STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MARK KRAJCO, Petitioner, vs. STATE BUREAU OF PERSONNEL, DEPARTMENT OF ADMINISTRATION (STATE OF WISCONSIN), STATE PERSONNEL BOARD, Respondents.	#148-037 MEMORANDUM DECISION

This case has its beginning in the refusal of the respondent Bureau of Personnel to accept petitioner's application for a job as apprentice electrician at the University of Wisconsin-Madison Campus. The position had been designated as an exceptional employment situation and, as advertised in the civil service bulletin, was limited to women and certain minority groups pursuant to Pers. 27, Wis. Adm. Code, and Sec. 16.08(7), Wis. Stats. In accordance with Sec. 227.06, Wis. Stats., petitioner sought a declaratory ruling from the Director of the Bureau regarding the legality of excluding petitioner from competition for this position and the legality of Pers. 27 generally.

By stipulation appellant and the director agreed that the director would reach a decision without a hearing and that his decision in letter form would serve as a basis for an appeal to the State Personnel Board pursuant to Sec. 16.05(1), Wis. Stats. On June 24, 1974, the director ruled that Pers. 27 was a necessary and lawful enactment and was properly utilized in this case. Petitioner appealed this ruling to the State Personnel Board, which held a de novo hearing, at which all parties presented evidence. The State Personnel Board made findings of fact and conclusions of law and in an opinion and order dated July 30, 1975, affirmed the director's decision. Petitioner seeks judicial review pursuant to Chapter 227, Wis. Stats.

In this case we confront a sensitive and complex issue: Whether Pers. 27, Wis. Adm. Code, and the University of Wisconsin affirmative action plan violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. We conclude that the University program challenged violates the constitutional rights of the petitioner herein because his application for a job was refused because of his race.

The question before us has generated an extraordinary amount of litigation, as well as a proliferation of debate among legal writers and commentators. Few constitutional questions in recent history have stirred as much debate.

We also observe preliminarily that, although it is clear that this job program classifies applicants by race, this fact alone does not render it unconstitutional. Classification by race has been upheld in a number of cases, as pointed out by respondents' counsel, in which the purpose of the classification was to benefit rather than to disable minority groups. Most of these cases deal with remedies imposed after a judicial finding of discrimination. These cases differ from the program at issue here in at least one critical respect, however. In none of them did the extension of a right or benefit to a minority have the effect of depriving persons who were not members of a minority group of benefits which they would otherwise have enjoyed. All of the efforts directed to erase past discrimination have a discommoding effect on nonminorities. The inconveniences and disadvantages thereby created cannot be equated with the absolute denial of a job opportunity as in the present case, where the refusal to accept petitioner's application was solely because of his race.

The issue to be determined thus narrows to whether a racial classification which is intended and designed to assist minorities, but which also has the effect of depriving those who are not so classified of opportunities they would enjoy but for their race, violates the constitutional rights of the majority.

As pointed out by respondents' counsel, two distinct inquiries emerge at this point: first, what test is to be used in determining

whether the job program violates the equal protection clause; and, second, does the program meet the requirements of the applicable test.

The general rule is that classifications made by governmental regulations are valid if the questioned classification has a reasonable basis or bears a rational relationship to the governmental purpose. This yardstick generally called the "rational basis" test is employed in a variety of contexts to determine the validity of government action, and its use signifies that a reviewing court will strain to find any legitimate purpose in order to uphold the propriety of the state's conduct.

But in some circumstances a more stringent standard is imposed. Classification by race is subject to strict scrutiny, at least where the classification results in detriment to a person because of his race. In the case of such a racial classification not only must the purpose of the classification serve a "compelling state interest," but it must be demonstrated by rigid scrutiny that there are no reasonable ways to achieve the state's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government. The Board in the instant case determined, using the latter test, that a showing of compelling state interest was demonstrated in the fact that the use of racial classification was the only way for the University to successfully achieve some racial balance in its work force.

We cannot accept this reasoning as the basis for finding that the program meets the "compelling interest" test. In our opinion, it results in invidious discrimination on account of race. The same standard of review under the Fourteenth Amendment must be applied if the race discriminated against is the majority rather than a minority. Racial discrimination cannot be more easily justified against one race than another. A program which discriminates against white applicants because of their race is not necessary to achieve an integrated work force.

Regardless of its historical origin, the equal protection clause, by its literal terms applies to "any person," and its purpose--to secure equality of treatment to all--is incompatible with the premise that some races may be afforded a higher degree of protection against unequal treatment than others.

Petitioner's counsel quoted an eloquent refutation to racial discrimination by Justice Douglas in DeFunis v. Odegaard, 416 U.S. at p. 342:

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans...."

The Board's counsel have cited many cases, most of which have been decided under the Civil Rights Act, that have upheld the right of minorities to preference in employment and which have resulted in detriment to the majority. In all of these cases, it was found that the defendant had practiced discrimination in the past and that preferential treatment of minorities was necessary to afford the equality they would have had except for a record of past discrimination. In the absence of such a finding, preferential treatment has been voided because it is unconstitutional reverse discrimination to grant a preference to a minority. This principle has been applied whether the preference was mandated judicially or voluntarily initiated by the employer, as in the instant case. It is not significant, as urged by counsel here, that the University was under no compulsion to adopt the program challenged here. To the victim of racial discrimination the result is the same in either event. We have no evidence in the record before this court to indicate that the University of Wisconsin has ever practiced any discrimination against minorities. The record is to the contrary, and no one has urged otherwise. The Board cannot rely on the fact that minorities are underrepresented in the University's labor force to support a determination that it has discriminated against minorities in the past

This court cannot take issue with the arguments set forth in the Board's opinion. The persuasiveness of these arguments cannot be denied. However, we consider the principle that the Constitution sanctions racial discrimination against any race--white, black, red or yellow--to be a dangerous concept frought with inherent dangers for misuse and application in situations which involve far less laudable objectives than are manifest in the instant case.

We deem it the safest course, the one most consistent with the basic interests of all people and the purpose of our Constitution, to invalidate the program here in question because it violates the rights guaranteed to the majority by the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The order of the Board is accordingly reversed, and petitioner's counsel may prepare an appropriate judgment for the court's signature.

BY THE COURT:

Dated: February 4, 1977.

William C. Sachtjen

William C. Sachtjen, Judge

c: McManus, Shellow