

Affirmative Action and the New Michigan Constitutional Prohibition of Preferential Treatment: the Impact of the Michigan Civil Rights Initiative (“Proposal 2”) on Central Michigan University’s Affirmative Action Programs

Comments by General Counsel Eileen Jennings

The Michigan Civil Rights Initiative, commonly referred to as “Proposal 2,” does not ban affirmative action. Although the new language in the Michigan Constitution added by passage of Proposal 2 is commonly referred to as banning “Affirmative Action”, this reference is inaccurate. The words “affirmative action” are not used in the constitutional amendment. The language prohibits discrimination and “preferential treatment.”

The term affirmative action has been used in different ways. Historically, affirmative action has referred to a broad range of policies and activities adopted in order to assure equal opportunity for all, including persons of color and women.

Many persons, however, believe that affirmative action includes programs and decisions that extend preferences to persons on the basis of their race, ethnicity or gender. Outright preferences, i.e., selecting a person for a job because he/she is of a particular race, have been unlawful for a number of years. Some educational institutions, agencies, and corporations have included, as one element of their affirmative action programs, activities which focus on persons of a particular race or gender. These activities attempt to remedy the effects of past discrimination and to increase the participation of persons of color especially in higher education, the professions, etc. Recognition of the fact that persons of color bring to the educational environment and the work place assets that may have been developed in a “nontraditional” manner has been integrated into admissions and hiring processes by many. So too have activities that focus on exposing women and students of color to professions in which they are greatly underrepresented. It is some of these last activities that have been called into question by the passage of the new Michigan constitutional language.

Although the range of affirmative action activities may be curtailed by the new constitutional language, affirmative action itself has not been prohibited.

CMU does not interpret affirmative action to mean preferences on the basis of race, sex, color, ethnicity, or national origin. Although it is possible that some programs or activities exist within the University that may be construed as involving preferences (we are reviewing programs to identify any that might exist), none of them are mandated by the University’s affirmative action Protocol.

The University is still obligated to continue its affirmative action programs. There is no reason why Central Michigan University cannot continue to use the term “affirmative action” in its standard statement on university publications and employment advertisements, in the title of the Affirmative Action Office and Director, and in the Affirmative Action Protocol. Federal law continues to use the words “affirmative action” to refer to many programs of equal opportunity.

Executive Order 11246 requires that the University have an affirmative action program in employment. The Office of Federal Contract Compliance Programs (OFCCP) (41 CFR Part 60) offers a helpful discussion of the purpose and contents of a required affirmative action program. The OFCCP addresses employment practices, but the principles described apply to all areas of the University's operation.

“An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action-oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination.” 41 CFR 60-2.10.

Affirmative action programs are designed to ensure that discrimination is not occurring, either intentionally or unintentionally. They are intended to assure equal opportunity.

Accordingly, Central Michigan University may, and will, continue its commitment to affirmative action. It will comply with federal and state laws that prohibit discrimination and will continue its affirmative action plans in compliance with federal laws. Executive Order 11246 specifically prescribes certain programs which the University must continue in order to receive federal grants and contracts. This Executive Order addresses equal opportunity in employment. As the University's Equal Opportunity and Affirmative Action Protocol states, the Executive Order requires an analysis of areas of our workforce to locate deficiencies in the utilization of specified minority groups and women and the setting of goals and timetables which we make good faith efforts to achieve. The University is required to continue its utilization analysis, goals and timetables to strive towards a workforce that reflects the availability of persons from the protected classes.

Once again, the OFCCP regulations offer helpful comment on the purpose of the goals and timetables.

“Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity.”

And further,

“Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden. . . . In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual’s employment status, on the basis of that person’s race, color, religion, sex, or national origin. . . . Placement goals do not create set-asides for specific groups, not are they intended to achieve proportional representation or equal results.” . . . Placement goals may not be used to supersede merit selection principles. “

These are not new principles. They have been in place since 1965, and CMU has been complying with them since that time.

These principles do not conflict with the new Michigan constitutional language. Furthermore, the constitutional language specifically states: “This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.” If the University were to fail to comply with the requirements of Executive Order 11246, it would become ineligible for federal contracts.

The purpose of the University’s goals and timetables is to assure that we are not discriminating in employment – even unintentionally. No preferences have been or will be used in hiring, promotion and other employment decisions. However, the University must continue to advertise its vacancies widely in order to notify and attract a wide diversity of candidates, including women and persons of color. The University must continue to monitor search and selection processes to prevent discrimination and the subtle uses of inappropriate factors in hiring. The University must continue to encourage all its hiring units to consider actively all candidates, including women and candidates of color.

Many other federal statutes (Title VI of the Civil Rights Act of 1964, Title IX, Title VII of the Civil Rights Act) and the Michigan Elliott-Larsen Civil Rights Act forbid discrimination, although they do not expressly require affirmative action programs. The University must use its energies to comply with these statutes. It must administer all of its programs – from admissions to construction contracts – in a way that actively and consciously avoids discrimination.

There are many difficulties in interpreting and applying the new constitutional provision. However, the University is not required to stop its active recruitment of persons of color, women, and other protected groups into the student body and the workforce. The University can and will continue programs to assure that persons from protected classes are welcomed into the student body and workforce, and are treated well.

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