WHEN CAN A LAW FIRM DISCRIMINATE AMONG ITS OWN EMPLOYEES TO MEET A CLIENT'S REQUEST? REFLECTIONS ON THE ACC'S CALL TO ACTION

Clare Tower Putnam*

Robert Black and William White are senior associates at Makeus Lotsuf Munnie, LLP, a large law firm in Metropolis. They both went to good colleges and the same top-tier law school. The firm has several hundred lawyers and has had success over the years in hiring, retaining and promoting female and minority attorneys. Both Bob and Will have done well at the firm, but Will's area of expertise—intellectual property—has been particularly busy in recent years, whereas Bob's field—mergers and acquisitions—has been a little slow. As a result, most people at the firm think Will has a better chance at making partner than Bob.

Earlier this year, however, the firm received a Request for Proposal from a Fortune 100 company. The Request is in Will's field, intellectual property, but the firm has decided to put Bob on the team it will "pitch" to the client. Indeed, if the firm gets the business, it plans to designate Bob as the "relationship attorney"—a designation that will guarantee Bob partnership along with a considerable increase in income related to the fees associated with this new account.

Upon hearing this news, Will is distraught. There are only so many opportunities for partnership in any given year, and if Bob gets this one—particularly in intellectual property—it seems certain that Will will not become a partner any time soon, if at all. Accordingly, Will goes to see the firm's Managing Partner, Simon Munnie. Munnie is sympathetic, but explains that the firm is a business and it needs to keep its clients happy. It is true that Will has more experience in the field, but the client wants to

deal with an African-American. The firm’s intellectual property group is relatively small and the only African-American partner in the field is in no position to take on additional work. Unless the firm proposes an African-American as the relationship attorney, Munnie says, there is a good chance the client will go elsewhere. Bob is African-American. He is also a perfectly good lawyer who can learn whatever he needs to learn to service this account. Will might have been a better choice “on the merits,” but Will is white. So the firm is going with Bob. “It’s nothing personal,” Munnie says, “business is business.”

Needless to say, Will is being discriminated against because of his race. The question explored in this comment is whether that discrimination is legal. A significant number of very sophisticated lawyers seem to think that it is, even though the law seems clear that a business cannot favor one employee over another on the basis of race simply because it has good reason to believe that its customers demand that it do so. For decades, this kind of discrimination has been analyzed by applying the law relating to “bona-fide occupational qualifications.” As discussed below, that law does not appear to provide a defense for Mr. Munnie here. Moreover, even the law of affirmative action—which is most likely the law upon which Mr. Munnie’s clients could rely—has not yet been applied in such a manner that it could provide an obvious defense for the firm.

I. DOES MAKEUS LOTSUF MUNNIE LLP EVEN EXIST?

It is true, of course, that there is no listing for Makeus Lotsuf Munnie LLP in the Vault Guide to the Top 100 Law Firms. If the firm is imaginary, however, the hypothetical presented above is fairly based in reality. In recent years, a number of major companies have begun to emphasize their commitment to “diversity,” not only in their own workplaces but elsewhere. In particular, they have made it clear that they expect their service providers—including their lawyers—to share this commitment and to promote diversity in their firms.

Clients are making their preferences known, not only privately but publicly as well. In 1999, the Chief Legal Officers (CLOs) of about 500 major companies in the United States signed Diversity in the Workplace, a Statement of Principle.¹ This statement sought to increase diversity in the workplace of the companies themselves and of the businesses with which they worked. That statement of principles, however, did not produce the effect its authors hoped it would and, five years later, some of them concluded that something stronger was needed. In 2004, Rick Palmore, the

Executive Vice President, General Counsel, and Secretary of Sara Lee and a member of the Board of Directors of the Association of Corporate Counsel (ACC), produced a diversity "Call to Action." The Call to Action states:

[W]e pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.

In contrast to a mere statement of principles, Palmore's "Call to Action" contemplated real consequences for firms that failed to produce results. At Palmore's urging, the ACC endorsed the Call to Action at its October 24, 2004 meeting.

Not surprisingly—given the public position so many of these companies have taken—the demand for "diverse" lawyers (and the threat not to deal with firms who fail to produce "diverse" lawyers) has begun to show up in the "Requests for Proposals" ("RFPs") that the law departments of these companies send to law firms when they are looking to hire a firm for a particular engagement or type of work. For example, a recent request from Schering-Plough includes this:

The promotion of a diverse work environment is one of S-P's core values, and in this regard, the S-P Law Department has a specific goal of supporting diversity in the legal profession. Schering-Plough requires the law firms that represent Schering-Plough to actively promote diversity in their workplace. The Law Department also requires [that] a diverse mix of individuals and firms work on its legal matters.

A similar "Request for Interest" from Pfizer reads:

We will expect our partnering counsel to work actively to
promote diversity within their workplace. To that end, if selected, we will urge you to make a diligent effort in the recruitment, retention and promotion of women and minority lawyers. We will also ask that you afford them opportunities to work on Pfizer matters.\(^7\)

General Electric makes its law firms report back on their diversity progress by filing reports twice a year. The Company’s “Outside Counsel Policy” states:

General Electric expects the law firms that represent GE to work actively to promote diversity within their workplace. In accordance with this commitment, GE requests on a bi-annual basis diversity-related information from its outside counsel. Requested information may relate to firm demographics as well as the number of hours and dollars billed by attorneys working on GE matters. Information is collected and analyzed in an effort to ensure that a diverse mix of attorneys is leveraged for GE matters.\(^8\)

But if there is any lingering doubt about how realistic Mr. Munnie’s hypothetical choice between Will and Bob really is, perhaps we should assume that the client submitting the Request for Proposal is Wal-Mart. Wal-Mart’s demands on its law firms are quite public and very detailed. In an article posted on www.law.com, Meredith Hobbs reported that Wal-Mart’s general counsel, Thomas Mars, had told the retailer’s “top 100 law firms that at least one person of color and one woman must be among the top five relationship attorneys that handle [Wal-Mart’s] business.”\(^9\) Mars outlined the policy in a memorandum, stating that each of the firms would submit a slate of three to five attorneys who would be the existing relationship attorneys on the Wal-Mart account. Wal-Mart would then review the slates and perhaps choose a new existing relationship attorney to handle the account.\(^10\) Thus, if the top existing relationship attorney were a white male, Wal-Mart wanted to be in a position to choose a person of color or a woman to replace him from the proffered slate, based solely on race or gender. It is clear that Wal-Mart is dedicated to following through with its new policy regarding firms: “[W]e have ended our relationship with two law firms for failing to meet our diversity expectations.”\(^11\)

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11. Id.
In such an environment, it is not difficult to understand Mr. Munnie's point of view. He may not care what color his colleagues are, but his clients evidently do. The demands of clients on law firms are widely acknowledged as simply another issue that firms need to take into account while conducting business. In a recent New York Times article, "Why Do So Few Women Reach the Top of Big Law Firms?," Timothy L. O'Brien takes it as a given that firms hire and retain lawyers in order to meet their clients' demands: "With law firms courting major corporations that demand diversity within the ranks of those advising them . . . , veteran lawyers say that promoting women's legal careers is not just a matter of goodwill or high-mindedness. It's also a winning business strategy." The same has been said for hiring minority lawyers: "Thanks to vigorous recruiting and pressure from corporate clients, black lawyers are well represented now among new associates at the nation's most prestigious law firms." Michael M. Boone, a founding partner of Haynes and Boone in Dallas, agrees: "Even the largest firms are at risk if they don't [hire in accordance with good business sense]." If the clients want women or minorities—or even Martians, as Boone jokes in the interview—then those groups are where law firms should turn for recruitment.

Whether companies have simply adopted the Call to Action of the ACC or have developed their own company-specific statements, it seems clear that Wal-Mart, Sara Lee and the rest are demanding diversity from their outside counsel. Law firms have the choice of meeting that demand or losing that business. It should be emphasized, moreover, that these diversity demands are generally being made in good faith and with good intentions. Absent a push from its clients, it may be that a given law firm will adopt or continue practices that have the effect of preventing minority or female attorneys from achieving full potential. What is widely known as the "glass ceiling" has formed, limiting certain employees to rise to a certain level within an organization due to race, gender or other characteristics, and then to remain permanently without any hope of advancement. Scholars have written extensively on the persistence of this problem.

15. See Ramona L. Paetzold & Rafael Gely, Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?, 31 HOUS. L. REV. 1517 (1994-1995) (arguing that Title VII does not provide a successful framework for breaking down the glass ceiling because it principally addresses employment decisions and the glass ceiling occurs where advancement decisions instead of employment decisions are made); Elizabeth K. Ziewacz, Can the Glass Ceiling Be Shattered?: The Decline of Women Partners in
That having been said, can we reasonably expect that the good intentions behind the Call to Action will matter to Will White? For all practical purposes, Mr. Munnie has told him he will not make partner because the client prefers dealing with a lawyer of a different race. Mr. Munnie wants Will to understand that this racial choice is no fault of the firm; the firm, he says, does not hire or promote on racial grounds. But the firm does what it needs to do to meet its clients’ desires, and it seems that the clients do indeed pick their lawyers on racial grounds. So the fault—if there is one—is the client’s, not the firm’s.

Yet Will seems to remember that this defense to a race discrimination claim has been tried before. Back when he and Bob were studying Employment Discrimination in law school, they discussed this very subject (or one related). And, if Will’s memory serves, the defense in question was not successful. Indeed, one of the oddest aspects of our hypothetical is that those who are authoring and implementing the Call to Action are not just businessmen—they are the chief legal officers of their companies. Those who are responding to the Call to Action are lawyers in the best law firms in the United States. One would think that someone—on either end of the transaction—would realize that accommodating clients’ racial preferences might be illegal. It can be assumed that all lawyers involved either are uncertain of the illegality of this practice, or in the alternative, are certain that it is legal. It is necessary to turn to Title VII and the case law to determine whether these lawyers are right.

II. THE HISTORY OF TITLE VII

Title VII of the Civil Rights Act of 1964 addresses employment discrimination. From the start, Congress recognized that businesses would seek to use bona fide business reasons to explain their employment practices. To this end, section 703(e) of Title VII allows for certain characteristics of employees to be taken into account in employment

Large Law Firms, 57 OHIO ST. L.J. 971 (1996) (analyzing the under-population of female partners in firms, and suggesting that a change in attitudes, flexibility for women with family responsibilities, and a better use of mentors would make a crack in the glass ceiling); M. Neil Browne and Andrea Giampetro-Meyer, Many Paths to Justice: The Glass Ceiling, the Looking Glass, and Strategies for Getting to the Other Side, 21 HOFSTRA LAB. & EMP. L.J. 61 (2003-2004) (considering the general context of confrontations with the glass ceiling, with a particular emphasis on “lookism” – the practice of using physical appearance as a gauge for an employee’s potential advancement); David A. Cotter et. al., The Glass Ceiling Effect, 80 Soc. F. 655 (2001-2002) (defining four specific criteria for determining where a glass ceiling exists and concluding that the term should only be applied to gender and not to racial inequalities); Mark S. Kende, Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners, 46 HASTINGS L.J. 17 (1994-1995) (arguing that there is an implied covenant of good faith and fair dealing that governs all partnership agreements, prohibiting gender discrimination between partners).
decisions:

Notwithstanding any other provision of this [title] . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [ ] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.¹⁶

Thus, the presence of a bona fide occupational qualification (BFOQ) in an employment situation is a statutory defense to intentional discrimination. It is significant, however, that in listing "religion, sex, or national origin,"¹⁷ section 703(e) omits race and color as excusable bona fide occupational qualifications.

The legislative history behind Title VII sheds some light on the omission of race and color in the BFOQ exceptions, and, not surprisingly, it demonstrates that the omission was deliberate. Indeed, Representative John Williams (D-MS) had proposed an amendment that would have included race and color and his reasoning had much to do with client preferences. For example, he worried that traditionally black businesses would be forced to hire white employees, which would "destroy [those businesses'] identit[ies] as [ ] Negro business[es], the very quality responsible for [their] success[es]."¹⁸ Other representatives agreed. While discussing the issue of blacks hiring only other blacks, Representative Rivers said, "... we do not want to change this. We are getting along fine. . . We do not want to change."¹⁹

Nevertheless, the Williams amendment was voted down.²⁰ Many Representatives opposed the amendment because it went directly against the purpose of the Civil Rights Act—Congress did not want black businesses hiring only blacks and white businesses hiring only whites. It was exactly this problem that Congress was attempting to eradicate.²¹ Representative Celler (D-NY) stated that, "We did not include the word 'race' because we felt that race would not be a bona fide qualification."²² Celler continued, "[T]he basic purpose of [T]itle VII is to prohibit discrimination in employment on the basis of race or color. Now the substitute amendment . . . would destroy this principle. It would permit discrimination on the basis of race or color. It would establish a loophole,

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¹⁷. Id.
¹⁹. Id. at 2552.
²⁰. Id. at 2563 (voting down the amendment with 78 for and 108 against).
²¹. Id. at 2559.
²². Id. at 2560.
that could well gut this [T]itle." Representative O'Hara stated, "[the substitute amendment] opens up other possibilities that I do not think any of us would want to open." Representative Alger said, "when we write laws they must apply equally to all people. We must not, in our zeal to protect civil rights, inflict civil wrongs on anyone in the name of protecting civil rights." In discussing the dissension over a lack of race as a BFOQ, Representative Corman simply stated, "My answer, sir, is that they will just have to live with it."

In fact, in its discussion of the amendment for race as a BFOQ, Congress discussed a hypothetical situation very similar to that presented above. The hypothetical proposed was that if all candidates for a position are equal, how can an employer make his choice about whom to hire or promote? In response, Representative Goodell stated, "If a person refuses to hire for any reason other than race, creed, or color that would be all right." Thus, an employer cannot legally refuse to hire (or choose to hire) for the reason of race, creed or color—exactly what Mr. Munnie is doing here.

Therefore, it cannot be argued that Congress's omission of a race or color exception from section 703(e) was an oversight. The subject was discussed at length. Congress knew what it was doing. Any inclusion of race or color in the BFOQ exceptions, it was feared, would "destroy [the] principle" of Title VII.

III. BFOQ CASE LAW AND CLIENT PREFERENCES

After the enactment of the Civil Rights Act, it was ultimately up to the courts to determine how expansive Title VII should be. In court, a bona-fide occupational qualification provides a statutory defense for employers who are intentionally using discriminatory practices in the workplace. While an employer is usually prohibited from discriminating against employees with respect to religion, sex, or national origin, an employer is permitted to take those factors into account if any are deemed "reasonably necessary to the normal operation of that particular business or enterprise." It was left to the courts to determine what makes a practice reasonably necessary.

In its first significant case of this kind, the Supreme Court employed a

23. Id. at 2556.
24. Id.
25. Id. at 2557.
26. Id. at 2559.
27. Id. at 2560 (emphasis added).
28. Id. at 2556.
very narrow definition of the BFOQ defense. In *Dothard v. Rawlinson*, the Court stated that a BFOQ is "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." The Court would allow gender-based discrimination only if the employer’s ability to accomplish the essential aspects of business would be compromised if the employer could not discriminate against one gender or the other. In this case, the Court upheld a rule requiring prison guards in "contact" positions to be the same gender as the inmates they guarded, reasoning that an "employee’s very womanhood" could undermine her ability to do her job. Soon after, the Supreme Court was confronted by the BFOQ defense in an Age Discrimination in Employment Act case. In *Western Air Lines v. Criswell*, a group of flight engineers brought an age discrimination case against Western Air Lines. The airline had either forced them to retire when they reached the age of sixty years old or refused to reassign the engineers once they reached that age, because they were part of the company’s retirement plan. The Supreme Court held for the engineers, noting that instructing the jury “to defer to ‘Western’s selection of job qualifications . . . that are reasonable in light of the safety risks’ . . . is plainly at odds with Congress’ decision . . . to subject such management decisions to a test of objective justification . . .” The Court stated that “[t]he BFOQ standard adopted in [the Age Discrimination in Employment Act of 1967] is one of ‘reasonable necessity,’ not reasonableness.” Simply because it was feasible that old engineers were not as quick at work as their younger counterparts did not mean that the jury was prohibited from questioning that reasoning and the evidence presented by the airline. Thus, simply because an employer deems a discriminatory characteristic as “reasonably necessary” to his or her business does not mean that this conclusion will go unquestioned. Even when invoking an explicit BFOQ exception, an employer is still required to show justification.

Most BFOQ cases in the Courts of Appeals reflect the narrowness of this exception. There are cases, however, in which the preferences of the employer’s clients or customers have been considered. In those cases, it

31. *Id.* at 334.
32. *Id.* at 336.
33. *Id.*
34. 472 U.S. 400 (1985).
35. *Id.* at 402-405.
36. *Id.* at 419.
37. *Id.*
38. *See* Steven F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of Intentional Sex Discrimination*, 52 *Ohio St. L.J.* 5, 22 (1991) (discussing cases that have succeeded in establishing a bona-fide occupational qualification).
is the exact preferences of the employer's clients that make an employee characteristic "essential" to the business. In Chambers v. Omaha Girls Club, Inc., the Court of Appeals for the Eighth Circuit allowed a girls club to discriminate against unmarried pregnant women, because that class of women would not serve as good role models for the girls.39 Similarly, the Court of Appeals for the Seventh Circuit held that the Wisconsin Department of Health and Social Services could discriminate and hire only female employees to work in a women's maximum security prison due to the rehabilitation needs of women prisoners.40

Because these cases are highly unusual, it is hard to see how they could be used to justify employment decisions based on a customer's preference for dealing with an employee of a particular sex or race where the services provided (e.g., legal or accounting services) have no specific racial or sexual aspects. Certainly the need for role models for young girls or the need for same-sex rehabilitation is a long way from a law firm's desire to please its client by offering an African-American (or female) "relationship attorney." Minority or female associates and partners cannot be said to help the firm's clients in a better or worse way because of their gender or the color of their skin.

The Equal Employment Opportunity Commission (EEOC) has stated that the BFOQ exception should be interpreted very narrowly.41 It lists a number of situations that do not warrant the use of the BFOQ exceptions including "[t]he refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers ...."42 The only exception the EEOC makes in this instance is for a situation concerning authenticity, such as the hiring of an actor or actress.43 In the Notes that accompany this section of the EEOC guidelines, the Commission reiterates that the exception protects an employer's gender preferences only if they are based on the employer's inability to perform a service that it offers.44 The EEOC uses the case Bollenbach v. Board of Education of Monroe-Woodbury Central School Dist.,45 to illustrate its point. In that case, even though a religious group preferred male bus drivers to drive male school children to a religious school, this customer preference "did not make being male a 'bona-fide occupational qualification'" of being a bus driver.46 The EEOC further states, "Economic considerations cannot be the basis for a [BFOQ]

39. 834 F.2d 697 (8th Cir. 1987).
40. BEFORT, supra note 36 at 23, citing Torres v. Wisconsin Dep't of Health and Social Servs., 859 F.2d 1523 (7th Cir. 1988).
41. 29 C.F.R. § 1604.2(a) (1998).
42. Id. at §1604.2(a)(iii).
43. Id.
44. Notes to 29 C.F.R. § 1604.2.
46. Notes to 29 C.F.R. § 1604.2.
defense to a discriminatory hiring case under Title VII.\textsuperscript{47}

This view has been echoed in the Courts of Appeals. In the early 1970s, Pan American Airways had a policy of hiring only female flight attendants. The airline’s reasoning for this policy was that “[t]he performance of female attendants was better in the sense that they were superior in such non-mechanical aspects of the job as ‘providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations.’”\textsuperscript{48} Nevertheless, the Court of Appeals for the Fifth Circuit held that the airline could not require that its flight attendants be female. While the airline might benefit to some degree because its passengers prefer female flight attendants, this potential benefit was “tangential to the essence of the business involved.”\textsuperscript{49} Even if women may be more “desirable” in a given occupation to a degree that makes the business employing them more competitive or profitable, it does not follow that their gender is an occupational qualification. Congress’s purpose in passing the Civil Rights Act was not to enable businesses to become more profitable, but “to provide a foundation in the law for the principle of nondiscrimination.”\textsuperscript{50}

In 1981, the Court of Appeals for the Ninth Circuit was confronted by a similar issue. Wynn Oil Company chose not to promote Delia Fernandez, a woman, to the position of Vice-President of the International Operations division.\textsuperscript{51} Wynn Oil reasoned that Latin American clients would react negatively to a woman in such a high position, and thus take their business elsewhere. The company argued that placing a woman in such a position would “destroy the essence” of its business.\textsuperscript{52} In its decision, the Court of Appeals held that Wynn Oil’s reasoning was inadequate as a matter of law because customer preference cannot justify gender discrimination: “stereotypic impressions of male and female roles do not qualify gender as a BFOQ . . . . Nor does stereotyped customer preference justify a sexually discriminatory practice.”\textsuperscript{53} The Court went on to cite the EEOC’s regulations, which state that the only customer preferences that can be taken into consideration are those concerning authenticity.\textsuperscript{54}

Even when client preferences are cloaked in more widely accepted reasons for allowing BFOQ exemptions, they seldom prevail. In \textit{Miller v.}

\begin{itemize}
\item \textsuperscript{47} Id. at note 21.
\item \textsuperscript{48} Diaz v. Pan American Airways, Inc., 442 F.2d 385, 387 (5th Cir. 1971).
\item \textsuperscript{49} Id. at 388.
\item \textsuperscript{50} Id. at 386, citing Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969).
\item \textsuperscript{51} Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1274 (9th Cir. 1981).
\item \textsuperscript{52} Id. at 1276.
\item \textsuperscript{53} Id. at 1276-77.
\item \textsuperscript{54} Id. at 1277, citing 29 C.F.R. § 1604.2(a)(2) (1972).
\end{itemize}
Texas State Board of Barber Examiners, James Miller, a black man, charged the Texas State Board of Barber Examiners with discriminating on the basis of race through its assigning process. While the white inspectors were assigned by geographical area, Miller was assigned to inspect the black and Mexican-American barber shops throughout the region because “the white inspectors refused to inspect black barber shops because of fears of physical violence.” While this seems to be an issue of safety, perhaps it could also be seen another way: black and Mexican-American shopkeepers threatened violence, because they did not want white inspectors in their shops—they only wanted inspectors of the same race. Whatever the reasoning of the State Board was, the Court refused to apply any BFOQ for race, stating that race was “conspicuously absent from the [Title VII] exception; therefore . . . there is no exception for either intentional or unintentional racial discrimination.”

One year later, the Court of Appeals for the Second Circuit held in the same way. In Knight v. Nassau County Civil Service Commission, James Knight alleged that the Commission had violated Title VII by failing to promote him and transferring him from the Commission’s Test Development Division to the Recruitment Division for the purpose of recruiting minority applicants. The Court held that Knight’s assignment to handle minority recruitment was impermissible because there was no BFOQ exception for race, and the Commission’s reasoning “was based on a racial stereotype that blacks work better with blacks and on the premise that Knight's race was directly related to his ability to do the job.” The Court of Appeals added that “[n]o matter how laudable the Commission’s intention might be[] in trying to attract more minority applicants to the Civil Service[,] the fact remains that Knight was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work.”

Other cases, although they do not address client preferences directly, may speak to the situation at Makeus Lotsuf Munnie, LLP. In Swint v. Pullman-Standard, Pullman-Standard had certain jobs that were unofficially “white only” jobs, and others that were unofficially “black only” jobs. This racial imbalance was perpetuated by a seniority system in place at the company, which made transferring departments very

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55. 615 F.2d 650, 652 (5th Cir. 1980).
56. Id. at 651.
57. Id. at 652.
58. 649 F.2d 157 (2d Cir. 1981).
59. Id. at 159.
60. Id. at 162.
61. Id.
62. 624 F.2d 525 (5th Cir. 1980).
63. Id. at 527.
difficult for minorities.\textsuperscript{64} The Court of Appeals for the Fifth Circuit stated that the BFOQ exception under Title VII is inapplicable to racial discrimination, reviewing the legislative history of Title VII and noting that "Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business."\textsuperscript{65}

Similarly, in \textit{Smallwood v. United Airlines Inc.},\textsuperscript{66} United Airlines tried to justify its rule against hiring pilots older than thirty-five years old. At trial, the airline reasoned that training was expensive and that hiring young pilots allowed the company to cut down on costs because younger pilots had a longer period of peak productivity.\textsuperscript{67} In first answering Smallwood's claim, United argued a form of the business necessity defense, claiming "a maximum age of 35 at hire was necessary to achieve peak productivity."\textsuperscript{68} It was only later in an amended answer that United raised the BFOQ defense. In any event, the Court found that United did not satisfy the BFOQ standard. Applying a two-prong test for claims under the Age Discrimination in Employment Act, the Court of Appeals rejected United Airlines' explanation, holding that just because a certain practice is more profitable, it does not follow that it is essential. The Court defined economic considerations as "precisely those considerations [that] were among the targets of the [ADEA]."\textsuperscript{69} Any disabilities or handicaps related to work performance that are a result of aging can be discovered on an individual basis, showing that no age discrimination BFOQ defense is required.\textsuperscript{70}

Consistent with the law established by the Courts of Appeals, the Supreme Court, in a landmark ruling in 1991, embraced a strict rule in the field of disparate impact cases and disparate treatment analysis. In \textit{International Union, UAW v. Johnson Controls, Inc.},\textsuperscript{71} Johnson Controls had a policy prohibiting fertile women from manufacturing batteries. The company reasoned that batteries contained high amounts of lead, which created potential health risks for employees and any fetus carried by an employee.\textsuperscript{72} One of the reasons this case is so significant is that it discusses the defendant's potential use of a business necessity defense as well as the BFOQ defense. In granting Johnson Controls' request for summary judgment, the Court of Appeals for the Seventh Circuit had held that the proper standard for evaluating Johnson Controls was the business necessity

\begin{footnotes}
\item 64. \textit{Id}.
\item 65. \textit{Id} at 535.
\item 66. 661 F.2d 303 (4th Cir. 1981).
\item 67. \textit{Id} at 306.
\item 68. \textit{Id}.
\item 69. \textit{Id} at 307.
\item 70. \textit{Id} at 308-309.
\item 72. \textit{Id} at 190.
\end{footnotes}
defense, but that the defendant would still receive summary judgment if it were subjected to the BFOQ standard. The Supreme Court held that this reasoning was incorrect. The Court had established the business necessity defense in *Griggs v. Duke Power Co.*, stating: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." An employer can only use a business necessity defense when his or her motive for some sort of exclusion is arguably benign. Here, Johnson Controls' motive to exclude fertile women was not benign and it did not get the benefit of the defense.

The Court also held that Johnson Controls could not establish a BFOQ defense. Johnson Controls argued that its policy fell within the safety exception of the BFOQ defense. But even if the company's concerns for the health of its female employees and their future children may be laudable, it is simply not the company's place to make such decisions. Women (including fertile women) are just as able to manufacture batteries as efficiently as their male counterparts, and the company could not discriminate against them simply because the women could get pregnant. Thus, *Johnson Controls* reaffirms the standard that business necessity can only be invoked in disparate impact cases. When an employer discriminates on the basis of gender, national origin, or religion, the courts must turn to a disparate treatment analysis, and the only statutory defense the employer may invoke is the BFOQ defense.

What is happening at Makeus Lotsuf Munnie LLP is analogous to the BFOQ cases concerning client preferences, and, using the reasoning of the Courts cited above, the law would appear to be that law firms cannot bend under the pressure of the Call to Action, however well-intentioned that pressure may be. It is true, of course, that the firm is only trying to satisfy its clients. Moreover, its clients are not motivated by some kind of racial animus. To the contrary, they are only trying to further the cause of diversity in law firms. Yet many of the clients in the BFOQ cases did not think they were being motivated by animus either: many airplane passengers actually thought that female stewardesses were better for airplane morale because of their gender. Similarly, many South American clients (and perhaps clients all over the world) actually believe that men,

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73. *Id.* at 187.
74. 401 U.S. 424 (1971).
75. *Id.* at 431.
76. 499 U.S. at 206.
77. *Id.* at 202.
78. *Id.* at 206-207.
not women, should be expected to handle important business affairs. But on a policy level, Congress and the Courts have decided that client preferences and economic concerns are not going to be taken into account. The law, in other words, is just as Will White remembers it.

It could be argued, of course, that the BFOQ exception has become too narrow and that the law needs changing. Some scholars have said exactly that, suggesting that it would make sense to include an explicit BFOQ exception for race under Title VII. In his Note, “Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination,” William R. Bryant argues that there are simply too many situations in which a race exception is justified. For instance, “[w]hile an employer should be allowed to discriminate against non-African Americans when casting for the role of Martin Luther King, Jr., such discrimination is illegal under the strict language of Title VII.” Bryant reasons that the Courts have so narrowly construed the other exceptions that race could be included under Title VII because it would be just as narrowly construed. He goes on to suggest that Title VII be amended to include a race exemption when: (1) the essence of the business in question would be undermined by prohibiting the discrimination; (2) all or substantially all of the people who are not part of the class in question are unable to perform the essence of the job; and (3) no reasonable, less discriminatory alternative exists. Bryant provides a few central circumstances in which all three prongs of this theory would be met.

Whether or not race should be included in the BFOQ exception under Title VII, it seems that even Bryant’s proposal would not allow law firms to hire (or fire) lawyers based on their clients’ demands. The law firms in this instance would fail the business essence test – prohibiting the use of a racial BFOQ would in no way alter the essence of the business of a law firm. The quality and success of the law firm’s work does not depend on the race of its associates.

80. Id. at 220.
81. Id. at 241.
82. Bryant suggests implementing a racial BFOQ for the authenticity problem (such as the Martin Luther King, Jr. example), for inmate populations (such as a prison hiring security guards based on race to reflect the racial makeup of the inmate population), and for other policing needs (such as officers reflecting the racial makeup of their community). Id. at 228-236.
IV. IS A CLIENT DEMAND FOR A MINORITY LAWYER A FORM OF AFFIRMATIVE ACTION?

So how will Mr. Munnie and his firm defend against Will White's charge of race discrimination (assuming Will is prepared to destroy his career with the firm by bringing such a charge)? The law that was meant to apply to the kind of decision Mr. Munnie made — the BFOQ defense — evidently offers the firm no help. It is no doubt true that Makeus Lotsuf Munnie LLP is merely trying to comply with its customer's wishes. But the law is that this particular excuse does not work. Race discrimination is illegal—even if it makes undeniable business sense.

Presumably, Rick Palmore and his colleagues know that. So does Mr. Munnie. Yet they persist. Why? The only plausible explanation is that they believe that they are engaged in a form of affirmative action that is exempt from the straight-forward reading of Title VII. Given the array of legal talent that has signed on to the Call for Action, one might assume that the "affirmative action" cases provide a solid legal basis for acceding to the demands clients are now making. But there are reasons to question this assumption.

In United Steelworkers v. Weber, United Steelworkers and Kaiser had entered into a collective bargaining agreement that included a voluntary affirmative action plan designed to eliminate racial imbalance in Kaiser's workforce. The new training program reserved 50% of the available spots for black applicants. Weber, a white production worker with seniority over blacks that had received spots in the training program, was rejected and brought a class action suit under Title VII, sections 701(a) and 701(d). Relying on a somewhat questionable case, Justice Brennan wrote for the majority that whatever the actual language of Title VII may have been, the "spirit" of the law was to correct racial imbalances in the workplace. It would be ironic, he reasoned, if the law were used to frustrate that intention.

Justice Brennan's opinion has been criticized, however. As Richard A. Epstein wrote, "As a matter of statutory construction his opinion rests

84. Id. at 197 (describing the affirmative action plan that aimed to employ a percentage of black employees commensurate with the local labor force).
85. Id. at 199–200.
86. Justice Brennan relies on Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), in which Justice Brewer relied more on his Christianity than the written law and rationalized a part of his decision based on the fact that the United States is a "Christian nation." Id. at 471.
87. 443 U.S. at 201.
88. Id. at 202.
largely on quicksand. The same point was made by Justice Rehnquist in his dissent, which argued that Title VII does not permit affirmative action; its purpose is the end of discrimination, not to promulgate reverse discrimination. Justice Rehnquist’s view also finds support in the legislative history. The legislators that passed Title VII in 1964 did not intend for it to encompass affirmative action. Indeed, as Senators Case and Clark wrote in a memorandum concerning the legislation:

There is no requirement in [Title VII] that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of [Title VII] because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race.

Nevertheless, Weber certainly provides support for the proposition that a voluntary affirmative action plan can provide a defense for a racial discrimination that would otherwise be subject to attack under Title VII. In reviewing Section 703(j) of Title VII, the Supreme Court found significance in the fact that nothing contained in Title VII “shall be interpreted to require any employer” to give preferential treatment. The language Congress used did not prohibit an interpretation of Title VII that

90. 443 U.S. at 254-255 (Rehnquist, J., dissenting) (arguing that the majority’s interpretation of the “spirit” of the law is incompatible with the 88th Congress’s intention that equality is the “spirit” of the law). Justice Scalia later argued that congressional inaction after the Weber decision did not necessarily signal Congress’s approval of the Court’s reasoning and the case should not be treated as precedent under stare decisis, because that case itself broke with precedent; the Court misapprehended the meaning of the statute and the case should be overruled. Johnson v. California Transportation Agency, Santa Clara, Cal, 480 U.S. 616, 672-673 (Scalia, J., dissenting).
91. Epstein, supra note 87, at 398 (quoting 110 Cong. Rec. 7213 (1964)).
92. Section 703(j) of Title VII reads, “Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.” 42 U.S.C. § 2000e-2(j).
93. 443 U.S. at 205-206 (quoting 42 U.S.C. § 2000e-2(j)).
would *permit* (as opposed to *require*) voluntary affirmative action efforts.\(^94\)

Therefore, the Supreme Court held that Section 703(j) did not prohibit an employer from hiring based on race, and that the "natural inference [was] that Congress chose not to forbid all voluntary race-conscious affirmative action."\(^95\) The Court found that the agreement in United Steelworkers' and Kaiser's plan was "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."\(^96\) The Supreme Court limited its endorsement of affirmative action plans to those seeking to correct a "manifest racial imbalance."\(^97\)

The continuing vitality of *Weber* can be seen in *Petit v. City of Chicago*, where a group of white police officers had brought a Section 1983 Equal Protection Clause suit against the City for discriminating in its sergeant promotional process.\(^98\) The Court found for the City, holding that the police force has a compelling interest in achieving racial diversity and announced a willingness to defer to experts in the field: "it is proper in this case to rely on the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the CPD."\(^99\) Although the Court acknowledged that white police officers were being discriminated against during this process, it provided them with little consolation and no remedy: "[w]hile we do not minimize the loss that those who were not promoted suffered, we find that the procedures met the *Grutter* standard for minimizing harm to members of any racial group."\(^100\)

As for the "*Grutter* standard" to which the *Petit* Court referred, that might be of particular use to Mr. Munnie and his firm because it comes from *Grutter v. Bollinger*,\(^101\) an affirmative action case involving law school admissions. In that case, the University of Michigan acknowledged that it was using race as a factor in its law school admissions. This discrimination, it said, was necessary to secure a sufficiently "diverse" law school class and, by extension, a sufficiently diverse bar. The Supreme Court, by the narrowest of majorities, allowed the discrimination to stand — but only for another twenty-five years. Discrimination of this kind evidently becomes illegal, with or without an Act of Congress or a constitutional amendment, in 2028.\(^102\)

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94. *Id.* at 206.
95. *Id.*
96. *Id.* at 209.
97. *Id.* at 208.
98. 352 F.3d 1111 (7th Cir. 2003).
99. *Id.* at 1114.
100. *Id.* at 1117.
102. *Id.* at 343. In coming to this conclusion, the Court reflected an obvious reluctance to endorse affirmative action on principle. As Epstein observes, "[t]here is no question but
That will be more than enough time, of course, for Mr. Munnie to make his clients happy and for Will White to find another line of work. But even if Weber and Grutter provide a rationale and defense for some affirmative action plans, do they really help Makeus Lotsuf Munnie LLP? The answer is that they only help if the firm is willing to do and say some things that it has not done or said in the hypothetical set forth above. For instance, those cases would help if the firm were to adopt its own "voluntary" affirmative action plan in order to redress an imbalance in its own workforce. But that is not what the firm has done here. Nor has the firm so much as suggested that it is favoring Bob Black over Will White to "remedy" any kind of discrimination—societal or otherwise. The firm is already diverse. It is not acting to address a perceived problem. Its defense is that it is responding to the stated racial preferences of its client. Perhaps such candor about its motives would be unusual in the real world, and the firm would be more than willing to pretend that it was engaging in affirmative action even when it was not. But if Title VII truly prohibits an employer from using race in its employment decisions in order to meet customer preferences, why shouldn't it protect Will White? And if we conclude that it should not protect Will White, shouldn't we change the law instead of asking employers to pretend they are doing something that they are not?

The fact is that Mr. Munnie is not attempting to eliminate "conspicuous racial imbalance in a traditionally segregated job category." He is, instead, trying to meet a client's request. And nothing in Weber—or any other case—suggests that the client may impose its own "voluntary" affirmative action plan on another business. Whether or not Wal-Mart may discriminate against its own employees on racial grounds, its demand that its lawyers discriminate against their employees on racial grounds is surely that affirmative action remedial decisions have resulted in an erosion of the color-blind and race-blind standards." Epstein, supra note 85, at 410. The principle of color-blind and race-blind standards remains attractive to the Court, even if it is not always followed.

103. Certainly, large law firms should be afforded the same opportunities available to other businesses to address problems in their own workforces. Different firms at different times can find that they are having difficulty attracting or retaining minority lawyers. "Between 1989 and 1996, Cleary Gottlieb hired more than 30 African American associates. Today, none remain." Alan Jenkins, Losing the Race, The American Lawyer 92 (Oct. 2001). The situation at that firm changed radically over time: "After a 50-year history as a virtually all-white institution, Cleary was becoming something of a mecca for young black lawyers. The firm went from only one black associate in early 1989 to 23 in 1992. By 1996 it had 30, giving it one of the highest numbers of black attorneys in the country. Over the same period, it increased its number of Latino attorneys from six to 14 and its number of Asian and Asian-American attorneys from seven to 24." Id. By 2001, however, Cleary had encountered difficulties in retaining these lawyers. If the firm had adopted a plan to address that problem, it would be in a better position to rely on the "affirmative action cases" than the firm in our hypothetical, which, by hypothesis, has no such problem and no such plan.
new and different. If its lawyers do so, it is hard to see why the BFOQ cases—which present exactly this issue—are not the more relevant authority.

As for Grutter, the law school’s use of racial preferences was deemed acceptable in part because a quota-system was not used. But when law firms meet their clients’ demands of placing at least a certain number of minority or female associates on each account, a type of silent quota will gradually appear. Indeed, the quota is not even all that silent. Wal-Mart says that it needs at least one minority and one female out of a list of five. That is a fairly explicit quota. Those affirmative action plans that have been approved by the Courts—whether adopted by the University of Michigan, the United Steelworkers or the Chicago Police Department—have always involved large enough numbers that their sponsors can at least pretend that the policy is intended to address a balance of a given workplace or environment. A law firm’s selection of a relatively small number of lawyers to work with a particular client is different in kind. The firm is not even arguably acting to remedy the effects of societal discrimination (or its own past discrimination) in its own workplace. It is merely meeting the client’s expressed preferences regarding race and/or gender, and it is doing so, inevitably, on a case by case basis.

In his article “Voluntary Affirmative Action in Employment for Women and Minorities Under Title VII of the Civil Rights Act: Extending Possibilities for Employers to Engage in Preferential Treatment to Achieve Equal Employment Opportunity,” Chris Engels reviews the concept and current law of voluntary affirmative action plans. His concept of voluntary plans “includes all plans instituted without any legal requirement imposed upon the private employer to engage in any kind of preferential treatment.”\textsuperscript{104} Engels proposes that “the employer should be granted much more leeway in determining whether it is justified in instituting an affirmative action plan,”\textsuperscript{105} and lays out a two-part test for Courts to use. First, he says, the courts should ask “whether the employer’s work force was manifestly imbalanced as compared to the composition of the general area labor market.”\textsuperscript{106} If the answer is in the affirmative, courts should then “determine whether sufficient room is left for the advancement and participation of the non-beneficiaries of the plan.”\textsuperscript{107}

\textsuperscript{105}. \textit{Id.}
\textsuperscript{106}. \textit{Id.} at 813.
\textsuperscript{107}. \textit{Id.}
Engels’ proposal has yet to be adopted by the courts. But even if it were, it would not help Makeus Lotsuf Munnie LLP. The firm’s workforce was not manifestly imbalanced as compared to its peers. And—even if it had been—the firm’s response to a single RFP does nothing to address that imbalance. Finally, once the firm responds as it has, there is, by definition, no room for Will’s advancement. Engels’ proposal—and affirmative action, generally—is an interesting and controversial subject. A firm’s assignment of a specific lawyer to a specific account because of his race (or her gender), however, simply is not an “affirmative action” decision, and there is no good reason to pretend that it is.

V. CONCLUSION

This is not to say that law firms should not strive to employ more minority and female lawyers. There is an undeniable dearth of both groups at law firms. In Women in American Law: The Struggle Toward Equality from the New Deal to the Present, Judith A. Baer wrote of the obstacles women face not only in law school, but in law firms, in court, and from other lawyers generally. For every additional hurdle, there are fewer lawyers who will attempt to climb it. According to the National Association for Law Placement (NALP), only about seventeen percent of partners at major law firms last year were women and only about four percent of partners were minorities. The absence of more women and more minorities in the top positions at law firms is troubling and should be addressed. Law firms may want to change their internal policies that discourage so many young women and minority associates from staying at the firms for the duration of their careers. Exploring courses of action such as instituting a better mentor system for young associates, providing on-site day care facilities and allowing employees to be flexible and work from home part-time would certainly encourage at least some young lawyers to stay on with a firm and advance into its upper ranks.

110. In his recent study of minority recruitment and advancement at large law firms in the United States, Professor Richard H. Sander concludes that law firms hire minority associates with lower grades than their white peers to ensure diversity. According to Professor Sander, because these white associates had higher grades than their minority counterparts during law school, this inevitably results in minority lawyers’ failure to advance because they are competing with peers who are simply more qualified. Richard H. Sander, The Racial Paradox of the Corporate Law Firm, 84 N.C. L. REV. 1769 (2005-06). While this study has been met with some criticism, many hope that Professor Sander’s findings and data will open up the discussion to the problem of minority advancement at law firms nationwide. See Liptak, supra note 13.
It is a considerable leap, however, to seek to address this problem by permitting firms to rely on an explicit demand from their clients that they assign minority and female lawyers to the clients' accounts. The clients' motives may be good. The law firms' response is undoubtedly entirely driven by economic advantage and not by prejudice. But this very question was addressed in 1964 and in the BFOQ cases. The decision then was that a legitimate economic justification for racial discrimination was not a good defense against an employee victimized by that discrimination. If that judgment is going to change, then it is up to Congress—not the Association of Corporate Counsel—to change it.