House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

AFFIRMATIVE ACTION; PUBLIC EMPLOYMENT

House Bill 4972 (Substitute H-5)
First Analysis (6-6-96)

Sponsor: Rep. Michelle McManus
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

The concept of affirmative action has increasingly become a source of considerable dissension. The original intent of affirmative action was to help to eliminate the use of discriminatory practices in education and employment. Many now believe that rather than helping to eliminate racism and sexism, affirmative action has come to be used as an excuse for blatant discrimination against individuals (mostly white males) who are not members of any minority group. Qualified non-minorities are, according to many, overlooked merely because of their sex or skin color in the same manner that minorities once were ignored. While few would object to qualified minorities being given the same opportunities as non-minorities, many argue that giving a preference to individuals who are less qualified solely because of their sex or skin color is patently unfair. It is proposed that, at least for public employers, the use of affirmative action plans be limited so as to prohibit the use of preferential treatment in hiring.

THE CONTENT OF THE BILL:

Currently, the Elliott-Larsen Civil Rights Act allows persons (not only individuals, agents, corporations and any other legal or commercial entities, but the state or a political subdivision of the state or an agency of the state) to adopt and carry out plans intended to eliminate the present effects of past discriminatory practices or to assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with and approved by the Civil Rights Commission. The bill would not affect the adoption and carrying out of such plans by private employers, but would impose a number of conditions on public employers that wished to adopt and carry out affirmative action plans. A public employer could adopt and carry out such a plan only if the legislature appropriated to the Civil Rights Commission funds necessary to implement the bill, and only if the following conditions were met.

Under the bill, a public employer would have to submit its proposed plan, or a proposal of significant changes to an approved plan, to the Civil Rights Commission. Public notice of the proposal would have to be provided according to the commission's rules and the public employer offering the plan would have to post copies of the public notice in conspicuous locations at the site or sites that would be affected by the institution of the proposed plan.

The proposed plan would have to specifically document the present effects of past discriminatory practices that the plan is intended to remedy. The plan would also have to document the facts that demonstrate the necessity of the plan and the actions, practices, or methods to be used to remedy the present effects of past discrimination or to assure equal opportunity. In addition, the proposed plan could not include quotas.

The commission would have to make the proposed plan available for public review and comment for 90 days before making any determination on the proposal. In order to be valid, the commission's approval of the proposed plan would have to occur no more than 90 days after the expiration of the review and comment period. The commission could not approve the plan unless it determined that the plan would meet a compelling governmental interest and that it was narrowly tailored solely to further that compelling governmental interest. A plan could be approved by the commission for a period of no more than five years.

A plan that had been approved by the commission would have to be made available for public review. After the approval of a plan had expired, the plan or a similar plan could not be re-instituted or re-adopted unless the plan again met the requirements necessary to have it approved by the commission.

Further, the bill would specify that a plan that had not been approved by the commission would be void and could not be used as a defense against a claim of discrimination or preferential practice under the act.

The bill would also amend the title of the act to specify that one of its purposes would be to prohibit "preferential" (as well as "discriminatory") practices,

policies, and customs in the exercise of [civil] rights based upon religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.

MCL 37.2102 et al.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Hiring decisions, especially by public employers, should be based on merit and should reinforce the ideal of equal treatment for all, regardless of race or sex. In past years, the impression of affirmative action as merely a tool for allowing preferential treatment of minorities to be used to the disadvantage of non-minorities has become increasingly widespread. Stories of well-qualified white males being passed over so that under-qualified minorities may be either hired, promoted, or admitted are now an inescapable part of popular culture. Many believe that the use of race-based preferences in this fashion leads to increased resentment on the part of non-minorities who believe they are not being given equal opportunities. In addition, such practices also injure the very people that they are intended to assist; the hiring, promotion or admission of unqualified individuals solely due to the color of their skin helps to reinforce negative stereotypes when those unqualified individuals inevitably fail to perform up to the expected standards. Many believe that the potential and actual misuse of affirmative action requires that action be taken to increase the Civil Rights Commission's oversight over plans adopted by public employers ostensibly to combat discrimination or to assure equal opportunity. Indeed, the bill's proponents note that the U.S. Supreme Court has ruled that state or local government affirmative action plans addressing racial preferences must be narrowly tailored to serve a compelling governmental interest. The bill would place this standard into Michigan law and provide for strict scrutiny by the Civil Rights Commission to make sure the standard is met. This increased oversight should help to make certain that affirmative action plans are not used to discriminate against non-minorities.

Response:

The bill doesn't go far enough. It should also address preferential treatment in private employment, college admissions, and in state programs such as set-asides for minority- and women-owned businesses in contracts for road construction and the like.

Against:

The bill would set up a number of obstacles for public employers attempting to implement affirmative action plans, and would likely have the effect of discouraging such efforts from being undertaken at all. For one thing, public employers would be put in the position of having to document "with specificity" the present effects of past discriminatory practices, thereby exposing themselves to potential liability for past discrimination. Further, the implementation of a plan would be delayed by up to 180 days, and then would be valid for only five years, before the employer would have to go through the entire approval process again to reinstate the plan. This would require the repeated expenditure of public resources to in order to document the need for such plans, even if there were no changes in circumstances during that time. In addition, the Civil Rights Commission would have its workload greatly expanded under the proposal; it would have to make a formal determination of a compelling governmental interest in order to approve affirmative action plans, and it would have to act within 90 days after the expiration of a public review and comment period. It seems unlikely that such an expanded workload would be met with increased appropriations. Indeed, a committee amendment would specify that public employers could adopt affirmative action plans *only* if the legislature appropriated funds to the Civil Rights Commission to implement the bill!

Unfortunately, despite gains by minority groups and women seeking advancement in employment, education, economic status, and so forth, it is a reality that racism and sexism still permeate many aspects of life in Michigan. It is unrealistic to assert that, if the bill passed, employment decisions would be based strictly on merit and qualifications. What about the more traditionally-practiced "preferences" in hiring, including assistance from influential relatives or friends, etc.? Affirmative action exists to provide opportunities to those who have been denied equal opportunities. Moreover, it also exists as a strong disincentive to those who would, but for the current law, continue to practice discrimination.

POSITIONS:

The following have presented testimony to the House Judiciary and Civil Rights Committee in support of the concept of the bill:

* The Michigan Farm Bureau

The following have presented testimony to the House Judiciary and Civil Rights Committee in opposition to the concept of the bill:

* The Michigan Chapter of the National Organization for Women

* The Michigan Education Association

* The Genesee County Board of Commissioners

* The Grand Rapids Urban League

* The United Auto Workers, Local 730

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.