supervision of a diverse group of people.

Employers should also consider how the Supreme Court's decision on affirmative action in higher education, *Grutter v. Bollinger*, can expand affirmative action in employment. *Grutter* explicitly accepts rationales other than remedial efforts as constitutionally acceptable reasons for affirmative action—opening the door to similar arguments in employment. See Cynthia Eastlund, *Taking Grutter to Work*, 7 Green Bag 215 (2004) (employers should be able to use the societal good argument of *Grutter* to defend affirmative action in employment); *University and Community College System of Nevada v. Farmer*, 930 P.2d 730, 736 (Nev. 1997) (pre-*Grutter* decision finding college affirmative action employment plan constitutional because "interest in fostering a culturally and ethnically diverse faculty. A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to multicultural diversity"). Second, *Grutter's* language regarding the need for affirmative action in public institutions as necessary to maintain faith in those institutions may be applicable to other professions such as law enforcement, the judiciary, the media, and education.

Increasing the number of women in a workplace and keeping them as employees may require an employer to rethink how the work environment is structured. Although women have drastically increased their presence in the workplace, the work they do outside the home has not been matched with a societal change in their care giving responsibilities. See generally, 29 U.S.C. §2601(a)(5) ("[d]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men"); AFL-CIO, Facts About Working Women Statistics, (last visited March 9, 2005) <<http://www.aflcio.org/issuespolitics/women/factsaboutworkingwomen.cfm>>; Nev. Dep.'t of Human Res. v. Hibbs, 538 US 721, 736 (2003) (relating the legislative history of the Family Medical Leave Act, passed to combat gender discrimination)

Women's increased presence in the labor force has not resulted in the widespread development of policies necessary to allow caregivers to earn a living, have the opportunity for high quality

work, and meet their family responsibilities. Employers continue to demand that employees act as “ideal workers” –employees who work full time or more, who are available for work at any time, who follow the timetables for promotion that assume no time out of the workforce and no part-time work, and who do not need paid time off or time off at all to care for children. Joan Williams, *Unbending Gender: Why Work and Family Conflict and What to Do about It*, pg. 67-84 (2000).

For single parents and poorer families the ideal worker norm results in the unaffordable loss of income and the loss or threat of losing a job because of too many absences due to the demands of childcare. For more affluent parents, one person, usually the woman, takes a reduction in pay and work hours (which also can entail a reduction in status and quality of work) or stops working altogether. General Accountability Office, *Women’s Earnings: Work Patterns Partially Explain Differences Between Men’s and Women’s Earnings* 24(October 2003). If a woman wants to make it to the top echelon, she usually has to forfeit a personal life. Williams, *Unbending Gender, supra*, 71 (women in higher positions are more likely to be unmarried and not have children than men in those same positions).

In order to allow women to participate in the workforce, an employer needs to consider how its attendance, leave, benefit, and work requirements favor a worker who can give the employer unlimited access. *See e.g., EEOC v. Warshawsky*, 768 F.Supp. 647 (D. Ill. 1991) (successful adverse impact challenge to employer’s policy limiting sick leave to employees with more than one year tenure); <http://www.pardc.org/TheScoop/> (listing selected Washington D.C. law firms and their part-time policies). Again these programs, besides being the right thing to do, are also financial sound decisions. Professional workers leave because of long hours, and it is expensive to replace them; it costs between \$200,000-\$500,000 to replace a law firm associate. Joan Williams and Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms*, Final Report of the Project for Attorney Retention 1 (2001) (available at <http://www.pardc.org/Publications/BalancedHours2nd.pdf>); Elayne Robertson Demby, *Do Your Family-Friendly Programs Make Cents? Businesses make significant strides in calculating the return on family-friendly programs*, 49 HR Magazine, Jan. 2004 at 75-78 (Deloitte and Touche claims to have saved \$ 41.5 million because its family friendly policies led to less turnover); Michelle M. Arthur, *Taking Stock of Work Family Initiatives: How Announcements of Family-Friendly Human Resources Decisions Affect Shareholder Value*, 57 Indus. & Lab. Rel. Rev. 599 (2004) (announcement of work-family initiatives improved share prices).