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Civil Rights: Affirmative Action Gender-Based Criteria Consistent with Title VII: Johnson v. Transportation Agency, Santa Clara County, California

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CIVIL RIGHTS: Affirmative Action Gender-Based Criteria Consistent with Title VII: *Johnson v. Transportation Agency, Santa Clara County, California*

I. INTRODUCTION

In *Johnson v. Transportation Agency, Santa Clara County, California*,[1] the United States Supreme Court held that a public employer's decision to promote a female applicant pursuant to a voluntary affirmative action plan was fully consistent with Title VII's purpose of eliminating the effects of discrimination in the workplace[2] and that Title VII should not be read to thwart such efforts.[3] The Court addressed the question of whether, in promoting a female applicant over a male, a public employer's use of gender as a positive criterion in making hiring decisions was permissible under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.[4] Guided

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1. 480 U.S. 616 (1987). Justice Brennan wrote the opinion for the Court in which Justices Blackmun, Marshall, Powell, and Stevens joined, with Justice Stevens writing a concurring opinion. Justice O'Connor concurred in the judgment.

Dissenting were Justices Rehnquist, Scalia, and White.

2. *Id.* at 630.

3. *Id.* This case neither raised nor addressed a constitutional claim below. The Supreme Court notes that its decision rests only on the issue of the prohibitory scope of Title VII. However, where a party advances a constitutional claim, the Court states that employers must "justify the implementation of a voluntary affirmative action program under the Equal Protection Clause." *Id.* at 620 n.2 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)).

The Court does not regard as identical the constraints of Title VII and the Constitution on voluntarily adopted affirmative action programs. *Id.* at 632. Furthermore, the Court notes that although a public employer must satisfy the Constitution, this does not negate the fact that the statutory prohibition (Title VII) with which the employer must contend was not intended to extend as far as that of the Constitution. *Id.* at 627 n.6.

This Note, therefore, does not address any constitutional claims. For an equal protection analysis of the *Johnson* decision, *see* Justice O'Connor's concurrence, *id.* at 647. *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), which holds that public employers must justify under the equal protection clause adoption and implementation of a voluntary affirmative action plan.

4. Section 703(a) of the Act, 78 Stat. 255, as amended, 86 Stat. 109, 42 U.S.C. sec. 2000e-2(a) provides that it

> shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national origin.

(Emphasis added.)

by their 1981 decision in *United Steelworkers of America v. Weber*,[5] the United States Supreme Court tested the legality of the affirmative action plan in *Johnson* and held that Johnson's employer appropriately took gender into account as one factor in determining promotion criteria.[6]

This Note examines *Johnson*[7] in light of the United States Supreme Court's evolving interpretation of antidiscrimination law. Since the *Johnson* decision does not establish permissible outer limits of voluntary employer programs,[8] in that the Court does not enunciate a specific standard for purposes of voluntary affirmative action plans under Title VII, this Note traces the Court's path and analysis in *Johnson* by first discussing the Court's past application of Congressional intent with respect to affirmative action plans under Title VII and the influence of past Court Title VII interpretations on the *Johnson* case. Finally, review of the majority's decision in *Johnson* will demonstrate the extent of the Court's willingness to find a public employer's consideration of gender as a valid factor to weigh in a voluntary affirmative action plan subject to the constraints of Title VII.

II. STATEMENT OF THE CASE

In December 1978, the Santa Clara County Transit District Board of Supervisors (County) approved an affirmative action plan (Plan) for the County Transportation Agency (Agency).[9] The County implemented an affirmative action plan because mere prohibition of discriminatory practices was insufficient to remedy effects of past practices.[10] In addition, the Plan would help achieve an equitable representation of minorities, women, and handicapped persons.[11]

Before adopting the Plan, the Agency reviewed its work force and found that women were underrepresented in comparison to the county labor force, in both the Agency as a whole and in five of seven

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5. 443 U.S. 193 (1979). The Court in a 5-2 decision upheld a collective bargaining agreement which set aside 50% of the positions in a new crafts training program until there existed an equal correlation between the percentage of blacks employed as skilled workers and the percentage of blacks in the local labor force.

Justice Brennan, writing for the majority, held that Title VII did not prohibit race-conscious affirmative action plans.

6. 480 U.S. at 641-42.

7. 480 U.S. 616 (1987).

8. *Id.* at 642. *See* Justice Stevens' concurrence wherein he emphasizes that the opinion does not establish limits of voluntary programs undertaken by employers in order to benefit disadvantaged groups. *Id.*

9. *Id.* at 620.

10. *Id.*

11. *Id.*

job categories.[12] The Agency attributed this underrepresentation of women in part to the fact that women were not traditionally employed in positions such as Agency officials, professionals, or skilled craft workers.[13] In addition, the Agency determined that women were not strongly motivated to seek training or employment in those areas because of limited opportunities in the past to work in such classifications.[14]

As a remedy, the Agency Plan provided that in making promotions to traditionally segregated job classifications in which women had been significantly underrepresented, the Agency had the authority to consider, as one factor, the sex or ethnicity of a qualified applicant.[15] However, the Agency Plan set aside no specific number of positions for minorities or women.[16] Instead, as a benchmark by which to evaluate progress, the Agency's stated long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the county labor force.[17]

One year after adoption of the Plan, the Agency announced a vacancy for road dispatcher,[18] a job classified as a Skilled Craft Worker.[19] At that time, no women occupied any of the 238 Skilled Craft Worker positions,[20] nor had the Agency ever employed a woman as a road dispatcher.[21] Twelve County employees applied for the promotion, among them Diane Joyce and petitioner, Paul Johnson.[22] Nine applicants, deemed qualified for the position, subsequently were interviewed by a two person board and given a score.[23] Seven applicants scored above 70, which meant they were eligible for se-

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12. *Id.* at 621. While women constituted 36.4% of the County's labor market, only 22.4% comprised Agency employees. Moreover, women occupied these Agency positions in areas traditionally held by women. *Id.*

Women comprised 76% of Office and Clerical Workers, but only 7.1% of the Agency Officials and Administrators, and 8.6% of the Professionals. *Id.*

13. *Id. See supra* note 12.

14. *Id. See* Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1 (1984) where the author notes that over fifty percent of all adult women are in the paid labor force; that half of all women workers are employed in segregated occupations that are over seventy percent female; and that women comprise less than ten percent of all skilled workers. *Id.* at 89, citing *Sex Discrimination in the Workplace, 1981: Hearings Before the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 245 (1981) at 16-23 (statement of Joan Goodin, Executive Director, Nat'l Comm. on Working Women).

15. *Johnson*, 480 U.S. at 621-22.

16. *Id.* at 622.

17. *Id.*

18. *Id.* at 623.

19. *Id.*

20. *Id.* at 621. The Agency Plan had recognized that women were most egregiously underrepresented in the Skilled Craft job category since no woman held a position in 238 of those positions. *Id.*

21. *Id.* at 624.

22. *Id.* at 623.

23. *Id.*

lection.[24] Scores ranged from 70 to 80.[25] Johnson tied for second with a score of 75, and Joyce ranked next with a score of 73.[26] The appointing authority certified these applicants as eligible for selection, and a second interview with three Agency supervisors followed.[27] After two interviews by separate Agency panels[28] and recommendation of the Affirmative Action Coordinator,[29] the Director of the Agency concluded that promotion should be given to Joyce.[30]

Petitioner Johnson filed a complaint with the Equal Employment Opportunity Commission (EEOC),[31] received a right-to-sue letter on March 10, 1981,[32] and filed suit in federal district court.[33] The district court found Johnson to be more qualified for the dispatcher position than Joyce[34] and that the sex of Joyce was the determining factor in her selection.[35] Holding the Agency plan invalid, the court found the evidence did not satisfy *Weber*'s criterion that the plan be temporary.[36] The court then held the Agency Plan violated Title VII.[37]

The Court of Appeals for the Ninth Circuit reversed the district court and held that the Agency's consideration of Joyce's gender was lawful.[38] The court found that the absence of a specific ter-

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24. *Id.*
25. *Id.*
26. *Id.* at 624.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 625. The Agency Director testified that in making his determination he looked at the overall picture in light of job qualifications, expertise, background, and affirmative action considerations. *Id.*
31. *Id.* Section 705(a) of the Act, 78 Stat. 253, creates the Equal Employment Opportunity Commission, whose members are appointed by the President with the advice and consent of the Senate.

Section 705(g) provides that "[t]he Commission shall have power—

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder."

32. *See supra* note 4. Sections 2000e-5(e) and (f) concern the power of the EEOC to enforce unlawful employment practices.

Section 2000e-5(e) states that a charge under this section shall be filed within 180 days after the alleged unlawful employment practice. If the Commission has not filed a civil action or entered into a conciliation agreement to which the aggrieved person is a party within 180 days from the filing of such a charge, section 2000e-5(f) provides that "the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ."

33. 480 U.S. at 625. On March 20, 1981, Johnson filed suit in the United States District Court for the Northern District of California. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. Johnson v. Transp. Agency, Santa Clara County, 748 F.2d 1308 (1984); *modified*, 770 F.2d 752 (1985).

mination date for the Plan was not dispositive of temporariness since the Plan's objective was attainment rather than maintenance of a work force mirroring the labor force in the County.[39] Applying the *Weber* test,[40] the court specifically decided that the Agency adopted the Plan in order to address a conspicuous imbalance in the Agency's work force[41] and that the Plan neither unnecessarily trammeled the rights of other employees nor created an absolute bar to their advancement.[42]

The United States Supreme Court granted certiorari and affirmed the decision of the Ninth Circuit Court of Appeals.[43] The Supreme Court held that the Agency appropriately considered the sex of Diane Joyce as an element in determining that she should be promoted to the road dispatcher position.[44] In concluding, the Court stated that the employment decision made pursuant to an affirmative action plan represented a moderate, flexible, case by case approach to effecting a gradual representation of minorities and women in the work force.[45]

III. DISCUSSION AND ANALYSIS

A. Historical Overview of the Court's Title VII Analyses

In determining whether an affirmative action plan complies with Title VII, the Supreme Court traditionally begins by re-examining Congressional intent associated with the statute.[46] Next, assessment of the legality of the plan is guided by factors that have arisen in previous disputes, for example, voluntary compliance, temporariness of a plan, and statistical references.[47] These factors create the building blocks which provide guidance for implementing a valid affirmative action program.

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39. *Id.* at 1320.
40. *See infra* notes 46-72 and accompanying text.
41. 748 F.2d at 1313-14.
42. *Id.*
43. 480 U.S. 616.
44. *Id.* at 641-42.
45. *Id.* at 642.
46. *See infra.*
47. *See generally* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (holding that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans); *see also* International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In a 7-2 decision, with Justices Marshall and Brennan concurring in part and dissenting in part, Justice Stevens, writing for the majority, stated that statistical comparisons between an employer's work force and the area labor market provided a standard from which prior discrimination could be inferred. *Id.* at 340 n.20.

1. Title VII and Congressional Purpose

Enacted as part of the 1964 Civil Rights Act, Title VII provided for elimination of discrimination in the workplace.[48] The central statutory purpose manifested by Congress was to eradicate discrimination throughout the economy and to afford a remedy to those persons injured through past discrimination.[49] To implement Title VII, Congress created the EEOC as a federal agency to provide technical assistance and to oversee compliance with Title VII.[50] To carry out these regulations, affirmative action plans became the appropriate means employed.[51]

In implementing an affirmative action plan, an employer may utilize statistics,[52] and consider race[53] and now gender,[54] to remedy past discrimination in the workplace. Although these factors do not describe the full range of possible evidentiary showings in an affirmative action plan, they propose a set of guidelines. Ideally, affirmative action plans, without using quotas or violating merit selection procedures, are the most practical and flexible way for employers to eradicate the effects of past discrimination and not infringe upon any significant interest of nonminority employees.[55]

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48. *See supra* note 4. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In *Albemarle* the Court stated that it was the purpose of Title VII to make persons whole for injuries resulting from unlawful employment discrimination. The *Albemarle* Court stated that "Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination." *Id.* at 418.

49. *Albemarle Paper Co.* at 413-22.

50. *See supra* notes 31 and 32.

51. 29 C.F.R. §§ 1604-1608.12 (1985). *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Although *Alexander* primarily involved an employer's statutory right to a de novo trial under Title VII irrespective of prior submission of his claim to final arbitration, the Court further illuminated the purposes and goals of Title VII. In an unanimous opinion, Justice Powell stated for the Court that in order to effectuate the goal of Title VII, the Court had determined that cooperation and voluntary compliance were the preferred means for achieving that goal. *Id.* at 44. The Court noted that Title VII does not concern "majoritarian processes," but rather, an individual's right to equal employment opportunities. *Id.* at 51.

52. *Weber*, 443 U.S. 193 (1979). Justice Blackmun emphasized in his concurring opinion that a preferential hiring plan attempting to remedy a traditional statistical imbalance was consistent with Title VII. *Id.* at 213-14. *See also Teamsters*, 431 U.S. 324 (1977), where the Court found that where statistical evidence was offered to show racial or ethnic imbalance as probative of purposeful discrimination, and not to support an erroneous theory that Title VII required the employer's work force to be racially balanced, 42 U.S.C. sec. 2000e-2(j) did not preclude use of such evidence. *Id.* at 339-40 n.20.

53. *Teamsters*, 431 U.S. 324 (1977).

54. *Johnson*, 480 U.S. 616 (1987). *See* Brief for Respondent at 8-9, *Johnson*, 480 U.S. 616 (No. 85-1129) which states that "[t]he remedy chosen here was to consider female gender as an additional positive factor in the promotion process. This is similar to the remedy approved in *Bakke*, wherein this Court held that race could be used as a positive factor to be considered in school admissions process."

55. Amicus Curiae Brief of the National League of Cities, National Association of Counties, U.S. Conference of Mayors, and International City Management Association in support of Respondent, *Johnson*, 480 U.S. 616 (1987) (No. 85-1129).

2. Judicial Interpretation of Congressional Intent Concerning Title VII Enactment

The United States Supreme Court first explored the meaning of Title VII in *Griggs v. Duke Power Co.*[56] The *Griggs* Court declared, "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."[57] Additionally, the objective of the statute was to achieve equality of employment opportunities and remove barriers that operated to favor an identifiable group.[58]

As to the preferred means of achieving Title VII's objectives, Congress intended that employers voluntarily comply.[59] *Johnson* remains consistent with that analysis.[60] Sharing this view, the EEOC promulgated guidelines with the understanding that Title VII encouraged employers to act on a voluntary basis.[61] These guidelines state that "voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII."[62]

As support for its analysis of Title VII's legislative intent, *Johnson* recognized that Congress had not amended the statute to reject judicial constructions.[63] Since no amendments have been proposed, the Court assumed their interpretation was correct.[64] Specifically, *Johnson* found Congressional reaction probative since Congress had not hesitated to amend the statute if displeased with judicial interpretation of Title VII.[65] Thus, based on an interpretation of Title

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56. 401 U.S. 424, 428 (1971). "In *Griggs. v. Duke Power Co.*, and again in *Albemarle* the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Teamsters*, 431 U.S. at 364.

57. *Griggs*, 401 at 431; *see* Dothard v. Rawlinson, 433 U.S. 321, 328 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

58. *Griggs*, 401 U.S. at 429-30. *See also* Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980).

59. Firefighters v. Cleveland, 478 U.S. 501 (1986). *See also supra* note 51.

60. 480 U.S. at 630. Justice Brennan states that " 'Congress' concern that federal courts not impose unwanted obligations on employers and unions,' [citation omitted] reflects a desire to preserve a relatively large domain for voluntary employer action." *Id.* at 631 n.8 (quoting *Firefighters*, 478 U.S. at 524).

61. *Firefighters*, 478 U.S. 501 (1986). With respect to EEOC interpretations, in his concurrence, Justice Stevens states these interpretations are entitled to great deference. *Johnson*, 480 U.S. at 643 n.2. *See supra* notes 29-30.

62. 29 C.F.R. § 1608.1(c) (1985).

63. 480 U.S. at 629-30 n.7.

64. *Id.* The majority states that "[a]ny belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted." *Id.* at 630 n.7.

This notion is not foreign to the Court. In *Weber* Justice Blackmun stated in his concurrence that "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." 443 U.S. at 216.

65. 480 U.S. at 629-31 nn.7-8.

VII's Congressional intent, the Court concluded that legislative history indicated Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination.[66]

3. *United Steelworkers of America v. Weber* and the Current Affirmative Action Analysis

With *United Steelworkers of America v. Weber*[67] the Supreme Court further elaborated on its prior legislative history analyses of Title VII. The Court articulated three primary guidelines to assist the Court in interpreting subsequent affirmative action disputes, such as that demonstrated by the *Johnson* case.[68] First, the prohibition against discrimination in Section 703(a)[69] "must be read against the background of the legislative history of Title VII and the historical context from which the Act arose."[70] Second, Congress' concern was addressed primarily to the problem of opening opportunities in occupations which traditionally have been closed to specific groups.[71] The Court likened the statutory words to a catalyst which causes employers to self-examine and self-evaluate their employment practices and to endeavor to eliminate discrimination.[72] Lastly, the Court observed that nothing contained in Title VII required an employer to grant preferential treatment to any group.[73] The Court drew the inference that Congress chose not to forbid voluntary affirmative action because the statutory language of Section 703(j) indicated Congress did not intend to limit traditional business freedom.[74]

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66. *Id.* at 628-30.
67. 443 U.S. 193 (1979).
68. *See Johnson*, 480 U.S. at 627.
69. *See supra* note 4.
70. *Weber*, 443 U.S. at 201. *See* Holy Trinity Church v. United States, 143 U.S. 457 (1892), in which the Court stated that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459.
71. *Weber*, 443 U.S. at 203.
72. *Id.* at 204.
73. *Id.* at 205. At the time of enactment, opponents of Title VII argued that the Act would be interpreted to require employers with racially imbalanced work forces to grant preferential treatment to racial minorities in order to integrate. *Id.* To allay any fears, Congress addressed the issue in Section 703(j) of Title VII, 78 Stat. 257, 42 U.S.C. Section 2000e-2(j) and provided that:

> [n]othing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . sex . . . or national origin in any community . . . or in the available work force in any community.

However, the Court notes that Section 703(j) does not preclude courts from considering racial imbalance as evidence of a Title VII violation. *See Teamsters*, 431 U.S. 324, 339-40 n.20 (1977). Justice Brennan noted in Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) that in some instances an employer's racist recalcitrance will be of such proportion that the only effective way to ensure enjoyment of the rights protected by Title VII is to require the employer to take affirmative steps to end discrimination. *Id.* at 448-49.
74. *Weber*, 443 U.S. at 206-07.

Weber established a standard against which the Court evaluated the *Johnson* case. Because the Court found it unnecessary to demarcate between permissible and impermissible affirmative action plans, the *Weber* decision does not articulate a dispositive test. Instead, the Court will look to the general purposes of the affirmative action plan and determine whether those purposes mirror those of Title VII. The inquiry involves four factors: 1) whether the plan's design breaks down old patterns of segregation;[75] 2) whether the plan's structure opens employment traditionally closed to certain groups in occupations traditionally closed to them;[76] 3) whether the plan unnecessarily trammels the interests of other employees and creates a bar to their advancement;[77] and lastly, 4) whether the plan represents an intention to eliminate a manifest imbalance.[78]

The Court expanded *Weber*'s holding in *Johnson*.[79] The cases together define the current framework of Title VII[80] and provide a foundation for subsequent Title VII issues which may arise.

B. The Johnson *Decision*

In reviewing the employment decision at issue in *Johnson*, the United States Supreme Court examined two questions.[81] First, was the decision made pursuant to a plan similar to the concerns of the employer in *Weber*?[82] *Weber* focused on the disparity between the percentage of black skilled workers in the employer's ranks and the percentage of blacks in the area labor force. Second, was the effect of the plan in *Johnson* comparable to the effect of the plan in *Weber*?[83] At the outset, the Court stated that the decision in *Weber* would guide the Court's assessment of the legality of the Agency Plan in *Johnson*.[84]

1. Manifest Imbalance

At issue in *Johnson* is whether consideration of the gender of applicants was justified by the existence of a "manifest imbalance"[85]

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75. *Id.* at 208.
76. *Id.*
77. *Id.*
78. *Id.* An employer need point only to an obvious imbalance in traditionally segregated job categories. *Johnson*, 480 U.S. at 630.
79. 480 U.S. 616.
80. *Weber*, 443 U.S. at 197. The concerns in *Weber* parallel those in *Johnson*. *Weber* involved an affirmative action plan designed to eliminate conspicuous racial imbalances. Although only 1.83% of skilled workers were black, approximately 39% of the area work force was black. Consequently, the plan reserved for black employees 50% of the openings in newly created in-plant training programs. *Id.*
81. 480 U.S. at 631.
82. *Id. See supra* note 5.
83. *Id.*
84. *Id.* at 627.
85. *Weber*, 443 U.S. at 197.

that reflected underrepresentation of women in "traditionally segregated job categories."[86] In order to determine whether an imbalance exists that would justify taking gender into account, the Court formulated two types of comparisons, depending upon the kind of job in dispute. If the job requires no special expertise, then a comparison of the percentage of women in the employer's work force with the percentage in the area labor market or general population is appropriate.[87] Where a job requires special training, the comparison should be with those in the labor force who possess the relevant qualifications.[88] The parties in *Johnson* fall into the latter category.[89] The Plan authorized consideration of affirmative action concerns when evaluating *qualified* applicants.[90]

Where an employee wishes to challenge an affirmative action program, two avenues are available, depending on whether the employee makes a constitutional challenge or a challenge pursuant to the constraints of Title VII. At the first level, the employee has the burden of demonstrating the legality of the affirmative action program.[91] When race or sex are taken into account in an employer's employment decision, a prima facie standard is applied.[92] The burden then shifts to the employer to articulate a nondiscriminatory rationale for the decision.[93] Existence of an affirmative action program provides such a rationale.[94] The burden then shifts back to the employee to prove the employer's justification was pretextual, thereby making the plan invalid.[95]

The Court cautions, however, that it does not regard as identical the constraints of Title VII and the Constitution on voluntary affirmative action plans.[96] *Johnson* finds application of the prima facie standard inconsistent with *Weber*,[97] and therefore applies a broader measurement, that of a manifest imbalance.[98]

Showing a manifest imbalance is a less stringent standard than that required to support a prima facie case against an employer.[99]

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86. *Id.*
87. *Id.* The Court cites *Weber*, 443 U.S. 193, and *Teamsters*, 431 U.S. 324, in support of this proposition.
88. *Johnson*, 480 U.S. at 635. In Hazelwood School District v. United States, 433 U.S. 299 (1977), the Court determined that in ascertaining underrepresentation in teaching positions, the employer school district had to compare the percentage of blacks in the employer's ranks with the percentage of qualified black teachers in the area labor market.
89. 480 U.S. at 633-37.
90. *Id.* at 637.
91. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
92. *Johnson*, 480 U.S. at 626.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 632.
97. 443 U.S. 193 (1979).
98. 480 U.S. at 632.
99. A three-part analysis applies to disparate impact claims. In order to establish a prima

The prima facie standard would have required the employer in *Johnson* to compare the percentage of women qualified for the job in its work force with the percentage of women qualified workers in the area labor market.[100] The Court notes that *Weber* "obviously did not make such a comparison"[101] and that the prima facie standard would have invalidated *Weber*.[102]

The manifest imbalance standard, however, permits comparison with the general labor force. Although not stated in terms of policy, but appearing to have that effect, the Court states that application of a prima facie standard in Title VII cases would be inconsistent with *Weber*'s focus on statistical imbalance.[103] This, the Court says, "could inappropriately create a significant disincentive for employers to adopt an affirmative action plan."[104] Even where the disparity is not so striking, the manifest imbalance standard permits an employer to adopt a plan without having to introduce non-statistical evidence of past discrimination that the prima facie standard would require.[105] As long as an agency undertakes a plan designed to eliminate work force imbalances in traditionally segregated job categories, a manifest imbalance standard applies. That mode of analysis, therefore, remains consistent with the *Weber* and *Johnson* Courts.

2. Unnecessarily Trammel Rights or Create Absolute Bar

Johnson's second level of inquiry involves the rights of employees who are not members of the underrepresented class. The issue is whether the Agency Plan unnecessarily trammels the rights of male employees or creates a bar to their advancement.[106] The facts of the case govern.

The Agency Plan acknowledged limited opportunities for women in the past in areas where women had not been traditionally em-

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facie case of discrimination, the plaintiff must show: 1) that the plaintiff belongs to a minority; 2) that he or she applied and was qualified for a job for which the employer was seeking applicants; and 3) that despite the plaintiff's qualifications, plaintiff was rejected. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

By utilizing this three-part analysis in disparate impact claims, the Court notes that "Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria." Connecticut v. Teal, 457 U.S. 440, 451 (1982).

100. 480 U.S. at 632-34. The Court notes that because of the employment issue in *Johnson* the discussion refers primarily to the Plan's provisions to remedy the underrepresentation of women. The Court takes care to note that its analysis of the provisions in the Plan could pertain to minorities as well. *Id.* at 635-36 n.13.

101. 480 U.S. at 633 n.10.

102. *Id.*

103. *Id.* at 632-33.

104. *Id.* at 633.

105. *Id.* at 633 n.10.

106. *Id.* at 637-38.

ployed.[107] Quotas were not set, nor was blind hiring authorized.[108] No persons were automatically excluded from consideration.[109] The Plan's goal was to attain a balanced work force, not maintain one.[110] With these factors, the Court rejected petitioner's contention that he was entitled to the job.

Johnson stressed that petitioner had no absolute entitlement to the job since seven applicants for the position qualified as eligible.[111] In addition, promotion was not a legitimate firmly rooted expectation.[112] Finally, Johnson retained employment with the Agency at the same salary and seniority and remained eligible for other promotions.[113]

The Plan merely provided that when the employer evaluated qualified applicants, consideration should be given to affirmative action concerns. Gender was but one of the criteria influencing affirmative action concerns. Since gender was only a factor to consider in order to attain rather than maintain a balanced work force, *Johnson* concluded that the rights of other employees were not unnecessarily affected by the Plan, nor did the Plan bar their advancement.[114]

C. *Effect of the* Johnson *Decision*

While *Johnson* marks the first affirmative action case to recognize gender under the aegis of Title VII, the effects of the decision are far-reaching not only for women but for minorities as well. This is of significant import in a multi-cultural state such as New Mexico. The *Johnson* decision condones a public employer's voluntary affirmative action plan which takes into account the number of women in an employer's work force compared to women represented in the area labor market for jobs that require no special expertise, and for jobs requiring special training, a comparison of women in the labor force who possess the relevant qualifications. An employer

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107. *Id.* at 634-35. *But see* Justice Scalia's dissent wherein he blames women and long-standing social attitudes as the culprits behind limited opportunities for women in areas where they have not traditionally been employed. He finds that these areas have not been regarded by women themselves as desirable work, and therefore, the Agency cannot be found to have systematically excluded women from employment on road crews. *Id.* at 668.

It appears, however, that the Court may have rejected this manner of reasoning when it stated, "[i]n the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).

108. 480 U.S. at 635-36.

109. *Id.* at 637-40.

110. *Id.* at 640.

111. *Id.* at 638.

112. *Id.*

113. *Id.* The Court has previously noted that denial of future employment opportunities is not as intrusive as loss of an existing job. *Wygant*, 476 U.S. at 267.

114. 480 U.S. at 639.

may use this measurement in order to attain a balanced work force and not violate the spirit and legislative intent of Title VII.

Congressional desire to read broadly the Civil Rights Act of 1964 remains evident. Three days short of the year marking the *Johnson* decision, the Senate overrode a Presidential veto by a 2/3 majority 73-24 vote,[115] in the Civil Rights Restoration Act, a bill intended "to restore the broad scope of coverage and to clarify the application of . . . the Civil Rights Act of 1964."[116] Although the bill concerned four other civil rights statutes, those pertaining to education, rehabilitation, and age discrimination,[117] the record exemplified the strong policy favoring broad interpretation of the Act.[118]

Both of New Mexico's senators strongly stated their support. "For too long, discrimination on the basis of race, sex, age, and physical handicap has been a blight on this country. So long as people in America are subjected to these types of discrimination, we are not a free people."[119] "The intent of Congress always has been, and must continue to be, that the broadest interpretation be given to statutory construction of our Federal civil rights laws."[120] In light of this commentary it is significant to note that Title VII's legislative history demonstrates that Title VII was intended to "cover . . . all Americans."[121] These words evince a strong Congressional intent to eliminate discrimination in the workplace.

IV. CONCLUSION

The majority in *Johnson* attempts to abolish sexual discrimination in the workplace. The Court announces its objective is to remedy past discrimination through a case-by-case analysis which affords an employer flexibility and freedom from undue federal involvement.

The import of *Johnson* is that an employer can exhibit preferential hiring towards women and minorities in order to eliminate work force imbalances in traditionally segregated job categories as long as the employer's affirmative action goal is to attain a balanced work force rather than maintain one. The Supreme Court has already demonstrated that *Johnson* was not an ad hoc decision whose determination rested exclusively on the facts in its case.[122] *Johnson*

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115. S. 557, 100th Cong., 2d Sess., 134 CONG. REC. 36, 2730 (1988).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 2751 (statement of Senator Domenici).
120. *Id.* at 2756 (statement of Senator Bingaman).
121. 110 CONG. REC. 2578 (1964).
122. *See* Corporate City of South Bend v. Janowiak, 481 U.S. 1001 (1987), *vacating* 750 F.2d 557 (7th Cir. 1984). On a petition for writ of certiorari, the Supreme Court vacated the judgment and remanded the case to the Seventh Circuit Court of Appeals for further consideration in light of *Johnson*. The case was appealed after remand, 836 F.2d 1034 (7th Cir. 1988), and the Supreme Court denied certiorari thereafter, 109 S. Ct. 1310 (1988).

exhibits the extent to which the Court has permitted affirmative action law to evolve.

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