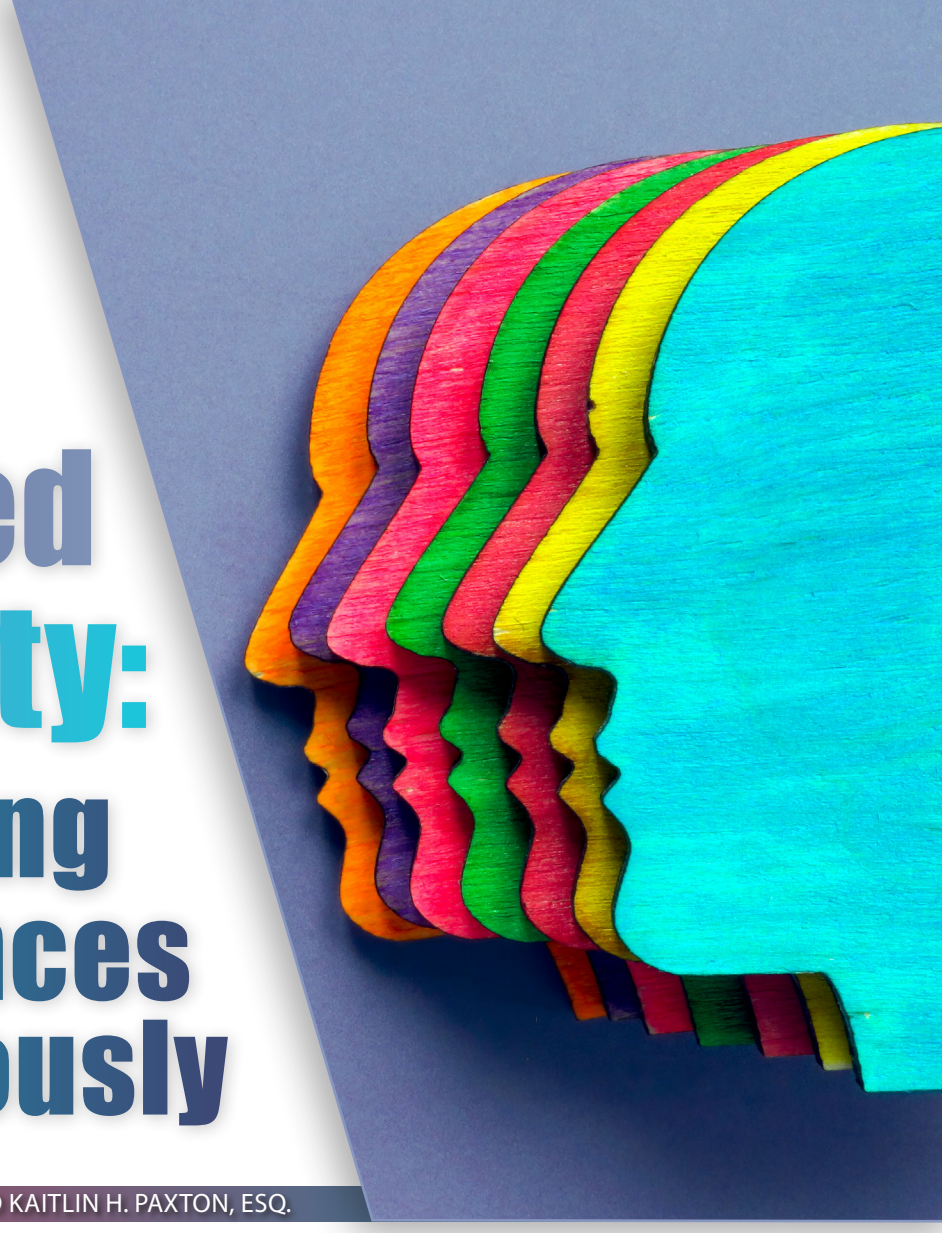

Committed to Diversity: Using Hiring Preferences Cautiously

BY SCOTT M. ABBOTT, ESQ., AND KAITLIN H. PAXTON, ESQ.

When Frances McDormand won the Best Actress award at the Academy Awards in 2021, she concluded her acceptance speech with two words: "Inclusion Rider." An inclusion rider is a provision in an actor's or filmmaker's contract that requires a certain level of diversity among casting and production staff. Celebrities like McDormand are known for using their public platform to promote awareness of many causes. Often, they are rooted in controversy. In this instance, however, she was addressing the need for increased diversity in her industry. Were her comments controversial? The answer may depend on how you view the issue of hiring preferences.

Achieving employment diversity is hardly a new concept. Our nation has an unfortunate history of marginalizing and underrepresenting various minorities. Though we have made great strides toward addressing these imbalances, they still persist today. As public consciousness of the problem has increased, so too have the efforts to correct it. Title VII of the landmark Civil Rights Act of 1964 made it unlawful for employers to discriminate against (*i.e.,* not hire) individuals based on their protected class, including race, color, creed, national origin, religion, or sex. Other laws soon followed, offering protections for age, pregnancy, and disability.

Many prudent employers have policies promoting equal opportunities in employment and broad statements condemning discrimination. Nevertheless, not all workplaces are as diverse as they would like. Many employers would welcome the opportunity to hire more diverse candidates, but they often lament the lack of diversity among applicants. Some employers have engaged in laudable efforts to increase diversity through specific community outreach and targeted recruitment efforts. This increased focus on diversity has led many employers to include diversity goals in their mission statements and strategic planning. Others have implemented specific Diversity, Equity, and Inclusion (DEI) metrics. Though many employers are committed to achieving a diverse work force, their efforts sometimes fall short.

Even the world of professional sports is not immune to this problem. The NFL established its Rooney Rule in 2003, requiring that at least one minority applicant be interviewed for

CONTINUED ON PAGE 22

CONTINUED FROM PAGE 21

Committed to Diversity: Using Hiring Preferences Cautiously

head coach positions. Today, however, there are still only five minority coaches in the entire 32-team league. In February 2022, Brian Flores, former head coach of the Miami Dolphins, filed a class-action lawsuit against the NFL and several teams, alleging racial discrimination. The apparent catalyst for Flores' suit was a series of text messages he received from another coach, advising that the New York Giants had already selected another head coach candidate before *any* minority applicants were interviewed, including Flores. Flores' suit now raises the important issue of tokenism. In recognition of this underrepresentation, the NFL has recently expanded the Rooney Rule. Specifically, for the 2022 season, all teams are now required to hire an offensive assistant coach who is either female or a member of an ethnic or racial minority.

Though the goal of hiring preferences is admirable, the execution can be problematic. Consider, for example, the seminal case of *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the university's medical school sought to increase representation of "disadvantaged" students, both economically and educationally. The school allowed applicants to identify whether they were considered disadvantaged. If so, no GPA minimum applied to them (as opposed to a 2.5 GPA for all other applicants), and they were not rated against regular applicants. Taking the issue one step further, the school established a specific number of special admissions candidates who had to be admitted (16 out of 100 students).

Bakke was a white male applicant who was rejected for admission even though there were still slots open under the special admissions program. Instead, those slots were filled by applicants with lower ratings than Bakke. Objecting to this racial and ethnic "quota," Bakke sued.

> "Many employers would welcome the opportunity to hire more diverse candidates, but they often lament the lack of diversity among applicants."

The U.S. Supreme Court's opinion in *Bakke* reflects the tension between those who support and condemn hiring preferences. While *Bakke* was not an employment case, it is instructive as it parallels the typical employment context where multiple applicants compete for selection to limited positions. Ultimately, the *Bakke* court ruled in favor of Bakke, ordering the medical school to admit him. Although the court acknowledged the school's diversity objective, it stated, "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307.

Furthermore, the *Bakke* court addressed the fallout the special admissions program had on other applicants. "The purpose of helping certain groups … does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.* at 310.

In the end, the *Bakke* decision took issue with the school's rigid application of race or ethnic background to the overall admissions process. While the court stated that such factors "may be deemed a 'plus' in a particular applicant's file, … it does not insulate an individual from comparison with all other candidates." *Id.* at 317.

The *Bakke* case illuminated the issue of how far an organization could go legally to correct racial or other protected class imbalances. Almost a decade later, the U.S. Supreme Court again confronted the issue in the employment context in *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987). In *Johnson*, a male employee sued his employer for sex discrimination under Title VII when he was passed over for a promotion for a less-qualified female applicant.

In *Johnson*, the employer voluntarily implemented an affirmative action plan (AAP) to increase representation of minorities and women in its workforce. The AAP established no quotas, and no specific number of positions were earmarked for any particular group. The male plaintiff scored second, and the

female who was promoted scored third. The AAP allowed for the consideration of an applicant's sex in the hiring process.

The Supreme Court found that the AAP was consistent with Title VII. In particular, the *Johnson* Court stated that "sex is but one of several factors that may be taken into account in evaluating qualified applicants." *Id.* at 641. In upholding the AAP, the court further noted that it represented a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women." *Id.* at 642.[1]

In view of cases like *Johnson*, many employers now question amid increased DEI awareness whether they are required to implement AAPs to achieve workplace diversity. Other than federal contractors or subcontractors, formal AAPs are not required.[2]

In Nevada, while there are broad prohibitions regarding discrimination in employment, employers are not required to give preferential treatment to individuals due to workforce imbalances. NRS 613.400. However, Nevada law specifically allows private employers to implement hiring preference policies for veterans and their spouses. NRS 613.385.

While many would support increased employment opportunities for veterans and other protected classes, the view may be quite different for someone who is passed over and believes they are better qualified. As a result, support for hiring preferences rests in the eye of the beholder.

Diversity and inclusion are unquestionably laudable objectives. However, employers need to avoid potential overcorrection. DEI initiatives, if not carefully implemented, can leave other individuals feeling unwelcome or at fault. Expressing a preference necessarily excludes other options. In the employment context, there are many capable applicants deserving of consideration. As the Supreme Court noted, an applicant's protected class may be deemed a "plus" but should not obviate comparison to other applicants. Achieving workplace diversity is certainly an important goal. How we get there, however, can be challenging and controversial.

ENDNOTES:

1. The Nevada Supreme Court used a similar analysis of AAPs in *University & Community College Sys. of Nevada v. Farmer*, 113 Nev. 90, 930 P.2d 730, 735 (1997).
2. Exec. Order 11246, as amended, 30 Fed. Reg. 12319 (September 24, 1965).

SCOTT M. ABBOTT is the managing partner of the law firm of Kamer Zucker Abbott, which exclusively represents employers in labor and employment matters. He has extensive experience advising and counseling clients, and defending employers against claims of discrimination, harassment, retaliation, wrongful termination, and wage/hour violations before all courts and government agencies. Abbott can be reached at sabbott@kzalaw.com or 702-259-8640.

KAITLIN H. PAXTON is an associate attorney with Kamer Zucker Abbott. She devotes her practice to representing employers in a variety of labor and employment matters, including union elections, collective bargaining, employment handbooks, policies, and contracts, training, and litigation defense. Paxton can be reached at kpaxton@kzalaw.com or 702-259-8640.