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Striking the Balance: EEO and Diversity

Weldon H. Latham

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1801 L Street NW
Washington, D.C.

Weldon H. Latham, Senior Partner
Corporate Diversity Counseling Group
Davis Wright Tremaine LLP
1500 K Street NW, Suite 450
Washington, D.C. 20005
Tel: (202) 508-6664
Fax: (202) 508-6699
weldonlatham@dwt.com

Good morning, Chair Earp and members of the Commission. Thank you for this opportunity to share my views and those of my clients—a number of the nation's leading companies, as well as champions for fairness and equity in the workplace.

My name is Weldon Latham and I am senior partner with the international law firm Davis Wright Tremaine LLP and Chair of its Corporate Diversity Counseling Group. I represent a wide range of *Fortune 500* companies, minority businesses, and government agencies in legal matters involving diversity, inclusion, crisis avoidance and management, complex employment audits and disputes, investigations, and litigation involving race and sex discrimination/harassment. I advise clients on the development and implementation of "best practice" diversity initiatives and comprehensive diversity action plans, ranging from executive management and workforce diversity to ethnic marketing/supplier diversity, government/community relations, and targeted philanthropic efforts (*see* attached Biographical Sketch).

The Commission has asked me to speak today on the general topic of "Striking a Balance: EEO and Diversity," and more specifically on (a) emerging best practices in corporate diversity, and (b) "downsizing the workforce without downsizing diversity."

Diversity in the workplace is a hot topic in the boardrooms of many of our nation's largest and most forward thinking companies, as well as in our national media. It is clear that a growing number of leading companies regard diversity not merely as a regulatory requirement but as either a business imperative or the basis for a competitive edge. These companies recognize not only the historic discrimination and hostility minorities, women, and other protected classes have faced in the corporate world, but also the perpetuation of stereotypes, prejudices, and barriers that have prevented these groups from securing equal access to the opportunities that would have naturally allowed them to achieve representative levels of success in all fields of endeavor. Thus, corporate diversity programs have become increasingly popular as a product of enlightened corporate self-interest.

Many major corporations have implemented strong diversity initiatives and have become recognized as "employers of choice" for *all* employees—enhanced recruitment and retention of minority and female employees have significantly improved their bottom line. As a result, many of these

companies have sought to institutionalize rigorous programs to ensure more opportunity for traditionally underutilized employees, *i.e.*, greater fairness and inclusion in their workplaces for all employees.

While many leading corporations have been proactive in overcoming institutional barriers to workplace inclusion—*i.e.*, seeking diversity from the boardroom to the mailroom[1]—there are hundreds of other large corporations that have totally neglected or avoided any efforts to diversify their organizations. In fact, studies of the boards of the *Fortune 500*, which are the companies traditionally most focused on workplace inclusion, found that minorities account for only 10% of board seats[2] and women account for only 15%.[3] This neglect of workplace diversity is further supported by scholarly studies of the subject, as well as daily media accounts of lawsuits filed by minorities and women alleging discrimination, and the multi-million dollar settlements paid by companies[4] that have since agreed to aggressively address this common workplace problem—a problem that so-called "ultra conservatives" would like EEOC, the rest of the Federal government, and the nation to ignore. They falsely propose that American business has achieved workplace equality (*i.e.*, a level playing field).

Despite a forty year, well-established legal framework, created by the Federal government and sanctioned by the Supreme Court, to eradicate the pernicious barriers to inclusion, widespread corporate discrimination still persists. Major lawsuits filed by minorities and women alleging discrimination and hostile work environments, and frequent headlines of costly discrimination settlements, evidence a continuing problem. As discussed below, Federal laws, regulations, and Supreme Court precedent make clear that affirmative inclusionary efforts are an appropriate means

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[1] *See* "2006 Top 50 Companies for Diversity," DIVERSITYINC, June 2006, at 40.

[2] *See, e.g.*, Business for Social Responsibility, "Board Diversity" (2006).

[3] *See, e.g.*, Catalyst, "2005 Catalyst Census of Women Board Directors of *Fortune 500*" (2006) (providing benchmark data for the number of women who serve as directors on *Fortune 500* boards and identifying 53 *Fortune 500* boards without a female director).

[4] *See* C. Stone Brown, "Bias and the Law: Protect Your Reputation," DIVERSITYINC, Special Issue 2006, at 37 (providing chart of largest corporate public settlements for race and sex discrimination, including: Coca-Cola, $192 million (race); Texaco, $176 million (race); MetLife, $160 million (race); Boeing, $90 million (gender); Sodexho, $80 million (race); Morgan Stanley, $54 million (gender); and Abercrombie & Fitch, $40 million (race).

to eliminating the treatment and prejudices that prevent equal employment opportunity for minorities and women.

LEGAL FRAMEWORK: STATUTES, REGULATIONS, AND CASELAW

A. Statutes and Regulations

Contemporary corporate anti-discrimination, anti-harassment, and diversity policies and practices implicate various Federal laws and regulations, including the Commission's enabling legislation, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; the Commission's Guidelines on "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended," 29 C.F.R. Part 1608 (the "Guidelines"); and Executive Order 11246 and implementing regulations of the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), 41 C.F.R § 60-2.1. Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin; the U.S. Supreme Court—recognizing this nation's long and embarrassing history of *de jure* and *de facto* discrimination and the exclusion of women, African Americans, and other minorities, as well as the continuing need to remedy actions of the past and practices that continue to this day—has ruled that provisions of a private employer's voluntarily adopted affirmative action plan may constitute a legitimate nondiscriminatory reason for an employment decision that takes race or gender into account.[5]

The Commission's own Guidelines also provide Federal regulatory support for voluntary affirmative action efforts under Title VII. The Guidelines recognize that decisions taking race, sex, and national origin into account are often necessary in order to achieve equal employment opportunity and address institutional barriers to a fair and inclusive workplace. The Guidelines clearly state that Title VII was never intended to discourage voluntary affirmative action undertaken to improve employment opportunities for minorities and women,[6] and provide that an employer that adopts a voluntary affirmative action program in conformity therewith can assert "good faith" reliance as a defense to allegations of so-called reverse discrimination.[7] Such an affirmative action plan or program must

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[5] *See, e.g.*, United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193 (1979); Johnson v. Transportation Agency, Santa Clara Co., 480 U.S. 616 (1986) (discussed below).

[6] *See* 29 C.F.R. § 1608.1(a).

[7] *Id.* at § 1608.2.

contain three elements: (1) a "reasonable self analysis" designed to determine whether employment practices disadvantage or adversely impact those previously excluded; (2) a "reasonable basis" for concluding affirmative action is appropriate; and (3) "reasonable action" in relation to the problems disclosed by the self analysis, which may include goals and timetables or other appropriate employment tools that recognize the race, sex, or national origin of applicants or employees.[8]

Executive Order 11246, issued in 1967, and the OFCCP implementing regulations obligate significant Federal contractors to establish and implement affirmative action programs and to ensure nondiscrimination in employment practices. This Executive Order has been reaffirmed for 40 years through eight Presidential Administrations, and remains needed to address patterns and practices of discrimination that continue today. According to OFCCP regulations, an affirmative action plan must contain the following elements: (i) an organizational profile; (ii) a job group analysis; (iii) determination of minority or female availability; (iv) a comparison of incumbency to availability; and (v) placement goals, where indicated. Simply put, the regulations require that a contractor compare the percentages of minorities and women in its workforce with their availability in the labor pool and set goals to remedy shortfalls. The regulations also require employers to regularly analyze workforce policies and practices in a continuing effort to eliminate barriers to hiring and advancement of women and minorities.

These laws and regulations make clear that companies may employ appropriate affirmative inclusionary efforts when implementing diversity and inclusion initiatives. The underlying premise is clear, obvious, and all too often ignored—discrimination, hostility, and exclusion of minorities and women in American workplaces is still too common, particularly as relates to denial of access to the highest positions representing power, influence, and individual financial success.

B. High Court Interpretations

As the Commission well knows, the leading case addressing voluntary affirmative action efforts in private employment is *Weber*,[9] where the Supreme Court upheld a voluntary affirmative action plan, finding that

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[8] *Id.* at § 1608.4.

[9] United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193 (1979).

it mirrored the purpose of Title VII, attempting to break down patterns and practices of institutional discrimination, and even segregation, and to create opportunities for traditionally excluded employees.

In *Weber*, a white employee challenged the legality of an affirmative action plan that reserved for black employees 50% of the openings in the craft training program until the percentage of black craft workers was commensurate with the percentage of blacks in the local labor force. In upholding the training program, the Court set forth the seminal three-part test; a plan is valid provided it: (1) is justified by a "manifest imbalance" in "traditionally segregated job categories;" (2) does not "unnecessarily trammel" the interests of the groups not benefited by the program, nor "create an absolute bar to the advancement" of non-minority employees; and (3) is temporary.

Weber was reaffirmed in *Johnson*,[10] in which a male employee who was passed over for promotion in favor of a female alleged his employer impermissibly took gender into account in violation of Title VII. The Court upheld the plan, as it represented a "moderate, flexible, case-by-case approach, effecting a gradual improvement in the representation of minorities and women in the work force . . . fully consistent with Title VII." The Court elaborated on "manifest imbalance," explaining that an employer can determine whether a manifest imbalance exists by comparing the percentage of minorities or women in the employer's workforce with the percentage in the area labor market *or* general population.[11]

Weber and *Johnson* make clear that voluntary affirmative action efforts are legally permissible under Title VII provided that employers comply with the legal standards set forth therein. The Supreme Court has not revisited the issue since 1986, but in its most recent affirmative action ruling, *Grutter v. Bollinger*,[12] the Court expanded its affirmative action jurisprudence by

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[10] Johnson v. Transportation Agency, Santa Clara Co., 480 U.S. 616 (1986).

[11] Employers need not admit—in satisfying the "traditionally segregated job categories" requirement—that *they* have engaged in discrimination, but rather may rely on underrepresentation in specific job categories in comparison with availability to satisfy the requirement. Justice Blackmun's concurrence in *Weber*, cited favorably in *Johnson*, noted that the Court was not requiring such an admission from the employer: "The individual employer need not have engaged in discriminatory practices in the past". *Weber*, 443 U.S. at 213 (Blackmun, J., concurring).

[12] 539 U.S. 306 (2003).

finding an additional compelling interest: seeking and attaining a diverse student body.

While the *Grutter* opinion addressed university admissions, the Court's reliance on *amici* briefs of major corporations in support of affirmative action—stressing the value of diverse workforces—implies a recognition that diversity and affirmative action efforts exist beyond the university.[13] The decision makes clear that properly crafted affirmative action programs are valid and provides insight into how affirmative action may be used in the employment context once there is a justifiable reason for its use (*i.e.*, eliminating a manifest imbalance in traditionally segregated job categories, or, perhaps, diversity alone; *see Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003) (accepting diversity alone as a compelling interest and applying the *Grutter* standards to uphold the Chicago Police Department's affirmative action plan in the employment context)).[14]

PRACTICAL GUIDANCE FOR CORPORATE AMERICA

In determining a company's approach to diversity, executives should recognize that they are able to select from a range of available diversity and inclusion initiatives. The most common diversity programs are designed to enhance representation throughout the company of minorities and others in legally protected categories (*e.g.*, women) and/or company policies prohibiting discrimination (*e.g.*, against sexual orientation, a protected class under various state and local laws). It is also not uncommon for large companies to adopt multi-year strategic plans for diversity

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[13] The dramatic change in Corporate America's position on affirmative action over the past 30 years is demonstrated by the response in *University of California v. Bakke*, 438 U.S. 265 (1978), where only one *amicus* brief was filed by "big business," the U.S. Chamber of Commerce, *opposing* affirmative action, and in *Grutter* where 70 of our nation's most prestigious companies, led by General Motors, joined in *amicus* briefs urging the Court to *uphold* affirmative action as a successful means of truly leveling the playing field.

[14] *Grutter* left open the question whether diversity alone can serve as the necessary predicate, in addition to *Weber's* "manifest imbalance," for justifying actions to address continuing institutional exclusion of minorities and women in the private sector employment context under Title VII. The validity of affirmative action plans and diversity initiatives continues to be litigated in lower courts, but as of this writing the Supreme Court has spoken, as noted above and in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) (announcing that a Federal, state, or local government actor may engage in "race-based action," such as affirmative action plans, so long as the action serves a compelling state interest and is narrowly tailored (*i.e.*, the strict scrutiny standard)).

recruitment, hiring, mentoring, retention, and advancement, as well as other initiatives designed to overcome the lack of fair representation of minorities, women, and others in their workforces.

Supreme Court precedent, regulatory guidance, and other pertinent authority, while purporting to establish rules of conduct for employers, nonetheless leave room for interpretation. One end of the diversity continuum is basic compliance with EEO/non-discrimination legal requirements. The potential risks of such a minimalist policy are substantially greater than the risks of a legitimate reverse discrimination lawsuit and may result in legal fees and expenses, settlements/judgments, adverse press coverage, damage to company brand, lost management/employee time and distraction, and depressed employee morale attendant to addressing growing complaints, external claims, investigations and even class action discrimination lawsuits. It is difficult to overstate the financial risk of major employment discrimination claims to employers. Some of the most noteworthy recent race and gender class action settlements include those noted above in *DiversityInc*,[15] *e.g.*, Coca-Cola, $192 million (race, 2000); Texaco, $176 million (race, 1996); MetLife, $160 million (race, 2002); Boeing, $90 million (gender, 2004); and others. Moreover, in 2006, the Commission recovered $61.4 million in monetary benefits for charging parties in race discrimination cases alone (not including monetary benefits obtained through litigation).[16] Similarly, OFCCP recovered a "record" $51.5 million for workers who had been subjected to employment discrimination in 2006.[17] In the past two years there has been a resurgence in judicial certification of huge employment discrimination classes, involving millions, and perhaps billions, of dollars in potential judgments. It is no wonder that 63% of corporate general counsel describe employment litigation as their "greatest risk."[18]

The other end of the continuum is exemplary energetic and motivated pursuit of employment diversity and inclusion. This involves aggressive corporate policies and procedures designed to achieve workforces that are

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[15] *See* C. Stone Brown, *supra* note 3, at 37 (listing largest corporate public settlements).

[16] Equal Employment Opportunity Commission, "Race/Color Discrimination," http://www.eeoc.gov/types/race.html.

[17] Office of Federal Contract Compliance Programs, "Improvements at OFCCP Produce Record Financial Recoveries," http://www.dol.gov/esa/ofccp/enforc06.pdf.

[18] Betty Morris, *How Corporate America is Betraying Women,* FORTUNE, January 10, 2005.

representative of their customer bases at all levels of the corporate hierarchy, from boardroom to mailroom, and to eliminate all types of discrimination, harassment, and hostile work environment. The benefits associated with aggressive diversity policies include those associated with diverse, inclusive workforces and reduction of major litigation risks of non-diverse, non-inclusive workforces, and often hostile work environments, described above. Such an approach in most instances will result in minimal risk of factually sustainable reverse discrimination cases.[19] In short, the extremely lower risk of such litigation must be balanced against the known risk and substantial exposure of discrimination litigation experienced by major American corporations over the past ten years.

A. Emerging Best Practices

A growing number of major corporations have been developing, assessing, and refining diversity practices, particularly over the past decade, and there are scores of such practices that could be included on "best of" lists. What these companies have learned, however, is that no single practice will meet every company's needs and objectives; diversity policies, programs, and practices must be designed and implemented to address each company's unique history, culture, and business case. That said, the following best practices, when properly designed, implemented, and overseen by senior management consistent with the applicable legal principles, should result in more effective achievement of corporate diversity objectives while reducing the likelihood of internal complaints, EEOC charges, adverse OFCCP audit findings, and employment discrimination litigation.

1. **Strong Corporate Diversity Policy**: A widely-publicized, strong mission/policy statement usually incorporating the company's business case for, and commitment to, diversity and inclusion, and recognizing diversity across all company functions as a company goal and management responsibility;

2. **CEO Leadership**: As with any major corporate initiative, the CEO's active participation in the diversity initiative demonstrates commitment, creates credibility for the initiative, and sets clear, mandatory expectations for company executives and managers;

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[19] Reverse discrimination cases have never approached the magnitude of class action exposure and settlements of cases like Coca-Cola, Texaco, and Boeing.