When affirmative action cloaks management bias in selection and promotion decisions

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Executive Overview

The Supreme Court decision in Johnson v. Transp. Agency, Santa Clara Cty., Cal. provides an instructive example of the pitfalls of a poorly implemented affirmative action program. The suit was brought by a white male who charged that he was more qualified but was denied a promotion solely due to his sex; a claim of reverse discrimination was supported in a federal district court on precedent. Subsequent appeals led to a Supreme Court decision important to organizational personnel and administrative practices.

Santa Clara Transportation Agency: The Setting

Although Title VII had been in existence since 1964, and the Santa Clara County Transportation Agency had made efforts to address the issue of employment discrimination in 1971 with an Equal Employment Opportunity Policy, there was a visible imbalance in the allocation of jobs at SCCTA. No females were employed in the 238 skilled craft positions. Only 2 of 28 officials and administrators, 5 of 58 professionals, and 12 of 124 technicians were female. Of the 110 road maintenance workers, only one was female. (Johnson, 1453) In 1978, SCCTA developed a voluntary affirmative action plan to improve performance in the “hiring, training, and promotion of minorities and women throughout the agency in all major job classifications where they [were] under-represented.” (Johnson, 1447) The program did not require quotas to adjust historical imbalances in the workforce, and sex was only one component in the selection and advancement process. Cases were to be handled individually rather than unilaterally across the company.

In December 1979, SCCTA announced a vacancy for the position of road dispatcher, a skilled craft position. Twelve county employees applied for the promotion. The nine applicants deemed qualified for the job were granted an initial interview before a two-man panel. Seven of the applicants, with interview scores ranging from 70 to 80, were considered sufficiently qualified to proceed with a second-level interview. Paul E. Johnson, who was then filling the dispatcher position on a temporary basis, was tied for second with a score of 75. The sole female applicant, Diane Joyce, was fourth with 73. The top scoring male received an 80, five points higher than Johnson and another male. Three other male applicants scored between 70 and 72. The second interview panel, composed of three SCCTA supervisors, unanimously recommended that Johnson be promoted over all other candidates. Agency Director James Graebner made the final decision after considering all factors, including a recommendation from the County’s Coordinator for Affirmative Action. He concluded the promotion should go to Joyce.

Litigation and the Supreme Court Decision

Johnson filed a complaint with the EEOC, alleging that he had been denied promotion on the basis of sex, a violation of Title VII. In March 1981, after receiving
a right-to-sue letter, Johnson filed suit. The District Court found “that Joyce’s sex was the determining factor in her selection and that the Agency’s plan was invalid under the criterion announced in Steelworkers v. Weber, 443 U.S. 193 that the plan be temporary.” (Johnson, 1449) On appeal, the Court of Appeals for the Ninth Circuit reversed the District Court decision, holding that “The Agency appropriately took into account Joyce’s sex as one factor in determining that she should be promoted.” (Johnson, 1444) On March 25, 1987, the Supreme Court affirmed the Court of Appeals, saying that the Agency’s Plan “represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency’s work force. Such a plan is fully consistent with Title VII . . . .” (Johnson, 1457)

In upholding Joyce’s promotion, the majority of the Supreme Court reasoned as follows: SCCTA had voluntarily adopted an affirmative action plan, which provided that within traditionally segregated job classifications in which women were significantly underrepresented, sex could be considered as one factor in judging among qualified applicants. The plan, thus, was consistent with Title VII.

Justice Scalia’s dissenting opinion chastised the majority for a decision that “guaranteed” that because race or sex often will be the basis for employment determinations, the goal of a discrimination-free society will be effectively replaced with the goal of proportionate representation by race and by sex in the workplace. (Johnson, 1466-67)

Scalia found Johnson’s qualifications for the position superior to those of Joyce in every respect, and he termed the discrimination against Johnson “shocking.” (Johnson, 1466) Scalia further argued that the majority had broadened the interpretation of Title VII and expanded on the decisions in prior cases to alter social attitudes rather than eliminate discrimination. (Johnson, 1469, 1474) Scalia’s arguments summarize a number of commonly held objections to affirmative action plans, and his views were to be reflected in some of the analyses that followed in the wake of the Supreme Court’s decision.²

A Second Look

Good faith strategies to rectify imbalances in the workforce, such as the establishment of an affirmative action plan, are often seen as preferable to quotas.³ Implementing an affirmative action program requires reviewing the human resource management system to eliminate barriers to equal employment opportunity. Change requires a careful analysis to ensure that all job requirements are performance based.⁴ The job analysis then forms the basis for the job description and specifications. These, in turn, prescribe what qualifications an applicant for a position must possess, the content of advertisements, the criteria and procedures for selection, advancement decisions, and salary.⁵

At SCCTA, there was a gross statistical imbalance of the sexes in the current workforce. Moreover, under the rules external candidates could not qualify for many of the positions. For example, as a prerequisite to advancement to road dispatcher, SCCTA required that candidates have four years of road maintenance experience within the Santa Clara system. (Johnson, 1447) Except for Joyce, who had earlier transferred to the road maintenance department because this was the only advancement route to the dispatcher position, the requirement excluded all women. Thus, while SCCTA had an affirmative action plan, it did not go “the extra mile” to prove good faith compliance.

The position of road dispatcher announced by SCCTA in December 1979 had been designated as a skilled craft position. The job description required candidates to
possess "at minimum four years of dispatch or road maintenance work experience for Santa Clara County." (Johnson, 1447, emphasis added) Based on the job description, two logical inferences can be made: First, to be a road dispatcher, four years' experience in road maintenance was necessary. Second, to be a SCCTA dispatcher, the experience had to be with Santa Clara County. Based on the job description, one must presume that experience as a road maintenance worker in Santa Clara County was content reliable and that there were valid and reliable reasons for the four-year requirement (as opposed to two or six years).

Extensive research suggests that unless interviews are carefully structured to focus on the specific job criteria, they may be open to systematic bias.

Joyce had worked for the County since 1970, serving as an account clerk until 1975. In 1974 she applied for a road dispatcher position but was considered ineligible because she had not worked as a road maintenance worker for four years. In 1975, Joyce applied for and received a transfer to road maintenance work, "becoming the first female ever to fill such a job." (Johnson, 1447) From 1975 to 1979, she served as a road maintenance worker and occasionally worked out of class as a road dispatcher. All her road maintenance and dispatch experience was with Santa Clara County. Johnson had been a road maintenance worker from 1977 to 1979. Like Joyce, on several occasions during this time he served as a road dispatcher. Although he had several years' experience as a dispatcher prior to working for Santa Clara County, Johnson's record does not show he had either the four years' experience as a road maintenance worker or that his experience was in Santa Clara county, as specified in the job description. (Johnson, 1448)

While the interview is a popular selection tool, it can be a deeply flawed technique. Consequently, employers are legally if not ethically responsible for showing that interviews are job related and are reliable and valid. Extensive research suggests that unless interviews are carefully structured to focus on the specific job criteria, they may be open to systematic bias.

As the first female road maintenance worker in the history of Santa Clara county, Joyce had faced harassment. "In performing arduous work in this job, she had not been issued coveralls, although [all of] her male co-workers had received them." When she ruined her clothes, she complained to her supervisor. Nothing happened. After two more incidents in which her clothing was ruined, Joyce filed a grievance against her supervisor. The next day she was issued four pairs of coveralls. While a road maintenance worker, Joyce served for a year and a half as Chair of the Roads Operations Safety Committee. In this capacity, she had several "differences of opinion" with males on how to implement safety measures. (Johnson, 1448, n.s.)

The second-level interviews for the dispatcher position were conducted by a three-man panel. One member was the supervisor against whom Joyce had found it necessary to file a grievance to obtain the coveralls. A second panel member had served on the Safety Committee with Joyce and had disagreed with her on the application of safety rules. The third panel member, who chaired the committee, had previously described Joyce as a "rebel-rousing, skirt-wearing person." (Johnson, 1448, n.s.) He deliberately scheduled Joyce's interview to conflict with a mandatory meeting she had to attend. The panel's makeup and the delay in scheduling the interview caused Joyce to contact the County Affirmative Action Officer and say she feared that her application "might not receive a disinterested review." (Johnson, 1448) It was this second interview panel that unanimously recommended that Johnson get the promotion to road dispatcher. The final phase of the selection process called for the director to make the personnel decision. He had several options. He could promote any of the seven applicants who had been judged equally qualified by the initial interview panel, one of whom was also the candidate recommended by the second interview panel. The director also had the option of taking the recommendation of the county's coordinator for Affirmative Action, whose responsibility is to keep the
director informed of opportunities for SCCTA to accomplish its affirmative action plan objectives. (Johnson, 1448)

Implications
Based on the record, Johnson did not appear to meet the published job description. Like Joyce in 1975, he lacked the required four years of road maintenance experience in Santa Clara County. For reasons that are not explained in the record, in the initial screening process, Johnson nevertheless was deemed qualified for the dispatcher position and granted an initial interview.

Two of the selection devices used by SCCTA were unstructured interviews. Accordingly, the initial scores awarded the candidates were neither reliable nor valid. This was recognized by the SCCTA director who told the Court that the difference in the first interview scores between Johnson’s 75 and Joyce’s 73 was not significant. The Court agreed, pointing out that “[n]o difference in qualifications between Johnson and Joyce were minimal, to say the least.” (Johnson, 1457, n. 17)

Quoting the Amicus Curiae brief of the American Society of Personnel Administrators (ASPA), the Court noted “[i]t is a standard tenet of personnel administration that there is rarely a single ‘best qualified’ person for the job.” (Johnson, 1457, n. 17)

The propensity for bias was particularly high in the second interview. Johnson had been filling the vacancy for which he had applied from September 1979, until June 1980. (Johnson, 1468) His selection to fill the position on a temporary basis suggests that even before a choice was made, the Road Operations people had a favorable response to and positive expectations for Johnson. Second, all three panel members had previously been involved in negative actions against Joyce. Given that unfavorable information carries more weight than favorable and that studies on the qualifications in promotion show fairly consistent bias in favor of men, Joyce stood little chance with this interview committee.8 Had SCCTA a strong affirmative action commitment and sound personnel policies, the three members of the second interview panel would have been automatically disqualified from the selection process for lack of objectivity. When the selection process proceeded with this panel, SCCTA was placed in a position where it could not demonstrate the validity, fairness, and utility of its selection procedures or show how alternatives were used less impact. In all, the evidence suggests that below the level of the director, despite the presence of an Affirmative Action plan SCCTA management was not practicing good policies or carrying out the Affirmative Action plan in good faith.

The Issues as Presented in the Courts

When Johnson sued, Court attention focused only on the question he raised—reverse discrimination. The job description, actual performance records of the two final candidates (particularly Johnson’s lack of road service), the flawed selection procedures, and rater bias in the second interview panel were not issues in his case. Ironically, had Johnson been given the promotion, all the above items would have allowed Joyce to pursue a discrimination case based upon the valid ground of disparate impact and discrimination by the second interview panel. These issues then would have been central. However, nowhere in the majority opinion or elsewhere does the Supreme Court challenge the job requirements for the position of dispatcher as published by SCCTA or note that below the director’s level, the SCCTA selection process was a sham, with a disparate impact on females.
Summary Remarks
A cloak of affirmative action hid real problems in the Santa Clara county personnel system. There was disparate impact because of a restricted hiring policy. There was disparate treatment because different standards were used to evaluate Joyce and Johnson. According to the job description, Johnson did not have the experience required for the job. His recommendation for promotion was produced through unstructured interviews. The process lacked validity. His selection as the most qualified candidate was made by a committee positively biased to him and negatively biased toward Joyce. Yet, after Joyce was promoted, Johnson claimed he had been mistreated because the first interview panel rated him two points higher than Joyce and the second interview panel selected him. Once Johnson sued, the courts spoke to the issues of a voluntary Affirmative Action program and the claim of reverse discrimination.

The Future Challenge
As written, the Supreme Court decision allows for the inference found in personnel management and human resource texts and articles, that Johnson is a case in which an agency with a voluntary Affirmative Action plan was allowed to bypass the promotion of a more-qualified male in favor of a less-qualified female. The facts suggest otherwise. While a superficial examination based solely on the interview scores may suggest that Joyce was not the most qualified of the nine applicants, when all factors are considered she was not, as was widely reported, less qualified than Johnson. Not only was Joyce the more qualified of the two final candidates; she was the only qualified candidate.

A number of questions in Johnson v. Transp. Agency, Santa Clara Cty., Cal. which are central to personnel systems were not addressed by the Court. How did Johnson, who did not meet the job description of four years of road maintenance experience in Santa Clara County, get into the group of promotable candidates? Conversely, if the specification in the job description of four years in road maintenance work in Santa Clara County were not relevant to the position of road dispatcher, why were they included in the job description? Why was Joyce deemed ineligible for promotion in 1974 and Johnson considered eligible in 1978? How was a voluntary Affirmative Action program put in place at SCCTA without a thorough job analysis, followed by corresponding job descriptions and specifications that would meet the uniform guideline test? Why was no one below the level of director concerned about personnel decisions that would have adverse impact leading to disparate treatment? With regard to the dissenting opinions of Justices Scalia, Rehnquist, and White, why do they ignore so many of the facts relevant to EEO/AA issues?

The real problem at SCCTA was this: When top management finally had to decide between Johnson and Joyce, the outcome was almost certain to result in litigation—no matter which choice was made. Poor personnel policies were a time bomb waiting to go off. For this predicament, management had only itself to blame.

Recommendations for Management
There are several steps management can take to avoid this time bomb:

- Increase the number of minority and female applicants. This demonstrates top management’s support for EEO policies.
- Develop sound selection devices for initial hiring and advancement decisions. Constantly update job descriptions by conducting frequent job analyses to determine which job behaviors are really needed. Discard obsolete requirements.
- Inform employees about the specifics of the affirmative action program. Be sure they understand that unbiased selection and promotion policies protect everyone’s right to be the most qualified applicant.
• Broaden employees' skill base to increase their advancement opportunities.
• Notify eligible employees of advancement and training opportunities.
• Incorporate into the performance evaluations of line supervisors and managers an evaluation of their proficiency in carrying out the EEO/AA plan. Don’t tolerate bias.
• Formalize and communicate sanctions for violations of EEO policy.
• Be sensitive to the special needs of employees who previously have brought grievances so that their rights will be protected.

Endnotes

2 The widely publicized decision was followed by considerable analysis, some of it polarized. See, for example, A. Press and A. McDaniel, "A Woman's Day in Court," Newsweek, April 6, 1987, 58-59. Law review articles were more restrained. The Supreme Court was said to have confirmed affirmative action ("Affirmative Action Affirmed: Johnson v. Transportation Agency ..., 33 Loyola Law Review, Winter, 1988, 1121-38) weighing statistical imbalance in favor of affirmative action (..., "The United States Supreme Court Weighs Statistical Imbalance in Favor of Affirmative Action," 21 J. Mar. Law Review, Spring, 1988, 593-612) with the result that sex-based criteria could be considered in promotion ("Civil Rights—Title VII—Public Employer May Consider Gender to Promote Employee Without Violating Title VII of Civil Rights Act of 1964 When Enforcing A Valid Affirmative Action Plan," in 19 St. Mary’s Law Journal, 1987, 455-68. Also see "Affirmative Action in 1987, United States v. Paradise, and Johnson v. Transportation Agency, Santa Clara County: Racial Quota Survives Strict Scrutiny, Sex Based Promotion Justified Under Title VII," 15 W. St. U. Law Review, Fall, 1987, 239-80). To some, because the Court said sex-based promotion was justified, the decision represented a victory for minorities, women, and affirmative action (15 W. St. U. Law Review, 239-80). To others the decision meant the Court had adopted a more liberal standard to validate affirmative action plans. (Johnson v. Transportation Agency, Santa Clara County, Calif., 748 F. 2d 1308: "The Ninth Circuit Adopts a Liberal Standard to Validate Affirmative Action Plans," in 21 Wilamette Law Review, Fall, 1985, 983-9) or suggested a new meaning for the term equally qualified (Mary E. Becker, “Prince Charming: Abstract Equality,” Supreme Court Review, 1987, 210-47). In one view, the Court had limited claims to reverse discrimination; consequently, employers could voluntarily adopt hiring and promotion goals to benefit minorities and women (Gary Dessler Personnel Management, 4th Ed., New Jersey: Prentice Hall, 1986, S8). To M.D. Levin-Epstein, Primer of Equal Employment Opportunity, (4th Ed.). Washington: Bureau of National Affairs, Inc., 1986, 96, "Johnson was a case where a female employee had been promoted "pursuant to an affirmative action plan over a more qualified male employee." To E.K. Marlow and N.D. Marlow, "Affirmative Action: The Last Two Years," Southern Management Association Proceedings, Miss. State: Southern, 1987, the Court had said Johnson may have been a minimally more qualified, but the ruling did not mean unqualified people would be hired or promoted.
4 A full text and coverage of these requirements is contained in "Equal Employment Opportunity Commission, Civil Service Commission, Department of Labor, and Department of Justice, Adoption by Four Agencies of Uniform Guidelines on Employee Selection Procedures, Federal Register, 43: 166, Aug. 25, 1978, 38290-38315.
7 Many organizations turned to the interview when they found it difficult to validate their employment tests. However, the intent of the law and the court rulings are clear: all selection tools, including the interview, must be reliable and validated. The more structured the interview the more defensible the technique is. For specific suggestions see N. Schmitt, "Guiding Causes of Success," Organizational Behavior and Human Decision Processes, 1986, 38, 366-377. Systematic bias may also occur, as discussed in D. Duhane and A. Tversky.


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