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Opinion No. 01-140

Application of Tenn. Code Ann. § 4-21-406(b)

QUESTION

Does Tennessee Code Annotated § 4-21-406(b)[1] take affirmative action plans out of the realm of discrimination law and contradict United States Supreme Court opinions, decided since the adoption and amendment of § 4-21-406(b), concerning the application of affirmative action plans?

OPINION

No. Section 4-21-406(b) of the Tennessee Code Annotated neither takes affirmative action plans out of the realm of discrimination law nor does it contradict United States Supreme Court opinions concerning the adoption of affirmative action plans. Instead, TENN. CODE ANN. § 4-21-406(b) is a statutory defense to a claim of employment discrimination in violation of the Tennessee Human Rights Act.

ANALYSIS

While the Tennessee Human Rights Act (THRA) prohibits both public and private employers from discriminating on the basis of race, color, religion, creed, sex, and age or national origin, the THRA also provides an exception to the prohibition against employment discrimination. The THRA states, "it is not a discriminatory practice" to discriminate on the basis of race, color, religion, creed, sex, age, or national origin, if it is pursuant to an affirmative action plan filed with and not disapproved by the Tennessee Human Rights Commission. TENN. CODE ANN. § 4-21-406(b). Of particular concern to the Commission is reconciling TENN. CODE ANN. § 4-21-406(b) with the United States Supreme Court decision in *Johnson v. Santa Clara County Transportation Agency*, 480 U.S. 616, 107 S. Ct. 1442 (1986). In *Johnson*, the Supreme Court applied the burden-shifting approach of *McDonnell-Douglas v. Green*, 411 U.S.

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[1] TENN. CODE ANN. § 4-21-406(b) provides as follows:

(b)It is not a discriminatory practice for a person subject to this chapter to adopt and carry out a plan to fill vacancies or hire new employees so as to eliminate or reduce imbalance with respect to race, creed, color, religion, sex, age or national origin, if the plan has been filed with the commission and the commission has not disapproved the plan.

792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to affirmative action plans, stating basically that such plans provide the requisite nondiscriminatory rationale thus shifting the burden back to the plaintiff to prove that the employer's plan is invalid. The Commission is concerned that by defining affirmative action plans as "not a discriminatory practice," Section 4-21-406(b)of the Tennessee Code Annotated sidesteps the *McDonnell-Douglas* analysis by taking such plans out of the realm of discrimination law and the THRA.

Section 4-21-406(b), however, does not take affirmative action plans out of the realm of discrimination law and the THRA. Rather, Section 4-21-406(b) provides a statutory defense to Tennessee employers who have discriminated pursuant to an affirmative action plan and have been charged with discrimination under the THRA or Title VII. *See* Charles R. Richey, *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts* (Federal Judicial Center Jan. 1988 ed.) C334 ALI-ABA 362. In addition, by defining affirmative action plans as "not a discriminatory practice," TENN. CODE ANN. § 4-21-406(b) states the same principle approved by the Supreme Court in *Johnson*, namely, that affirmative action plans may provide a nondiscriminatory reason for basing an employment decision on race or gender. Once the employer raises Section 4-21-406(b) as a defense to a plaintiff's prima facie showing of discrimination, the burden then shifts back to the plaintiff to demonstrate that the affirmative action plan is invalid.

Analysis of a claim made pursuant to the THRA generally follows the analysis of a Title VII claim. *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc*., 173 F.3d 988 (6th Cir. 1999). Thus, a Tennessee court considering an affirmative action plan in light of the THRA will likely follow the analytical directive of federal case law addressing Title VII and affirmative action plans. *See Eckard v. Chattanooga State Technical Community College*, 1991 WL 253305 (Tenn. Ct. App. 1991)(noting that the Tennessee legislature emphasized that passage of the human rights statute was intended to promote within the state the execution of the policies embodied in the federal civil rights acts of 1964, 1968 and 1972).

There is only one Tennessee case addressing the issue of affirmative action plans and the THRA. In *Eckard*, the defendant employer raised Section 4-21-406(b) as a defense to the plaintiff's claim of reverse discrimination under the THRA. The employer claimed that although race was a factor in appointing a black female to the position of director, this was not a discriminatory practice because the employer followed the affirmative action plan set out in *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986). The Tennessee Court of Appeals did not preclude the plaintiff's discrimination claim simply because Section 4-21-406(b) defines affirmative action plans as "not a discriminatory practice." Instead, the Court acknowledged that THRA claims are analyzed in the same manner as Title VII claims and applied the *McDonnell-Douglas* burden shifting approach. The Court held that the trial court correctly refused to grant a directed verdict to the employer on the issue of reverse race discrimination because there was a disputed issue of material fact as to whether the employer was acting in compliance with the affirmative action plan it raised as a defense. Other states that have addressed this

issue have reached the same result.[2]

In light of the cases discussed above and the fact that THRA claims are analyzed in the same manner as Title VII claims, TENN. CODE ANN. § 4-21-406(b) neither sidesteps the traditional analysis in employment discrimination cases nor does it take affirmative action plans out of the realm of discrimination law.

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[2] For example, the Oklahoma Discrimination in Employment Act has analogous language to Section 4-21-406(b). Section 1310 of the Discrimination in Employment Act provides in pertinent part, "However, **it is not a discriminatory practice** for a person...to adopt and carry out a plan to eliminate or reduce imbalance with respect to race, color, religion, sex, national origin, age, or handicap if the plan has been filed with the Commission under regulations of the Commission and the Commission has not disapproved the plan." 25 Okl. St. Ann. § 1310 (1985) (emphasis added). In *Frost v. Chrysler Motor Corporation*, 826 F. Supp.1290 (W.D. Okla. 1993), the defendant, faced with a Title VII reverse discrimination suit, alleged that it rejected the white plaintiff's application for a dealership because that particular dealership was reserved for a black person as part of the defendant's voluntary affirmative action program. Like the court in *Eckard*, the Oklahoma District Court also applied the *McDonnell-Douglas* burden shifting approach. The Court held that the plaintiff met its burden of showing that defendant's race-conscious affirmative action program was invalid.