Legislative # 140727

MEMORANDUM

Office of the City Attorney

Phone: 334-5011/Fax 334-2229
Box 46

TO: The Mayor and Members of the City Commission

DATE: February 17, 2015

FROM: Stephanie M. Marchman, Senior Assistant City Attorney

SUBJECT: Requiring Racially Diverse Interview Panels in Selection Processes for Regular Appointments Involving Supervisor Positions and Above

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At issue is whether it is lawful for the City to adopt a policy requiring its hiring managers to utilize "racially" diverse interview panels in selection processes for regular appointments involving supervisor positions and above. In short, the answer is likely no. As such, the City Attorney's Office recommends that the City Commission maintain its current Human Resources Policy Number E-1 as it relates to diverse interview panels and take no action to add "racially" diverse interview panels as a requirement.

I. Overview of Federal Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Based on this constitutional right, all racial classifications imposed by a local government in any context, including employment, are inherently suspect and subject to strict scrutiny by the courts.[1]

In addition to this constitutional protection, a number of federal statutes also prohibit discrimination based on race. In the employment context, Title VII provides that it is "an unlawful employment practice for an employer 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."[2] Claims for race discrimination in the employment context may also be brought under 42 U.S.C. § 1981, although such claims are treated in the same manner as Title VII disparate treatment claims.[3]

In recent years, the United States Supreme Court has invalidated a number of race-based governmental programs. For example, the United States Supreme Court struck down several school districts' student assignment plans as unconstitutional under the Equal Protection Clause because they used racial classifications, such as "white or non-white" or "black or other", to achieve racial diversity within the public schools in their districts. In so doing, the United States Supreme Court opined:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. Government action dividing us by race is inherently suspect because such classifications promote notions of racial inferiority and lead to a politics of racial hostility, reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin, and endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to

> an escalation of racial hostility and conflict. . . . one of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.[4]

In the employment context, the United States Supreme Court recently held that the City of New Haven, Connecticut, violated Title VII's disparate treatment provision when it threw out the results of its fire department promotional examinations because white candidates outperformed minority candidates on the examination.[5] In response, certain white and Hispanic firefighters who would have been promoted based on their good test performance sued the City and alleged that the City discriminated against them based on race, in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment.[6] The United States Supreme Court held:

> We conclude that race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. The respondents, we further determine, cannot meet that threshold standard. As a result, the City's action in discarding the tests was a violation of Title VII.[7]

II. Affirmative Action Plans and Consent Decrees

In certain circumstances, employment decisions based on race or other protected characteristics made pursuant to an affirmative action plan or consent decree[8] do not run afoul with Title VII.[9] This is because one of the primary goals of Title VII was to remedy the consequences of past discrimination.[10] However, in recent years, plans and decrees that were put into place decades ago are failing strict scrutiny review because the goals of the plans or decrees have been met. For example, in a recent case involving the City of Syracuse's fire department, white applicants alleged that the City's hiring of "black list" applicants who scored lower than them on the civil service examination pursuant to a consent decree was an employment decision based on race in violation of the Equal Protection Clause, Title VII, § 1981, and the state's civil rights law.[11] The federal appellate court concluded that the record did not establish that the City's race-based employment decisions were justified by the consent decree and remanded the case to the trial court for further proceedings.[12] In 2012, the City of Syracuse settled with the plaintiffs, reportedly for $110,000, and the case was dismissed by the trial court pursuant to the settlement agreement.[13]

The City of Gainesville is not under a consent decree and does not maintain an affirmative action plan whereby race or any other protected characteristic is taken into consideration in making hiring decisions. Indeed, the City's Affirmative Action Plan (or "AAP"), which was presented to the City Commission on March 6, 2014 by the Office of Equal Opportunity, provides the following:

> Any placement goals that the City has established herein are not intended as rigid, inflexible quotas that must be met, but rather as targets reasonably attainable by applying every good faith effort in implementing this AAP. The use of placement goals in this AAP is not intended, nor is the effect of such placement goals intended to discriminate against an individual or group of individuals with respect to any employment opportunities for which he, she, or they are qualified on the grounds that he, she, or they are not the beneficiaries of affirmative action themselves. ***Nothing herein is intended to sanction the discriminatory treatment of any person. Indeed, all employment decisions at the City are made based on job-related criteria.***[14]

The City's Affirmative Action Plan is consistent with the City's Charter, Human Resources Policies, and Equal Opportunity Policies. Specifically, Section 3.01 of the City Charter provides "[t]he charter

officers provided for in this article are vested with authority to administer the assigned duties of their offices including the employment and removal of all subordinate employees of their offices. They must make all appointments based on merit and fitness alone . . ." The City's personnel policies required selection of "employees based on suitability for a given position without regard to race, color, creed, religion, sex or national origin" as early as January 1, 1965. The City's current Human Resources Policy Number E-1, Employment, provides "[i]t is the policy of the City of Gainesville to make all appointments to employment with the City based on merit and fitness alone, and without regard to race, color, gender, age, religion, national origin, marital status, sexual orientation, disability, or gender identity." Moreover, City Equal Opportunity Policy Number EO-7 provides "[i]t shall be the policy of the City to provide equal employment opportunities to all persons regardless of race, gender, color, age, national origin, religion, sexual orientation, marital status, disability, or gender identity, except as may otherwise be required by law."

III. "Reverse Discrimination"

Cases where a white employee alleges to be a victim of employment discrimination are sometimes referred to as "reverse discrimination" cases. With regard to these cases, the federal appellate court applicable to the City of Gainesville has held:

> Whatever the rhetorical effect of that phrase in the ongoing public debate over affirmative action may be, it has no place in the legal analysis of the alleged governmental action before us. ***Discrimination is discrimination no matter what the race, color, religion, sex, or national origin of the victim.*** As Justice Scalia has observed, "In the eyes of government, we are just one race here. It is American." ***Racial discrimination against whites is just as repugnant to constitutionally protected values of equality as racial discrimination against blacks.*** Therefore, we will treat [the plaintiff's] Title VII and Equal Protection Clause discrimination claims as discrimination claims, not as "reverse discrimination" claims, and we will analyze his claims exactly as we would any racial discrimination claim.[15]

The following are examples of "reverse discrimination" cases:

- In a case where two African American members of the Fulton County Board of Commissioners voted to replace the white female clerk with an African American clerk on account of race, the federal appellate court applicable to the City of Gainesville held that the board members were not entitled to qualified immunity, and thus may be held personally liable for their actions. The Court held that "[g]iven the clear state of the law prohibiting racial discrimination in public employment at the time the Board voted to replace [the white female clerk], no reasonable commissioner . . . would have believed that his or her discriminatory actions were constitutional."[16]

- In an employment discrimination action brought by four white fire lieutenants against the City of Jacksonville and its Fire Chief claiming that the Fire Chief allowed the promotional eligibility list to expire because the next candidates in line for promotion were white males, the jury found that race was a motivating factor in the decision and the fire lieutenants were awarded over $203,000 in back pay and promoted to the position of rescue captain retroactive to 1999. Because the fire lieutenants prevailed both at the trial court and appellate court levels, the Court awarded them over $480,000 in attorney's fees and costs.[17]

- In an employment discrimination action brought by a former white male employee of the Orange County Fire and Rescue Division, the Court held that the plaintiff put forth ample

circumstantial evidence of discrimination to permit his claims to go to a jury, which included evidence of the pressure on management to hire and promote minorities, the statement by a non-decision maker about the County's desire to promote on the basis of color, the hiring of a less qualified candidate, and deviation from the standard hiring procedure.[18]

IV. Application of Federal Law to a Policy Requiring Racially Diverse Interview Panels

A City policy requiring racially diverse interview panels in selection processes for regular appointments involving supervisor positions and above potentially runs afoul with federal law in two ways. First, City employees who are required by their managers to serve on interview panels simply because of the color of their skin may claim that this race-based work assignment runs afoul with Title VII. Serving on an interview panel is indeed a work assignment, as City employees routinely serve on interview panels as part of their regular work day, they are paid by the City for the time they spend interviewing applicants, and their time spent on the interview panel is a part of their job duties assigned by their manager. The issue will be whether this race-based work assignment is "adverse" under the law. Federal courts have found that employees may have suffered adverse employment actions under Title VII when they were assigned harder work than employees of a different race, provided more administrative tasks and less professional work than employees of a different race, removed from a police assignment at a certain precinct because of their race and the race of citizens living in the precinct, or assigned to make calls to black households because of their race.[19] As such, a City employee who is black may argue that spending half his work time serving on interview panels instead of his regular job duties is "adverse." In addition, a white City employee may argue that she suffered an adverse employment action because she did not receive the same development opportunities to become a manager or supervisor as black employees who were able to serve on multiple interview panels.

Secondly, it may be argued that this proposed City policy injects race into the City's selection processes and such processes are required to be based on the applicants' qualifications, not race. For instance, a white applicant may claim that he was not selected for a position with the City because he is white. This applicant may claim that this action violates his constitutional rights and Title VII. To support his claim, he may cite as evidence the City policy requiring "racially" diverse interview panels and allege that the purpose of including non-whites on an interview panel was to ensure that non-white applicants were hired. This together with evidence of the pressure on management to hire and promote minorities, statements by elected and appointed officials of their desire to promote on the basis of color, the hiring of a less qualified candidate, and/or deviation from the City's standard hiring procedures may be sufficient evidence of discrimination to allow a claim to proceed to a jury.

V. Response to the Equal Opportunity Director's Memorandum Dated April 10, 2014

The case law cited by the former Equal Opportunity Director, Cecil Howard, does not stand for the proposition that racially diverse interview panels are lawful.

The 2003 Connecticut Supreme Court case cited by Mr. Howard involved a review of a decision of the Commission on Human Rights and Opportunity finding that the Board of Education of the City of Norwalk, Connecticut ("Board") had discriminated against an African-American teacher on the basis of his race, color, and age. It did not involve the legality of racially diverse interview panels or whether the Board's affirmative action plan was lawful under the constitution. See Bd. of Educ. of City of Norwalk v. Comm'n on Human Rights & Opportunities, 266 Conn. 492, 493, 510 (2003). This Connecticut state court case, which is not binding precedent for the City, found that the Board was not in compliance with its own affirmative action plan and its failure to comply with its own plan could be evidence of discrimination. Unlike the Board in this case, the City does not have an affirmative action plan requiring minority representation on interview panels, and, as set forth above, it is not likely that

such a plan would withstand strict judicial scrutiny. Furthermore, failing to comply with one's own hiring policies is admittedly not advisable, for a court may find that such a deviance from policy is evidence of discrimination.

The 1980 Lewiston Board of Education case cited by Mr. Howard involved a Maine state trial court decision that is not published on Westlaw. Nevertheless, it appears to have involved a 35-year-old affirmative action plan where a school board took gender into account in hiring. It is not clear that this school board still has such a plan, and if it did, whether it would withstand strict judicial scrutiny today. In addition, the City does not have an affirmative action plan requiring minority representation on interview panels, and, as set forth above, it is not likely that such a plan would withstand strict judicial scrutiny.

Mr. Howard also cited a number of other governmental entities who employ diverse interview panels as part of their affirmative action plans. Notably, none of the examples cited by the Equal Opportunity Director, require "racially" diverse interview panels. Furthermore, consistent with these other governmental entities, current City policy provides "[w]hen interview panels are used for selection processes for regular appointments involving supervisor positions and above, diverse interview panels shall be utilized."[20]

Finally, Mr. Howard's opinion that there is a "greater potential for liability" if the City does not require racially diverse interview panels is simply not supported by the law. For example, one federal court had the following to say with regard to an applicant who claimed he was discriminated against based on his race due in part to the all white interview panel used by the employer. The Court addressed this evidence as follows:

> ***Nor would the fact that the interview panel was all white—by itself—permit a reasonable juror to infer that race and/or national origin played an impermissible role in the selection process.*** One suspects that most human resources professionals would counsel the County that a more diverse interview panel would have been a better approach and would have communicated a more enlightened human resources policy. Nevertheless, ***there is no indication that the racial makeup of the panel played a role in Obi's non-selection, or that it resulted in clearly favorable evaluations for all the white candidates.*** A juror who drew the inference urged by Obi here would be engaged in speculation.[21]

Indeed, the case quoted by Attorney Cynthia Sass in Mr. Howard's Memorandum, does not stand for the proposition that all white interview panels create "greater potential for liability." Instead, in the case cited by Ms. Sass, the Court found that the plaintiff presented evidence of pretext and intentional discrimination by demonstrating in part that she was more qualified than the applicant selected and the fact that she was not promoted because of her black "accent." The racial makeup of the interview panel was not a determining factor in this case. See Griffis v. City of Norman, 232 F.3d 901 (10th Cir. 2000).

VI. Neutral Measures to Achieve Diversity in the Workplace

There is no doubt that diversity in the workplace is invaluable and a critical goal of the City. However, to achieve this goal, it is recommended that the City avoid taking race or gender conscious measures in its selection processes, as such measures are unlikely to survive judicial scrutiny. Instead, the City may take race or gender neutral measures to achieve greater diversity. In the context of interviewing for example, it may be helpful for the panelists to undergo unintentional bias training prior to serving on a panel. In addition, the establishment of internal mentoring and training programs may assist in

retaining and developing entry level employees into the City's future supervisors and managers. Finally, employee benefits such as tuition reimbursement, flexible workplace policies, paid parental leave, and childcare assistance may aid in attracting and retaining women and minorities in the workforce.

VII. Conclusion

Based on the foregoing, the City Attorney's Office recommends that the City Commission maintain its current Human Resources Policy Number E-1 as it relates to diverse interview panels and take no action to add "racially" diverse interview panels as a requirement.

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[1] See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."). Bass v. Bd. of Cnty. Comm'rs, 256 F.3d 1095, 1116 (11th Cir. 2001), *overruled in part on other grounds by* Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008) ("Strict scrutiny review requires the racial classification to serve a compelling governmental interest and be narrowly tailored to achieve that interest.")

[2] 42 U.S.C. § 2000e-2 (a)(1). Title VII prohibits both intentional discrimination (known as "disparate treatment"), as well as practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact"). Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

[3] See Bass, 256 F.3d at 1120 n. 4.

[4] See Parents, 551 U.S. at 745-746 (internal quotations and citations omitted). In addition, in the United States Supreme Court's recent review of the University of Texas at Austin's undergraduate admissions process in which race is considered as a selection factor to increase racial minority enrollment on campus, the Supreme Court vacated the lower court's decision approving the process because the lower court did hold the university to the demanding burden of strict scrutiny articulated by the Supreme Court in previous cases. Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2415 (2013).

[5] See Ricci at 562-563, 580.

[6] Id. at 562.

[7] Id. at 563.

[8] A consent decree is a court supervised agreement between two parties to resolve some dispute between them.

[9] See, e.g., Schurr v. Resorts Intern. Hotel, Inc., 196 F.3d 486, 496 (3d Cir. 1999).

[10] Id. at 497.

[11] Vivenzio v. City of Syracuse, 611 F.3d 98, 99, 102 (2d Cir. 2010).

[12] Id.

[13] See http://www.syracuse.com/news/index.ssf/2012/07/syracuse_settles_reverse_discr.html (last visited 5/6/2013).

[14] (emphasis added).

[15] Bass, 256 F.3d at 1102-1103 (internal quotations and citations omitted) (emphasis added).

[16] Smith v. Lomax, 45 F.3d 402, 407 (11th Cir. 1995).

[17] See Williams v. Consolidated City of Jacksonville, Case No. 3:00-cv-469-J-12A, M.D. Fla., Amended Complaint Dated July 21, 2000; Judgment Dated May 15, 2006; Judgment for Attorneys' Fees and Costs Dated September 11, 2006; Judgment for Appellate Attorney's Fees Dated April 22, 2008.

[18] Bass, 256 F.3d at 1098, 1106-1109.

[19] See Hunter v. Army Fleet Support, 530 F. Supp. 2d 1291, 1295 (M.D. Ala. 2007) (the assignment of more or harder work to black employees may qualify as an adverse employment action); Smith v. O'Neill, 277 F. Supp. 2d 12, 19 (D.D.C. 2003) (finding that the plaintiff established a prima facie case of discrimination and retaliation based on the alleged discriminatory assignment of administrative work projects to her); Patrolmen's Benev. Ass'n of City of New York, Inc. v. City of New York, 74 F. Supp. 2d 321 (S.D.N.Y. 1999) (holding that a genuine issue of material fact as to whether police department's transferring of Black and Black-Hispanic officers from one precinct to another, while transferring white officers back to original precinct, was adverse employment action, precluded summary judgment on officers' race discrimination claims under Title VII); Ferrill v. Parker Grp., Inc., 168 F.3d 468 (11th Cir. 1999) (holding that the fact that the telemarketing firm did not act with racial animus in making race-based job assignments did not preclude a finding that firm was liable for intentional race discrimination and neither bona fide occupational qualification defense nor affirmative action defense were available to firm).

[20] City of Gainesville Human Resources Policy Number E-1.

[21] Obi v. Anne Arundel Cnty., 142 F. Supp. 2d 655, 670-71 (D. Md. 2001); see also Vessels v. Atlanta Indep. Sch. Sys., 408 F.3d 763, 772-73 (11th Cir. 2005) (finding that summary judgment in favor of the employer was appropriate despite the applicant's allegations that the employer deliberately skewed the interview panel in favor of black and female employees).