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The Significance of Statistical Significance: Ninth Circuit Clarifies Usefulness of Statistical Evidence When Implementing Pay Equity Adjustments in Rudebusch v. Hughes

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THE SIGNIFICANCE OF STATISTICAL SIGNIFICANCE: NINTH CIRCUIT CLARIFIES USEFULNESS OF STATISTICAL EVIDENCE WHEN IMPLEMENTING PAY EQUITY ADJUSTMENTS IN *RUDEBUSCH V. HUGHES*[1]

I. INTRODUCTION

In *Rudebusch v. Hughes*,[2] the Ninth Circuit held that a university president, although in violation of an equal protection claim, was immune from the action after implementing a "pay equity" plan among faculty members.[3] The plan increased the salaries of women and minority professors at Northern Arizona University (NAU) while leaving the salaries of white male professors untouched.[4] Also at issue was a Title VII claim against the University, which the court ultimately remanded to the lower court to decide a factual issue.[5] Most importantly, the court clarified that evidence of discrimination that is not statistically significant cannot be relied upon, on its own, when implementing pay equity adjustments.[6]

The main issue this Comment addresses is whether the court was correct in granting NAU's President qualified immunity. In answering this important question, the surrounding circumstances of the decision to implement the plan must be examined, as well as the law at the time of implementation. After taking the findings of these inquiries together, this Comment concludes that NAU's President did not meet the required standard for qualified immunity.

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1. 313 F.3d 506 (9th Cir. 2002).
2. *Id.*
3. *Id.* at 525.
4. *Id.* at 510.
5. *Id.*
6. *Id.* at 518.

II. BACKGROUND AND PROCEDURAL HISTORY

As a recipient of federal funding, the government required NAU to implement and maintain an affirmative action plan.[7] The plan adopted by NAU mandated increases in recruitment and retention, as well as parity in all areas of employment and pay between non-minority and minority/women faculty.[8] As part of the plan, NAU was required to regularly review its figures and to remedy any disparities or inequities within one year.[9] Non-compliance with the plan could have resulted in the cancellation, termination, or suspension of federal funding.[10] As President of NAU, Dr. Eugene Hughes was ultimately responsible for the compliance.[11]

Despite efforts to increase and retain minority faculty, in 1993 NAU had reportedly lost twice as many minorities as it had hired during the previous academic year.[12] Furthermore, Hughes discovered that pay inequity was also present—in 1989, female faculty made an average of $8,000 less per year than male faculty, and minorities made an average of $6,700 less than non-minority faculty.[13]

In order to comply with NAU's affirmative action program, Hughes felt "compelled" to take action to eradicate the pay disparities.[14] Since 1986, NAU produced an annual report authored by the head of its office of institutional research, Dr. Stephen Chambers.[15] The report included the results of a regression analysis that determined to what extent discrimination played a role in the determination of faculty salaries.[16] The report concluded that a statistical difference did exist with regard to gender and ethnic pay equity, and this difference could be eliminated with salary adjustments.[17] Hughes then used Chambers' analysis and made

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7. *Id.* at 510.
8. *Id.*
9. *Id.*
10. Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. § 2000(e) (2000).
11. *Rudebusch*, 313 F.3d at 510.
12. *Id.* at 511.
13. *Id.*
14. *Id.* at 512.
15. *Id.* at 511.
16. *Id.* at 511–12.
17. *Id.* at 512.

increases of $207,613 to female and minority male faculty members whose salaries fell below the predicted salary of a similarly situated white male faculty member.[18] No non-minority men were granted salary increases, even those with salaries below their predicted level.[19]

The salary adjustments triggered Rudebusch, an NAU faculty member, along with a class made up of non-minority and female faculty, to bring an equal protection suit against Hughes under forty-two United States Code Sections 1981 and 1983.[20] In addition, Rudebusch, along with a class of non-minority male professors, sued NAU and the Arizona Board of Regents (Regents) under Title VII.[21]

In the district court, Hughes responded to the equal protection violation by moving for summary judgment on the grounds of qualified immunity.[22] The court granted the motion in part, but reserved the ultimate decision for a jury trial because factual issues regarding Hughes' actions were in dispute.[23] The jury ultimately found in favor of Hughes.[24] With respect to the Title VII charges against NAU and the Regents, the district court ruled that the pay adjustments did not "unnecessarily trammel" Rudebusch's rights, but reserved for a jury trial the issue of whether a "manifest imbalance" occurred.[25] The jury found in favor of NAU and the Regents, and Rudebusch's claims were dismissed.[26]

III. SYNOPSIS OF COURT'S DECISION

A. Equal Protection Analysis Under Saucier v. Katz

The Ninth Circuit first analyzed the equal protection claim against Hughes, where he asserted the defense of qualified immunity.[27] This defense, if effective, would make Hughes immune

18. *Id.* at 513.
19. *Id.*
20. *See id.*; see also 42 U.S.C. §§ 1981, 1983 (2000).
21. The Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2000).
22. *Rudebusch*, 313 F.3d at 513.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

from standing trial.[28] The U.S. Supreme Court recently clarified the proper qualified immunity analysis in *Saucier v. Katz*.[29] Under this analysis, the court utilized a two-part test. The first part is the threshold question: "'[I]n the light most favorable to the party asserting [the] injury, do the facts alleged show the officer's conduct violated a constitutional right?'"[30] Then, if a constitutional right was determined to be violated, the second inquiry is "whether the law was so clearly established that 'a reasonable official would understand that what he is doing violates that right.'"[31]

Following the test set forth in *Saucier*, the court first determined that a constitutional right had been violated as a result of the pay adjustments.[32] The court recognized the general rule established by the Supreme Court that race-based classifications must withstand strict scrutiny.[33] With regard to racial classifications, a governmental interest is deemed sufficiently compelling only where "'actual, identifiable discrimination has occurred.'"[34] The court further recognized that in situations where statistical evidence is used to identify discrimination, as in the case at hand, such evidence could be an "invaluable" resource.[35]

Hughes brought two sources of evidence forward in support of his motion for summary judgment: (1) the Chambers report and (2) the 1993 affirmative action summary report.[36] The court, utilizing the *Saucier* test, found the Chambers report to be an inadequate piece of evidence to rely upon for finding prima facie discrimination.[37]

The first inadequacy was that the study indicated that the highest single pay disparity was a mere 2.0 standard deviations from the

28. *Id.* at 514 (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

29. 533 U.S. 194 (2001).

30. *Rudebusch*, 313 F.3d at 514 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2000)).

31. *Id.* (quoting *Saucier*, 533 U.S. at 202).

32. *Id.*

33. *Id.* ("[T]here must be a compelling governmental interest in employing a racial classification, and the classification must be narrowly tailored to achieve that interest." (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989))).

34. *Id.* (quoting Coral Construction Co. v. King County, 941 F.2d 910, 916 (9th Cir. 1991)).

35. *Id.* at 515 (quoting *Coral Construction Co.*, 941 F.2d at 918).

36. *Id.*

37. *See id.* at 515–16.

predicted salary.[38] Although there is no threshold in which statistical evidence is sufficient to infer discrimination, Ninth Circuit precedent has, in a Title VII case, rejected the idea that standard deviations of 1.3 and 2.46 alone were sufficient to infer discrimination.[39]

Secondly, the court found problematic the fact that, although over half the minority faculty made less than the predicted salary, a very large percentage of white male faculty also made less than the predicted amount.[40] The court interpreted this fact as indicating some other factor may be to blame in explaining the imbalances.[41]

Finally, the court viewed the calculations of the salary adjustments as problematic,[42] specifically, those that were made in reliance upon the Chambers Report. The court considered the Chambers Report to be flawed because it did not account for certain performance factors, such as academic credentials, performance, merit, teaching, etc.[43] The court determined that the strict scrutiny standard could not be satisfied without taking into consideration these individualized variables with respect to each faculty member.[44] In fact, the court made this determination notwithstanding the Supreme Court's guidance that "the propriety of controlling for particular variables in a regression analysis goes to weight rather than admissibility."[45]

The court not only viewed the Chambers report as inadequate evidence of discrimination, but also deemed the 1993 affirmative action report as insufficient.[46] The figures in that report indicated very low levels of minority retention among minority faculty

38. *Id.* at 515; *see* also Richard E. Biddle, *Disparate Impact Analysis with Small Samples*, CAL. LAB. & EMP. L.Q. (Fall 1995), *available at* http://www.biddle.com/resources/articles/disparatesmall.htm (last visited July 30, 2003). On a perfectly normal distribution curve, approximately 95% of the sample will be within two standard deviations of the mean. In most situations, statisticians determine 1.96 standard deviations to be statistically significant; the U.S. Supreme Court has rounded this to a range of 2 to 3 standard deviations.

39. *Rudebusch*, 313 F.3d at 515 (citing Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 551 (9th Cir. 1982)).

40. *Id.* at 516.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* (citing Bazemore v. Friday, 478 U.S. 385, 400 (1986)).

46. *Id.* at 517.

members at NAU.[47] However, this alone was viewed as a weak indication of discrimination. The low minority retention could have been due to many reasons and the report did not attempt to isolate them, let alone attribute it to discrimination.[48] Therefore, based on the lack of clear evidence of discrimination, the court determined that Rudebusch established an equal protection violation.[49]

Upon concluding that an equal protection violation had occurred, the court applied the second step of the *Saucier* test: "whether a 'reasonable official' in Hughes' position 'would understand that what he is doing violates that right.'"[50] Based on this step, the court determined that Hughes should be granted qualified immunity mainly because the law regarding pay equity was not clearly established at the time he decided to make the pay adjustments.[51]

In order to follow the precedent of *Saucier* as closely as possible, the court highlighted the difference between the general rule, that racial classifications must survive strict scrutiny, from the more specific issue of pay equity.[52] Although recognizing that many salary discrimination cases exist, the court noted that most lie within the context of Title VII as opposed to equal protection.[53] The court noted that within the equal protection context, courts have not considered whether pay adjustments resulting from perceived discrimination in minority salaries violate the rights of those non-minorities whose salaries are not considered for adjustment.[54]

In addition to the lack of clearly established law, the court also took into account the information that was available to Hughes at the time he made the decision to adjust the salaries. He did not have the "after-the-fact" Gantz/Miller study,[55] and he was under pressure

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).
51. *Id.* at 517–18.
52. *See id.* ("[D]etermining whether the law was clearly established 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" (quoting *Saucier*, 533 U.S. at 201)).
53. *Id.*
54. *Id.*
55. The Gantz/Miller study was conducted subsequent to the Chambers Report and after President Hughes implemented the salary adjustments and had left the University. The study criticized several aspects of Chambers'

from the U.S. government to adhere to NAU's affirmative action program.[56] Therefore, recognizing the purpose of the qualified immunity defense, "'to protect officials who are required to exercise their discretion,'"[57] coupled with the lack of clearly established law and the information available to Hughes, the court determined that qualified immunity against Rudebusch's equal protection claim was appropriate.[58]

B. Title VII Analysis Under Johnson v. Transportation Agency

Although Hughes was granted qualified immunity from the equal protection claim, the Title VII claim against NAU, brought by Rudebusch and a class of forty white male professors, still remained for consideration. The claim was that NAU violated Title VII by failing to consider pay adjustments for the white male professors whose salaries were below the predicted levels.

In considering the Title VII claim, the court recognized that neither the Supreme Court nor the Ninth Circuit had "examined the Title VII parameters for analysis of adjustments made to achieve pay equity."[59] The court therefore analyzed the claim based upon the Supreme Court's guidance in affirmative action hiring and promotion in the Title VII context.[60] In this context, the Supreme Court held in *Johnson v. Transportation Agency*,[61] that "sex and race can be considered for purposes of hiring and promotion of women and minorities when such affirmative action is justified by the existence of a 'manifest imbalance.'"[62] Moreover, the Supreme Court distinguished between equal protection cases and Title VII cases,

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methodology and also found that the pay differences between majority and minority faculty was not statistically significant. Rudebusch used this study as evidence that no discrimination was present prior to the pay adjustments, and therefore, that equal protection and Title VII violations had occurred. *See id.* at 512–13 (describing Gantz/Miller study).

56. *Id.* at 519.

57. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

58. *Id.* at 510.

59. *Id.* at 520.

60. *Id.*

61. 480 U.S. 616 (1987).

62. *Rudebusch*, 313 F.3d at 520 (quoting Johnson v. Transp. Agency, 480 U.S. 616, 631 (1987)).

stating that the former requires evidence of actual discrimination while the latter does not require the same degree of proof.[63]

Johnson further set forth two additional factors for Title VII scrutiny. First, hirings and promotions cannot "'unnecessarily trammel . . . the rights of male employees or create . . . an absolute bar to their advancement.'"[64] Second, remedial action cannot be designed to do more than "'attain a balance.'"[65] Although acknowledging that differences exist between affirmative action in promotions and actions that attempt to remedy pay inequities, the court determined that the three *Johnson* factors should be used to evaluate the present pay adjustment claim.[66]

The first *Johnson* factor—whether a manifest imbalance existed with respect to minority and female salaries—was not addressed by the court because a jury determined that an imbalance did exist.[67] Therefore, the court first analyzed the second factor—whether the pay adjustments unnecessarily trammeled the rights of the white male professors.

To determine the "unnecessarily trammeled" factor, the court distinguished the pay equity adjustments at issue from the typical affirmative action case.[68] It reasoned that affirmative action typically involves competition for a finite position or promotion, while with the pay adjustments additional funds would not be available for salary increases *but for* NAU's decision to rectify the perceived racial imbalances.[69] Therefore, the gain in salaries to the minority and female faculty was not to the detriment of anything the white male faculty would have expected. The court further stated that under Rudebusch's argument, there could never be any "catch up" adjustments without a simultaneous adjustment of the entire pool,

63. *See id.*; *see also Johnson*, 480 U.S. at 632 ("A manifest imbalance need not be such that it would support a prima facie case against the employer . . . since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans.").

64. *Rudebusch*, 313 F.3d at 520 (quoting *Johnson*, 480 U.S. at 637–38).

65. *Id.* (quoting *Johnson*, 480 U.S. at 639).

66. *Id.* at 520–21.

67. *Id.* at 521.

68. *Id.*

69. *Id.* at 522.

resulting in the "perpetuation, not [the] elimination, of pay disparity."[70]

The court then analyzed the third *Johnson* factor, whether the pay adjustments went beyond merely attaining a balance. The Supreme Court held in *Steelworkers v. Weber* that, under Title VII, remedial action is only valid "if it is designed 'to eliminate a manifest racial [or gender-based] imbalance.'"[71] The court again used *Johnson* as a guide and concluded that "implicit in [the above] requirement is an inquiry whether the University may have impermissibly gone beyond 'attaining a balance' in making its adjustments."[72]

In *Rudebusch*, the court weighed the fact that, although a large group of minority and female professors were earning less than the predicted salary of a similarly situated white male professor, more than half the white male professors were also earning below the predicted salary.[73] The court stated that "the law of averages" dictates that some of a group will necessarily fall above the mean and some will fall below.[74] Furthermore, it stated:

> Just as these realities of averages . . . would not necessarily justify pay adjustments for those white male faculty falling below predicted levels, the use of the mean predicted salary as a baseline for the pay adjustments given to minority and female faculty—even when a manifest imbalance otherwise exists—raises legitimate questions about the scope of the adjustments made.[75]

Since using the predicted salary of similarly situated white male faculty for the adjustments may have overcompensated the minorities and females who received them, the adjustments could be more than remedial. Therefore, the court determined that the third factor could not be decided on summary judgment and remanded the matter to the district court.[76]

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70. *Id.* at 523.
71. *Id.* (quoting Steelworkers v. Weber, 443 U.S. 193, 208 (1979)).
72. *Id.* (quoting Johnson v. Transp. Agency, 480 U.S. 616, 639 (1987)).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 524.

IV. WAS THE COURT CORRECT TO GRANT RUDEBUSCH QUALIFIED IMMUNITY?

At first glance, it may appear that the Ninth Circuit acted inconsistently in this case. The court ultimately established the rule that imbalances in salaries cannot be evidenced by salary disparities that are not statistically significant, and, absent other evidence, an official implementing a salary adjustment plan cannot rely upon such evidence.[77] Notwithstanding this rule, the salary adjustments made at NAU were primarily based upon the Chambers report.[78] The Chambers report, although not statistically significant evidence of discrimination, was relied on by Hughes to determine that racial and gender discrimination were present.[79] It was also used to determine the appropriate increases to minority and female salaries.[80] Nonetheless, the court granted Hughes qualified immunity against the equal protection action, emphasizing mainly that this rule was not clearly established at the time he implemented the salary adjustments.[81] Therefore, the inquiry that needs clarification is whether the court correctly claimed that the law was not sufficiently clear, and ultimately, whether it was correct to grant Hughes qualified immunity.

The rule the court used to determine whether qualified immunity applied to Hughes was "whether a 'reasonable official' in Hughes' position 'would understand that what he is doing violates [the] right.'"[82] The court clarified the rule by stating "that 'officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law.'"[83] Although the court recognized that the general strict scrutiny rule was well established, it went on to state that "the *specific* contours of the law pertaining to pay equity were not well developed or sufficiently clear at the time."[84] Following its

77. *Id.* at 518.
78. *See id.* at 512.
79. *See id.*
80. *Id.*
81. *Id.* at 517–18.
82. *Id.* at 517 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).
83. *Id.* (quoting Butz v. Economou, 438 U.S. 478, 507 (1978)).
84. *Id.* at 518 ("no qualified immunity only if 'contours of the right' are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))).

interpretation of *Saucier*, the court used this standard when it analyzed Hughes' immunity defense.[85] Based on Ninth Circuit precedent, however, the court may have applied the concept of "clearly established law" too stringently.

Judge Kleinfeld, dissenting, pointed out that the Ninth Circuit previously had not required a case *directly* on point for the law to be "clearly established."[86] He further stated that the "qualified immunity standard of clarity is met provided that the 'unlawfulness is apparent in light of preexisting law . . . .'"[87] Furthermore, even in the absence of an analogous law, "a right can be clearly established 'on the basis of common sense.'"[88] The Ninth Circuit similarly stated, in *Blueford v. Prunty,*[89] that "if the only reasonable conclusion from binding authority were that the disputed right existed, even if no case had specifically so declared, . . . officials would be on notice of the right and would not be qualifiedly immune if they acted to offend it."[90]

The Ninth Circuit similarly rejected another move to narrow the scope of "clearly established law" in *Robins v. Meecham,*[91] where it stated that since the "situation presents no new principles of which the officers could not have reasonably been aware," the law was considered "clearly established" and the officers were not granted qualified immunity.[92]

The above precedent signifies that the creation of the racial classifications alone should have been enough for Hughes to lose his qualified immunity defense. The law at the time clearly established that creating racial classifications without valid evidence of past discrimination was illegal.[93] Since Hughes only granted pay adjustments to individuals whose salaries were below their predicted

85. *See id.*
86. *Id.* at 530 (citing Giebel v. Sylvester, 244 F.3d 1182, 1189 (9th Cir. 2001)).
87. *Id.* (quoting *Giebel*, 244 F.3d at 1189).
88. *Id.* (quoting *Giebel*, 244 F.3d at 1189).
89. 108 F.3d 251, 255 (9th Cir. 1997).
90. *Id.*
91. 60 F.3d 1436 (9th Cir. 1995).
92. *Id.* at 1442.
93. *Rudebusch*, 313 F.3d at 526 n.3 (Kleinfeld, J., dissenting) (listing cases that have established that racial classifications violate equal protection).

levels and only if they were minorities and/or females,[94] he surely classified by race and/or gender. The majority de-emphasized this, however, because Hughes did not have the after-the-fact Gantz/Miller study and the law was "uncertain."[95]

The fact that Hughes did not have access to the Gantz/Miller study was given excessive weight, considering that the Chambers report itself conceded that the racial and gender disparities were not statistically significant.[96] Hughes presented no other convincing evidence that discrimination was actually present at NAU, and as University President, he should have known, or found out, that evidence that is not statistically significant cannot be confidently attributed to discrimination. This is especially relevant because the study did not include variables that would obviously affect salary, such as "academic credentials [i.e., whether or not a faculty member held a Ph.D.], performance, merit, teaching, research, or service."[97] The bottom line is, because racial classifications are illegal except when used for a non-discriminatory purpose, such as complying with an affirmative action program, evidence of discrimination must exist. Here it did not.

President Hughes should not have been granted qualified immunity on the equal protection claim. The law was sufficiently clear that an official could not classify based on race or gender without clear evidence of discrimination.[98] Furthermore, non-statistically significant evidence alone is not clear evidence of discrimination and Hughes should have reasonably known this before issuing the pay adjustments. However, what makes this case truly significant is that the court clarified the rule regarding pay equity adjustments beyond doubt. In the future, officials cannot use qualified immunity as a shield when they classify individuals based on race or gender using evidence of discrimination that is not statistically significant.

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94. *Id.* at 512.
95. *Id.* at 519.
96. *Id.* at 527 (Kleinfeld, J., dissenting).
97. *Id.* at 516.
98. *Id.* at 527 (Kleinfeld, J., dissenting).

V. IMPLICATIONS AT STAKE

Although this Comment criticizes the *Rudebusch* court's decision to grant qualified immunity to Hughes for implementing an affirmative action program based on a "faulty" regression analysis, the case's overall importance is great. It made the evidentiary standard on which to implement pay adjustments stricter, thereby ensuring a legitimate basis for carrying out affirmative action programs. In the long run, this result is instrumental for the legitimacy and, as a result, the survival of these programs.

Since its inception, affirmative action programs have been the subject of both criticism and praise. They have been molded by presidential administrations, courts, state and local governments, and by private companies. Advocates of affirmative action see it as a necessary means for offsetting, and perhaps redressing, the effects of current and past discrimination. Opponents argue that jobs and university admissions awarded based on racial characteristics rather than merit are unjust and counterproductive. The danger of employing affirmative action programs without clear evidence that they are needed is that these resentments will become more widespread, perhaps to the point of dismantling the programs altogether, even when they are needed.

Affirmative action programs potentially offer many benefits. They have been shown to increase minority integration into the workforce,[99] decrease the racial wage gap,[100] and increase minority human capital accumulation.[101] These positive effects illustrate the

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99. *See* Harry J. Holzer & David Neumark, *What Does Affirmative Action Do?*, 53 INDUS. & LAB. REL. REV. 240 (2000) (using data from both firms that practice affirmative action and those that do not, found that minority employment increased by about 10–15% when affirmative action was employed); *see also* Jonathon S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. ECON. PERSP. 47, 58 (1990) (reporting that in periods of decreased affirmative action enforcement, evidence indicates that minority employment is reduced).

100. *See generally* Jonathon S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439 (1984) (showing evidence that affirmative action may have a greater than 50% impact on decreasing the racial wage gap).

101. Although evidence exists that shows affirmative action has resulted in greater employment opportunities for minorities, there are no studies directly linking these increased opportunities to an increase in human capital accumulation. However, as a result of discrimination, lower expected returns for minorities of gaining certain employment qualifications can lead to under-

importance of retaining affirmative action as a legitimate anti-discrimination resource. Class-based pay raises and promotions, on the other hand (put into place where discrimination is not clearly exhibited), will only lead to litigation by excluded groups. These raises and promotions will create animosity among races and genders, and incite resentment among colleagues.

Despite the fact that affirmative action laws do not require organizations to hire less skilled minorities over more skilled majorities, organizations may feel compelled to "overcomply" with affirmative action laws. When a firm overcomplies, the marginal minority worker is less productive than the marginal majority worker. There could be various reasons why an organization might choose to overcomply: one might be a fear of litigation, another might be, as was the situation in this case, fear of losing federal funding.

When affirmative action is overcomplied with, however, serious detriments may follow. Instead of increases in minority human capital accumulation, affirmative action could dull the incentive for minorities to invest in greater levels of education. If the subjective probability of being hired or promoted rises at the same effort level as before, then minority human capital accumulation may be lower than in an economy with no affirmative action.[102]

Similarly, overcompliance with affirmative action could potentially backfire on the very individuals it is intended to help by creating new forms of discrimination. For instance, employee discrimination results when dissatisfied majority workers work less productively because they see the hiring of minorities as a form of reverse discrimination. Another strong criticism of affirmative action is the negative stigma it places on minorities who receive job

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investment in human capital accumulation. *See* Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AM. ECON. REV. 340 (1983).

102. *See* Stephen Coate & Glenn C. Loury, *Will Affirmative-Action Policies Eliminate Negative Stereotypes?*, 83 AM. ECON. REV. 1220 (1993) (arguing that affirmative action can reduce the incentives of minorities to invest in human capital); *see also* Charles Murray, *Affirmative Racism*, *in* DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLICIES OF INCLUSION 191 (Nicolaus Mills ed., 1994) (arguing that preferential treatment for blacks lowers the incentives for greater efforts, as minorities are rewarded for factors independent of those efforts).

offers over majority applicants.[103] Furthermore, there is an unfortunate tendency to blame affirmative action when a minority worker is hired over a majority worker. Whether or not the minority was more qualified often times remains unknown, but the program is nevertheless used as an excuse for why the majority worker was not hired.[104] This leads to two negative results. First, employee discrimination may be reinforced. Second, majority workers may view the hiring of minorities as reverse discrimination and may "shirk" in production.

Affirmative action programs began largely as efforts to review patterns of minority employment to find areas where under-representation of minorities existed.[105] When organizations identified these areas, they were to undertake efforts to actively seek out and recruit minorities into the work force, and create mobility programs to help them advance in the work force. These early programs, formed on the premise of non-discrimination, could be classified as outreach programs. Once minority applicants were brought forward, they were to be screened for actual hire on the basis of merit.

Around the time of the Nixon Administration, however, affirmative action programs emphasized racial preferences as opposed to outreach in hiring. The Philadelphia Plan, carried out in 1969, was the starting point for the establishment of "goals" and "timetables" for hiring a certain representation of minorities.[106] Current public opinion, however, strongly favors programs more

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103. Murray, *supra* note 102, at 207 (discussing the stigma hypothesis, stating that one of the "evil[s]" of affirmative action is that it "perpetuates an impression of inferiority.").

104. *See, e.g.*, Kevin T. Fowler, *Affirmative Action for the Better*, *in* MOTION MAGAZINE (Apr. 22, 1999), *at* http://www.inmotionmagazine.com/fowler.html (stating that "[t]he stigma associated with affirmative action is the public's perception that the applicant in [sic] incompetent" and are "only being selected because of race or gender.").

105. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000(e) (2003) (stating that federal contractors must "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.").

106. Women's History, *Affirmative Action Review*, http://womenshistory.about.com/library/etext/gov/bl_gov_aa_02.htm (last visited Aug. 13, 2003) [hereinafter Women's History].

closely resembling those that were originally implemented. For example, support for affirmative action drops when questions are asked in terms of "preferential treatment" or racial quotas, but rises when respondents are asked about implementing affirmative action "to overcome past discrimination."[107] The *Rudebusch* court helped maintain the original ideals of affirmative action by requiring that significant evidence of discrimination must be shown when taking a race and/or gender based action to comply with an affirmative action program.

VI. CONCLUSION

Although *Rudebusch* is not a typical affirmative action case, the Ninth Circuit used the case to clarify an important issue regarding the implementation of affirmative action programs. The court established that where evidence of discrimination is not statistically significant, and absent other evidence, an official cannot institute a pay equity plan in order to comply with an affirmative action program. Implementing such a program violates equal protection and qualified immunity is no longer a valid defense.

The result of the case makes sense from a public policy perspective as well. Reliance on "flawed" regression analyses when implementing affirmative action programs only weakens their legitimacy and does not serve affirmative action's original purpose—to eliminate discrimination.[108] Evidence exists that affirmative action, when implemented properly, achieves many positive results-from pay equity to increased minority education levels. Now is the time—when the programs are in such a state of flux—that the legitimacy of the programs must be upheld if they are to survive.

John Teske[*]

107. The Pew Research Center for the People and the Press, *Conflicted Views of Affirmative Action*, *at* http://people-press.org/reports/display.php3?ReportID=184 (May 14, 2003).

108. *See* Women's History, *supra* note 106, *at* http://womenshistory.about.com/library/etext/gov/bl_gov_aa_04.htm (last visited Aug. 18, 2003).

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