Washington State Solicitor General Noah Purcell

Now that Directive 98-01 is Rescinded, What Now?

Role of the AG's Office

- Deep commitment to diversity, equity, inclusion
- Created Civil Rights Division
- Created Racial Equity Unit
- Significantly improved attorney diversity

Role of the AG's Office

- We control affirmative litigation, e.g., civil rights
- Primary role is advising and representing clients: hundreds of state agencies and boards
- In that role, we give advice, clients make policy
- We give options-based advice, explaining risks, not dictating what they do

Status of Affirmative Action in WA

- Affirmative action programs can be used but must be carefully designed

- Limitations come from state and federal law

Federal Law

- Pre-dates I-200 and applies to the state and all local governments in Washington

- Allows limited use of affirmative action in contracting, higher education, and hiring, but imposes stringent requirements

- "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. V. Pena*, 515 U.S. 200, 227 (1995).

Federal Law on Contracting

- State must specifically identify the industry in which discrimination is occurring (broad categories are insufficient) and who is facing discrimination.

- "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Croson*, 488 U.S. at 504.

Federal Law on Contracting

- To meet the standards just described, the State can use a "disparity study."

- State has conducted several disparity studies, and others are in progress or coming soon.

Federal Law on Contracting

- Race-conscious measures "may only be used as a last resort." *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 519 (1989).

- Quotas are prohibited, but flexible goals are allowed if the standards above are met.

Federal Law Higher Ed

- *Regents of University of California v. Bakke*, 438 U.S. 265 (1978): Any racial classification is subject to strict scrutiny. Promoting diversity in higher education is a compelling interest, but quotas are not an acceptable approach. Race can be used as a "plus factor."

Federal Law Higher Ed

- *Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016): Public universities can use affirmative action if they don't use quotas or fixed percentages and they show that race-neutral alternatives that are "available and workable" are insufficient.

- 4-3 decision, authored by Justice Kennedy. (Scalia had died, Kagan was recused.)

Federal Law Higher Ed

- Two cases pending at US Supreme Court attack use of affirmative action at Harvard and UNC
- WA joined 19 other states in supporting Harvard and UNC's affirmative action programs
- Court may overturn or limit prior decisions allowing affirmative action in higher ed

Federal Law on Hiring

- Under Title VII, employers may not discriminate against any individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

- Title VII prohibits the use of protected classifications as a "motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §2000e-2(m).

Federal Law on Hiring

- Employers can use race or gender as factors in hiring if doing so is necessary to avoid a "disparate impact" based on race or gender.

- Before employing race-conscious measures, employer must have a "strong basis in evidence" to believe they would otherwise violate Title VII's disparate impact rules. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

State Law

- In 1998, Washington voters passed Initiative 200.

- I-200 said: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” RCW 49.60.400(1).

State Law

- In the Voter's Pamphlet, I-200 supporters said:

  "Initiative 200 does not end all affirmative action programs. It prohibits only those programs that use race or gender to select a less qualified applicant over a more deserving applicant."

- I-200 did not repeal preexisting statutes, like Chapter 39.19, authorizing affirmative action

State Law

- Governor Locke then issued Directive 98-01, interpreting and implementing Initiative 200.

- The Directive addressed contracting, hiring, and education.

State Law

- Directive 98-01 interpreted I-200 to mean:
  - "Race, sex, color, ethnicity and national origin may not be used in the final selection of a bidder for a public contract."
  - "Race, sex, color, ethnicity and national origin may not be used in the final selection of an applicant for public employment."
  - "Preferences in admissions based on race, sex, color, ethnicity and national origin should be discontinued."

State Law

- In 2003, the Washington Supreme Court interprets I-200 only to "prohibit[] reverse discrimination where race or gender is used by government to select a less qualified applicant over a more qualified applicant." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1*, 149 Wn.2d 660, 689-90, 72 P.3d 151 (2003).

State Law

- 2017: our Office issued AGO Opinion 2017 No. 2:

- The question: "Does Initiative 200 prohibit the State from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities?"

State Law

- Our answer: “Initiative 200 does not categorically prohibit all uses of race- or sex-conscious measures in state contracting. The measure allows the use of measures that take race or gender into account in state contracting without elevating a less qualified contractor over a more qualified contractor. In narrow circumstances, an agency may be allowed to use a narrowly tailored preference based on race or sex when no other means is available to remedy demonstrated discrimination in state contracting. State agencies may also employ race- or sex-based preferences when necessary to do so in order to avoid losing eligibility for programs providing federal funds.”

State Law

- For example: “For example, consistent with [I-200], an agency could potentially rank applicants as “exceptionally well qualified,” “well qualified,” “qualified,” and “not qualified,” and use race or gender as a tiebreaker between applicants who fell within the same category.”

State Law

- In 2022, Governor Inslee rescinds directive 98-01 and issues three new executive orders

- EXECUTIVE ORDER 22-01 (January 7, 2022) - Equity in Public Contracting
  - Implements Measures for Equity in Public Spending for Cabinet State Agencies, including data collection, outreach efforts, and other steps

- EXECUTIVE ORDER 22-02 (January 17, 2022) - Equity in State Government
  - Focuses on four main public sector areas: contracting, employment, education, and services

- EXECUTIVE ORDER 22-04 (March 21, 2022)- Implementing the Washington State Pro-Equity Anti-Racism (PEAR) Plan & Playbook
  - Office of Equity to create Plan to “bridge opportunity gaps and reduce disparities so everyone in Washington flourishes”

State Law

- Governor Inslee's rescission of Directive 98-01 makes additional options available to agencies.

- Governor Inslee's order does not change federal law or eliminate I-200.

Bottom Line

- Federal law allows limited use of certain forms of affirmative action in state contracting, hiring, and higher education
- I-200 restricts the options available but does not eliminate the State's ability to use affirmative action
- I-200 allows use of affirmative action to select among equally qualified bidders/applicants, where there is no other way to remedy demonstrated discrimination, or where required by federal law
- Implementing affirmative action programs requires careful analysis and planning to withstand legal challenges

Questions?