



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Legal Counsel

July 10, 2018

By mail and e-mail: ehill@browngold.com

Eve L. Hill, Esq.
Brown Goldstein Levy
120 E. Baltimore Street
Suite 1700
Baltimore, Maryland 21202

Dear Ms. Hill:

This responds to your letter dated June 26, 2018, inquiring whether it would violate either the Americans with Disabilities Act (ADA) or constitutional protections if a private employer implements an affirmative action program that includes:

- preferences for applicants with disabilities or customers of vocational rehabilitation (VR) programs;
- a percentage or numerical goal for hiring of people with disabilities or VR customers; and/or
- advertising jobs as reserved or prioritized for applicants with disabilities or VR customers.

All three of these forms of affirmative action on behalf of individuals with disabilities are permissible. Favoring an individual with a disability over a non-disabled individual for purposes of affirmative action in hiring or advancement is not unlawful disparate treatment based on disability, and therefore does not violate Title I of the ADA.¹ Both the text of the ADA itself, as clarified by the ADA Amendments Act of 2008, and the EEOC's implementing regulations explicitly state that an individual without a disability cannot bring a claim of discrimination under the ADA. *See* 42 U.S.C. Section 12201(g) ("Claims of no disability") ("Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability."); 29 C.F.R. Section 1630.4(b) ("Claims of no disability") ("Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation

¹ The Commission has similarly stated that by engaging in affirmative action on behalf of individuals with disabilities, a federal government agency does not violate the employment nondiscrimination prohibitions of Section 501 of the Rehabilitation Act of 1973. *See Questions and Answers: Promoting the Employment of People with Disabilities in the Federal Workforce*, at question 3, <https://www.eeoc.gov/federal/qanda-employment-with-disabilities.cfm>. Pursuant to 1992 amendments to the Rehabilitation Act, the nondiscrimination standards of Title I of the ADA and Section 501 of the Rehabilitation Act are the same.

that was denied to an individual without a disability.”). As further explained in the appendix to the EEOC’s regulations, this provision:

... makes it clear that the language “on the basis of disability” is not intended to create a cause of action for an individual without a disability who claims that someone with a disability was treated more favorably (disparate treatment), or was provided a reasonable accommodation that an individual without a disability was not provided. See 2008 House Judiciary Committee Report at 21 (this provision “prohibits reverse discrimination claims by disallowing claims based on the lack of disability”). Additionally, the ADA and this part do not affect laws that may require the affirmative recruitment or hiring of individuals with disabilities, or any voluntary affirmative action employers may undertake on behalf of individuals with disabilities. However, part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use criteria that are job related and consistent with business necessity to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

29 C.F.R. Part 1630, App. § 1630.4.²

The EEOC has in fact recognized, for more than 20 years, that the ADA permits affirmative action on behalf of individuals with disabilities, whether legally required or voluntarily undertaken. In its *Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations Under the ADA* (1995), www.eeoc.gov/policy/docs/preemp.html, the EEOC explained the circumstances under which employers may ask job applicants to voluntarily self-identify as individuals with disabilities for affirmative action purposes. Such voluntary invitations to self-identify are permitted, provided that the employer: (1) is undertaking affirmative action pursuant to either a legal requirement or voluntarily to benefit individuals with disabilities; (2) states clearly that the information is being used solely in connection with its affirmative action obligations or efforts; and (3) states clearly that the information is being requested on a voluntary basis, that it will be kept confidential in

² This rule stands in stark contrast to the legal standards under Title VII of the Civil Rights Act of 1964 for affirmative hiring based on race or ethnicity. See *EEOC Compliance Manual Chapter on Race and Color Discrimination*, Section VI-C (Diversity and Affirmative Action) (Apr. 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.html>.

Eve L. Hill, Esq.
July 10, 2018
Page 3

accordance with the ADA, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with the ADA. The EEOC has repeated in numerous policy and technical assistance materials ever since that any employer may invite applicants or employees to voluntarily self-identify as individuals with disabilities for affirmative action purposes, whether pursuant to a federally-mandated affirmative action requirement such as Section 503 of the Rehabilitation Act (which imposes various affirmative action requirements on federal contractors) or a voluntarily adopted program.³

With respect to your further question about whether this type of preferential treatment would violate the U.S. Constitution, please note that constitutional protections are only implicated by acts of the government, not private employers. Moreover, federal, state, or local government employers commonly engage in affirmative hiring, retention, and advancement programs on behalf of individuals with disabilities.⁴

This informal discussion letter addressing the issues you raised is not an official opinion of the Commission. If you would like to discuss this topic further or if you have any further questions, please do not hesitate to contact me.

Sincerely,



Christopher J. Kuczynski
Assistant Legal Counsel

³ For further background on why compliance by federal contractors with affirmative action requirements under Section 503 of the Rehabilitation Act does not violate the ADA, *see* [https://www.dol.gov/ofccp/regs/compliance/sec503/Self ID Forms/OLC letter to OFCCP 8-8-2013_508c.pdf](https://www.dol.gov/ofccp/regs/compliance/sec503/Self_ID_Forms/OLC_letter_to_OFCCP_8-8-2013_508c.pdf). *See also* Informal Discussion Letter, EEOC Office of Legal Counsel (Sept. 15, 2010) (stating that employers do not violate the ADA by making specified inquiries to identify for affirmative action purposes those applicants referred through a vocational rehabilitation program), https://www.eeoc.gov/eeoc/foia/letters/2010/ada-titlevii-adea_work_tax_irs_eta_form.html.

⁴ As noted, under Section 501 of the Rehabilitation Act, federal government agencies are specifically required to engage in affirmative employment of people with disabilities, and a range of Presidential Executive Orders and EEOC Directives have addressed these goals. *See Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, <https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm>. Under Section 503 of the Rehabilitation Act, enforced by the U.S. Department of Labor, private employers holding federal government contracts also have their own specific affirmative action obligations. *See Frequently Asked Questions: Section 503 Regulations*, https://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm.