legality dictated by the Supreme Court. To the contrary, in 2014, the U.S. Court of Appeals for the Fifth Circuit affirmed its ruling on the defendant's favor.[26] As this textbook went to press, the plaintiff's petition for a second trip up to the Supreme Court had been filed and remained pending.

Meanwhile, it is important to note that in addition to being justified by a compelling governmental interest, the affirmative action program must also be narrowly tailored to achieve that purpose. The courts have held that affirmative action programs that give a relative preference rather than an absolute one—race or gender is used as a "plus factor" rather than as the determinative factor—are narrowly tailored. Programs that are temporary and that will cease when the employer achieves a more diverse work force have also been held to be narrowly tailored. However, an affirmative action program that required laying off or firing nonminority employees was held to be unconstitutional in *Wygant v. Jackson Board of Education*.

The following case discusses the legality of an affirmative action plan under both Title VII and the Constitution.

CASE 6.5

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA V. FARMER

113 Nev. 90, 930 P.2d 730 (Nev. Sup. Ct. 1997), *cert. denied*, 523 U.S. 1004 (March 9, 1998)

Background

Between 1989 and 1991, only one percent of the University of Nevada's full-time faculty were black, while eighty-seven to eighty-nine percent of the full-time faculty were white; twenty-five to twenty-seven percent of the full-time faculty were women. In order to remedy this racial imbalance, the University instituted the "minority bonus policy," an unwritten amendment to its affirmative action policy which allowed a department to hire an additional faculty member following the initial placement of a minority candidate.

In 1990, the University advertised for an impending vacancy in the sociology department. The announcement of the position vacancy emphasized a need for proficiency in social psychology and mentioned a salary range between $28,000.00 and $34,000.00, dependent upon experience and qualifications. The University's hiring guidelines require departments to conduct more than one interview; however, this procedure may be waived in certain cases. Yvette Farmer was one of the three finalists chosen by the search committee for the position but the University obtained a waiver to interview only one candidate, Johnson Makoba, a black African male emigrant. The department chair recalled that the search committee ranked Makoba first among the three finalists. Because of a perceived shortage of black Ph.D. candidates, coupled with Makoba's strong academic achievements, the search committee sought approval to make a job offer to Makoba at a salary of $35,000.00, with an increase to $40,000.00 upon completing his Ph.D. This initial offer exceeded the advertised salary range for the position; even though Makoba had not accepted any competing offers, the University justified its offer as a method of preempting any other institutions from hiring Makoba. Makoba accepted the job offer. Farmer was subsequently hired by the University the following year; the position for which she was hired was created under the "minority bonus policy." Her salary was set at $31,000.00 and a $2,000.00 raise after completion of her dissertation.

Farmer sued the University and Community College System of Nevada ("the University") claiming violations of Title VII of the Civil Rights Act, the Equal Pay Act and for breach of an employment contract. Farmer alleged that despite the fact that she was more qualified, the University

[26] *Fisher v. University of Texas at Austin*, 758 F.3d 274 (5th Cir. 2014), rehearing denied, 771 F.3d 274 (5th Cir. 2014).

hired a black male (Makoba) as an assistant professor of sociology instead of her because of the University's affirmative action plan. After a trial on her claims, the trial court jury awarded her $40,000 in damages, and the University appealed to the Supreme Court of Nevada. The issue on appeal was the legality of the University's affirmative action plan under both Title VII and the U.S. Constitution.

Steffen, Chief Justice

… Farmer claims that she was more qualified for the position initially offered to Makoba. However, the curriculum vitae for both candidates revealed comparable strengths with respect to their educational backgrounds, publishing, areas of specialization, and teaching experience. The search committee concluded that despite some inequalities, their strengths and weaknesses complemented each other; hence, as a result of the additional position created by the minority bonus policy, the department hired Farmer one year later.…

The University contends that the district court made a substantial error of law by failing to enter a proposed jury instruction which would have apprised the jury that Title VII does not proscribe race-based affirmative action programs designed to remedy the effects of past discrimination against traditionally disadvantaged classes. The University asserts that the district court's rejection of the proposed instruction left the jury with the impression that all race-based affirmative action programs are proscribed.…

Farmer … asserts that the University's unwritten minority bonus policy contravenes its published affirmative action plan. Finally, Farmer alleges that all race-based affirmative action plans are proscribed under Title VII of the Civil Rights Act as amended in 1991; therefore, the University discriminated against her as a female, a protected class under Title VII.

Tension exists between the goals of affirmative action and Title VII's proscription against employment practices which are motivated by considerations of race, religion, sex, or national origin, because Congress failed to provide a statutory exception for affirmative action under Title VII. Until recently, the Supreme Court's failure to achieve a majority opinion in affirmative action cases has produced schizophrenic results.…

United Steelworkers of America v. Weber is the seminal case defining permissible voluntary affirmative action plans [under Title VII].… Under *Weber*, a permissible voluntary affirmative action plan must: (1) further Title VII's statutory purpose by "break[ing] down old patterns of racial segregation and hierarchy" in "occupations which have been traditionally closed to them"; (2) not "unnecessarily trammel the interests of white employees"; (3) be "a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." …

Most recently, in *Adarand Constructors, Inc. v. Pena*, the Supreme Court revisited [the issue of the constitutionality of] affirmative action in the context of a minority set-aside program in federal highway construction. In the 5–4 opinion, the Court held that a reviewing court must apply strict scrutiny analysis for all race-based affirmative action programs, whether enacted by a federal, state, or local entity.… [T]he Court explicitly stated "that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." …

Here, in addition to considerations of race, the University based its employment decision on such criteria as educational background, publishing, teaching experience, and areas of specialization. This satisfies [the previous cases'] commands that race must be only one of several factors used in evaluating applicants. We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body.…

The University's affirmative action plan conforms to the *Weber* factors [under Title VII]. The University's attempts to diversify its faculty by opening up positions traditionally closed to minorities satisfies the first factor under *Weber*. Second, the plan does not "unnecessarily trammel the interests of white employees." The University's 1992 Affirmative Action Report revealed that whites held eighty-seven to eighty-nine percent of the full-time faculty positions. Finally, with blacks occupying only one percent of the faculty positions, it is clear that through its minority bonus policy, the University attempted to attain, as opposed to maintain, a racial balance.

The University's affirmative action plan … [also] passes constitutional muster. The University demonstrated that it has a compelling interest in fostering a culturally and ethnically diverse faculty. A failure to attract minority faculty perpetuates the University's white enclave and further limits student exposure to multicultural diversity. Moreover, the minority bonus policy is narrowly tailored to accelerate racial and gender diversity. Through its affirmative action policies, the University achieved greater racial and gender diversity by hiring Makoba and Farmer. Of note is the fact that Farmer's position is a direct result of the minority bonus policy.

Although Farmer contends that she was more qualified for Makoba's position, the search committee determined that Makoba's qualifications slightly exceeded Farmer's. The record, however, reveals that both candidates were equal in most respects. Therefore, given the aspect of subjectivity involved in choosing between candidates, the University must be given the latitude to make its own employment decisions provided that they are not discriminatory.

[The court then rejected Farmer's claim that the 1991 amendments to Title VII prohibit affirmative action.]

... we conclude that the jury was not equipped to understand the necessary legal basis upon which it could reach its factual conclusions concerning the legality of the University's affirmative action plan. Moreover, the undisputed facts of this case warranted judgment in favor of the University as a matter of law. Therefore, even if the jury had been properly instructed, the district court should have granted the University's motion for judgment notwithstanding the [jury's] verdict. Reversal of the jury's verdict on the Title VII claim is therefore in order.

The University ... has adopted a lawful race-conscious affirmative action policy in order to remedy the effects of a manifest racial imbalance in a traditionally segregated job category....

The University has aggressively sought to achieve more than employment neutrality by encouraging its departments to hire qualified minorities, women, veterans, and handicapped individuals. The minority bonus policy, albeit an unwritten one, is merely a tool for achieving cultural diversity and furthering the substantive goals of affirmative action.

For the reasons discussed above, the University's affirmative action policies pass constitutional muster. Farmer has failed to raise any material facts or law which would render the University's affirmative action policy constitutionally infirm....

Young and Rose, JJ., concur.
Springer, J., dissenting [omitted]

Case Questions

1. Why did the university adopt its affirmative action plan and the "minority bonus policy"?
2. How was Farmer injured or disadvantaged under the university's affirmative action plan?
3. How does the Court here apply the Weber test for legality of affirmative action under Title VII to the facts of this case? Explain your answer.
4. According to the Court, how does the constitutional "strict scrutiny" test apply to the facts of the case here? Explain your answer.

The affirmative action plan in the previous case was a voluntary plan; that is, it was not imposed upon the employer by a court to remedy a finding of illegal discrimination. The affirmative action plans in the *Weber*, *Johnson*, and *Wygant* cases were also voluntary plans. Title VII specifically mentions affirmative action as a possible remedy available under §706(g)(1). In *Local 28, Sheet Metal Workers Int. Ass'n. v. EEOC*,[27] the Supreme Court held that Title VII permits a court to require the adoption of an affirmative action program to remedy "persistent or egregious discrimination." The Court in *U.S. v. Paradise*[28] upheld the constitutionality of a judicially imposed affirmative action program to remedy race discrimination in promotion decisions by the Alabama State Police.

ethical DILEMMA

You are the human resource manager for Wydget Corporation, a small manufacturing company. Wydget's assembly plant is located in an inner-city neighborhood, and most of its production employees are African Americans and Hispanics,

[27] 478 U.S. 421 (1986).

[28] 480 U.S. 149 (1987).