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## Affirmative Action Plan Must Have Remedial Purpose, 3rd Circuit Rules

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**A**ffirmative action plans illegally discriminate against white job candidates if there is no proof that the employer's hiring goals were adopted to remediate a history of discrimination against the protected group, a federal appeals court has ruled.

"Unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of [Title VII]," U.S. Circuit Judge Carol Los Mansmann wrote in her 22-page opinion in *Schurr v. Resorts International Hotel Inc.*

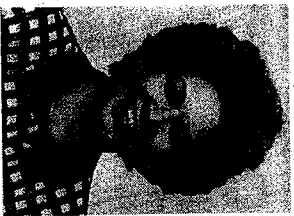
The ruling is a major victory for attorneys Joseph J. Ayella and Stephen G. Console because it not only reverses the grant of summary judgment against their client but orders that summary judgment be granted in his favor, followed by an immediate hearing to calculate his damages award.

Like a law school test question, Karl Schurr's case against the Resorts casino in Atlantic City posed a purely legal

question, that was narrow and focused due to the simplicity of the facts.

Schurr, who is white, was one of five applicants for a job as a light-and-sound technician at Resorts, where he already worked part-time. Casino management quickly narrowed their choices to two — Schurr and Ronald Boykin, a black man who also worked for the casino part-time.

Bill Stevenson, the casino's director of show operations, decided that the two men were equally qualified for the



**MANSMANN**

job. As a result, Stevenson checked the statistics for minority hiring and found that the casino was slightly behind in meeting its goal of 25-percent minority hiring in the technician job category.

Stevenson testified that he believed the casino was obligated to hire the minority candidate when two applicants are equally qualified and the casino was

"underutilizing" minorities in that job category.

Casinos in New Jersey are regulated by the Casino Control Commission, which requires every casino operator to undertake affirmative action in order to ensure equal employment opportunity.

### Regulations

Require that casino licensees take affirmative steps "to ensure that women, minorities and persons with disabilities are recruited and employed at all levels of the operation's work force and treated during employment without regard to their gender, minority status, or disability."



**CONSOLE**

Based on statistics for the racial makeup of the Atlantic City area population, the regulations require that in most job categories casinos must aim for hiring a workforce that is 25 percent minority

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## Affirmative Action

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and 46 percent women.

When Schurr learned that he was not chosen for the job, he filed a charge of discrimination with the New Jersey Division of Civil Rights and the U.S. Equal Employment Opportunity Commission.

In his lawsuit, Schurr also named the Casino Control Commission and its chairman, James Hurley, arguing that its affirmative action regulations should be struck down as unconstitutional.

### CASE TOSSED OUT

U.S. District Judge Stephen M. Orlosky granted summary judgment to all of the defendants.

Orlosky said Schurr lacked standing to sue the commission chairman because he failed to show a causal link between the regulations and Resorts' decision not to hire him.

"There is only the most attenuated relationship between the Commission's regulations and the hiring decisions which allegedly injured or will injure Schurr," Orlosky wrote.

When evaluating the decision not to hire Schurr, Orlosky concluded that "Schurr's damage is fairly traceable only to Resorts' actions in implementing its affirmative action plan and Resorts' actions in administering the plan through its employees.... Schurr's damage is not, however, traceable as far back as the Commission's regulations."

Orlosky also found that the regulations

did not mandate hiring preferences but merely required casinos to expand the "pool" of applicants by recruiting more minorities and women.

Judge Mansmann disagreed, saying "the regulatory scheme challenged here contemplates something beyond benign methods by which casino licensees may expand the applicant pool."

The regulations were drafted "to prohibit discrimination," Mansmann said, by "encouraging businesses to achieve a balanced representation of employees at all levels of the work force and to ensure that 'affirmative efforts are made to recruit and employ' minorities."

If a casino licensee fails to meet the established goal, Mansmann said, the licensee is required to document its good faith efforts to hire a qualified female or minority candidate for the position.

"The broad language used throughout the regulations as a whole undermines both the District Court's conclusion that the scheme is addressed to recruitment alone and its disposition of the standing issue on the basis of that conclusion," Mansmann wrote.

But in the end, Mansmann said she agreed with Orlosky's decision that Schurr lacked standing to sue the commissioner — only for different reasons.

"In order to have standing to challenge future rather than past application of the regulation," she said, "Schurr must allege that the setting of minority employment goals for job categories within the casino industry in the future constitutes an invasion of a legally protected interest which is 'concrete and particularized,' and 'actual or imminent,

not conjectural or hypothetical...."

Schurr failed to meet that test, she said, because there was no evidence of how frequently jobs for which he was qualified become available or how frequently he must compete with women or minorities for those jobs.

"In sum," Mansmann said, "Schurr failed to make an adequate showing that he is in danger of suffering imminent injury as a result of the challenged regulations."

### RESORTS MUST PAY

But Schurr fared much better in his claim against Resorts, winning a ruling that grants him a victory on liability and orders the lower court to proceed directly to a calculation of damages.

Judge Mansmann, who was joined by U.S. Circuit Judges Anthony J. Scirica and Richard L. Nygaard, seemed to recognize that such a ruling is rare.

"Generally, courts of appeals should not decide the legality of an affirmative action program in the absence of careful district court analysis of the merits. In most cases, a district court's analysis of why an affirmative action plan was adopted and how the plan affects non-minorities is crucial to thorough and effective appellate review of the plan," she wrote.

"In most cases, therefore, the better course is to remand and instruct the district court to conduct this analysis. But this is an atypical case; here, the record on summary judgment makes clear that Resorts' plan was not adopted to remedy a manifest imbalance in traditionally segregated job categories."

Mansmann found that Schurr's claim was similar to the case of *Taxman v. Board of Education of Piscataway*, in which an employer conceded that two candidates — one white and one black — were equally qualified for a job and that the black candidate was chosen for affirmative action reasons.

The *Taxman* court held that such a plan violates Title VII where the employer cannot show that it was adopted to address a history of discrimination. (Although the U.S. Supreme Court agreed to hear the *Taxman* case, it was settled before the justices heard argument.)

Mansmann found no reason not to apply the same logic to Schurr's case and to rule against Resorts since it admitted that its affirmative action plan was not intended to remedy past discrimination.

"Resorts' affirmative action plan is deficient. The plan itself and the regulations which mandate the plan were not based on any finding of historical or then-current discrimination in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation," Mansmann wrote.

"This absence of any reference to or showing of past or present discrimination in the casino industry is fatal."

(Copies of the 11-page opinion in *Schurr v. Resorts International Hotel Inc.*, PICS NO. 99-2140, are available from The Legal Intelligencer. Please refer to the order form on page 11).