

Compensation System Found to be Race-Neutral and not in Violation of Title VII

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A group of brokers filed suit against their employer firm claiming race discrimination under Title VII and 42 U.S.C. §1981 on the grounds that the firm's "teaming" and account-distribution policies prevented black brokers from obtaining lucrative assignments and earning greater compensation. Thereafter, the firm was acquired by a bank, and the companies commenced a "retention-incentive program" which was designed to compensate brokers based upon their previous levels of production. A second lawsuit was filed against both the bank and the firm, alleging that the new program was similarly violative of Title VII because the new plan incorporated policies which were derivative of the prior firm's discriminatory practices.

The bank challenged the suit, arguing that the programs were race-neutral and keyed to quality of production and therefore exempt under Title VII §703(h). The district court agreed with the bank and found the program to be protected from challenge unless it was adopted with the intent to discriminate on the basis of race.

§703(h) specifically addresses "seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions" as follows:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that

such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [section 6(d) of the Labor Standards Act of 1938, as amended].

The Seventh Circuit Court of Appeals affirmed the district court's dismissal of the suit. The Court similarly found that the retention program provided for bonuses to brokers based on race-neutral assessment of levels of production. To the extent there were any past discriminatory effects of the underlying firm's employment practices, those matters would be addressed in the prior litigation, and were not to be considered here. The only allegations here regarding the discriminatory effects were found to be purely conclusory. The Court ultimately affirmed the dismissal of the suit against the bank.

Employers are probably most familiar with claims of intentional discrimination, but this case serves as a reminder that policies, practices, and processes, even if seemingly neutral, can come under fire if the effects of those policies, practices, and processes adversely affect a group on account of race, disability, gender, or other protected classes. If you have questions about your own policies, or would like to know more about *McReynolds v. Merrill Lynch & Co., Inc.*.

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