

Opinion | OP-ED CONTRIBUTOR

Only Minorities Need Apply

By JOHN D. SKRENTNY MAY 6, 2014

SAN DIEGO — THIS year is the 50th anniversary of the Civil Rights Act, which among other things prohibits the use of race in deciding whom to hire, fire, promote or place in the best and worst jobs.

But while the overt discrimination of 1964 is now rare, a more subtle form of bias is emerging: Both public and private employers increasingly treat race not as a hindrance, but as a qualification — a practice that, unchecked, could undermine the basic promise of the act.

For example, corporations often match African-American, Asian-American and Latino sales employees to corresponding markets because of their superior understanding of these markets, or because customers prefer to see employees of their own race, or both.

This is not affirmative action: Such “racial realism” is not intended to guarantee equal opportunity or compensate injustice, but rather to improve service and deliver profits for employers.

Racial realism is common in many sectors. Hospitals, supported by progressive foundations, racially match physicians and patients to improve health care. School districts place minority teachers in schools with large numbers of minority students because they supposedly understand their learning styles better, and serve as racial role models. Police departments try to reduce crime and police brutality by racially matching officers and neighborhoods.

Film producers manipulate audience reactions by displaying the right races in the right roles. This may be motivated by artistic goals — obviously, a film like “12 Years a Slave” required actors of particular races in particular roles. More often, these are business decisions. Whites in starring roles are thought to generate more box-office revenue, though adding nonwhites can broaden appeal.

Such practices are legally dubious. The Equal Employment Opportunity Commission, charged with enforcing federal anti-discrimination laws, states that the Civil Rights Act “does not permit racially motivated decisions driven by business concerns.” Nor may race or color ever be a “bona fide occupational qualification.”

Courts have long supported this position. The Supreme Court’s 1986 decision in *Wygant v. Jackson Board of Education* held that hiring and placing teachers to be racial role models was discrimination, even linking it “to the very system the Court rejected in *Brown*.”

In 1999, the 11th Circuit Court considered a telemarketing firm that matched employees’ race with those of the customers they called, and ruled that the company’s belief that this produced better responses was based on a stereotype and was “clearly” discrimination.

Meanwhile, the Seventh Circuit rejected Chicago’s contention that minority firefighters were needed for credibility and cooperation in minority neighborhoods; separately, it ruled that hiring black counselors to deal with black disadvantaged youths was illegal because it catered to discrimination by clients and their parents. There are only two areas where courts have authorized racial realism. Some courts have argued that law enforcement creates a compelling interest — “operational needs” — in communication and legitimacy with nonwhites, justifying racial realism in the hiring and placement of police officers. And there have been some exceptions made for artistic license: In 2012, a Tennessee district court, in a case regarding the reality show “*The Bachelor*,” stated that casting only whites in the lead roles was expression, akin to speech, and protected by the First Amendment.

Not only is racial realism legally unjustified, but it often hurts the people who, in the short term, would seem to benefit from it. Studies by the sociologists Elijah

Anderson and Sharon Collins have found that nonwhite employees who are promoted to fill racially defined roles have trouble leaving them.

Moreover in jobs where part of an employee's salary is based on sales volume, assigning nonwhites to nonwhite market sectors — which tend to be lower income — can mean significantly smaller paychecks. In 2008, Walgreens agreed to pay \$24 million to black managers who objected to being placed in black neighborhoods, which typically had lower sales and thus lower compensation.

Nevertheless, racial realism is too slippery, and too widely used, to stamp out completely. And so rather than trying to end racial realism, we need to make sure that it doesn't block opportunities for minorities. For one thing, we could require more transparency and verification. If employers think race is a legitimate qualification for a job, they must rely on evidence, not stereotypes.

And in cases where racial-realist hiring and placement is justified, like after a series of racially fraught police incidents, there should be opt-outs and time limits.

This was the position of a New York district court when black police officers sued to limit Mayor Rudolph W. Giuliani's ability to force them to work in a dangerous precinct after the 1997 beating of Abner Louima, a Haitian immigrant, by white police officers. Mayor Giuliani argued that the presence of black officers was necessary to ease racial tensions, and the court agreed — but also held that the placements had to be temporary.

America has changed significantly since the Civil Rights Act. But we are still a long way from the day when race no longer plays a role in society. Racial realism may be unavoidable for the time being, but we must still be wary of its excesses, lest it lead us back down the road toward racial discrimination.

John D. Skrentny, a professor of sociology and the director of the Center for Comparative Immigration Studies at the University of California, San Diego, is the author of "After Civil Rights: Racial Realism in the New American Workplace."

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