THE FLAWED FOUNDATION OF PISCATAWAY HIGH—A MISLEADING STIPULATION, AN ABSENCE OF REPRESENTATION, AND UNCERTAINTY ABOUT INFORMAL AFFIRMATIVE ACTION

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In 1989, the Piscataway New Jersey Board of Education chose to layoff one of ten teachers in the business department

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This paper was prepared in a seminar at Rutgers Law School, spring, 1998, with the participation of Julio Gomez, Roberta Haskins, Dennis Hopkins, Ray Vivino and Stuart Turner. The advice of Professor Phillip Shuchman concerning federal procedure and other matters has been invaluable.

The authors recognize that in a complex case, the initial positions of the parties may change for many reasons; that institutional policies of EEOC and the Justice Department influence the actions of administrators and lawyers; and that the District Court and the Court of Appeals were entitled to rely on the stipulation as were the many amici who addressed the diversity issue in briefs to the Supreme Court. The appellate process must rely on facts developed at trial.

of the high school. The choice was between two teachers who had equal seniority and qualifications, but were of different races. The Board laid off Ms. Taxman who was White, and retained Ms. Williams, the first and only Black teacher in the all White department. Ms. Taxman complained to the Equal Employment Opportunity Commission (EEOC), which referred the matter to the U.S. Department of Justice, Civil Rights Division. The Department of Justice sued the Board of Education under Title VII of the Civil Rights Act of 1964. Ms. Taxman intervened. Ms. Williams, the Black teacher, did not intervene, nor was she represented by counsel.[1]

The facts were established by a stipulation between the Department and the Board. The stipulation was misleading on two crucial issues. It asserted:

- The proportion of Black teachers in the school district fairly reflected the labor market; therefore there was no basis for affirmative action concerning employment.[2]

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1. *See* United States v. Board of Educ. of Township of Piscataway, 832 F. Supp. 836 (D.N.J. 1993), *aff'd in banc sub nom.* Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547 (3d Cir. 1995), *cert. granted*, 117 S.Ct. 2506 (1997), *cert. dismissed*, 118 S.Ct. 595 (1997). Oral argument was scheduled for January, 1998. After the record and briefs had been filed, the case was settled with a major monetary contribution from civil rights organizations who were concerned that the Supreme Court might address the "diversity" justification for affirmative action programs. The settlement was made public on November 21, 1997. *See Affirmative Action Settlement*, N.Y. TIMES, Nov. 22, 1997, at B4.

The reality of their concern is suggested by the efforts to draft hypothetical opinions for the Supreme Court based on the record. *See* Ann C. McGinley & Michael J. Yelnosky, *Board of Education v. Taxman*: *The Unpublished Opinions*, 4 ROGER WILLIAMS UNIV. L. REV. 205-92 (1998) [hereinafter McGinley].

While the case was pending before the Court of Appeals, the Department of Justice sought leave to file a brief opposing Ms. Taxman's claim. That motion was denied. The Third Circuit treated the oral argument on that motion as a motion to withdraw which it granted on November 17, 1995. *See* United States v. Board of Educ., Nos. 94-5090, 94-5112, 1995 WL 704036 (3d Cir. Nov. 17, 1995). Thereafter, the case was argued in the Third Circuit and briefed before the Supreme Court by Ms. Taxman. The change of policy by the Department of Justice is discussed in *infra* note 12.

2. The position of the Department and the Board is reflected in the stipulations of fact before the District Court, entered into on May 7, 1993. *See* Joint Appendix at 136a [hereinafter JA] (All references to the Joint Ap-

- The Board retained the Black teacher in order to maintain "diversity" in the high school faculty, not to correct any prior hiring practices.[3]

Both the District Court and the Third Circuit (sitting en banc) relied on the stipulation as the factual foundation for holding that "diversity" did not justify an employer in using race to decide which employee to retain in a layoff.[4] Certiorari was granted on petition by the Board. After the record and briefs had been filed, the case was settled with a major monetary contribution from civil rights organizations who were concerned that the Supreme Court might address the "diversity" justification for affirmative action programs.[5]

The record submitted to the Supreme Court after certiorari was granted does not support the key elements in the stipulation. Rather, it establishes these contrary facts:

- The conclusion that the employment of Black teachers fairly reflected the labor market was based on a comparison with the largely White labor market to the south that ignored an equally close but better integrated labor market to the north. When that labor market is included, the Board's employment of minority teachers appears so

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pendix (JA) were filed in the Supreme Court after Certiorari had been granted).

"Defendant [Board] did not adopt its Affirmative Action/Employment Policy in 1983 for the purpose of remedying any prior discrimination by Defendant, or for any remedial purpose." JA 61a. "The Calculation of Underutilization table contained in the 1985 Employment Practices Addendum . . . shows that for blacks, the Piscataway School District workforce exceeds Middlesex County labor market availability and concludes that there is no underutilization of blacks in Defendant's teacher workforce." JA 63a. "Defendant did not establish any goal with respect to the hiring of black teachers as part of its 1985 Employment Practices Addendum because its statistical analysis . . . showed that there was no underutilization of blacks in Defendant's teacher workforce." *Id.; see also* JA 60a-63a, Stipulations 52, 53, 56-58, 63-65, and 69-71.

3. "The Board accepted the Superintendent's recommendation not to remedy past discrimination in its employment relations, but to promote the educational benefits flowing from racial diversity in an otherwise all-white department." JA 138a(g); *see also* JA 67a, Stipulations 88, 89, and 90. Ms. Taxman was not a party to the Stipulations.

4. *See* Taxman, 91 F.3d at 1550-51.

5. *See supra* note 2.

small that it justifies affirmative action under existing law.[6]

- The Board retained the Black teacher in order to further equal employment opportunity, not to assure diversity.[7]

These discrepancies between the facts in the record and the stipulation suggest that the Justice Department and the Board chose to litigate a largely hypothetical question concerning the "diversity" justification for affirmative action rather than test the validity of the Board's action under well established principles of equal employment opportunity law.[8] If that is the case, the assurance of focused advocacy essential to the effective presentation of issues is wanting, the precedential value of the opinion is problematic, and vacatuer may be appropriate.[9]

The core problem with the Piscataway case was that Ms. Williams, the Black teacher who was the "beneficiary" of affirmative action, was not represented. If she had been represented, these two "crucial facts" could have been contested, and adjudicated by the District Court. While Ms. Williams had a right to intervene, it would have been ungracious and apparently unnecessary since the Board appeared to be pro-

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6. The details are discussed in *infra* Part II.

7. The details are discussed in *infra* Part III.

8. An employer may take race or sex into account in making personnel decisions if there is a "manifest imbalance" between its labor force and the available pool of qualified minorities/females. *See* United Steelworkers v. Weber, 443 U.S. 193, 197 (1979); *see also* Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 632-33 (1987). That "manifest imbalance" suggests that the employer may have engaged in unfair recruitment and hiring practices. Affirmative action allows employers the leeway to correct the situation without admitting or being found to have discriminated. *See, e.g.,* EEOC Guidelines on Affirmative Action, 29 C.F.R. §1608.1(c) (1998). Affirmative action may be used to correct a "manifest [racial or sex] imbalance," but not to "maintain" racial balance. *See* Weber, 443 U.S. at 208; *See also* Johnson, 480 U.S. at 641-42. Thus, the right to take affirmative action turns on the extent to which the employer is underutilizing minority/female workers.

9. Further discussion of this point appears in *infra* Part V. In a related context, the Supreme Court has been cautious in granting certiorari in sensitive civil rights cases in the absence of a genuine dispute. *See, e.g.,* Texas v. Hopwood, 518 U.S. 1033, 1033 (1996) (explaining the unanimous denial of certiorari that "[w]e must await a final judgment on a *program genuinely in controversy* before addressing the important question raised in the petition") (emphasis added).

tecting her interests. But the employer who "protected" her had its own agenda. In fact, the Board had no interest in establishing its possible prior discrimination. The result — common in "reverse discrimination" cases — was that her interests and the public concern for equal employment opportunity were not fully presented to the District Court.[10]

Instead, the facts established in the stipulation between the Board and the Department of Justice eliminated any claim that the employer was entitled to take affirmative action to address the effects of its own hiring practices. Both the trial court decision, and the Court of Appeals affirmance were based on the stipulation. Had the federal agencies identified the "manifest imbalance" between the Board's employment of minorities and the available qualified labor force, they might have recognized the justice in allowing affirmative action in Ms. Williams' situation and refrained from instituting the litigation in the first instance.[11]

The initial responsibility for identifying the possibility that affirmative action was appropriate because of the School

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10. *See Weber*, 443 U.S. at 209 (Blackmun, J., concurring); Alfred W. Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity 223-24 (1993) [hereinafter Modern Law]:

> *Weber* was interested in proving that there had been discrimination against *whites*, not blacks, and neither Kaiser [the employer] nor the Steelworkers [union] wished to establish that they had discriminated against blacks. Such a showing would have opened them to direct discrimination suits by blacks. They defended the training program on the grounds that they were helping to address problems of "societal discrimination," not that they were correcting their own past misdeeds. As a consequence, no one argued that the plan was justified by prior discrimination against blacks. Weber, Kaiser and the union were the only parties to the litigation. They controlled the evidence which would be introduced. Party control over the evidence is an integral part of the common law process. This means . . . that the facts and arguments relating to a public interest may not be presented unless one of the parties finds it advantageous to do so.

Id. For a discussion of the same issue as it appeared in the wake of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *see* Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. REV. 31 (1979) [hereinafter *Litigation Without Representation].*

11. The details are discussed in *infra* Part III.

Board's prior hiring practices rested with the EEOC. That investigation should have inquired into the adequacy of statistics concerning the utilization of minority teaching personnel, once the school board had acknowledged that there were no Black teachers in the business department. The local office of EEOC should have been aware that Piscataway was located on the northern border of Middlesex County, immediately south of major areas of minority population. Once the appropriateness of using Middlesex County figures to define the labor market had been identified as an issue, the data described in this paper would have sharpened the justification that the school board so hesitatingly advanced, and then abandoned, in the initial stages of the litigation.

I. THE STIPULATION WAS NOT A RELIABLE BASIS FOR DECISION BECAUSE MS. WILLIAMS' WAS NOT REPRESENTED BY HER OWN COUNSEL

Normally, stipulations are relied upon by courts because they assure that there is no dispute concerning the facts stipulated. In this case the stipulation is unreliable because no party sought to defend the decision to retain Ms. Williams as legitimate affirmative action to remedy a "manifest imbalance" in minority employment.

A. *The United States*

The Department of Justice instituted this litigation during the Bush Administration. It pursued a policy developed in the Reagan administration that minimized the use of statistics in discrimination cases and rejected the concept of "disparate impact" with its concomitant justification for affirmative action.[12]

12. *See* U.S. Department of Justice, Office of Legal Policy, Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action (1987). The Reagan Justice Department's view was that Title VII protected only identified individual victims of invidious discrimination. This view was rejected by the Supreme Court in the 80's. *See* Modern Law, *supra* note 10, at 274-76. The policy developed in the Reagan Administration (1981-1989) was not changed during the Bush Administration of 1989-1993, when the litigation in *Taxman* was initiated.

Apparently, it was not concerned with the racial implications of ignoring the minority teaching force north of Piscataway when calculating the available labor force. Once the stipulation had been entered, the Department of Justice had deep institutional interests in maintaining its integrity. Therefore it would have hesitated to challenge the stipulation in *Taxman* even after the Department changed its policy on the merits.[13]

B. *The Piscataway Board of Education*

The Board insisted that it had not intentionally discriminated against Blacks.[14] With respect to "disparate impact" discrimination, its position was uncertain. Initially, it appeared to claim that it took affirmative action to remedy its underrepresentation of Black business teachers.[15]

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13. This change took place during the first Clinton Administration. President Clinton took office on January 20, 1993. The Stipulation of Facts was entered into on May 7, 1993. *See* JA 136a. The District Court entered judgment on Sept. 13, 1993. *See* JA 10a. The case was appealed to the Third Circuit. President Clinton's first appointee as Assistant Attorney General for civil rights, Deval L. Patrick, was confirmed in the spring of 1994. Thereafter, while the case was pending in the Court of Appeals, the Department sought leave to file a brief opposing Ms. Taxman's claim. That motion was denied. The Third Circuit treated the oral argument on that motion as a motion to withdraw which it granted on Nov. 17, 1995. *See* United States v. Board of Educ., No. 94-5090, 94-5112, 1995 WL 704036 (3d Cir. Nov. 17, 1995).

14. *See* Interrogatory 7, "Q: Do you contend that prior to May 22, 1989, the Defendant . . . discriminated against any employee or applicant for . . . the position of teacher . . . or engaged in a pattern or practice of discrimination in employment . . . on the basis of race . . . ?" JA 83a; "A: The Board does not contend that it ever engaged in any conduct which would have resulted in a finding of 'disparate treatment' . . . . [t]he Board is presently analyzing whether, as a hypothetical proposition, its past practices could have justified a finding of a *prima facie* case of "disparate impact." JA 94a.

15. *See* Interrogatory 58, "Q: Do you contend that Defendant's termination of Sharon Taxman from employment in 1989 was based upon facts or information . . . which showed that blacks were then underrepresented or underutilized in Defendants full-time teacher workforce?" JA 116a; "A: Yes." JA 126a; *see also* Interrogatory 59, "Q: If your answer to Interrogatory No. 58 is affirmative . . . Set forth . . . all such facts and information upon which Defendant relies in support of any such contention . . . ." JA 116a; "A: Debra Williams was the only black instructor in the Piscataway High School Business Education Department at that time, and for as far back in time as defendant can presently recall. Her termination would have

It would have been awkward for the Board to maintain that position because it had advised State authorities twice in the preceding 13 years that it did not "underutilize" Black teachers.[16] The Board abandoned the "underutilization" justification when it stipulated that "diversity" was its sole reason for retaining Ms. Williams.[17]

C. *The Individual Plaintiff*

Ms. Taxman was seeking to prove that she had been discriminated against on the grounds of race. She had no interest in showing that Blacks had been discriminated against, for that might have provided a justification for her layoff.[18]

D. *The Beneficiary Who Wasn't There*

Ms. Williams — the Black teacher who had been retained — was not a party to the case. Like most beneficiaries of affirmative action, she assumed that the employer would defend its decision in litigation. She was the only party who had an interest in showing past underutilization of minorities as a justification for her retention.

The record filed in the Supreme Court discloses the thin quality of the stipulation on the two crucial facts in the case. It makes clear that there were serious and disputable facts that, in absence of the stipulation would have forced consideration of a different and well recognized justification for affirmative

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resulted in no minority instructors in that department." JA 126a; Interrogatory 60, "Q: Do you contend that Defendant terminated the employment of Sharon Taxman in 1989 in an effort to eliminate a manifest racial imbalance in a traditionally segregated job category in Defendant's workforce?" JA 116a; "A: Defendant contends that there was an underrepresentation of black instructors in business education, compared with their presence in the teaching profession in general." JA 126a.

16. *See supra* note 2; *see also infra* notes 19, 21 and 22.

17. The "diversity" justification for minority student programs in higher education gained popularity after Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

18. Although the Department of Justice had initiated the litigation, it was concluded in the Court of Appeals and briefed in the Supreme Court by Ms. Taxman who had intervened in the District Court. Ms. Taxman was not a party to the stipulation.

action. We now examine the evidence concerning these two crucial facts.

II. A "MANIFEST IMBALANCE" EXISTED IN THE EMPLOYMENT OF BLACK TEACHERS IN PISCATAWAY THAT JUSTIFIED AFFIRMATIVE ACTION[19]

In 1976 and 1985, the Board filed statistics with the NJ State Department of Education establishing that it employed a higher proportion of minorities than were in the relevant labor force and therefore had no reason to establish a goal for recruiting Black teachers.[20] It could make this claim only because of its dubious choice of the "relevant labor market." Each time the Board reported its employment statistics, it used a different analysis and different numbers. But the reports remained constant in their omission of any reference to Union and Essex Counties immediately to the north of Piscataway.

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19. *See supra* note 8.

20. In its Affirmative Action Program, Statement of Analysis, the Board reported that, for minorities in the professional category:

> Piscataway has 7% of the labor force as compared to 9/10 of 1% [of the labor force in Middlesex / Somerset Counties] and 10% of the labor force by job category [professionals] as compared to 5% for the [Middlesex / Somerset County] labor market area . . . Thus it can be seen that the Piscataway School District exceeds the labor force area in all categories for Minorities except Office and Clerical where the District lags by only two-tenths of one percent.

JA 217a. These comparisons are between the Board utilization in the second and third columns. *See* Lodging Appendix at JA 217a [hereinafter LA JA] (The Joint Appendix printed and filed by the parties in the Supreme Court (JA) made reference to a document entitled "Lodging Appendix," consisting of several documents containing statistics that constitute the comparisons that are discussed in the printed brief). These figures compare the Board utilization with the population and labor force of Middlesex and Somerset Counties. The Board used state wide statistics to describe minorities as a percent of the labor force, and as a percent of "professionals," but these numbers did not affect the utilization comparisons. The use of general labor force or population statistics as comparators for a job which requires education and skill is not acceptable. *See* Hazelwood Sch. Dis. v. United States, 433 U.S. 299, 308-12 (1976). *Hazelwood* was decided the year after the statistics were submitted.

In 1976, the Board compared the entire teaching staff of the school district with the population and total employment of "professionals" in Middlesex and Somerset Counties.[21] The result of that comparison was that the Board's employment of 7% minority professionals exceeded the 5% in the labor market and the .9/10th of 1% in the minority population.[22]

In 1985, the Board reached the same conclusion by a different analysis. It compared the entire teaching staff of the school district in the category of "Educational Professionals," with the teaching staff and administrators of all schools in Middlesex County.[23] Blacks constituted 5.8% of the "educational professionals" employed in the County. Piscataway employed 9.5% Black educational professionals (47 out of 447), well above the average. The proportion of Black teachers in the high school, 8.75% (14 of 160) was also above the 5.8% of Black educational professionals in the County.[24] These "good" statistics flow only from the Board's decision to com-

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21. Somerset County lies west northwest of Middlesex. It is more rural, more lightly populated with minorities with a smaller proportion of minority teachers than Middlesex. *See* LA JA 217a. Including Somerset County may have reduced the availability figures for Black teachers in the 1976 report. In 1985, Somerset County Black teachers constituted 3% of its full time teachers, while Middlesex County had 4.1%. *See* LA JA 150a. For 1988, Somerset had 3.2% while Middlesex had 4.2%. *See id.*

22. *See supra* note 20; *see also* JA 60, Stipulation 55-57.

23. In 1985, the Board filed another report reaching the same conclusion. This report compared the utilization of Black "educational professionals" by the Board with statistics relating to Middlesex County alone. *See* LA JA 100a. Administrators were said to account for 10% of the persons in the category of "educational professionals." The statistics concerning full time teachers did not distinguish between elementary and secondary school teachers. *See* LA JA 100a; *see also* JA 62a-63a, Stipulations 68-71. The State Department of Education figures for Middlesex County for 1995, showed that Whites constituted 93.7% and Blacks 4.1% of full time teaching personnel. *See* LA JA 150a, Table 1A. Middlesex had 243 Black and 5,570 White teachers of a total of 5,942. Blacks constituted 4.08%. *See id.* The business department alone contained only ten employees, including Ms. Williams and Ms. Taxman. The business department was part of the high school teaching staff in which Blacks constituted too few employees to provide a formal justification for affirmative action either under the "statistical significance" standard or the "eighty percent" rule of the Uniform Guidelines on Employee Selection Procedures. *See generally* 29 C.F.R §1607 (1998).

24. The Board had not reported any later figures when it made the decision in 1989 to lay off Ms. Taxman. State Department of Education statistics

pare its employment pattern with that of Middlesex County alone. That decision distorted the relevant labor market.

Piscataway is located on the northern border of Middlesex County. The southern boundary of Middlesex County is more than 25 miles south of Piscataway. Had Board officials "looked north" that same 25 miles, they would have encompassed Union County, the major cities of Elizabeth and Plainfield, and most of Essex County, including Newark and its suburbs. This area lies within easy commuting distance of Piscataway. In 1985, 11.5% of the school teachers in Union county were Black while in Essex county the percentage was 30.9%. Black teachers accounted for 17.5% of all teachers in Middlesex, Union and Essex Counties.[25]

The 9.5% of black "educational professionals" and the 8.5% Black high school teaching staff in the Piscataway schools is half that of the proportion of Black teachers in the three counties taken together. This difference could constitute the "manifest imbalance" that would justify affirmative action. When statistics concerning secondary school teachers in the three counties are examined separately, they yield similar evidence of imbalance.[26] If minority status rather than race is used to characterized the teaching staff and labor market, the disparity is greatly increased. In its 1985 plan, the Board stated it was

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by county for September, 1988, show little change from 1985. *See* LA JA 150a, Table 1X for 1988.

25. The combined totals from the three counties are black teachers-3250, white teachers-14,726, total teachers 18,568. *See id.*

26. For 1980 and 1990, the percentage and number of black secondary school teachers by county was:

Combined percentages for three counties				
	1980	1990	1980	1990
Middlesex	4.5% (126)	5.4% (93)	11%	16.4%
Union	8.0% (174)	6.9% (71)		
Essex	18.5% (600)	30.2% (580)		

Id. If the 1990 statistics for Somerset County (51 of 1230 or 3.2%) are added, the combined percentage for the four counties is 14%. *See* U.S. CENSUS OF POPULATION AND HOUSING, DATA FOR AFFIRMATIVE ACTION PROGRAMS, TABLE 2. This is markedly higher than the 8.5% Black secondary school teachers in Piscataway, and may constitute a "manifest imbalance." *See id.*

underutilizing Hispanic teachers to such an extent that it established a goal for increasing their employment.

What "non racial" justification could there be for the Board to define its labor market by looking only to the south?[27] The county lines are used for the purpose of creating manageable and useful statistics, but do not track the labor market.[28] Under normal circumstances, when dealing with a commuting labor force, the practicalities of transportation are important in defining the labor market. Transportation by car to Piscataway appears to be easier from the north than from southern Middlesex. Piscataway is on US Rt. 287, giving easy access to both the New Jersey Turnpike and the Garden State Parkway, which traverse the densely populated areas of northern New Jersey. In 1990, 50,000 employees commuted between Middlesex and Union Counties, 24,000 employees commuted between Middlesex and Essex Counties and 46,000 employees commuted between Middlesex and Somerset Counties.[29] The restriction of the labor market to Middlesex County was tilted against minority employment opportunity.[30]

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27. This question is particularly relevant since the Board's Affirmative Action Program promised to "make a good faith effort to utilize those sources which will contribute to substantially increasing the representation of women and minorities in the aforesaid positions." JA 209a. In 1976, it had relied on statistics that included Somerset County to the north west, but it never used statistics of the counties to the north. *See supra* note 21.

28. *See* Barbara Lindemann & Paul Grossman, Employment Discrimination Law 1717-24 (3d ed. 1996) [hereinafter Employment Discrimination Law].

29. *See* N.J. Dep't, Area Labor Force Statistics (1990).

30. *See generally* Alfred W. Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968). The Board may not have intended this consequence, because employment statistics are collected by counties. But intent is not required in Title VII matters, and in any event, the consequence is evidence of intent. A "real" trial over the issue of appropriate statistics would confront additional problems, for example, whether to combine statistics concerning blacks with those of Hispanics, which would increase the underutilization, or to look west of Piscataway, which might reduce the underutilization. These are matters for the trial court. In any event, the appropriate labor market area for examination of utilization rates under Title VII is a federal question.

Had the Board recognized the realities described in the text, it could have argued that this "manifest imbalance" entitled them to take race into account. If the board members believed that there had been low utilization of

There is no evidence that the state prohibited the Board from using a labor area larger or different than Middlesex County for comparison purposes. Stipulation No. 72 states that the Board used the county statistics, "at the direction of the New Jersey State Department of Education."[31] The only evidence referenced is in Stipulation 59,[32] that states that the New Jersey Department of Education had directed the Board that in future comparisons, it was to use Middlesex County percentages for females and minorities "if they are higher than state percentages." This is far from an instruction to use county statistics. Rather, it could be read as a suggestion to use the highest available statistics and that the State thought Middlesex was "low balling" its statistics to avoid recognizing a problem in its employment of minorities. Nevertheless, the mechanical use of county statistics by the State board did permit districts such as Piscataway to understate the appropriate justifications for affirmative action. That does not alter the Board's obligations under Federal law.

III. THE BOARD'S DECISION WAS BASED ON AFFIRMATIVE ACTION, NOT DIVERSITY

The stipulation stated that the reason for retaining Williams and terminating Taxman was the desirability of maintaining diversity in the faculty. There was no Board Policy concerning diversity. The Board Policy under which Williams was retained dealt with affirmative action in employment.

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minorities, but also considered teachers as role models, or symbols of an integrated society, then the case involves the *Price Waterhouse* analysis of "mixed motives," in which both legitimate and illegitimate considerations are considered. If the Board showed that it would have made the same decision if it had acted on legitimate considerations alone, it would have won the case. *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). This rule was changed by Congress in 1991. The new statutory rule in such cases is that plaintiff wins, but cannot recover back pay, damages or reinstatement. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (1994). The new rule is not retroactive. *See generally* Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994).

31. JA 63a.

32. *Id.*

In 1976 and again in 1985, the Board reported statistics showing that it had "enough" Black teachers so that it did not need to adopt a "goal" to increase their number.[33] It never set a goal with respect to Black teachers. In 1975, the Board adopted an affirmative action plan (AAP) pursuant to a State requirement. The AAP was expressly designed to assure fairness in hiring and promotion of minority and female teachers.[34] The Board never applied the plan to a personnel action prior to the Taxman-Williams situation.[35] The plan does not

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33. *See* supra notes 20 and 23.

34. Statement of Purpose . . . The basic purpose of the program is to make a concerted effort to attract women candidates for administrative and supervisory positions and minority personnel for all positions so that their qualifications can be evaluated along with other candidates. In all cases, the most qualified candidate will be recommended for appointment. However, when candidates appear to be of equal qualifications, candidates meeting the criteria of the affirmative action program will be recommended.

JA 208a; JA 209a, General Purpose 5, "The School System will review the sources from which applicants are derived and will make a good faith effort to utilize those sources which will contribute to substantially increasing the representation of women and minorities in the aforesaid positions;" The Affirmative Action Program/Employment Practices/Overview, stated:

1. Affirmative action covers all positions;
2. Opportunities for staff members for promotion;
3. Posting of vacancies;
4. Requests that applicants file written applications;
5. Maintenance of affirmative action file so female applicants may be considered.
6. Encouragement of female staff to apply for administrative positions;
7. Encouragement of minority and female education for higher positions;
8. Equal application of requirements to men and women.

JA 214a-216a.

In 1975, when the AAP was adopted, Title VII's "disparate impact" doctrine was sufficient justification for affirmative action by governmental bodies. *See generally* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971). The Supreme Court had not yet decided that the 14th Amendment required proof of intent to discriminate. That standard was announced in 1976 in *Washington v. Davis*, 426 U.S. 229 (1976).

35. *See* Certification of the Board President T. H. Kruse: "When we were confronted with this issue in May 1989, it was the first time I can recall that the Board itself was ever given a choice of considering race as a factor, to any extent, in making a specific personnel decision." JA 194a; Deposition of Board Member Paula Van Riper: "Q: Do you recall any instance in which a

use the term "diversity." In contrast, a separate section of the plan concerning students did use the term diversity, but that section does not mention faculty diversity. This difference makes clear that the Board was aware of the diversity issue and did not use the term "diversity" in connection with faculty employment. The affirmative action plan was not designed to address diversity in the teaching staff.

The Board took the choice between Ms. Taxman and Ms. Williams seriously. It discussed the issue at two meetings. "There was a discussion of the desire to have a diverse teaching staff in the school district, and that discussion took place in conjunction with the fact that the superintendent pointed out that Mrs. Williams was the first and only black teaching staff member in the business department."[36]

The Board laid off two other teachers at the same time they laid off Ms. Taxman. One of those teachers was white, the other is listed as Cuban.[37] If they had laid off Ms. Williams, two thirds of the people released at that time would have been "minorities." At the meetings, board members discussed the fact that if Ms. Williams were let go, the business department would again be all white.[38] The Board also considered the racial composition of the teaching staff. They were generally aware that only eight percent (14 of 160) of the high school teachers were black and that the District had advised the State that they employed so few Hispanic teachers that they had established a goal to increase their numbers.[39] The Board mem-

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personnel decision was being made, the hiring, transfer, termination of a teacher, other than the Taxman incident, in which the racial or ethnic or gender composition of that individual's grade or department was a factor in the decision?" JA 132a; "A: No." *Id.*

36. *See* Deposition of Gordon Moore, JA 140a.

37. *See* Board's response to EEOC questionnaire, JA 77a.

38. *See supra* note 34.

39. Deposition of Board Member Paula Van Riper: "Q: Has at any time there been a specific report, verbal or written, to the board giving a breakdown of the teaching staff by department, by grade, by school?" JA 132a;

> A: I could only say that I have vaguely been aware that there were documents presented to me during my life on the school board that would detail percentages of the various minority groups in our school district generally, we have that by student; I don't remember anything being specifically broken down by department. Maybe by

bers may not have known the exact numbers of minority teachers as compared to Whites, but a layoff of two minority teachers would be visible. It would constitute 15% of the 16 minority teachers in the high school.[40]

The Board's actions were consistent with its knowledge. Faced with two equally qualified and equally senior teachers, the Board decided to "give consideration to the person that fell within the affirmative action policy."[41] This policy, as has been noted, related to employment opportunity, not diversity for educational values.[42] It wrote to Ms. Taxman explaining that its decision was based on the affirmative action policy.

> Dear Ms. Taxman: . . . the board of education has decided to rely on its commitment to affirmative action as a means of breaking the tie in seniority entitlement in the secretarial studies category. As a result, the board . . . acted to abolish one teaching position and to terminate your employment as a teaching staff member effective June 30, 1989.[43]

That policy was based on assuring equal employment opportunity. It does not address diversity.[44]

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general school, maybe, or something. But certainly I don't remember anything specifically by department.

Id.; Interrogatory 7, "Q: Do you contend that prior to May 22, 1989, the Defendant . . . discriminated against any employee or applicant for . . . the position of teacher . . . or engaged in a pattern or practice of discrimination in employment . . . on the basis of race . . . ?" JA 83a;

> A: The Board does not contend that it ever engaged in any conduct which would have resulted in a finding of "disparate treatment" . . . . The Board is presently analyzing whether, as a hypothetical proposition, its past practices could have justified a finding of a *prima facie* case of "disparate impact."

JA 94a.

40. After the Cuban teacher was released, there may have been one Hispanic teacher remaining in the high school. Respondent's brief asserts that at the time Williams was retained, the high school had 14 African-American, 2 Hispanic and one Asian American teacher. *See* Brief for Respondent at n.3, Taxman, No. 96-679, 1997 WL 626853 (U.S. Oct. 9, 1997).

41. Deposition of Board Member Paula Van Riper: "Regardless of the names of the people involved we were basing it . . . on two individuals and of similar seniority, similar ability, whether one was - we were giving the consideration to the person that fell into the affirmative action policy, in this case it was a black woman." JA 70a.

42. *See supra* note 30.

43. *See* JA 153a.

44. This discrepancy was noted in McGinley, *supra* note 1, at 205-92.

The evidence that "diversity" was the sole ground of the decision comes from a "certification" by the Board President. In Mr. Kruse's deposition, he stated that it was his personal opinion that the values of "diversity" had justified the decision to retain Ms. Williams.[45] In a subsequent "certification," prepared because of the United States attorney's view that his deposition "does not establish that we were attempting to achieve diversity," the President stated that this was his position and that "of those Board members who chose to express themselves in our deliberations."[46] This is the only evidence linking his views to those of the other Board members.

They made a practical judgment that reflected their concern about the low number of minority teachers.[47] The Board explained to Ms. Taxman that the decision was made in pursuance of an affirmative action policy that related to equal employment opportunity.

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45. *See* Deposition of Theodore H. Kruse: "Q: In what way did retaining Mrs. Williams rather than Mrs. Taxman further any educational objective for the Piscataway Board of Education?" JA 197a;

> A. *In my own personal perspective* I believe by retaining Mrs. Williams it was sending a very clear message that we feel that our staff should be culturally diverse, our student population is culturally diverse and there is a distinct advantage to students, to all students, to be made—come into contact with people of different cultures, different background, so that they are more aware, more tolerant, more accepting, more understanding of people of all background.

Id. (emphasis added).

46. JA 194a, ¶ 3; JA 194a, ¶ 4 where he also restated his personal position:

> Based on my experience as a university professor and a long-time Piscataway Township Board of Education member, I had come to the conclusion by May 1989 that a racially and culturally diverse faculty and student body promoted a more enriching educational environment for students. During my tenure on the Board beginning in approximately 1983, we have taken various steps in the School District in furtherance of that goal. As an educator and school board member, I see this objective as distinct from fostering equitable labor relations; the former is for the students' benefit, the latter for employees'.

Id.(emphasis added).

47. Analytically, the issue is similar to the subjective judgment issue in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

After the Justice Department filed suit, the Board's first affirmative defense was that the decision was based on "lawful affirmative action."[48] The second was that the actions were taken "pursuant to policies and administrative regulations of the State of New Jersey."[49] It contended that race became a decisive factor only because factors of qualifications and seniority were equal.[50]

Additionally, it reserved the right to assert that the decision had been made because there was underutilization of minorities in the school system.[51] At that point, the issues were simi-

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48. *See* JA 42a; Interrogatory 1, "Q: Set forth . . . all facts . . . upon which Defendant relies to assert that the actions undertaken by Defendant . . . were pursuant to a lawful affirmative action policy." JA 82a; "A: At the time . . . the Board had a standing Policy 4111.1 Affirmative Action/Employment Practices, which had been accepted and approved by the New Jersey Department of Labor . . . ." JA 93a. The complaint appears at JA 38a. Ms. Taxman's possible action under 42 U.S.C. § 1983 was barred by the statute of limitations. *See Taxman*, 91 F.3d at 1552 n.5.

49. *See* JA 43a; Interrogatory 4, "Q: Set forth . . . all facts . . . upon which Defendant relies to assert . . . that the actions taken . . . were pursuant to policies and administrative regulations of the New Jersey Department of Labor." JA 83a; "A: The Board contends that its action was consistent with its Affirmative Action/Employment Practices Policy, which had been submitted for review and approval by the New Jersey Department of Education, consistent with that agency's Affirmative Action/Equal Employment Opportunity Guidelines . . . ." JA 93a.

50. "Only after the candidates' seniority and qualifications were determined to be equal did the candidates' race become a factor." JA 137a. Applying the statute and the Administrative Code, it was determined that Sharon Taxman and Debra Williams were tied in seniority. It, therefore, became incumbent upon the Board to determine a method of selecting one of the two teachers tied in seniority who would be subject to the reduction in force. In making this determination, the Board of Education decided to rely on its own policy Affirmative Action/Employment Practices 4111.1. Because Debra Williams is Black and meets the criteria of the local Affirmative Action program, the Board of Education decided to continue her employment and terminate the employment of Sharon Taxman. The Board believed that the two individuals were comparably qualified within the meaning of the policy, and took particular note of the fact that Debra Williams was the only Black teacher in the Business Department of the High School. *See* JA 92a; *see also* Answer to Interrogatory 1, JA 82a. (requesting *each and every basis or reason* for the decision to terminate Ms. Taxman) (emphasis added).

51. *See* Interrogatory 15, "Q: Do you contend that blacks were under represented in Defendant's full-time teacher workforce when Defendant adopted its Affirmative Action Program Employment Practices Addendum dated January 1985?" JA 85a; "A: This answer will be supplied after a re-

lar to the competition between Mr. Johnson and Ms. Joyce concerning a promotion in *Johnson*.[52] There, the Supreme Court held that a "manifest imbalance" by sex justified the employer in taking sex into account in a similarly close case. As in *Johnson*, the affirmative action in *Taxman* was taken in a "traditionally segregated job category." Ms. Williams was the first and only black teacher in the business department.

The evidence that affirmative action in relation to employment opportunity motivated the Board is compelling. It includes the language of the affirmative action plan, the public statement of the Board at the time of the decision and the discussion at Board meetings about the numbers of Black faculty.

IV. THE ISSUE OF INFORMAL AFFIRMATIVE ACTION

This informal but informed choice between two equivalent candidates by an employer with few minority employees in the job category is an example of decisions that have been made thousands of times, over the past twenty five years that have contributed to improved employment opportunity for minorities and women.[53] Essentially, affirmative action takes place when employers confronted with a "close case" decide to select the woman or minority. That is what happened in Piscataway.

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view and analysis of data believed to be in the files . . . relating to representation of blacks in defendant's full time teaching work force." JA 95a; Interrogatory 17, "Q: Do you contend that blacks were underrepresented in Defendant's full time teacher workforce . . . when Defendant determined to terminate . . . Mrs. Sharon Taxman . . . ?" JA 86a;

> A: Reports filed with the New Jersey Department of Education . . . indicate that the representation of Blacks serving as instructional personnel and educational services in nonsupervisory capacities exceeded the percentage of Blacks residing in Middlesex County. However, the Board contends . . . that there was an underrepresentation of [B]lacks in the High School Business Education Department when compared with the relevant labor pool.

JA 95a.

52. *See generally* Johnson v. Transportation Agency, Santa Clara Cnty., 480 U.S. 616 (1987).

53. *See* MODERN LAW, *supra* note 10, at 289-317.

The real issue in the case — before the stipulation converted it into a question of "diversity"— was whether an employer may take affirmative action in a specific situation, pursuant to a general policy that supports equal employment opportunity, but, that contains no specific "goal", when statistics show a "manifest imbalance" from the qualified available labor force sufficient to suggest that its recruitment and hiring practices had limited opportunities of minorities/women as compared to Whites/males.

Such informal affirmative action is not unlawful because the plan lacks specificity. In fact, affirmative action plans that include *specific* goals may raise questions of legality because they may imply that persons will be hired to "meet a quota." A plan without a specific goal does not raise these concerns; it does not create a risk that the employer will use race in a mechanical manner in every personnel decision. Therefore, it should be *less* objectionable than a plan that appears to apply to every personnel decision.[54] The Piscataway Board never applied the plan to any personnel decision until it was confronted with the Taxman-Williams situation.[55]

What are the permissible parameters of such informal affirmative action? The Supreme Court has not faced this ques-

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54. Strangely, the Majority in the Piscataway case seemed to favor a plan that contained specific goals, *see Taxman*, 91 F.3d at 1547 n.15, but then condemns Piscataway because its plan was not stated to be "temporary" *Id.* While the plan itself may have been general, the "goals and timetables" included in 1985 were very specific. *See* LA JA 100a, Table B. This plan, like that in *Johnson*, would end when the "underutilization" ended.

55. "When we were confronted with this issue in May 1989, it was the first time I can recall that the Board itself was ever given a choice of considering race as a factor, to any extent, in making a specific personnel decision . . . "JA 194a; '"Q: Can you recall any employment decision, whether it be the hiring or termination or transfer of a teacher, has occurred [sic] while you have been a member of the school board which was based upon or in which one of the factors considered was the racial composition of the faculty of any given department or school or grade . . . other than the *Taxman* case[?]" JA 133a; "A: No." *Id.*

tion directly.[56] It has not held that Title VII requires a specific written plan before affirmative action may be taken.[57]

As the Third Circuit pointed out in *Taxman*, a challenge to affirmative action is to be processed as any other discrimination claim. The plaintiff bears the burden of proving that the employer's claimed justification was pretextual.[58] If "affirmative action based on a manifest imbalance" is argued by a defendant employer to be the "legitimate non discriminatory reason" for denying an employment opportunity to a White/male plaintiff, evidence in support of that explanation should be admitted under the same standards as evidence of any other asserted reason. Nothing in the jurisprudence of Title VII suggests a sort of "statute of frauds" requirement that the reason must be in writing.

It is necessary to protect employers from the "Catch 22" situation that faced the Board.[59] If they had retained Ms. Taxman, they would have faced a discrimination claim from Ms. Williams that was arguably stronger than that asserted by Ms. Taxman. Ms. Williams, had she been laid off, could have argued (1) the "inexorable zero" in the business department, (2) the "manifest imbalance" in the High School and in the School District, compared to a reasonable recruiting area (3) evidence that the Board had disregarded the statistics of minority teachers in the immediate labor area to the north, thus

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56. The facts of *Johnson*, are similar to those in *Taxman*. Santa Clara County had an affirmative action plan to increase female employment that was triggered by a complaint from a female employee in a particular situation. The plan was not applied in any automatic fashion. In *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978), the Court held that evidence of an affirmative action program to counterbalance a racially exclusionary hiring system was admissible on behalf of the employer as evidence that it did not harbor discriminatory intent. *See also* Connecticut v. Teal, 457 U.S. 440 (1983) (holding that such evidence did not affect disparate impact liability). For a criticism of Teal, *see* MODERN LAW, *supra* note 10, at 116.

57. The EEOC Guidelines on Affirmative Action do not require that the plan be in writing, but afford "safe harbor" protection of 713(b) of Title VII only to written plans and suggests that an employer gains credibility if its plan is in writing. *See* 29 C.F.R. §1608.4(d).

58. *See Taxman*, 91 F.3d at 1156.

59. *See* United Steelworkers v. Weber, 443 U.S. 193, 209-10 (Blackmun, J., concurring).

denying that they were underutilizing Black teachers, and (4) that the Board had opposed school integration only seventeen years earlier.[60] Cumulating these factors, she could have argued that the Board had knowingly resegregated a traditionally White job category.

An employer in this situation should not be forced to litigate what ever choice it makes when it chooses between equivalently qualified white/males and minorities/females. This situation will become increasingly common as qualified minorities and women come into the labor market. They will inevitably compete with Whites and males.[61] A rule of law that exposes employers to liability every time they choose a minority or woman between equivalently qualified persons would discourage employers from hiring minorities or women to avoid the risks of litigation whenever there was competition with whites/males. This result would be directly contrary to the purposes of Title VII. Therefore, the lawfulness of informal affirmative action should depend on the record of the employer in relation to the qualified labor force.[62]

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60. *See* Piscataway Township Bd. of Educ. v. Burke, 386 A.2d 439 (N.J. Sup. Ct. App. Div. 1978), *appeal dismissed*, 401 A.2d 230 (N.J. 1978). Board opposed an order of the Commissioner of Education requiring it to adopt a policy on equal educational opportunity and school desegregation; approve a desegregation plan to correct racial imbalance in three schools; and adopt a program to prevent further racial imbalance. The challenge was based on the 14th amendment to the federal constitution. The challenge was dismissed.

61. *See* Alfred W. Blumrosen, *How the Courts Are Handling Reverse Discrimination Claims, Bureau of National Affairs*, DAILY LABOR REPORT, Mar. 23, 1999, at E-7. Populations shift contribute to increased minority competition for traditionally segregated jobs. *See id.* Between 1980 and 1990, the white population of Middlesex County increased by 3%, or 16,000 while the Black population increased by 50% or 18,000 people. *See id.* In Piscataway, the changes were White—decrease of 6% or 2,000 people; Black—increase of 34% or 2,000 people. *See id.*

62. *See* MODERN LAW, *supra* note 10, at 245-46:

> Government regulators tend to deal with large institutions which engage regularly in planning, including the planning of their industrial relations systems. Therefore, it was natural for the EEOC to build the [affirmative action] guidelines around the concept of planned affirmative action. . . . This perspective was, in retrospect, overly simplified. The "Washington myopia" of the government left a serious gap in the guidelines.

Employers were given such "leeway" by the Supreme Court, in the *Price Waterhouse* "mixed motive" case.[63] That same breathing space should be available in the situation presented in the *Taxman* case. This is especially important as we enter an era where "qualifications" become more subjective, and where differences between "qualified" individuals are difficult to identify.[64]

V. THE PRECEDENTIAL EFFECT OF THE THIRD CIRCUIT OPINION

We have concluded that none of the parties in Taxman had an interest in identifying the underutilization of minority teachers or the "real" reason for the retention of Ms. Williams. The result is an opinion that is not rooted in the facts of the case. This uncomfortable situation is likely to arise whenever an employer is sued for "reverse discrimination."[65] The em-

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Id.

63. *See* Alfred W. Blumrosen, *Society in Transition II:* Price Waterhouse *and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1031-33 (1990).

64. The option of a coin flip that had been used in Piscataway to resolve non-racial ties, may not protect an employer from liability to the losing employee who claims she was denied the job because of her race. Even an honest coin flip does not pass the test of rationality explained in *Furnco*, nor the need to justify practices by reasons that are job related and consistent with business necessity. *See generally Furnco*, 438 U.S. at 567.

65. A related standing issue was raised in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.) *suggestion for rehearing en banc denied*, 84 F.3d 720 (5th Cir. 1996). An action challenging the constitutionality of a law school admission program of the University of Texas. The District Court denied intervention of Black legal and pre-law associations on grounds that the state would adequately represent their interests because they were seeking the same results. *See id.* at 959-60. This decision was affirmed on a preliminary appeal. *See id.* At trial, the District Judge allowed only Amicus status to the associations, and did not permit them to present evidence that the State was constitutionally required to maintain a minority student program because of its own acts. *See id.* The Court of Appeals rejected a renewed motion to intervene on grounds that the "law of the case" had been established in its earlier opinion. *See id.* The net result was that evidence of the prior acts of the defendant that would have supported the minority student program was never allowed to be presented. The experience of these cases suggests that affirmative action defendants have interests different from the beneficiaries, consisting primarily of sheltering their reputation from evidence of their own

ployer will not want to admit the possibility of its past discrimination.[66] In contrast, when an employer is sued by a minority or woman, the employer has every reason to assert all relevant "legitimate non discriminatory reasons." the questions raised are (1) should beneficiaries of affirmative action be considered "necessary parties" under Federal Rule 19 in "reverse discrimination" cases? (2) May the Third Circuit sua sponte vacate its opinion in Taxman?

A. *Affirmative Action Beneficiaries as Necessary Parties in "Reverse Discrimination" Cases*

The strongest — and least controversial — reason for an employer to take affirmative action is to correct the effects of its own past discrimination.[67] If the only person who has an interest in showing that the employer may have discriminated against minorities or women is the "beneficiary" of affirmative action, that issue will not be presented to the court unless he or she is made a party.

Under Title VII, the "beneficiary" of affirmative action has a right to intervene.[68] Often, the beneficiary believes that his/her interests will be fairly and without expense represented by

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possible misconduct, whether they be private parties or the state. *See* Jones, *Litigation Without Representation*, *supra* note 10.

66. *See* Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 290-92 (1986).

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations . . .[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken.

Id. "Where . . . those employers . . . act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous finding requirement should not be necessary." *Id.* at 290-91. The Affirmative Action Guidelines of EEOC also recognize that no "finding or admission of discrimination is necessary before affirmative action can be taken." *See* 29 C.F.R. § 1608.4(c) (1998).

67. *See generally* Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987); *Wygant*, 476 U.S. at 274; 29 C.F.R. §1608.3 (b).

68. *See* EMPLOYMENT DISCRIMINATION LAW, *supra* note 28, at 1717-24.

the employer. Once the trial has ended, so has the possibility of introducing evidence suggesting prior discrimination or a "manifest imbalance" justifying affirmative action. For these reasons, courts should characterize the minority or female beneficiaries of affirmative action as "necessary parties" under Rule 19 in "reverse discrimination" litigation.[69] A court order to join the "beneficiary" would prevent the use of questionable stipulations, and may diminish the beneficiary's hesitance to litigate against his or her benefactor. It will assure the opportunity to raise issues that an employer may prefer to leave unstated.[70] Joinder is appropriate under Rule 19 because a court decision adverse to the beneficiary, may impose multiple

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69. *See* FED. R. CIV. P. 19(a). A person may be joined as a party if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
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> *(2)* the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
>
> (i) as a practical matter impair or impede his ability to protect that interest or
>
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest . . . .

Id. In *Hermes v. Hein*, 479 F.Supp. 820, 825-26 (D. Ill. 1979), plaintiffs alleged political rigging of promotions of two police officers by village officials. Defendants argued that plaintiffs should be required to join those who received the promotions. *See id.* The court agrees. *See id.*

> Under Rule 19d(a), Fed. R. Civ. P. these officers clearly have an interest relating to the subject of the action, namely the promotions they received, that might be jeopardized by a judgment for plaintiff . . . [A] judgment for plaintiffs in this suit might force the defendants to demote and re-examine the two officers . . . . This possibility would expose defendants to the risk of new litigation. Also, the request for an injunction ordering that the plaintiffs be promoted presents the defendants with the prospect of paying double salaries or demoting the previously promoted officers.

Id.

70. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit.

Martin v. Wilks, 490 U.S. 755, 765 (1989).

liability on the employer, while leaving the beneficiary free to litigate the same issues, at the same time as it is likely to adversely affect the beneficiary in the future.[71] If the courts recognize that the employer's interest and the beneficiary's interests may be seriously diverse, and require joinder of the beneficiaries, issues of the type that were not raised in *Taxman* are more likely to be addressed on their merits. While any party may raise the non-joinder issue, neither the "reverse discrimination" plaintiff, nor the employer are likely to do so. Courts are not helpless in this situation. "[B]oth the trial court and the appellate court may take note of the non joinder of an indispensable party sua sponte."[72]

B. *May the Third Circuit Vacate its Opinion in the* Taxman *Case*?

Taxman now stands as Third Circuit precedent concerning the "diversity" justification for affirmative action. It has been cited in other jurisdictions, and is binding in the Third Circuit. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."[73]

The decision in Taxman was obtained through a stipulation that we believe to be misleading. The stipulation was subject to Rule 11 of the Federal Rules of Civil Procedure, and is a

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71. *See* Mann v. City of Albany, Georgia, 883 F.2d 999, 1002 (11th Cir. 1989) (effects of non joinder on employer); Bremer v. St. Louis Southwestern Ry. Co., 310 F. Supp. 1333, 1339-40 (E.D. Mo. 1969) (fragmentation of litigation).

72. 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1609 at n.26 (2d ed. 1986). The term "indispensable" is used in the conclusionary sense as the outcome of the multi-factor analysis required under Rule 19. *See id.* at § 1604; *see, e.g.* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968). "When necessary . . . a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Id.*

73. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 40 (1993); *See also* U.S. Bancorp v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994).

certification by both lawyers and both parties that, "after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension of existing law. . . ." Sanctions for violation of Rule 11 may be imposed after the action has been dismissed.[74] Rule 11 as of the time of signing the stipulation provided that a court may act "upon its own initiative. . ." If either the District Court or the Court of Appeals knew of the questionable factual basis for the stipulation, it is reasonable to assume that the court would have investigated the matter.

If the conduct of the attorneys in entering into the stipulation constituted "fraud upon the court," — an issue that we do not address — the Court has jurisdiction and the power under Rule 60 to set aside its judgment.[75] Under "extraordinary circumstances" the Court may vacate its opinion, even after a settlement.[76] Thus, despite the settlement in *Taxman* after the grant of Certiorari, the Third Circuit could, sua sponte, review the case including the representations of the parties and their lawyers in considering vacatur of its decision. It appears that the parties sought a judicial decision on a hypothetical question set forth in the stipulation.[77]

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74. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990).

75. *See* Pumphrey v. Thompson Tool Co., 62 F. 3d 1128, 1130 (9th Cir. 1995).

76. *See U.S. Bancorp*, 513 U.S. at 28.

77. Other issues buried in the record of the Taxman case might have surfaced but for the stipulation. The plaintiff had alleged that the action of the School Board violated State Law. This allegation was put to one side by the courts, as they focused on the federal questions. If Ms. Taxman was correct, there arises the question of whether state law can prevent a unit of state government from exercising a federal right to take affirmative action. This issue was addressed in the California Proposition 209 case. *See* Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997). Finally, there is an underlying conflict between the Court's Title VII jurisprudence using disparate impact to prove employment discrimination and its Constitutional Law jurisprudence that requires proof of intentional discrimination by a state or local government before the 14th Amendment is violated. The Board attempted to raise this issue before discovery in *Taxman*, *See Taxman*, 798 F.Supp. at 1099. The issue is whether Congress has legitimately decided that the disparate impact doctrine is necessary to enforce 14th Amendment rights to equal employment opportunity. The resolution of this issue will be shaped by the recent decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

VI. REFLECTIONS

The temptation for judges to make broad pronouncements on race issues reflects their central role in our culture. The public correctly believes that there has been great improvement in employment opportunities for women and minorities. But this improvement is uneven. Some employers have done well in implementing equal opportunity, others drag their feet.[78] Our understanding of the dynamics of affirmative action is increasing as we begin to evaluate the experience of the past third of a decade.[79]

Under these conditions, there may be no single or simple answer to questions about the continuation of affirmative action. A careful evaluation of the facts in reverse discrimination cases can control the tendency to over-generalize. Finally, issues concerning affirmative action are squarely, and properly, in the center of the political arena. This wholesome fact should counsel caution on the part of the judiciary in making broad pronouncements while public policy issues are being openly deliberated by the people.

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78. *See* MODERN LAW, *supra* note 10, at 322-25.

79. *See, e.g.,* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER — LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (Princeton University Press 1998); Alfred W. Blumrosen & Ruth G. Blumrosen, *The Intentional Discrimination in Employment Project — An Overview for EEOC/Diversity Managers*, Daily Labor Report, Jan. 29, 1999, at E-1.