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Talbert v. City of Richmond

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CASE COMMENTS

TALBERT v. CITY OF RICHMOND

The issue of race-consciousness in the classroom and in the workplace has produced more tension among Americans than any other issue in the past decade. In recent years, the United States Supreme Court has sanctioned race-conscious affirmative action programs in professional schools,[1] private employment,[2] and federally funded construction projects.[3]

One area where the Supreme Court has yet to address the issue of benign race classifications is in the public employment sector. The United States Court of Appeals, Fourth Circuit, in *Talbert v. City of Richmond*,[4] recently upheld[5] a race-conscious promotion program used by the Richmond, Virginia city police department.

Talbert, a white police officer, brought suit against the City of Richmond for alleged intentional discrimination against him on the basis of race. Talbert's claim was based on the city's failure to promote him from captain to major while promoting a black police officer with a lower test score.

The case arose when the city announced three vacancies for the rank of major. Eight candidates[6] for the positions were given an assessment test and were ranked in the order of their performance. Talbert ranked third on the assessment test. In a letter to the Director of Public Safety, the Chief of Police recommended the two highest ranked candidates for promotions. He then skipped over Talbert and the other white candidates to recommend Miller, a black officer whose test score was lowest.[7]

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[1] Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

[2] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[3] Fullilove v. Klutznick, 448 U.S. 448 (1980).

[4] 648 F.2d 925 (1981).

[5] The opinion was delivered on May 1, 1981.

[6] The city charter requires a "rule of five" as the procedure for promotions. The number of candidates considered for the promotions equals the number of vacancies plus five.

[7] Talbert's assessment score was 39.5 while Miller's score was 34.0. The 5.5 point difference was predictive of better performance by Talbert.

The Chief's letter briefly commented on each candidate.[8] In the letter, the Chief emphasized that a black officer would be advantageous to the department, especially in a city that has a 50% black population. In light of the Chief's recommendation, the Director promoted Miller.

In district court,[9] Talbert claimed that the promotion was unconstitutional because of the superiority of his test score. The court entered judgment for Talbert, reasoning that there was a 5.5 point difference between Talbert's and Miller's test scores and that there was a "much more glowing"[10] recommendation of Talbert as opposed to Miller. The court concluded that Miller was promoted only because of his race and ruled that such a consideration was impermissible. It held that the city and its officers had violated Talbert's constitutional right to be free of discrimination on the basis of race[11] and awarded him injunctive relief.[12]

The court of appeals,[13] reversed the district court decision, holding that the officials' action of promoting Miller was not "a pretext to cloak invidious discrimination against Talbert."[14]

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[8] In regard to Talbert, the Chief wrote:

> A very capable and efficient officer. A take charge type who can be relied upon to get the job done especially in the field. There is no doubt in my mind that he could function effectively as a Police Major and there would be no hesitancy in recommending his promotion if there is a future vacancy.

648 F.2d at 927.

In regard to Miller, the recommendation stated:

> A very steady, easy going individual who performs his assignments without fanfare. He has established a reputation for honesty, fairness, and impartiality. Captain Miller is the first black who has ever been in contention for promotion to Major. He has reached this plateau on his own merit. In a city with a population which is approximately 50% Black, I feel it would be to the city's advantage to have a man of his caliber and reputation in a top level policy making position. I do not feel that the point difference . . . is so great that we should side step this opportunity to promote a deserving individual and at the same time comply with the spirit and intent of the City's Affirmative Action Plan.

Id. at 927.

[9] United States District Court for the Eastern District of Virginia, at Richmond (D. Dortch Warriner, J.).

[10] 648 F.2d at 927.

[11] *Id.* at 928.

[12] Talbert was also awarded damages, costs, and attorney's fees.

[13] United States Court of Appeals, Fourth Circuit (Butzner, J.).

[14] 648 F.2d at 932.

Relying on the landmark case of *Regents of the University of California v. Bakke*,[15] the court held that the preferences in favor of minorities are necessary to promote the compelling interest of the city to achieve diversity in the police department. It sustained this reasoning on two points. First, the assessment test was not designed to govern the ultimate promotions. If it was, then the "rule of five" would be thwarted, and the candidates with the five lowest scores would be automatically eliminated.[16] More importantly, the court decided that the city officials legitimately took race into account on an individualized basis, in order to achieve a legitimate end.[17]

The standards used by the *Talbert* court were extracted directly from a trilogy of recent case law[18] dealing with equal protection and the fourteenth amendment. These cases set the standard for determining whether the city's action violated the Equal Protection Clause.

Washington v. Davis established that an intent to discriminate must be proven; a showing of adverse impact alone is not sufficient.[19] The Court in *Arlington Heights* also dictated that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[20]

Arlington Heights set forth four standards for determining whether purposeful discrimination was a "motivating factor:" (1) whether the act burdens one race more than another, (2) the historical background of the challenged decision, (3) the degree to which the action departs from normal substantive criteria, and,

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[15] *See* note 1 *supra*. In *Bakke*, Justice Brennan, joined by White, Marshall and Blackmun, upheld the constitutionality of the admissions program on the grounds that race could be a factor in government programs when side programs were necessary to remedy the effects of past discrimination. Justice Powell held that race may be a factor to consider when the government is attempting to correct past discrimination, but it may not be the sole factor in the selection process.

[16] 648 F.2d at 930. The evidence discloses that the test was designed to establish access to the eligibility list, not to determine the final appointment. In the past, the city had promoted a white officer to major whose score had been lower than Miller's.

[17] In other words, it was not unlawful for the city to consider Miller's race as a factor.

[18] Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); and Swain v. Alabama, 380 U.S. 202 (1965).

[19] 426 U.S. at 239.

[20] 429 U.S. at 265.

(4) the contemporaneous statements of those making the decisions.[21]

Due to these recent judicial developments in *Arlington Heights* and *Washington v. Davis*, the technique of measuring employment discrimination by disparate impact alone is no longer viable. In both cases, the Court found that evidence of disproportionate impact was relevant to the issue of discriminatory intent, but noted that it did not by itself indicate a constitutional violation.[22] Discriminatory intent must be shown by using the standards prescribed by *Arlington Heights*[23] in order to prove an equal protection violation.

On the broader question of whether race could ever be considered as a factor, there are deep divisions in the Court and society which have cast a shadow of uncertainty over the issue.[24]

One of the first cases to address the issue of benign race preferences was *DeFunis v. Odegaard*,[25] a 1974 case regarding law school admissions. Justice Douglas' opinion in *DeFunis* was the only opinion to reach the merits of the case.[26] Douglas opposed racial criteria in selections, even when dealing with so-called "benign" racial classifications.[27] Douglas believed that each individual, regardless of his race, has a right to be considered for admission in a racially neutral manner.[28] He justified this view on the theory that the Equal Protection Clause dictates elimination of racial barriers and not a reconstruction of them in order to mold a preconceived notion of an ideal society.[29]

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[21] *Id.* at 266-68.

[22] 426 U.S. at 239; 429 U.S. at 266. The Court in *Arlington Heights* said that "impact alone is not determinative and the Court must look to other evidence."

[23] 429 U.S. at 266-68.

[24] Justice Powell summed it up best in *Bakke* when he declared that "no issue since the Vietnam War has produced such bitter divisions among Americans as has the issue of racial preferences." 438 U.S. at 288.

[25] 416 U.S. 312 (1974).

[26] The majority of the Court found the case moot due to the fact that DeFunis had already been accepted to law school, and was about to graduate.

[27] 416 U.S. at 337.

[28] *Id.*

[29] For a further discussion, *see generally* Ely, "The Constitutionality of Reverse Racial Discrimination," 41 U. CHI. L. REV. 723 (1974); Lavinsky, "The Affirmative Action Trilogy and Benign Racial Classifications—Evolving Law in Need of Standards," 27 WAYNE L. REV. 1 (1980).

Three years after the *DeFunis* stalemate, the Court attempted to provide a resolution to the controversy in *Bakke*.[30] The *Bakke* decision was the first official recognition by the Court that the use of race was necessary to achieve the national goal of equal opportunity.[31]

In *Bakke*, a majority of the Court, for different reasons, held that even if a state institution is not under mandate to operate an affirmative action program, it is not absolutely barred from giving any consideration to race. Only five of the Justices reached the constitutional questions of the case, and they divided, four to one.

The decisive opinion in *Bakke* was delivered by Justice Powell. His opinion cast the fifth vote[32] for the majority that rejected the Davis program of limiting the number of places for which white applicants could compete.[33]

Justice Powell's constitutional discussion produced two main points. First, that no applicant can be excluded from consideration for any position on account of race, thus making "quotas" an impermissible means of assuring minority participation. Second, that race can be considered as one factor in an admissions program, so long as it is for the purpose of securing a diverse student body. According to Powell, the state must seek to serve a "compelling interest" and must demonstrate that its racial classification is "necessary for achieving that purpose."[34] The theme that emanates most from Powell's opinion is that of individualized consideration of all applicants for all programs.

Another opinion was delivered by the "Brennan four,"[35] who focused more closely upon the standard of review to be used. They agreed with Powell that race-consciousness was permissible. Their justification, however, was not diversity but the in-

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[30] 438 U.S. at 283 (1978).

[31] "[A] state government may adopt race conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have. . . ." *Id.* at 369.

[32] In congruence was the so-called "Brennan four", a bloc of Justices Brennan, White, Marshall, and Blackmun who agreed that race consciousness was appropriate.

[33] 438 U.S. at 319-20.

[34] *Id.* at 269-319.

[35] 438 U.S. at 324.

terest of the school in correcting past discrimination.

Bakke stands for the proposition that race-consciousness is permissible in an admissions program, either for the purpose of achieving racial diversity or for rectifying past discrimination. However, because of the diversions between the Justices on various points, *Bakke* left uncertainties as to the limits of race-conscious programs. The question relevant to the *Talbert* case is whether race-consciousness is justifiable for the purpose of achieving racial diversity in the public employment sector.

Using the test for detecting purposeful discrimination outlined in *Arlington Heights* and using the *Bakke* standard for a race-conscious admissions program, *Talbert* partially succeeds in defining more clearly under what circumstances and to what extent the government and private sector can allocate opportunities on the basis of race.

In its application of the four *Arlington Heights* standards, *Talbert* reasoned that: first, the appointment of a single black major results in no disproportionate impact on the white race; second, there is no historical background of discrimination against white police officers; third, there were no significant procedural departures; and fourth, the contemporaneous statements of the officials revealed no discriminatory intent.[36]

The court then turned to *Bakke* for a standard to support its race-consciousness. In *Talbert*, unlike *Bakke*, there were no quotas for promotion of minority police officers. Also unlike *Bakke*, there were no allocated vacancies for black officers. There was no suggestion that the city was attempting to remedy the effects of past discrimination in the force or in society.[37] Nevertheless, the *Talbert* court found *Bakke* "instructive",[38] despite the fact that *Bakke* lacks a dominating coherent doctrine.[39]

Faced with more than one Bakke standard from which to choose, *Talbert* followed Powell's analysis. [Powell justified the medical school's consideration of race by that school's interest in attaining a "diverse student body."] *Talbert* recognized that the

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[36] 648 F.2d at 929-30.
[37] *Id.* at 928.
[38] *Id.*
[39] *See* note 30 *supra.*

city's claim that diversity is beneficial to operation of the department was similar to the claim accepted by Powell in *Bakke* that the school has a legitimate interest in a diverse student body.[40] The city claimed that it took race into account to advance the operational needs of the police department.[41] The *Talbert* court felt that racial diversity was a legitimate interest where the police served a multi-racial community.[42]

Perhaps the most important aspect of the *Talbert* decision is to be found in the court's endorsement of Justice Powell's rationale in *Bakke*. As stated previously, *Bakke* left uncertainties as to the limits of racial preference. *Talbert* is successful to the extent that it confirms Powell's *Bakke* opinion as the dominant standard. Unfortunately, *Talbert* does very little beyond that. There is still no clear-cut definition as to what degree the consideration of race is permissible in employment programs. In an area where extension and clarification is greatly needed, *Talbert* obviously falls short.

Talbert amounts to a toning down of the facts to achieve a goal—the validation of Richmond's race preferences to promote affirmative action. For example, in its consideration of the impact of the promotion on the white race, the court states that "the appointment of a single black major results in no disproportionate impact on the white race."[43]

This view could be seen as somewhat narrow-minded because it ignores the impact upon the plaintiff, Talbert, who was denied the promotion. It appears that if the city had not taken race as a consideration, Talbert would have received the promotion. This is certainly the greatest injustice of *Talbert* and other race conscious decisions—the deprivation of an individual's rights in order to satisfy court ordered objectives. In addition, the *Talbert* rationale fails to recognize that the

[40] 648 F.2d at 928.

[41] *Id.*

[42] The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

[43] 648 F.2d at 929.

cumulative effect of a number of these promotions nationwide could result in an even greater impact on whites as a whole.

Given the absence of any purposeful discrimination, the promotion was, of course, a valid means of attaining a legitimate goal in a city that has a 50% black population. *Talbert* is limited in scope however, because it fails to give answers for cities with a significantly smaller black population. Using the *Talbert* rationale, black candidates might be legitimately barred from promotions in cities with little or no black population. In other words, the city could legitimize an exclusion of blacks on the theory that effective crime prevention depends on public support of the police, therefore an all-white public would cooperate better with an all-white police department.

The decision in *Talbert* sets forth a justification for race-consciousness in the public sector that accords with both the realities of American life and the values furthered by the Supreme Court in its recent decisions. As harsh as the result in *Talbert* may seem, without race-conscious programs, members of minorities would remain barred from the mainstream of American life. With expansive treatments of race-consciousness such as this, it appears that the American court system is finally eroding a barrier that has existed much too long.

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