

STATE OF MICHIGAN
COURT OF APPEALS

LESLIE G. CRAWFORD,

Plaintiff-Appellant,

v

DEPARTMENT OF CIVIL SERVICE and
DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

UNPUBLISHED

June 1, 1999

No. 205603

Saginaw Circuit Court

LC No. 96-014806 CZ

Before: Jansen, P.J., and Sawyer and Markman, JJ.

MARKMAN, J. (dissenting).

I respectfully dissent and would reverse the trial court's grant of summary disposition in favor of defendants for the following reasons.

First, 'augmented certification' appears, on its face, to violate 42 USC § 2000e-2(1), which reads as follows:

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex or national origin.

See also 42 USC 2000e(i); *Seminole Tribe of Florida v Florida*, 517 US 609; 116 S Ct 1114; 134 L Ed 2d 252 (1996). As the "supreme law of the land," to which "judges in every state shall be bound," US Const. Art VI, 'augmented certification' must be scrutinized in the context of this federal statute, as well as in the context of Michigan law and the Michigan and federal constitutions.

Second, to the extent that defendant has raised federal and state constitutional claims relating to the equal protection of the law,¹ I do not believe that the State may nullify these claims by virtue of the pre-approval of an affirmative action plan by the Commission on Civil Rights (CRC), pursuant to MCL 37.2210; MSA 3.548(210).² While an employer who obtains approval of an affirmative action plan from the CRC may thereby insulate itself from suit under the Act itself, the CRC neither determines the

meaning of the federal or state constitutions nor the extent to which a state affirmative action plan is consistent with such constitutions. Unlike a private employer's affirmative action plan, a state affirmative action plan is subject to constitutional as well as statutory review.³

In measuring affirmative action plans under the federal constitution, the Supreme Court has endorsed 'strict scrutiny' analysis:

Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. [*Wygant v Jackson Board of Education*, 476 US 267, 273-74; 106 S Ct 1842; 90 L Ed 2d 260 (1986).]

This was reiterated in *Adarand Constructors v Pena*, 515 US 200, 227, 115 S Ct 2097; 132 L Ed 2d 158 (1995), in which the Court remarked, "We hold today that all racial classifications, imposed by whatever . . . governmental actor, must be analyzed by a reviewing court under strict scrutiny." Nor is this standard of review "dependent on the race of those burdened or benefited by a particular classification . . . the single standard of review for racial classifications should be strict scrutiny." *Id.* at 221, quoting *City of Richmond v J.A. Croson Co*, 488 US 469, 493-94; 109 S Ct 706; 102 L Ed 2d 854 (1989).⁴ Therefore, I believe that plaintiff is entitled to careful consideration of his constitutional claims by the trial court independent of its analysis of plaintiff's statutory claims.

Third, MCL 37.2210; MSA 3.548(210) authorizes the CSC only to approve affirmative action plans which either "eliminate present effects of past discriminatory practices" or which "assure equal opportunity" with respect to race. By requiring such approval, "the Legislature intended to ensure that plans did not unnecessarily trammel rights of non-minority employees." *Victorson v Dept of Treasury*, 439 Mich 131, 140; 482 NW2d 685 (1992).⁵ While approvals of affirmative action plans by the CRC are entitled to considerable deference by this Court, I see no evidence that they are not subject to judicial review in the same manner as other decisions of administrative agencies.⁶ MCL 24.306; MSA 3.560(206) provides:

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

- (a) In violation of the constitution or a statute.
- (b) In excess of the statutory authority or jurisdiction of the agency.
- (c) Made upon unlawful procedure resulting in material prejudice to a party.

(d) Not supported by competent, material and substantial evidence on the whole record.

(e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

(f) Affected by other substantial and material error of law.

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

Indeed, the fact that the CRC undertakes decisions pursuant to § 210 that directly affect the federal and state constitutional rights of individuals,⁷ and does so without affording such individuals the opportunity to participate in such proceedings, only underscores the need to subject the decisions of the CRC to the normal checks and balances set forth in Michigan law.⁸

Further, unless the delegation of authority from the legislature to the CRC under the act is accompanied by meaningful standards which are followed by the agency, there is a violation of the non-delegation doctrine which is “rooted in the principle of separation of powers that underlies our tripartite system of Government.” *Mistretta v United States*, 488 US 361, 371-72; 109 S Ct 647; 102 L Ed 2d 714 (1989); see also *American Trucking Associations v EPA*, __ US App DC __; F3d __, 1999 WL 300618. In other words, the statutory requirement that the CRC determine that an affirmative action plan either eliminates the “present effects of past discriminatory practices” or otherwise “assure[s] equal opportunity” with respect to race, is not only compelled by constitutional provisions requiring that all persons in Michigan be accorded the “equal protection” of the law, but also by constitutional provisions requiring that unelected administrative agencies such as the CRC be governed by “intelligible principles” in implementing the statutes of the legislature. *Id.*

Where there is little or no evidence of the “present effects of past discriminatory practices” on the part of an employer, there are no grounds for the CRC under MCL 37.2210; MSA 3.548(210) to authorize a racially-conscious employment plan.⁹ Similarly, where there is no evidence that such a plan will “assure equal opportunity” by any reasonable understanding of that phrase, but will, in fact, achieve precisely the opposite result, there is no basis upon which the CRC may validate a racially-conscious employment plan. The phrase “to eliminate present effects of past discriminatory practices” and “assure equal opportunity with respect to religion, race, color, national origin or sex” in MCL 37.2210; MSA 3.548(210) are not mere surplusage; rather, they are the triggering standards for allowing the CRC to authorize an employment plan which might otherwise contravene the act-- an act adopted by the Legislature expressly in furtherance of the equal protection guarantee of Const 1963, art 1, § 2. *Civil Rights Dep’t v Waterford*, 425 Mich 173, 186, 188; 387 NW2d 821 (1986); *Neal v Corrections Dep’t*, 230 Mich App 202, 217-18; 583 NW2d 249 (1998). The CRC under § 210 cannot approve merely *any* plan, no matter to what extent such a plan might “trammel” the rights of non-protected minorities¹⁰ and no matter how unconnected its racial preferences might be to remedying past discrimination. Rather, this provision charges the CRC with responsibility for undertaking extraordinarily sensitive decisions-- ones with considerable constitutional implications—only where it

has brought its expertise to bear and determined that a racially conscious employment plan was temporarily necessary to remedy a past history of discrimination by the employer. While its decisions are presumed to be valid and reasonable, *Battjes Builders v Kent County Drain Commissioner*, 15 Mich App 618, 623; 167 NW2d 123 (1969), they are “not controlling and cannot be used to overcome the statute’s plain meaning.” *Western Michigan University v Michigan*, 455 Mich 531, 544; 565 NW2d 828 (1997); MCL 24.306; MSA 3.560(206).¹¹

Fourth, whatever deference to which the decisions of the CRC are entitled must, in the instant case, largely rest on faith, since there is nothing in the record here concerning their deliberations beyond a one-page affidavit from Charles Roules, Assistant Director of the Business and Economic Services Team of the Michigan Department of Civil Rights, that he is familiar with the procedures under which ‘equal employment opportunity’ plans are reviewed and approved by the Commission and that the Department of Correction’s (DOC) plan, in fact, underwent this process.¹² Beyond this, I find nothing in the CRC’s record which is specific to the DOC plan in controversy, or which suggests anything about the thought processes or analyses by which the CRC concluded that the DOC plan either “assured equal opportunity,” “eliminated the present effects of past discriminatory practices,” or was otherwise compatible with the federal and state constitutions, notwithstanding the racial considerations that the plan explicitly took into account.¹³ While the trial court may be correct that Roules’ testimony “demonstrates conclusively” that the CRC approved the DOC plan,¹⁴ it demonstrates nothing at all concerning the rationale or justification for such approval.

Absent any such specific determination by the CRC, it is not only hard to understand not only why its “approval” should be accorded deference under § 210, but also how the DOC plan can be seen as compatible with the concept of equal protection under either Const, art 1, § 2 or the Fourteenth Amendment. The ‘augmented certification’ rule being challenged by plaintiff specifies that it is triggered by the “underutilization” of a “protected class.”

“Underutilization” is defined as having fewer members of a protected category than would reasonably be expected by their availability for the job. This is calculated by looking at population percentages for minority groups and labor force percentages for women and “handicappers” with appropriate “validated” modifications for certain positions with higher level qualifications.¹⁵

As so defined, “underutilization” does not amount to even *prima facie* evidence of past discrimination. *Hazelwood School Dist v United States*, 433 US 299; 97 S Ct 2736; 53 L Ed 2d 768 (1977). Nonetheless, when there is “underrepresentation” of a “protected group” in the position to be filled, the DOC is required to include at least three members of “protected groups” from the “highly qualified” band of applicants in the designated list of candidates from which a final selection must be made. If there are not enough such individuals available, then “protected group” members from lower bands are added or “augmented” to the highly qualified band eligible for promotion.

Rather than attempting to identify “past discrimination,” then relating such discrimination to present levels of “underutilization,” the ‘augmented certification’ rule instead appears to be a relatively

straightforward exercise in racial calculation. The starting point of the rule-- and seemingly the finishing point-- is the mere existence of disparities between numbers of minority groups in the population and their numbers in particular positions of public employment. There is not even a pretense of attempting to identify past questionable employment practices or any history of discrimination which might explain such disparities and, therefore, arguably justify racially-conscious remedial practices. Nor is there any apparent standards set forth for determining when the race-consciousness of 'augmented certification' is no longer necessary. See in this regard *Adarand, supra* at 228. In my judgment, the 'augmented certification' rule appears to have explicitly taken race into account, it appears to have explicitly advantaged individuals on the basis of race (and therefore to have explicitly disadvantaged others, including plaintiff, on the same basis), and it appears to have done so without any determination that such racial decisionmaking was required in order to remedy the "present effects of past discrimination."

Fifth, to the extent that defendants attempt to identify the 1971 Employment Practices Review and Recommendations Report of the Department of Civil Services and the CRC as an adequate factual predicate to justify the DOC's affirmative action plan 23 years later in 1994, I believe this to be wholly inadequate.¹⁶ I would find it inadequate even if there were evidence that the CRC, in fact, considered the 1971 Report in approving the DOC's 1992-94 affirmative action plan. As the Sixth Circuit U.S. Court of Appeals stated in *Middleton v City of Flint*, 92 F3d 396, 409 (CA6, 1996):

[E]vidence of past discrimination that is remote in time will not support a claim of compelling governmental interest when other evidence is adduced to show that the governmental body has taken serious steps in recent years to reverse the effects of past discrimination and to implement appropriate new standards. Thus, in *Brunet v City of Columbus*, 1 F3d 390 [CA6, 1993], we held that strong evidence proffered in 1989 that a city fire department had discriminated prior to 1975 'is too remote to support a compelling governmental interest to justify the affirmative action plan,' especially in light of evidence that the city had subsequently taken steps to improve its recruitment efforts.¹⁷

Whatever the merits of the 1971 Report in support of the proposition that the DOC has ever discriminated against racial minorities, it hardly suffices to demonstrate that the "present effects" of such discrimination continue, and require a race-conscious remedy, a quarter-century later. Obviously, such a Report cannot take into account the myriad affirmative action plans and other civil rights initiatives adopted in its wake; the subsequent enactment and enforcement of the Elliott-Larsen Civil Rights Act and its progeny; the subsequent efforts of the CRC, the DOC, the Civil Service Commission (CSC) and other state agencies to promote equality of rights; and the increasingly diluted impact of any past discriminatory conduct by the DOC over the ensuing two decades.¹⁸

Such a recent determination is not a matter of technical detail but instead lies at the heart of whether the DOC plan is compatible with the federal and state constitutions. As the U.S. Supreme Court observed in *Wygant v Jackson Board of Education*, 476 US 267; 106 S Ct 1842; 90 L Ed2d 260 (1986), a case arising out of this State:

[A]ny racial classification ‘must be justified by a compelling governmental interest’ . . . This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination As the legal basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive. [*Wygant, supra* at 274-76 (citations omitted); see also *City of Richmond, supra*.]

“In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past and timeless in their ability to affect the future.” *Wygant, supra* at 276. Therefore, one important inquiry in reviewing affirmative action plans is “whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’” *Adarand, supra* at 237 (citations omitted). In the present case, I see no effort on the part of the CRC to review the 1971 Report in light of the events of the ensuing years, to assess the DOC plan in light of those events, or to acknowledge in any way that the affirmative action plan of the DOC was designed as an extraordinary and temporary remedy, not one to be justified in perpetuity by a boilerplate reference to an increasingly stale and outdated report. See *Detroit Police Officer’s Association v Young*, 989 F2d 225, 228 (CA6, 1993).

Therefore, because the CRC, in my judgment, may “immunize” an affirmative action plan from attack under the Act only where it has applied the proper statutory standards, and because there is utterly no evidence here that the CRC has either engaged in any evaluation of the DOC plan or based its approval of such plan upon anything beyond an egregiously outdated report on the need for affirmative action in Michigan’s public sector, I would remand for further fact-finding on the part of the trial court. If nothing is shown beyond what has already been adduced by defendants, the DOC’s plan would, in my judgment, be clearly violative of the federal and state constitutions.

Sixth, it is not altogether clear that the plan approved by the CRC is the same plan being challenged here by plaintiff. Plaintiff alleges that the 1992-94 affirmative action plan of the DOC which was approved by the CRC referenced only a 1977 ‘expanded certification’ rule, rather than the 1986 ‘augmented certification’ rule developed by the CSC, and adopted by the DOC, which is at issue in the instant case. Plaintiff contends that the latter rule is “wholly distinct” from the former rule. Plaintiff also challenges the ‘Availability Standards’ by which the DOC specifically measured underutilization, which standard was never a part of the affirmative action plan submitted to the CRC. In assessing the ‘augmented certification’ rule and the ‘Availability Standard,’ plaintiff observes that the 1992-94 plan approved by the CRC expressly states that DOC supervisors are responsible for “preventing discriminatory practices . . . against employees” on the basis of race or color and that the DOC is “committed to ensuring that promotional decisions are in accord with principles of equal opportunity and only essential job-related tasks will be used for requirements.” To the extent that the actual promotion plan implemented by the DOC was not the plan submitted to, and approved by, the CRC, defendants here can hardly avail themselves of the “safe harbor” provisions of § 210.

Seventh, plaintiff alleges that the actual implementation by the DOC of their affirmative action plan was inconsistent with the specific terms of the plan approved by the CRC. In particular, he asserts that “[t]he most stark fact showing that defendant’s actions in the Spring of 1994 were beyond the scope of the DOC’s plan is the fact that its underutilization number for blacks was four, but it chose to promote *seven* clearly less experienced and less qualified blacks.” Again, whatever the effect of approval of an affirmative action plan by the CRC under § 210, such approval can hardly be understood to extend to every manner of implementation of the plan, no matter how inconsistent such implementation might be with its express terms.

Eighth, although defendant is correct that evidence has been offered that might well lead a reasonable factfinder to conclude that, even absent the DOC’s plan, plaintiff would not have been promoted, there are material questions of fact that remain in this regard. MCR 2.116(C)(10). These questions arise from the fact that plaintiff’s competitive testing results were markedly superior to many of those who benefited from the plan and who were promoted in his stead, the fact that plaintiff’s experience was markedly greater than many of those who benefited from the plan and who were promoted in his stead, and the fact that the DOC was engaged via the plan in a process of determining promotions based, at least in part, upon straightforward consideration of the race of applicants.

As a result, plaintiff has, in my judgment, established a prima facie case of reverse discrimination. In *Allen v Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997), this Court, relying upon *McDonnell-Douglas v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973),¹⁹ held that such a prima facie case required (i) background circumstances supporting the “suspicion” of reverse discrimination; (ii) a showing that plaintiff applied and was qualified for the available promotion; (iii) a showing that, despite such qualifications, plaintiff was not promoted; and (iv) evidence that another person of similar or lower qualifications who fell within the “protected category” was instead promoted. Here, the basis for a “suspicion” of reverse discrimination is simply the presence of a policy which explicitly takes race into account, and which advantages applicants from “protected groups,” while disadvantaging applicants from non-“protected groups.” When combined with plaintiff’s competitive testing results which placed him within the highest band of applicants (and fourth highest overall among applicants), plaintiff’s general and supervisory experience, and the fact that “protected group” members were promoted with lower test results and lesser amounts of experience than plaintiff,²⁰ I conclude that defendant has established a sufficient prima facie case of reverse discrimination to withstand summary disposition.²¹ Further, if, upon remand, the DOC affirmative action plan is determined by the application of proper standards to be violative of the federal or state constitutions, plaintiff is entitled to a trial on his substantive claims of discrimination. While it may eventually be shown, based upon a consideration of the totality of circumstances, that plaintiff was not truly among the best qualified candidates for promotion, such a determination must be reserved to the finder of fact.

Ninth, concerning plaintiff’s standing to bring this suit, Count III sets forth a claim for damages under the Civil Rights Act. A claim of unlawful discrimination may be based upon the loss of equal employment opportunity as well as the loss of employment itself. *Laitenen v Saginaw*, 213 Mich App 130, 132; 539 NW2d 515 (1995).²² Therefore, plaintiff, who applied for and was denied a promotion,

pursuant to a program which disadvantaged him in the course of advantaging other applicants on the basis of race, clearly possesses standing to pursue his statutory claim in Count III.²³ He has suffered an individualized and particularized injury based upon the allegations set forth in his complaint.

With respect to Count I, plaintiff sues for declaratory relief under 42 USC § 1983, namely a declaration that “said affirmative action policy, the current availability standard, the ‘augmented certification’ rule and the DOC’s affirmative action plans in force in 1994 and thereafter are unconstitutional, null and void . . .” Here, there is indisputably a “case of actual controversy,” in which the parties have adverse interests. *Detroit Base Coalition v Dept of Social Services*, 431 Mich 172, 191-92; 428 NW2d 335 (1988); MCR 2.605(A). Plaintiff asserts that the government has acted in a manner inconsistent with the federal and state constitutions in carrying out its affirmative action programs, while defendant denies this. As the Commentary in Michigan Court Rules Practice observes,

It is clear enough that, if a case has progressed to the point where a traditional action for damages or for an injunction can be maintained, declaratory relief will not be denied for a lack of an actual controversy. But if declaratory relief is limited to such situations, it would fail in its intended purpose to give relief, in appropriate cases, before injury has occurred or duties have been violated. Typically, these are cases in which a party would like to know its rights or liabilities under a statute These are the precise situations that declaratory relief was meant to cover, and that intent should not be frustrated by an unduly restrictive construction of the actual controversy requirement. [Martin, Dean & Webster, Michigan Court Rules Practice, § 2605.3.]

Therefore, what is most essential to an ‘actual controversy’ is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). In my judgment, plaintiff, being entitled to pursue his statutory claim of actual damages in Count III, is also entitled to pursue his claim for the lesser remedy of declaratory judgment, *to wit*, that the affirmative action policies of the DOC are incompatible with the federal and state constitutions.

With respect to Count II, plaintiff sues for injunctive relief under Const 1963, art 11, § 5. Such provision, in addition to mandating civil service promotions “exclusively on the basis of merit” and prohibiting decisions undertaken for “religious, racial or partisan purposes,” also provides that “[v]iolation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.” However broadly this provision is to be construed with regard to the rights of “any citizen,” it is certainly broad enough to encompass a “citizen” who has been subject to the application of an affirmative action plan-- involving at least arguably a departure from the constitutional “merit” standard-- and who otherwise has standing to pursue a statutory damages claim. Plaintiff asserts that, but for the dilution of the “merit” standard by defendant’s affirmative action policies, he would have obtained the promotion which he has currently been denied.

With respects to Counts I and II, I am not persuaded that plaintiff’s claims are “moot,” as defendants assert, because the policy of ‘augmented certification’ has since been discontinued.²⁴ First,

it is clear that plaintiff's complaint is not focused exclusively upon 'augmented certification.' Rather, the complaint is explicitly focused upon 'augmented certification,' the current 'availability standard' and the DOC's overall affirmative action plan. Second, defendant's voluntary cessation of 'augmented certification,' only after the filing of plaintiff's lawsuit and at least in some part in apparent response to such lawsuit, does not necessarily render a challenge to such policy "moot." *Parks v Employment Security Commission*, 427 Mich 224, 260; 398 NW2d 275 (1986); *Educational Subscription Service v American Educational Services*, 115 Mich App 413, 430; 320 NW2d 684 (1982).

For the reasons set forth in note 3, *supra*, I do not believe that plaintiff has standing to sue directly under Const 1963, art I, §2, but only because I conclude that he is not foreclosed from bringing suit under the Civil Rights Act. If I were to share the interpretation of § 210 adopted by the majority, namely that decisions by the CRC providing 'safe harbor' to affirmative action plans are effectively unreviewable by this Court, I might well conclude differently.

Finally, I note that I agree with defendants that the CSC and its members are not properly joined as defendants in this suit because only the DOC is the operative appointing authority here. As appointing authority, the DOC made the actual decision to utilize an affirmative action plan just as it made the decisions to utilize 'augmented certification' and the 'Availability Standard.' According to Mary Pollock, affirmative action coordinator for the Department of Civil Service, "The decision whether or not to request an augmented certification rests solely with the hiring agency. The Civil Service Commission does not require the use of 'augmented certification.'"

The government here has raised an impressive array of procedural issues in opposition to plaintiff's claims-- that he lacks standing, that his claims are moot, that his claims are not ripe, that he has sued the wrong parties, that this court lacks jurisdiction to hear his claims, that plaintiff has not established a prima facie case in support of his claims. Although I am not persuaded of their merits, the government has properly and capably raised these issues. However, I cannot help but reflect upon the considerable obstacles that the government would place in the way of a plaintiff attempting to assert his right not to be denied one of the bedrock rights of American constitutional government, the right not to be disadvantaged by one's government on account of skin color.

/s/ Stephen J. Markman

¹ Here, plaintiff has sued on the basis of Const 1963, art 11, § 5 which provides that the Civil Service Commission (CSC) shall “determine by competitive examination and performance, exclusively on the basis of merit, efficiency and fitness, the qualifications of all candidates for positions in the classified service” and that “no appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.” Plaintiff has also sued under the Fourteenth Amendment to the United States Constitution which guarantees all persons “the equal protection of the law.”

² This provision of the Elliott-Larsen Civil Rights Act states that an employer “may adopt and carry out a plan to eliminate the present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.”

³ In *Smith v Dept of Public Health*, 428 Mich 540; 410 NW2d 749 (1987), aff’d sub nom *Will v Michigan Dep’t of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed2d 45 (1989), the Supreme Court held that, in the appropriate circumstances, a plaintiff could bring a claim for damages against the State for violation of the Michigan Constitution. See also *Johnson v Wayne County*, 213 Mich App 143; 540 NW2d 66 (1995). As described in *Jones v Powell*, 227 Mich App 662, 671; 577 NW2d 130 (1998), *Smith* “recognized a narrow remedy against the state where none otherwise would have existed.” Here, where indisputably there is a state “custom or policy” which implicates the equal protection clause of the state constitution, *Johnson, supra* at 151, and where plaintiff, at least according to the majority, has no statutory remedy because the Civil Rights Act enables the CSC to immunize affirmative action plans from challenge by individuals aggrieved by ‘reverse discrimination,’ plaintiff may well be entitled to sue the State directly under art 1, § 2 of the Constitution. See *Cremonte v State Police*, 232 Mich App 240, 251-52; 591 NW2d 261 (1998) (relying generally upon the implementation clause of art 1, § 2 and the Civil Rights Act as establishing an alternative remedy for a civil rights plaintiff but not addressing the particular circumstances under which a plaintiff is denied a remedy by virtue of the CRC’s approval of an affirmative action plan under MCL 37.2210; MSA 3.548(210)). However, because I disagree with the majority concerning the preclusive effect of § 210, I find it unnecessary to determine the extent to which plaintiff can sue directly under the state constitution.

⁴ “The purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race” by assuring that challenged actions constitute goals important enough “to warrant use of a highly suspect tool.” *Croson, supra* at 493.

⁵ *Victorson* held that, notwithstanding the express requirement of § 210 that an affirmative action plan be filed and approved by the CRC in order to be afforded a defense under the law, an *unapproved* affirmative action plan might also be asserted as a defense to a discrimination claim under the Act where

the plan was otherwise valid under federal civil rights law. The decision in *Victorson*, if anything, diminishes the supposed inviolateness of the CRC approval process; just as such process may be unnecessary to validate an affirmative action plan, it also may not necessarily validate a plan which fails to meet statutory standards.

⁶ The CRC is a constitutionally created agency, Const 1963, art V, § 29, whose principle constitutional responsibility is to “investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination.” However, the specific authority which the CRC is exercising in the instant case, i.e., the review and approval of specific affirmative action plans, is wholly a function of § 210 of the Civil Rights Act.

⁷ Const 1963, art I, § 2 provides that “No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.” The 14th Amendment to the U.S. Constitution guarantees all persons “the equal protection of the laws.” See also Const 1963, art 11, § 5 at note 1, *supra*.

⁸ While I agree with defendants that a plan approved by the CRC constitutes a “complete and legitimate defense to a discrimination claim under the Elliott-Larsen Civil Rights Act,” this is not the equivalent of the proposition that such approvals are immune from judicial review. I read nothing in *Victorson*, *supra*, or the other cases cited by defendants, to the contrary.

⁹ If an affirmative action plan was *not* racially-conscious, but directed merely, for example, to informing a broader spectrum of the community about the availability of employment positions, there would, of course, be no need to erect a “safe harbor” for such a plan under the Civil Rights Act. Further, with regard to racially-conscious employment plans, defendants have identified no cases in support of their theory that race-conscious personnel practices on the part of the government are to be judged by a different “equal protection” standard when they occur at a preliminary or intermediate stage of the hiring or promotion process rather than at an ultimate stage of the processes. Thus, their assertions that the promotion process here “did not require the appointment of a protected group member” is unavailing, in my judgment, as is their observation that “plaintiff set forth no facts showing that race was a factor or considered in the decision to hire individuals for the sergeant position at the Saginaw Correctional Facility in spring 1994.”

¹⁰ Pursuant to Michigan affirmative action policy, “protected” groups include blacks, Asians, women, American Indians, Hispanics and handicapped persons.

¹¹ I respectfully disagree with defendants’ assertion that “[t]he Citizens of the State of Michigan have vested these two commissions [the CRC and CSC] with *absolute and plenary power* over the personnel transactions subject to this suit” (Emphasis supplied.) More accurately, in my judgment, “We, the people of the State of Michigan . . . do ordain and establish this constitution”, a constitution which happens explicitly to guarantee the “equal protection of the laws” in art 1, § 2 and non-discrimination in the civil service promotion process in art 11, §5. Further, in the interests of checks and balances, the powers of state government are divided into three branches, Const 1963, art

III, § 2, including a judicial branch, Const 1963, art VI. Only within this constitutional context do these agencies possess governmental authority of any kind.

¹² Although it is not a part of the record on appeal because of its late discovery, plaintiff has submitted evidence that the specific DOC affirmative action plan for 1992-94 was not even subject to regular procedures because it was inadvertently *not* submitted to the CRC in a timely manner by the DOC and not formally approved by the CRC until early 1997. Cf. *Middleton v City of Flint*, 92 F3d 396, 401 n 4 (6th Cir 1996) (late approval of a plan does not affect an employer's defense under §210). Further, despite the trial court's reference to the affidavit of Bobbie Butler, EEO Administrator of the DOC, as somehow casting useful light on the CRC's approval process, I see nothing in her statement which provides any illumination on the deliberations of the CRC in this matter.

¹³ See note 15, *infra*, and accompanying text.

¹⁴ I also question why there is no official record of such approval, for example, in the minutes of the CRC or in some other document. It is not at all clear that oral testimony that an administrative agency took an important official act, of which no record has been produced, is either competent, admissible, or sufficient evidence of such action. The RJA specifies that it is official records, or certified copies thereof, that constitute evidence of government business. RJA §§2107-08, 2111, 2118a(3), 2129, 2131, 2137-38, 2146-47.

¹⁵ In explaining underutilization and the availability of the use of augmented certification, Mary Pollock, a State Equal Employment Opportunity and Affirmative Action Coordinator for the Department of Civil Service, testified that,

4. The Availability Standard is a percentage representation expected in each classification, classification series and job subgroup (an occupation) for a region based on the percentage representation of the specific protected group in the relevant labor market. This can also be called the 'expected utilization rate'.

5. The current representation of employees in the occupation in the hiring agency in the region can be called the 'actual utilization rate'.

6. To determine underutilization, the regional Availability Standard for an occupation (expected utilization rate) is compared to the current representation of employees in the occupation in the agency in the region (actual utilization rate).

The Availability Standards implemented in 1989 do not simply measure "underutilization" by comparing the relevant labor market with racial proportions of state employees. Rather, the availability standards also accord weight to the racial and ethnic makeup of the *existing* workforce, so that "underutilization" might be identified even though proportions of racial minorities in the workforce reflected or exceeded their proportions in the relevant labor market. The Availability Standards are described by defendants as part of a process designed to assure protected group members "equal consideration" in the promotion process.

¹⁶ Although my exclusive concern with the Report here is with its staleness, I observe nonetheless that, insofar as it addresses the DOC, the Report is notable in its absence of evidence that, even prior to 1971, the DOC had engaged in any actual discrimination. The three pages of the Report which are devoted to analysis of the personnel practices of the DOC are focused solely upon alleged “underrepresentation” in the DOC workforce at the time. In particular, I find irrelevant the Report’s observation that the disparity between the racial composition of the DOC workforce and the prison population somehow justifies affirmative action policies.

¹⁷ Cf. *Conlin v Blanchard*, 745 F Supp 413 (ED Mich, 1990), where the district court upheld reliance upon the same 1971 Report to establish a factual predicate for an affirmative action plan in 1987, albeit seven years earlier than the plan involved in the instant case.

¹⁸ Indeed, plaintiff also offers statistical evidence that, even on the basis of simply comparing proportions of minorities in the population to minorities working for the DOC, minorities have been represented at the DOC in recent years in numbers significantly higher than would be expected from their numbers in the overall work force.

¹⁹ As elaborated upon by *Parker v Baltimore & O R Co*, 209 US App DC 215; 652 F2d 1012 (1981).

²⁰ Of the “protected group” members who were promoted over plaintiff, only one would have been eligible for such promotion absent the “augmented certification” policy.

²¹ See, for example, *Harding v Gray*, 9 F3d 150, 153-54 (D DC, 1993), in which the court observed that the “background circumstances” of a reverse discrimination case could consist merely of plaintiff’s superior qualifications:

We see nothing . . . that would suggest superior qualifications are not enough . . . If a more qualified white applicant is denied promotion in favor of a minority applicant with lesser qualifications, we think that in itself raises an inference that the defendant is ‘that unusual employer who discriminates against the majority.’

²² “A claim of unlawful discrimination may be based upon loss of equal employment opportunity as well as loss of employment. Here, for example, plaintiff might establish that he was personally deprived of equal employment opportunity to the extent that minority job candidates were accorded preferential treatment in the selection process . . . Defendant’s determination to offer the position to a less qualified candidate because of race not only foreclosed plaintiff’s opportunity to be considered for the available job opening, it also established a precedent that did not bode well for advancement in the future.” See also *Regents of University of California v Bakke*, 438 US 265, 280 n 14; 98 S Ct 2733; 57 L Ed 2d 750 (1978):

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The ‘injury in fact’

in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Further, see *Adarand, supra*, at 211, quoting *General Contractors v Jacksonville*, 508 US 656, 667; 113 S Ct 2297; 124 L Ed 2d 586 (1993). “Standing is proper even where a program establishes ‘goals’ rather than rigid quotas.” *Alexander v Estep*, 95 F3d 312, 315 n5 (CA4, 1996).

²³ Obviously, in the zero-sum game of employment promotions, it will usually be the case that one person’s advantage will directly inure to another’s disadvantage.

²⁴ Plaintiff filed the instant suit in June of 1996. In April of 1997, the DOC suspended the use of ‘augmented certification’ and in September of 1997, the CSC rescinded ‘augmented certification. See *Crawford v Adamany, et al*, Case No. 5:98-CV-94 (WD Mich, 1999), a federal lawsuit arising out of some of the same facts as the instant case, in which the court determined that such voluntary cessation did, in fact, moot that lawsuit because it occurred prior to that lawsuit’s filing. In contrast to the federal lawsuit, the filing of the instant lawsuit preceded the DOC’s discontinuation of the ‘augmented certification’ policy.