EVALUATION OUTREACH AND HIRING OF PROFESSIONAL EMPLOYEES: Avoiding the Reverse Discrimination Mythology

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I. **INTRODUCTION:**

Institutions of higher education are confronted with challenging employment disputes and allegations of discrimination on a seemingly routine basis. While such discrimination claims are ordinarily raised by minorities and women, since the Civil Rights movement of the 1960’s members of the majority (whites and/or males) have also pursued claims of reverse discrimination.

The term “reverse discrimination” is a corruption of a concept no matter in which sense it is used. If it is used to describe denial of a right or a benefit or an expectation to whites because Blacks or other minorities are being given preference, it is a corruption of the law. The Supreme Court has ruled, Mr. Justice Marshall for the unanimous court, that Title VII of the Civil Rights Act of 1964 and the Reconstruction Era Civil Rights Act prohibit discrimination because of race—white, brown, or Black.


This paper will review selected reverse discrimination cases at colleges and universities, and the analytical framework applied by various courts in rendering their decisions in such cases. In addition, this paper will offer suggestions for avoiding reverse discrimination claims and recognizing the nuances of these claims.

II. **A REVIEW OF SELECTED REVERSE DISCRIMINATION CASES:**

Medcalf v. The Trustees of University of Pennsylvania, 71 Fed. Appx. 924 (3rd Cir. 2003) stems from a dispute brought by a job applicant who was not hired or even granted an interview for the
position of Women’s Crew Coach at the University of Pennsylvania. Andrew Medcalf, the male Plaintiff, applied for the coaching position in the spring of 1997 after serving as Assistant Men’s Crew Coach at the University from 1991 to 1997. The University Athletic Director, Steve Bilsky, delegated the responsibility for conducting the search process to the University’s Associate Athlete Director Carolyn Femovich, but Bilsky retained the ultimate hiring authority. Id. at 925.

The initial advertisement for the position identified the vacancy as “assistant coach” and 25 applications were submitted for the position, including those of the Plaintiff, Medcalf, and Barbara Kirch. In an attempt to attract a stronger pool of applicants, the position was revised and renamed Coach II – Women’s Rowing. The revised position announcement attracted fifty-four (54) candidates for the position which were reviewed by the Rowing Director Stan Bergman. Based upon his review of all the candidates, Bergman recommended Medcalf as the superior candidate in the entire pool. However, contrary to this recommendation, Medcalf was not interviewed for the position and Barbara Kirch was hired.

The Plaintiff filed a charge with the EEOC and after receiving a right to sue notice filed suit in federal district court. The matter was tried by a jury and Medcalf was awarded lost wages, as well as compensatory and punitive damages. The University filed a post-trial motion for judgment as a matter of law which was denied by the district court, and subsequently appealed.
On appeal the court recognized the legal framework of reverse discrimination claims pursuant to Title VII, 42 U.S.C. § 2000e-2. Addressing the controlling law in the Third Circuit the court observed the following:

[W]e developed a modified burden shifting analysis in which a plaintiff must first establish a prima facie case of reverse discrimination, after which the defendant then must articulate a legitimate, nondiscriminatory reason for the hiring decision. Once the defendant does this, the plaintiff has the opportunity to prove by a preponderance of the evidence that the defendant’s articulated reason is merely pretextual, and that the true reason for the failure to hire plaintiff was discrimination.

Id. at 927.

The University conceded that Medcalf could demonstrate a prima facie case, but argued that Plaintiff’s case should fail as a matter of law because Kirch was hired for legitimate, nondiscriminatory reasons.

Specifically, the University argued at trial that Kirch was hired over Medcalf because of her superior administrative skills. Id. at 929. However, the court’s analysis found the University’s argument problematic because the hiring criteria summarized in the position announcement placed a high priority on actual coaching ability and expertise, not administrative aspects of the job. Also, the University’s contention that Kirch was hired over Medcalf because she had substantial knowledge of NCAA and Ivy League rules was also found suspect. The position announcement made no mention that knowledge of these rules was vital to the position. Furthermore, there was substantial evidence in the record that
Medcalf had far more experience as a coach than each of the women who were granted interviews. *Id.* at 930.

The Associate Athletics Director’s conduct in the hiring process also provided evidence that the University acted with a discriminatory animus. The court noted that the Athletics Director gave Ms. Femovich the authority to conduct the search process as she saw fit. At trial, credible evidence was introduced that Femovich made remarks that she wanted to hire a woman for the coaching position, and that she had concerns about hiring Medcalf because all the other rowing coaches on staff were males. Couple this evidence with the University’s flawed basis for hiring Kirch, and the court found that the jury rationally could conclude that Medcalf was declined the women’s crew coach position based upon his gender. Thus, the court affirmed the decision denying the University’s post-trial motion for judgment as a matter of law in the job applicant’s reverse discrimination action.

In *Geddis v. University of Delaware*, 40 Fed. Appx. 650 (3rd Cir 2002), Alexander Geddis, a white male, filed a lawsuit against the University of Delaware following his termination as Director of Support Services. In May 1996, the University received various complaints about Geddis’ conduct and behavior which resulted in his termination. After being notified that he would be terminated, Geddis filed a grievance and exhausted all remedies extended to University employees without success.
Before the University actually terminated Geddis’ employment, Charlene Benson, an African-American woman who served as an Executive Assistant at the University was asked by Plaintiff’s supervisor to monitor Geddis’ conduct and performance. Benson was also asked to become familiar with the Support Services Department and the skills necessary to manage the department. After Plaintiff’s termination, Benson was appointed Director of Support Services on an interim basis. She was permanently appointed to the position without an official search about five (5) months later. Plaintiff subsequently filed a charge with the EEOC and a complaint in federal district court in which he claimed, inter alia, that the University “. . . engaged in ‘reverse’ race and gender discrimination in violation of Title VII when it terminated Geddis and replaced him with an African American female. . . .” Id. at 651.

In this case, the Third Circuit acknowledged that reverse discrimination cases, like other Title VII employment discrimination cases, are analyzed under the McDonnell Douglas burden-shifting analysis. This familiar approach requires that plaintiff first set forth a prima facie case which, if shown, shifts the burden to the employer to produce evidence that the adverse employment decision was based on a legitimate, non-discriminatory reason. If the employer present such evidence, the burden shifts back to the plaintiff to show that the proffered

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\(^1\) The court also affirmed the jury award of punitive damages to
reason was merely a pretext for unlawful discrimination. 


The prima facie case usually requires plaintiff to establish: (i) membership in a protected class, (ii) adequate qualifications for the position in question, and (iii) that people who were not in the protected class were treated more favorably than those in the class. However, the Circuit Court took issue with this standard for establishing a prima facie case:

This showing is however, ill-suited to claims involving alleged “reverse discrimination.” We have held that “the substance of the burden-shifting analysis applies with equal force to claims of ‘reverse discrimination,’ *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999), and that “all that should be [*6] required to establish a prima facie case in the context of ‘reverse discrimination’ is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.”

*Id.* at 161.

The University conceded that Plaintiff had demonstrated a prima facie case. Nonetheless, Circuit Court found that the University had articulated a legitimate, non-discriminatory reason for its employment decision. In ruling on the lower court’s decision granting the University’s motion for summary judgment, the

Plaintiff based on Femovich’s conduct.
critical question the court focused on was whether Plaintiff could prove by a preponderance of the evidence that the University’s reason for the termination was pretextual. The only evidence that the Plaintiff pointed to was (1) that his former position was filled by an African-American woman who arguably was less qualified than he was; and (2) that the University did not follow its standard procedures for filling his former position.

Plaintiff presented no evidence to undermine the University’s legitimate, non-discriminatory reason for his discharge. Plaintiff failed to identify a job description that the African-American female who replaced him did not meet; indeed, her qualifications were well known. Furthermore, the court noted that the plaintiff must do more than show that the University’s termination decision was wrong, because the real issue is whether the University of Delaware acted with a discriminatory animus. The court found no evidence to suggest that the University terminated Plaintiff because of his race or sex. In fact, the record showed that Plaintiff lacked credibility, lacked the ability to manage support services, and used profanity and inappropriate remarks towards his staff. Thus, the lower court’s granting of the University’s summary judgment motion was affirmed.

In Carl E. Dixon v. University of Kansas, Civil Action No. 95-2504-GTV, 1997 U.S. Dist. LEXIS 2371 (D. Kan Feb. 3, 1997), the male Plaintiff filed a claim of sex discrimination in violation of

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2 While the “trait” referred to by the court obviously includes
Title VII alleging that he was treated disparately compared to female employees. The Plaintiff worked as a laborer in the University’s Department of Facilities Operations in the Special Services Shop. In 1994, Plaintiff was assigned to work with Karen Schoor who historically had difficulty working with the males and had been counseled regarding her attitude toward and treatment of male employees by her supervisor Pat Mills.

By December 1994, Schoor complained about Plaintiff’s job performance, and Plaintiff apparently overheard Schoor say that she had to “get [plaintiff] before his probationary status was up.” The next month Plaintiff was accused by Schoor of insubordination and refusing to complete an accident report consistent with University policy. Following these incidents, Plaintiff was terminated by the University.

Acknowledging that Title VII prohibits reverse discrimination, the court described reverse discrimination as employment discrimination against a member of a historically favored group. \textit{Id.} at *6. The court observed that in the Tenth Circuit a prima facie case for reverse discrimination could be established (1) under the \textit{McDonnell Douglas} framework or (2) by presenting indirect evidence sufficient to support a reasonable probability that but for the plaintiff’s status, the challenged employment decision would have favored plaintiff. \textit{Id.} at **7-8.

\underline{race and sex, the term is thought-provoking.}
Reverse discrimination claims in the Tenth Circuit may be established by a modified McDonnell Douglas prima facie case requirement. In this case, Plaintiff, a male, was a member of a historically favored group. Applying the Tenth Circuit’s modified McDonnell Douglas test requires, a member of a historically favored group to establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority. Id. at *8; Notari v. Denver Water Dept., 971 F.2d 585, 589 (10th Cir. 1992). Although Plaintiff could not provide the necessary background circumstances to establish the prima facie case under McDonnell Douglas, his case could still survive summary judgment through the presentation of indirect evidence sufficient to support a reasonable probability that he would not have been discharged but for his status. Put another way, Plaintiff must show specific facts that are sufficient to support a reasonable inference that but for being a male, he would not have been terminated.

Crucial to his case, Plaintiff presented an affidavit from his former supervisor, Mills, in support of his allegations. Mills stated in his affidavit that Schoor, Plaintiff’s female supervisor, consistently had problems working with men and no such difficulty with women. In addition, Plaintiff effectively refuted Schoor’s stated reasons for discharging Plaintiff; insubordination and/or other misconduct. Thus, the University’s motion for summary judgment was denied because Plaintiff’s evidence was sufficient to
raise a genuine issue of material fact as to Plaintiff’s reverse discrimination claim.

Cleveland State University faced a reverse discrimination lawsuit filed under 42 U.S.C. § 1983 in *Evans v. Cleveland State University*, No. 90-3759, 1991 U.S. App. LEXIS 12218 (6th Cir. June 3, 1991), wherein the University allegedly denied a white male faculty member tenure based on his race and national origin. The salient facts of the case indicate that Plaintiff, Austin L. Evans, was hired as an instructor in the University’s Department of Mechanical Engineering. After earning his doctoral degree in 1984, Plaintiff was promoted to assistant professor and thereafter sought promotion to the rank of associate professor and tenure.

Like most universities, the tenure process at Cleveland State University involved a multi-level review process involving faculty members, Department Chairperson, Dean, and Provost. The Provost also had the authority to refer controversial tenure applications to a university personnel committee comprised of tenured faculty members for additional review prior to submitting a recommendation to the University President. A candidate denied tenure retained the right to appeal such decisions to the faculty affairs committee.

Evans’s tenure application received criticism from the Provost relative to his scholarship which was concentrated in “applied engineering” rather than “fundamental or theoretical engineering.” The university personnel committee agreed with the Provost’s
observations and Evan’s application for tenure was denied. Plaintiff appealed the decision but he did not prevail.

In his lawsuit, Plaintiff alleged that his tenure denial constituted reverse discrimination based on race and a violation of his equal protection rights not to be treated differently from other similarly situated persons. The University filed a motion for summary judgment arguing that Plaintiff presented no evidence to support his claims, and the district court granted the motion. On appeal before the U.S. Court of Appeals for the Sixth Circuit, Plaintiff attempted to overcome the University’s legitimate, nondiscriminatory rationale for denying his application for tenure by arguing that two black professors had deficiencies in their scholarship but were treated differently. Specifically, Plaintiff claimed that as a result of a voluntary affirmative action plan and public criticism directed toward the University’s equal employment policy, a black associate professor was awarded tenure and another black associate professor in the Civil Engineering Department was hired after Plaintiff was denied tenure. Id. at *11.

The Sixth Circuit affirmed the district court’s decision recognizing that tenure decisions in academic settings involve a combination of factors which tend to set them apart from the garden-variety employment decision. Further, the evidence presented by Plaintiff did not show that the University’s basis for denying him tenure was pretextual.
Evan’s comparison of a black associate professor in the College of Education and an untenured black associate professor in the Department of Civil Engineering is inappropriate. A denial of tenure by the Mechanical Engineering Department should not be compared with a grant of tenure in the College of Education or Department of Civil Engineering. . . He has demonstrated only that his denial of tenure occurred in the context of disagreement about the scholarly merits of his academic work . . . .

Id. at *12; Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984). The court affirmed the grant of summary judgment as to Plaintiff’s equal protection claim as well because he presented no evidence of race discrimination. “[T]he denial of a faculty promotion or tenure based upon an evaluation of a faculty member’s scholarly achievements is not judicable in a federal court under a civil rights statute without evidence of sex or race discrimination.” Evans, at *13.

III. UNDERSTANDING AND AVOIDING REVERSE DISCRIMINATION CLAIMS:

A. To Modify or Not to Modify the McDonnell Douglas Prima Facie Case for Discrimination Remains the Question.

In order to demonstrate a prima facie case of discrimination, a plaintiff must show: 1) that he is a member of a protected class; 2) that he applied and was qualified for a job for which the employer was seeking applications; 3) that despite his qualifications, he was rejected; and 4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff’s qualifications. McDonnell
Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Arguably, strict application of this test would eliminate all cases of reverse discrimination because a plaintiff could not satisfy the first element; being a racial minority or member of a protected class. Some circuits such as the Sixth, Seventh, Eighth, Tenth and D.C. Circuits have resolved to modify the first element of the McDonnell Douglas prima facie test by requiring a plaintiff to show “background circumstances” that support an inference that the defendant is one of those unusual employers who discriminates against the majority. Murray v. Thistledown Racing Club, Inc., 770 F.2d 63,67 (6th Cir. 1985); Mills v. Health Care Serv. Corp., 171 F.3d 450, 457 (7th Cir. 1999); Duffy v. Wolfe, 123 F.3d 1026, 1036 (8th Cir. 1997); Notari v. Denver Water Dep’t, 971 F.2d 585, 589 (10th Cir. 1992); and Russell v. Principi, 257 F.3d 815, 818 (D.C. Cir. 2001). Other circuits (the First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits) have chosen not to modify the test. Pettiti v. New England Tel. & Tel. Co., 909 F.2d 28, 32 (1st Cir. 1990); Stern v. Trustees of Columbia Univ., 131 F.3d 305, 312 (2d Cir. 1997); Iadimarro v. Runyon, 190 F.3d 151, 161 (3d Cir. 1999); Lucas v. Dole, 835 F.2d 532, 533-34 (4th Cir. 1987); Byers v. Dallas Morning News, Inc., 209 F.3d 419, 426 (5th Cir. 2000); Zottola v. City of Oakland, 32 Fed. Appx. 307, (9th Cir. 2002); Bass v. Board of County Commissioners, 256 F.3d 1095, 1103-04 (11th Cir. 2001). By choosing not to modify the prima facie test, these courts recognize that all persons are members of the protected class.
B. Recognizing the “Background Circumstances” that May Support a Reverse Discrimination Prima Facie Case.

As previously noted, several U.S. Courts of Appeals including the D.C. Circuit, Sixth Circuit, Seventh Circuit and Tenth Circuit have imposed a higher standard of proof in reverse discrimination cases. Rather than showing that he or she is a member of a protected class, a plaintiff will have to present background circumstances that indicate that the defendant is that unusual employer that discriminated against the majority. Evidence that the employer has used illegal factors such as race, sex, etc. in past hiring decisions may justify a suspicion that discrimination against the majority may be likely. Zambetti Cuyahoga Community College, 314 F.3d 249, 255 (6th Cir 2002); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63,67 (6th Cir. 1985). Therefore, hiring procedures and processes should be controlled by objective factors intended to determine whether a candidate has the skills and abilities to perform the job functions.

C. The Importance of Unambiguous Hiring Procedures.

Assume for example, a white male employee claims that he was denied an accounting position that was offered to a black female. Assume the white male can show 20 years of accounting experience, and the black female can only show 10 years but she is a Certified Public Accountant (“CPA”). Arguably, a reverse discrimination
claim will fail if the job description specifically required a successful applicant to be a CPA.

Hiring well qualified professional employees is the backbone of any organization, including colleges and universities. The inability to recruit and retain productive employees can have a pervasive effect on the institution’s daily operations. Because human resources are vital, the process used to hire employees must focus on matching skilled job applicants with specific institutional needs. Significant attention should be given to drafting position announcements and job descriptions that define the specific skills and credentials that successful applicants must possess. The failure to provide such specificity could result in a pool of candidates who meet certain minimum qualifications for a position but not the institution’s needs.

IV. CONCLUSION:

The term “reverse discrimination” is well-established in our culture, and potential majority plaintiffs understand that they may seek redress under a theory that they have been discriminated against because of their status. Regardless of the terminology, discrimination based upon a suspect classification like race or sex is unlawful and has no place in higher education administration. The challenge is to ensure that institutional decision-making processes are based on objective, legitimate, nondiscriminatory factors.