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ALEXANDER v. ESTEPP 95 E3d 312 (4Th Cir. 1996).

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95 F.3d 312 (4Th Cir. 1996).

I. FACTS

Seven white job applicants[1] denied employment by the Prince George's County Fire Department ("County" or "Department") sued the Department, claiming that its affirmative action plan violated the Fourteenth Amendment Equal Protection Clause.[2] Six of the plaintiffs had applied for firefighter positions with the Department in 1993. That year, the Department hired thirteen individuals, but not the plaintiffs. Three of the plaintiffs applied again in 1994. One plaintiff, Josh Reedy, applied to the Department for the first time in 1994. The Department hired two of the plaintiffs in 1994, not including Reedy. Plaintiffs filed suit against the county and named officers of the Fire Department as individual defendants.

Prince George's County tests applicants on performance and a written examination. Those who pass both are interviewed. They are then grouped into three "bands": "Outstanding"; "Well Qualified"; and "Qualified." Within each band, applicants are ranked based on their "preference level."[3] A county ordinance requires that applicants within the same band be hired in the following order:

(1) Current county employees seeking promotions;
(2) Disabled military veterans;
(3) Non-disabled veterans who were volunteer firefighters;
(4) All other non-disabled veterans;
(5) All other former volunteer firefighters;
(6) Displaced homemakers not in any of the above categories;
(7) County residents not in any of the above categories;
(8) All other persons.[4]

The preferences for volunteer firefighters, (categories #3 and #5, above), however, may be eliminated if the county's personnel officer certifies in writing to the fire chief that continued use of the preference "will have a disparate impact on a protected class as defined by the guidelines of the Equal Employment Opportunity Commission."[5] Applicants within the same band who have the same preference level are ranked on the basis of their combined examination and interview scores.[6] The department maintains an "Applicant Register," which lists the applicants and their total rank based on band, preference and score. The county continually updates the Applicant Register as new persons apply and existing applicants withdraw their applications.[7]

While the Department never committed its affirmative action program to writing, it nevertheless took steps to meet affirmative action goals set by the county in accordance with census data.[8] During each recruiting season, fire department officials set informal "caps" on the number of whites and the number of males who would be offered employment. The department offered applicants employment in the order in which they were listed on the Applicant Register; but once a cap was reached (either for whites or for males), a lower-ranking, applicant of another race or gender was offered employment instead of a higher ranking, capped applicant.[9]

Plaintiffs complained specifically about the hiring procedures in 1993 and 1994.[10] In 1993 the department offered positions to thirteen applicants.[11] According to the Applicant Register, none of the plaintiffs ranked better than fourteenth in that hiring season.[12] In 1994 the department offered employment to nine applicants. Plaintiffs Marc Alexander and Angela Moore received and accepted the positions offered them.[13] Plaintiff Josh Reedy ranked eighth on the Applicant Register, but the department did not offer him a position.[14] The remaining plaintiffs ranked lower than ninth.[15]

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[1] Six men and one woman

[2] Alexander v. Estepp, 95 F.3d 312 (4th Cir. 1996), cert. denied, 117 S. Ct. 1425 (1997). Because of practical constraints, this case comment will address only the equal protection claims of these seven petitioners. The case also held that (1) with one exception, applicants would be denied personal relief since they did not rank high enough to have been offered a job even in absence of the program; and (2) county officials were not qualifiedly immune from suit, since they should have known that the program was unconstitutional.

[3] Alexander, 95 F.3d at 314.

[4] Prince George's County Code § 16-162(d)(2)(i).

[5] Prince George's County Code § 16-162(d)(4).

[6] Alexander, 95 F.3d at 314.

[7] *Alexander v. Prince George's County, Maryland,* 901 F.Supp. 986, 991(D.Md. 1995). Because the Applicant Register is continually updated as part of the hiring process so that a comprehensive list is available, the district court ruled that it is a business record admissible at trial under Fed.R.Evid. 803(6), (8).

[8] Alexander, 95 F.3d at 315.

[9] *Id.* at 315.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 315, n.4. Ms. Moore received an offer because of the existence of the affirmative action program.

[14] *Id.* at 315.

[15] *Id.*

Plaintiffs sued seeking injunctive, declaratory, and monetary relief. The district court rejected their claims and entered summary judgment in favor of the defendants.[16] Plaintiffs appealed the district court's decsion that, as a matter of law, the plaintiffs had failed to support allegations that they were denied employment because the county "played with the process" to ensure hiring of minorities.[17] The Plaintiffs also appealed the district court's ruling that the Department's affirmative action plan was narrowly tailored to meet a compelling governmental interest.[18]

II. HOLDING

The Fourth Circuit affirmed in part and reversed in part the district court's judgment. The Fourth Circuit applied a strict scrutiny standard of review to the Department's affirmative action program and overturned the district court's ruling on the grounds that the Department's affirmative action plan was not narrowly tailored to serve a compelling interest and thereby violated the Equal Protection Clause.[19] The Court of Appeals never addressed the dispute over whether the asserted governmental interests[20] were compelling, but held that the County's affirmative action program was not narrowly tailored because the means chosen by the Department were not closely related to the interests asserted. It found that the program was not narrowly tailored because means less drastic than outright racial classifications were available to Department officials to achieve their goals.[21] The County could have benefitted African-Americans and women by eliminating the hiring preference for firefighters from the volunteer department where discriminatory attitudes were alleged to originate. Additionally, the program was not narrowly tailored because it "tende[d] to benefit particular minority groups who had not been shown to have suffered invidious discrimination."[22] According to the court, the program treated all minority groups alike, even though the County had presented evidence only of discrimination against African- Americans.[23]

III. ANALSIS/APPLICATION

The decision reached by the Court of Appeals in *Alexander v. Estepp* is the result of nearly a decade of Supreme Court inquiry into the issues of affirmative action. Whether attempts to remedy past discrimination are called "benign" or "reverse" discrimination, "racial preferences" or "affirmative action," they refer to a wide range of different processes by which people are treated differently on the basis of race or gender with regard to employment, education, or government contracts. Since its influential holding, by a 5-4 vote, in Regents of University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978), that the legal standards to be used in determining discrimination under Title VII[24] were the same as those applicable to the Constitution's equal protection guarantee, the Court has decided a dozen cases involving affirmative action.[25] The Supreme Court's lack of unanimity in these cases, as evidenced by its contradictory opinions, attests to the incompatible goals, objectives, and different understandings of affirmative action plans as perceived by the Court and members of society as well. One consequence has been a line of lower-court affirmative-action-in-the-workplace cases including *Alexander v. Estepp,* which illustrate the suspicion that all racial classifications are unconstitutional.

In *Wygant v. Jackson Board of Ed.,* 476 U.S. 267, 106 S.Ct. 1842 (1986), the Court overturned a plan that pro-

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[16] *Id.* at 315, n. 5. The district court held and the Court of Appeals affirmed that all of the plaintiffs had standing, even those who would not have been hired even in the absence of the department's affirmative action program.

[17] *Id.* at 317.

[18] *Id.* at 316.

[19] U.S.C.A. Const.Amend. 14

[20] The County argued that its program was intended to benefit African Americans and women by serving, among others, the following goals: (1) redressing present effects of past and current incidents of discrimination and harassment within the department, (2) sending a message that the department respects diversity and that discrimination and harassment will not be tolerated, (3) promoting more effective fire prevention and firefighting by fostering the trust of a diverse public, and (4) serving educational goals by providing children with racially and sexually diverse role models. Alexander v. Estepp, 95 F.3d 312 at 316.

[21] Alexander, 95 F.3d at 316.

[22] *Id.* at 316.

[23] *Id.*

[24] Title VII of the 1964 Civil Rights Act provides that "[n]o person ... shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[25] *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978); *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979); *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Firefighters Local Union 1784 v. Stotts,* 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education,* 476 U.S. 276 (1986); *Local 28 of Sheet Metal Workers' International Association v. EEOC,* 478 U.S. 421 (1986); Local Number 93, *International Association of Firefighters v. City of Cleveland,* 478 U.S. 501 (1986); *United States v. Paradise,* 480 U.S. 149 (1987); *Johnson v. Transportation Agency, Santa Clara County Calif.,* 480 U.S. 616 (1987); *City of Richmond v. J.A. Croson Co.,* 488 U.S.469 (1989); *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990); *Adarand Constructors, Inc. v Pea,* 115 S. Ct. 2097 (1995).

vided greater protection from lay-offs for black teachers than for white. The Court relied on previous holdings that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.[26] Even where a race-conscious statute operates against a group (white teachers) that has not historically been the victim of discrimination, strict scrutiny must still be applied.[27] Strict scrutiny demands that the racial classification "must be justified by a compelling governmental interest"[28] and the means chosen must be "narrowly tailored to the achievement of" that interest."[29] In addition, the court pointed out that the remedying of "societal" discrimination alone does not justify use of race-conscious plans because prior discrimination by the government unit involved is of concern, not discrimination by society as a whole.[30]

Following Wygant, the Supreme Court went on to evaluate several different types of race- conscious plans including plans based on promotions, hiring goals and quotas. In a companion case to Wygant, *Local 28 of the Sheet Metal Workers' International Association v. EEOC,* 476 U.S. 421 (1986), a five-Justice majority upheld a court ordered "hiring goal" of 29% non-white membership in a private union that consistently and intentionally discriminated against non-whites. The Court indicated that the remedy for past discrimination may be "class-based," that is, those who receive benefits under a race-conscious plan need not have been the particular victims of the past discrimination being redressed. Similarly, a 5-4 decision in *U.S. v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053 (1987) upheld a court ordered plan requiring that a black be promoted for every white promoted to corporal Alabama State Trooper positions.[31] A majority of the Court agreed that numerical quotas may be used by a court in at least some circumstances to remedy past discrimination.32 Like *Sheet Metal Workers, Paradise* involved a history of blatant, intentional, pervasive discrimination against non-whites.

In the landmark case, *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706 (1989), the Supreme Court finally agreed that strict scrutiny should be the standard of review applied to any form of race-conscious affirmative action programs.[33] In *Croson,* the city of Richmond, Virginia, enacted a plan that required prime contractors on construction contracts funded by the city to subcontract at least 30% of the dollar amount of the contract to one or more minority business enterprises.[34] The majority struck down the city's set-aside program and held that race- based affirmative action plans to benefit minorities who historically suffered discrimination must be subjected to the same strict scrutiny standard as actions that intentionally discriminate against minorities.[35]

Contrasting Croson's rigorous standards and backward-looking approach, the Supreme Court in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990) held that "benign" federal racial classifications need only satisfy intermediate scrutiny,[36] even though Croson had recently held that State-enacted racial classifications would be subject to the strict scrutiny standard.[37] Metro said that certain racial classifications should be treated less skeptically than others and that the race of the benefitted group is critical to the determination of which standard of review to apply.[38]

Five years later in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200,115 S.Ct. 2097 (1995), the Supreme Court overruled *Metro,* and relied on *Croson* in finding that the federal government must satisfy the same "strict scrutiny" standard for race-based affirmative action plans as do state and local governments.[39] Nonetheless, in the opinion for the divided Court, Justice O'Connor offered an assurance that the use of strict scrutiny did not necessarily mean that the governmental action being reviewed would be struck down.[40] "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[41] After *Adarand,* a constitutionally sound race-based remedy must meet rigid requirements. It must serve a compelling interest, must be narrowly tailored not to overburden innocent third parties, must be of limited duration and must essentially be the only available response to proven racial discrimination.

One year after the Supreme Court decided *Adarand,* the Fourth Circuit decided *Alexander v. Estepp,* which presented the question of whether a governmental affir-

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[26] University of California Regents, 438 U.S. 265, at 291-299 (1978).

[27] *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724, n. 9 (1982).

[28] *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984).

[29] *Fullilove v. Klutznick,* 448 U.S. 448, 491 (1980).

[30] *Wygant v. Jackson Board of Ed.,* 476 U.S. at 274.

[31] *U.S. v. Paradise,* 480 U.S. 149, 185-186 (1987).

[32] Paradise, 480 U.S. at 166.

[33] City of Richmond, 488 U.S. 469, 472 (1989).

[34] at least 51% owned by minority group members

[35] City of Richmond, 488 U.S. at 472.

[36] Metro applied an "intermediate level" of review in finding that it was sufficient that the means chosen by Congress were "substantially related" to the achievement of "important" governmental objectives. Metro Broadcasting, Inc., 497 U.S. at 564-565 (1990).

[37] *Id.*, at 564-565.

[38] *Id.*

[39] Adarand Constructors, Inc., 515 U.S. 200, 227.

[40] *Id.* at 237.

[41] *Id.*

mative action program for firefighters violated the Equal Protection Clause of the Fourteenth Amendment. Both the district court and the Court of Appeals agreed that all racial classifications, even those intended to benefit minority groups, are subject to strict scrutiny.[42] Therefore, the affirmative action program could be upheld only if it was narrowly tailored to serve a compelling governmental interest.[43] The Fourth Circuit Court of Appeals found that the district court erred in holding that the County's affirmative action program was narrowly tailored.[44]

The district court was mindful of the Supreme Court's assertion that the application of strict scrutiny was not necessarily fatal to affirmative action plans.[45] In deciding that the County's affirmative action plan was narrowly tailored, the district court considered several factors: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority groups in the relevant population; (4) availability of waiver provisions; and (5) the effect of the plan on innocent third parties.[46] The district court looked at each of these factors in upholding the County Fire Department's affirmative action hiring plan.

The Fourth Circuit Court of Appeals focused on the first factor: the efficacy of alternative remedies. It ruled that the program was not narrowly tailored because means less drastic than outright racial classification were available to department officials.[47] In particular, the Prince George's County Code expressly provided that the fire department could eliminate its preference for volunteer firefighters in order to encourage diversity within the department.[48] If discriminatory patterns of employment within the county fire department owed their origin to practices and attitudes within volunteer fire departments, the Department could simply have denied volunteer firefighters the hiring preference they enjoyed.[49] The Court of Appeals stated that the County should have severed its ties with the allegededly discriminatory volunteer fire department before relying on a suspect classification.[50] In 1984, the Fourth Circuit Court of Appeals explained that, "[t]he essence of the "narrowly tailored" inquiry is the notion that explicit racial preferences, if available at all, must be only a "last resort" option."[51]

In addition to inquiring into the County's failure to consider alternative remedies, the Fourth Circuit found the affirmative action program defective because it benefitted particular minority groups that have not suffered proven invidious discrimination. The department passed over white applicants in favor of Hispanics and South Asians, although there was no evidence on record of discrimination against any group other than African-Americans.

IV. CONCLUSION

Despite the limitations set upon affirmative action plans by the Supreme Court and followed by the Court of Appeals in *Alexander v. Estepp,* hope for affirmative action plans must not be abandoned. Justice O'Connor speaks of this viewpoint in Adarand when she cites *United States v. Paradise* as an example where "the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy."[52] In referring to Paradise, Justice O'Connor implies that only the most extreme, apparent cases of discrimination will evoke an acceptable affirmative action remedy. But, racism today is often not so visible as in *Paradise.* Too often minorities are denied opportunities in subtle ways that are not as blatantly discriminatory as the conduct at issue in *Paradise,* or in *Sheet Metal Workers.* The Supreme Court should legitimize the forward looking goal of diversity and realize the social and economic benefits of promoting and encouraging minority inclusion by lowering the strict scrutiny standard to the level of intermediate scrutiny.

Justice Brennan's opinion in *Metro Broadcasting,* upholding an intermediate standard of review, adheres to the idea that there is a clear distinction between racial classifications that are designed to help minorities and those that discriminate against them. Unlike Justice O'Connor who sees affirmative action as valid only when used as a remedy for proven or admitted past discrimination and then only for the most blatant and pervasive oppression, there are four Justices on the current Court

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[42] Alexander, 95 F.3d 315, citing *Adarand,* 115 S.Ct. at 2111.

[43] *Id.*, citing Adarand, 115 S.Ct at 2113.

[44] Alexander, 95 F.3d at 314.

[45] *Alexander v. Prince George's County, Maryland,* 901 F.Supp. at 992. The Court noted that gender based classifications are subject to "intermediate scrutiny," but the Court addressed both aspects of the plan together for convenience.

[46] *Alexander v. Prince George's County, Maryland,* 901 F. Supp. at 992, citing *Paradise,* 480 U.S. at 187.

[47] *Id* at 316.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Hayes v. North State Law Enforcement Officers Ass'n,* 10 F.3d 207, 217 (4th Cir. 1993).

[52] Adarand Constructors, Inc., 515 U.S. at 237, citing Paradise, 480 U.S. at 167.

that believe that Brennan's opinion in *Metro Broadcasting* was correct: Stevens, Souter, Ginsburg, and Breyer. In his dissent in *Adarand,* Justice Stevens pointed out that there is a difference between a "No Trespassing" sign and a "welcome mat,"[53] and between "a decision by the majority to impose a special burden on the members of a minority race, and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority."[54] However, the Court's majority includes five Justices who have never voted to uphold an affirmative action program based on race: Rehnquist, O'Connor, Kennedy, Scalia, and Thomas. The Court has not approved an affirmative action program since 1991 and the Court's decisions seem to be narrowing in on the extinction of affirmative action programs all together.

Necessarily, the strict standards the Supreme Court applies to evaluate the constitutionality of an affirmative action plan affect the likelihood that such a plan ever will be employed or implemented. The very idea that an institution must first admit to proven, past racial discrimination, so pervasive and ongoing that it would warrant an affirmative action program that could satisfy the current strict scrutiny standard, places a huge risk on employers. As a result of the threat of litigation, employers who see racial disparities in their workforce are extremely hesitant to employ any race based actions in an effort to enhance diversity.

The goal of affirmative action has never been to punish or unnecessarily burden those in the majority who have children to support and lives to live. But racism remains active in America, and, to date, affirmative actions programs are the most effective way the government has created to give minorities some chance for equal opportunity. Confusion surrounding the question of just what affirmative action is seems to have erupted into an attack on affirmative action programs. The result has been the passage of anti-affirmative action programs in the state of California by the UC Board of Regents and the endorsement of such anti-affirmative programs by Governor Pete Wilson. *Alexander v. Estepp* seems to be an extension of this broad uprising, emphasizing the fact that racism in the workplace, although subtle in form but clearly evident in its results, will be permitted to flourish, long after the strict scrutiny standard has choked the life out of affirmative action in America.

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[53] *Id.* at 245.
[54] *Id.* at 243.