

THE MICHIGAN SUPREME COURT

the Revolt Against Reverse

BY GLEN N. LENHOFF

“Whether described as ‘benign discrimination’ or ‘affirmative action’, the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.”¹

The people of Michigan dislike reverse discrimination. According to polls, if the issue was ever put to a vote, Michigan voters would end racial preferences. But reverse discrimination continues in Michigan. The tactic of intimidation has succeeded, and reverse discrimination now seems like a fact of life.

But evidence is mounting that there is one court that will not be intimidated. The Michigan Supreme Court has rendered a striking series of decisions in the last few years. These decisions give hope to victims of reverse discrimination.

This article discusses the recent decisions, and suggests theories that should be asserted to the Michigan Supreme Court. Perhaps the Michigan Supreme Court will end reverse discrimination in Michigan.

The Sharp Opinion, the Michigan Constitution, and the Vulnerability of Public Sector Affirmative Action Plans

In *Sharp v City of East Lansing*,² the Michigan Supreme Court considered the issue of whether the Elliott-Larsen “safe harbor” provision immunizes challenges to approved affirmative action where the challengers merely seek injunctive or declaratory relief under Article I, Section 2 of the Michigan Constitution. *Sharp* held that the MCLA 37.2210 safe harbor provision does not immunize governmental entities from such challenges. Admittedly, there is no private

challenge to the University of Michigan—or any Michigan public university—affirmative action admissions policy is brought under the Michigan Constitution? The emergent answer seems to be that the Michigan Supreme Court could well overturn racial preferences in University admissions.

Do Racial Preferences in Government Violate the Michigan Constitution?

Crawford and the Markman Court of Appeals Dissent

In *Crawford v Department of Civil Service*,⁶ the Michigan Supreme Court held that a white male had standing to assert a reverse racial discrimination claim under the Michigan Constitution despite the fact that the subject affirmative action plan had been discontinued. The narrow holding in *Crawford* was that, because the plaintiff could have obtained injunctive relief placing him in the position he allegedly was discriminatorily denied, the plaintiff’s lawsuit was not moot.

The *Crawford* standing and mootness holdings are unremarkable. But there is something remarkable about the *Crawford* litigation—the dissenting *Crawford* Opinion of Judge, now Justice, Stephen Markman.

In the *Crawford* dissent, Judge Markman incisively demonstrated that the Department of Correction’s affirmative action plan did not meet the requirements of the MCLA 37.2210 safe harbor provision.

A memorable aspect of the *Crawford* dissent is its strong tone. That tone rose to a crescendo in the dissent’s last sentence, where Judge Markman opined: “. . . 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 gov-

ernment, the right not to be disadvantaged by one’s government on account of skin color.”⁷

It thus seems that the now Michigan Supreme Court Justice Stephen Markman believes that the Michigan Constitution is colorblind. Such a Constitution does not tolerate racial preferences.

Lind, and the Concurring Opinion of Justice Robert Young

On June 11, 2004, the Michigan Supreme Court decided *Lind v Battle Creek*.⁸ The narrow issue in *Lind* was whether an Elliott-Larsen reverse discrimination plaintiff must make an additional prima facie showing of background circumstances beyond what is required of a minority plaintiff.

The most famous pre-*Lind* background circumstances Michigan case is *Allen v Comprehensive Health Services*.⁹ Furthermore, as Justice Cavanaugh’s dissent pointed out, a number of federal courts have embraced the background circumstances test.¹⁰ But in *Lind*, the Michigan Supreme Court rejected *Allen*. The Supreme Court held that a white plaintiff need merely satisfy the same prima facie case standard as a non-white plaintiff.

Lind was a lawsuit against a governmental entity. But the chief *Lind* issue involved a construction of the Elliott-Larsen Civil Rights

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action for monetary damages under the Michigan Constitution.³ The hapless governmental employee subjected to an “approved” Elliott-Larsen affirmative action plan may well be unable to obtain monetary damages. Furthermore, there would not appear to be a source of attorney fees for an affirmative action challenge brought under the state constitution.

But, after *Sharp*, a non-monetary damages lawsuit may be brought under the Michigan Constitution challenging approved governmental racial preferences. This opens the door to lawsuits that could end governmental racial preferences in Michigan, even where the defendant has obtained approval from the Michigan Civil Rights Commission.

In *Grutter v Bollinger*,⁴ the United States Supreme Court held that a race-conscious University of Michigan Law School admissions affirmative action plan was constitutional under the Federal Constitution’s Equal Protection Clause. Apparently, the *Grutter* plaintiffs made the strategic decision to proceed under the United States Constitution—and disregard the Michigan Constitution.

Admittedly, *Sharp* did not decide the issue of whether the Michigan Constitution permits racial preferences. But, after *Sharp* and *Lind v Battle Creek*,⁵ a beguiling question is: what will happen if a

Fast Facts:

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Act in the context of *Allen*. The majority Supreme Court Opinion—authored by Justice Markman and joined by Justices Corrigan, Weaver, and Taylor—did not reach the *Allen* Constitutional issue.

Justice Young, however, chose to reach the Constitutional issue in his concurring Opinion. Justice Young pointed out that the language of the Michigan Constitution, unlike the Federal Constitution's Equal Protection Clause, prohibits racial discrimination.¹¹ As Justice Young noted, the language says: "No person shall be denied the equal protection of the law... because of... race..."

Justice Young criticized the two *Lind* dissenters—Justices Kelly and Cavanaugh—for ignoring the language of the Michigan Constitution and the Elliott-Larsen Act. The Young concurring Opinion reflects a colorblind view of the Michigan Constitution's Equal Protection Clause.

Justice Young's *Lind* concurring Opinion—like the last sentence of the *Crawford* dissent—is written in forceful language. At a minimum, there seem to be two Michigan Supreme Court Justices—Justices Young and Markman—who believe racial preferences violate the Michigan Constitution.

Summary

Justice Markman and Justice Young are but two Justices. Four Justices constitute a majority. What about Justices Taylor, Corrigan, and Weaver? Will two of these three Justices join Justices Young and Markman and hold that all governmental racial preferences violate the Michigan Constitution? If so, public university racial preference admissions programs will be in violation of the Michigan Constitution—whether the plans are approved or unapproved.

A vigorous Michigan Constitution-based attack against racial preferences in university admissions seems to have escaped many. Admittedly, such a challenge would not have direct national application. But state Supreme Courts could bring about a revolt against reverse discrimination. Reverse discrimination could be struck down under state constitutions. The Michigan Supreme Court could be at the vanguard of this movement.

Private Sector Racial Preferences

Public sector racial preferences are vulnerable. Whether approved or unapproved, public sector racial preferences face a formidable challenge under the Michigan Constitution.

What about the private sector? Can private companies, with impunity, engage in racial preferences?

The Approved Private Sector Affirmative Action Plan

The Markman *Crawford* dissent is a blueprint for challenges to approved private sector racial preference. The Markman dissent focused on the language of the Elliott-Larsen safe harbor provision. It pointed out that the safe harbor is not a total grant of discretion to the Civil Rights Commission. The commission has the power to

approve an affirmative action plan only where the plan is "to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex..." The Markman dissent pointed out that, "where there is little or no evidence" of the "present effects of past discriminatory practices," there is no ground for a race-conscious employment plan under the "present effects" clause. Alternatively, where there is no evidence that an affirmative action plan will assure equal opportunity "by any reasonable understanding of that phrase, but will in fact, achieve precisely the opposite result," the Civil Rights Commission may not approve a racially-conscious employment plan.¹²

The majority *Lind* Opinion—discussed later in this article—and the Markman *Crawford* dissent suggest that the Michigan Supreme Court may hold that the MCLA 37.2210 safe harbor provision does nothing more than allow the Civil Rights Commission to take steps to inform the community of job openings. This is a far cry from allowing racial preferences.

Plaintiff's counsel also must be mindful of an indirect Constitutional challenge to the Commission's approval of racial preferences. In his *Crawford* dissent and *Sharp* concurrence, Justice Markman made it clear that the Commission is limited "by the requirements of the Constitution."¹³

As the *Crawford* dissent pointed out, the Michigan Administrative Procedure Act, MCLA 24.306(1)(a), prohibits the Michigan Civil Rights Commission from approving unconstitutional affirmative action. If the Michigan Supreme Court holds that racial preferences are unconstitutional, the commission presumably must refrain from approving race-conscious affirmative action.

Thus, there are two methods of challenge to approved private sector affirmative action. First, a language sensitive application of MCLA 37.2210 should stop the Michigan Civil Rights Commission from approving race-based affirmative action. This approach would involve a detailed analysis of the "eliminate present effects of past discriminatory practices or assure equal opportunity" language of MCLA 37.2210 and 37.2212.

Alternatively, given that the Michigan Supreme Court renders a clear ruling that all race-based preference programs are unconstitutional, practitioners can file actions for declaratory relief against the Michigan Civil Rights Commission under the Michigan Administrative Procedure Act. These lawsuits would seek declaratory judgments that the commission has approved an unconstitutional plan. Administrative Procedure Act lawsuits could also seek an injunction prohibiting the future approval of race-based affirmative action.

Unapproved Affirmative Action in the Private Sector

The final question considered here relates to "unapproved" private sector affirmative action plans. A reasonable reading of *Lind* must acknowledge the implications of *Lind*'s construction of the word "individual" in Elliott-Larsen § 37.2202(1)(a).

MCLA 37.2202(1)(a) provides that it is unlawful for an employer to discriminate “against an individual” in employment. In the *Lind* majority Opinion, Justice Markman—with Cardozo like economy—pointed out that it does not take a multi-page Opinion to show that the word “individual” means “individual.”¹⁴ Justice Young’s concurring Opinion has been discussed earlier in this article. And it bears emphasis that three other Justices—Chief Justice Corrigan and Justices Weaver and Taylor—concurred with Justice Markman’s *Lind* Opinion.

Yes, the word “individual” means “individual.” So, will the Michigan Supreme Court hold that private sector race-conscious unapproved affirmative action plans are illegal? The only barrier is the 12-year-old case of *Victorson v Department of Treasury*.¹⁵

In *Victorson*, the Michigan Supreme Court held that an unapproved affirmative action plan can be lawful under Elliott-Larsen if the employer shows: (1) the unapproved plan is similar to the Civil Rights Act; (2) the plan does not unnecessarily trammel the rights of non-minorities; and (3) the plan is temporary. *Victorson* explicitly followed the 1979 United States Supreme Court case of *United Steelworkers of America v Weber*.¹⁶

Victorson is inconsistent with the strong *Lind* message that the MCLA 37.2202 term “individual” protects non-minorities as well as minorities. For this reason alone, the present Michigan Supreme Court should not feel bound by *Victorson*.

But there is an additional reason to repudiate *Victorson*. *Victorson* relied on the 1979 U.S. Supreme Court Title VII case of *Steelworkers v Weber*.¹⁷ Ignoring the literal language of MCLA 37.2202, *Victorson* blindly followed *Weber*.

Weber was a dubious decision that was roundly criticized in the Law Reviews. Professor Meltzer, for example, opined that *Weber* was “a profound disappointment, whether tested by its depth, its clarity, its candor, or its power to convince.”¹⁸

In a brilliant dissent, Justice Rehnquist devastated the *Weber* majority Opinion. Justice Rehnquist showed that *Weber* ignored the language and legislative history of Title VII, and that the *Weber* majority had refused to step forward and honestly construe Title VII. To Justice Rehnquist, the *Weber* majority had behaved like the great escape artist “Houdini,” instead of the great jurists “Hale, Holmes, and Hughes.”¹⁹ Justice Rehnquist’s dissent dictates that the Michigan Supreme Court should run from—not follow—*Weber*.

The current Michigan Supreme Court should simply not tie its statutory interpretation of private sector unapproved affirmative action to *Weber*. The Michigan Supreme Court has, in other decisions, demonstrated that it is not bound to follow federal judicial decisions.²⁰ The better approach would be to repudiate *Victorson* because of its misplaced reliance on *Weber* and its disregard of the language of MCLA 37.2202.

The Michigan Supreme Court should follow in the footsteps of *Lind* when it decides the issue of unapproved private sector racial preferences. Because MCLA 37.2202 provides that an employer shall not “discriminate against an individual with respect to employment,” all racial preferences in private sector employment should be held unlawful.

Summary

The barriers against abolishing private sector racial preferences are not legally formidable. It would be jurisprudentially unsound for the High Court of the state to allow a state agency—the Michigan Civil Rights Commission—to issue unconstitutional approvals of race-based employment plans. It would be utterly ridiculous to then allow private corporations to use these unconstitutional approvals as shields against reverse discrimination litigation.

Victorson is an erroneous decision that should be repudiated. The private sector—like the public sector—should be made free of reverse discrimination.

Conclusion

As the twentieth century becomes the twenty-first century, reverse discrimination marches on. Fulfilling the fear of the great scholar Joseph Grano, years of racial preferences have resulted in a feeling that reverse discrimination is the accustomed order. As Professor Grano observed, “This is hardly a societal good.”²¹

It will take courage for the Michigan Supreme Court to follow through on its recent decisions as suggested in this article. But there is an opportunity here. The Michigan Supreme Court can do what the giants of the past—like Rehnquist and Grano—could not do. The Michigan Supreme Court can, within the framework of legitimate Constitutional and statutory adjudication, abolish all forms of racial discrimination in Michigan. The Michigan Supreme Court can leave behind a legacy of racial justice. ♦

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Footnotes

1. *United Steelworkers v Weber*, 443 US 193, 254 (1979) (Rehnquist J. dissenting).
2. 464 Mich 792 (2001).
3. *Lewis v State of Michigan*, 464 Mich 781 (2001).
4. 539 US 306 (2003).
5. 470 Mich 230 (2004).
6. 466 Mich 250 (2002).
7. See unpublished *Crawford* dissenting Opinion of June 1, 1999, COA No. 205603, at 99 WL 33441326.
8. 470 Mich 230 (2004).
9. 222 Mich App 426 (1997).
10. See, e.g., *Parker v B&O Railroad*, 652 F2d 1012 (1981); *Pierce v Commonwealth Life Insurance*, 40 F3d 796, 801 (CA 6, 1994).
11. *Lind v Battle Creek*, 470 Mich 230, 234–235 (Young J. concurring).
12. See *Crawford* Dissent, COA No. 205603, at 1999 WL 33441326.
13. *Sharp v City of Lansing*, 464 Mich 792, 816 (2001).
14. *Lind v Battle Creek*, 470 Mich 230, 233 (2004).
15. 439 Mich 131 (1992).
16. 443 US 193 (1979).
17. 443 US 193 (1979). See *Victorson* at 439 Mich 131, 144 (1992).
18. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 Univ. of Chicago L. Rev. 423 (1980).
19. *United Steelworkers v Weber*, 443 US 193, 222 (1979) (Rehnquist J. dissenting).
20. See, e.g., *Chambers v Tretco*, 463 Mich 297, 314 (2000).
21. Grano, Book Review, *Bakke, DeFumis and Minority Admissions*, by Alan P. Sindler, published at 26 Wayne Law Review, 1398 n 20 (1980).