Beware Another Term of Clinton Judges

Those interested in what another Clinton term will do to the federal bench and the discrimination laws should take a careful look at the Fourth Circuit’s recent decision in Smith v. Virginia Commonwealth University. The case involved a reverse-discrimination challenge by male faculty members to a “salary equity” adjustment that the University had granted female faculty in 1992. The contrasting approaches of the majority (Nixon, Reagan, and Bush appointees) and the dissent (Clinton, Carter, and Ford appointees) reveal a fundamental conflict in the concept of equality that these judges believe to be embodied in the nation’s laws. Anyone averse to rampant quotas should worry about the havoc that would be wreaked by a judiciary populated largely with Clinton appointees.

After a “salary equity” study concluded that female faculty were underpaid, Virginia Commonwealth University raised the salaries of almost half its female faculty. Male faculty members brought a lawsuit alleging sex discrimination, arguing that the University lacked an adequate basis to believe that the observed salary discrepancies were attributable to sex discrimination. Although VCU’s pay system was based purely on merit, the salary study did not control for the factors used in awarding merit increases: teaching load, teaching quality, quantity and quality of research and publications, and service to the community. The male professors produced evidence that inclusion of these factors would have changed the results of the salary study, although they did not introduce their own statistical study. The University contended that the omitted variables were “too subjective” to include in the statistical model and that an assumption of equal productivity of the two sexes was reasonable. The trial court granted summary judgment for the University, ruling that the University had an adequate basis to conclude that the discrepancies were attributable to sex. Therefore, the salary adjustments were permissible under the Supreme Court’s affirmative-action precedents.

On May 10, the Court of Appeals for the Fourth Circuit, in a 9-5 decision, overturned the district court’s ruling in favor of the University. The majority ruled that the plaintiffs’ evidence that the omitted variables would have made a difference created a factual dispute over whether the discrepancies were attributable to sex. Judge Luttig concurred in the judgment, correctly expressing the view that a statistical study of a merit-based pay system that omits the primary measures of merit is so flawed as to be inadmissible. He suggested that the plaintiffs themselves should be entitled to summary judgment because the University
lacked any competent evidence to support its conclusion that salary disparities were due to sex.

What makes this case so fascinating is not the relatively straightforward, and self-evidently correct, decision of the majority, but rather the position taken by the dissent. Judge J. Blaine Michael, joined by another Clinton appointee, two Carter appointees, and a Ford appointee, dissented, revealing what is really at issue in this case and so many others like it: a fundamental dispute over the meaning of equality.

The dissent first argued that the University’s assumption of equal productivity of male and female faculty was a reasonable one. However, as Judge Luttig pointed out, that cannot be a reasonable assumption when the question under investigation is precisely whether observed disparities are due to productivity differences or to sex. Under the salary model, an assumption of equal productivity automatically led to a conclusion that discrimination caused the disparities. The plaintiffs had introduced evidence that the assumption was unwarranted, and they could easily have introduced even more, since virtually all studies of scholarly productivity show men to be more productive on average than women. Nonetheless, the dissent was offended by the majority’s even “tacit” acceptance of the argument that the assumption of equal productivity was inappropriate, suggesting that “we should be far beyond that point today.”

Even more disturbing is the dissent’s discussion of what a showing of sex differences in performance would mean. The dissent stated that “even if performance factors could measure and did in fact show differences between the productivity of men and women on the average, the only appropriate conclusion to be drawn is that performance factors improperly favor one sex over the other, not that one sex is actually more productive than the other.” The only appropriate conclusion! Demonstrating that this breathtaking statement was not merely a product of artless drafting, the dissent went on to say that “as a matter of law” use of performance measures that lead to unequal salaries is illegal sex discrimination. Thus, under the dissent’s view, not only was the University permitted to make the salary adjustments, it apparently was required to do so. Thus, for the dissenters, a showing that male faculty members published more and better articles than female faculty and taught more classes than female faculty (and taught them better) would not impair the validity of the University’s salary adjustments. Instead, it would prove that quantity and quality of publication and teaching are “biased” measures of performance and are per se illegal.

Seldom does one find such an unabashed articulation of mindless egalitarianism, a “group think” mentality according to which sex (and by implication, race) differences in outcomes are not only suspect but invalid “as a matter of law.” But one should not be surprised to see this kind of thinking coming from a Clinton appointee.
President Clinton has shown himself to be anything but a “New Democrat” when it comes to “equality” issues. From the very beginning, he set aside particular positions in his administration for people of specific racial and sexual identities, and he populated all the important civil rights positions with civil rights “activists.” His administration has repeatedly subordinated other interests to equality. Not even the First Amendment is safe. On a number of occasions, the Justice Department has sued local residents who object to the placement in their neighborhood of group homes for the retarded or rehabilitation facilities for substance abusers. This opposition is not protected by the First Amendment, the Justice Department says, but rather prohibited by the Fair Housing Act.

The Clinton Administration has consistently valued proportional representation over merit. The Justice Department supported the racial construction set-asides struck down by the Supreme Court in the *Adarand* case, and it supported the right of a New Jersey school district to select a teacher for layoff on the ground that she was white. After the Supreme Court’s *Adarand* decision imposed stricter standards on federal affirmative-action programs, the Justice Department sent a memorandum to agency general counsels providing them justifications for affirmative action in federal employment that the Supreme Court has either never endorsed or explicitly rejected. In its post-*Adarand* “review” of federal affirmative-action programs, the Administration could find only one that did not satisfy *Adarand*s rigorous standards, a program that had already provoked a lawsuit. When the Dole-Canady bill was introduced in Congress to forbid federal race and sex preferences, the Justice Department announced an intention to recommend its veto. When the Board of Regents of the University of California announced an end to racial preferences, the Clinton Administration threatened to sue. The list goes on and on.

The VCU dissenters provide a glimpse of the future under a second Clinton administration, a future that is not appealing to those who believe individual qualities rather than group membership should be the basis for reward. While the original vision of the discrimination laws was to require employers to rely on merit rather than sex or race, the new vision is to recharacterize “merit” in such a way as to declare all groups equally “meritorious.” This was not the vision of the Congress that passed the 1964 Civil Rights Act, and it is not the vision of the American people. Sad to say, it is the reigning vision of the Clinton Administration and at least some of his lifetime appointees.

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