UNITED STATES DISTRICT COURT

WESTERN DISTRTCT OF WASHTNGTON

KATURIA S. SMITH, ANGELA ROCK and MICHAEL PYLE,

Plaintiffs,

vs.

THE UNIVERSITY OF WASHINGTON LAW SCHOOL, WALLACE D. LOH, ROLAND HJORTH, SANDRA MADRID, and RICHARD KUMMERT,

Defendants.

INTRODUCTION

NO. C97-335 (C) Z

INDIVIDUAL-DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON §1981 & §1983 DAMAGE CLAIMS

Noted on Motion Calendar: Friday, January 30, 1998

In order to defeat the instant motion, plaintiffs must demonstrate that there are genuine issues of fact as to whether the defendants violated constitutional requirements that were clearly established in early 1996. Plaintiffs' Memorandum addresses a quite distinct issue, whether there are genuine issues of fact regarding the constitutionality of the Law School's admissions policy. The difference is of critical importance, since it is only with regard to the merits of their claims, and not with regard to qualified immunity, that plaintiffs are at liberty to advance new legal theories, or to preserve for appeal a claim that *Bakke* was wrongly decided. The attack set out in Plaintiffs' Memorandum on the constitutionality of the Law School's admission policy is grounded on three distinct legal contentions:

(1) An otherwise constitutional Harvard Plan is invalid if adopted, not only to ensure diversity of the student body, but also to achieve some other goal;

(2) The Constitution sets specific limits on the comparative weight that can be given under a Harvard Plan to racial or ethnic diversity; and

(3) Under a Harvard Plan, final admission decisions about and offers to minority candidates must be made at the same time as those regarding other diversity candidates.

Plaintiffs have not demonstrated - indeed they do not squarely argue - that these limitations on a Harvard Plan were unequivocally announced by *Bakke* or pre-1996 decisions of the United States Supreme Court, the Ninth Circuit, or other relevant jurisdictions. '

ARGUMENT

I. There Is No Clearly Established Constitutional Rule that a Harvard Plan Must Have Been Adopted Solely to Promote Student Body Diversity

The Law School's admissions policies were avowedly and indisputably adopted for the purpose of

insuring the creation of a diverse student body. The documentary material adduced by plaintiffs, the accuracy of which they acknowledge, repeatedly reiterates this purpose: "[t]he goals of the overall

1Plaintiffs' opposition (p. 2, n.l) also introduces a new theory for denying summary judgment on the § 1981 claim; i.e. that immunity is not available to state officials sued for damages in their official capacities. This argument runs directly afoul of the Eleventh Amendment because a suit against state officials in their official capacities is tantamount to a suit against the state itself. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 66 (1989). While the 1991 Civil Rights Act [codified at 42 U.S.C. § 1981(c)] amended § 1981 to permit suits against persons who act under color of state law, *Federation of African American Contractors v. City of Oakland,* 96 1204 9th Cir. 1996), in order for there to be an abrogation of Eleventh Amendment immunity, Congress's intention to do so must be "unmistakably clear in the language of the statute." *Dellmuth v. Muth,* 491 U.S. 223, 227-228 (1989). No such statement of intent appears in § 1981(c), as Judge Coughenour held in White v. State of Washington, No. C92-1864C, copy of order attached. Accordingly, any such claim for damages against the individual defendants in their official capacities should also be dismissed on Eleventh Amendment grounds.

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admission system, including its concern for 'diversity', are set forth in Section 1 of the Law School's current Admissions policy ...." (Plaintiffs' Memorandum at 2_3).2 But, plaintiffs argue, the use of a Harvard Plan is unconstitutional unless promotion of student body diversity is the "sole goal" of the plan. Plaintiffs' Memo., p. 4 (emphasis added). Plaintiffs therefore oppose summary judgment on the basis of this proposed constitutional rule, contending that there is a factual dispute as to whether the 1989 admissions program was adopted, not solely because it resulted in a diverse student body, but also because it served some additional purpose.

However, plaintiffs do not assert that *Bakke* contained such a requirement. To the contrary, under Justice Powell's opinion, an affirmative action plan should be upheld if the state can "show" that the plan advances a state "purpose or interest [that] is both constitutionally permissible and substantial ...." *Regents of Univ. of Calif. v. Bakke,* 438 U.S. 265, 306 (1978) (emphasis supplied). Justice Powell's analysis contains no reference whatever to what was on- the minds of California officials when they adopted the plan in question. Indeed, the very structure of his opinion is inconsistent with plaintiffs' contention that the existence of even a single constitutionally insufficient rationale would make the sufficiency of the diversity rationale legally irrelevant. Rather, Justice Powell's opinion considered the sufficiency of four separate proffered justifications, *Id.* at 307-19, which were based, not on the contemporaneous goals of state officials, but on rationales either asserted by counsel in. the University's Supreme Court brief or proposed by scholars in books and articles. 438 U.S. at 306 and n. 43.

Plaintiffs' specific arguments concerning the Law School's objectives in adopting its 1989 admissions

program also illustrate the novelty of their arguments. While they contend that -it may be

[2] Indeed, plaintiffs themselves rely on a 1989 Law School memorandum which states that "diversity 'has long been a justification for our own affirmative action Memorandum p. 5)(Emphasis in Plaintiffs' Memorandum). Nothing in the Law School's earlier policies, or those of the University as a whole, or the practices of the American Association of Law Schools, is inconsistent with this justification. See Kummert supp. dec. 2, 3 and 5.

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permissible for the Law School to seek diversity in general, they say it is unconstitutional for the Law School to desire specifically that its plan would increase racial diversity. Plaintiffs' Memorandum, pp. 4, 7, 20. But Harvard itself had modified its diversity-based admissions plan, which prior to the 1970's did not consider race, for the very purpose of increasing minority enrollment. 438 U.S. at 322.

Plaintiffs also object that the Law School may have adopted a Harvard plan, not because it favored diversity, but because it wished to comply with the constitutional standard announced in *Bakke.* (Plaintiffs' Memorandum, pp. 3-5, 20-21). Apparently, the very existence of an intent to comply with the Constitution renders unconstitutional the adoption of an otherwise constitutional affirmative action plan. Plaintiffs do not explain where in the Supreme Court's constitutional jurisprudence such a paradoxical rule is to be found.

Because plaintiffs cannot show that their sole goal analysis was adopted in *Bakke,* they rely primarily on a footnote 16 in *Mississippi University for Women v. Hogan* 458 U.S. 718 (1982). This argument is unavailing for several reasons. First, footnote 16 does not even hint that the existence of multiple goals might undermine the validity of an affirmative action plan; the most that it suggests is that the courts need not evaluate the sufficiency of possible justifications that were never considered by the

of officials adopting the plan. 458 U.S. at 730. Nothing in footnote 16 purports to overrule, or even refers to *Bakke.* Possible arguable implications- of a single inapposite footnote cannot suffice to clearly establish a constitutional rule contrary to prior Supreme Court precedent. [3] Second, subsequent to

3 The other cases cited by plaintiffs in support of their mixed motives argument are similarly unhelpful: *Shaw v. Hunt, 116* S.Ct. 1894, was decided on June 13, 1996, nearly six months after the last relevant admission decision in this case. Footnote 4 in *Shaw,* like footnote 16 in *Hogan,* speaks only to the absence of any constitutional purpose for consideration of race, and not to any alleged mixed motive. l 16 S.Ct. at 1904; *see also, Contractors Assn. Of E.P.A. v. Philadelphia, 91* F.3d 586, 597, 3rd Cir. July 31, 1996). Likewise,Podberes/yu *Kirwan,* 956 F. 2d 52 56,n. 4(4 Cir. 1992)refusedtoconsiderdiversityas an interest where it did not appear that the program in question was established "with this goal in mind." *Davis K Halpern,* 768 F. Supp. 968 981 (E.D.N.Y.1991) stands only for the unremarkable proposition that an admissions program that does not consider diversity factors other than race will not pass muster under *Bakke.*

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Hogan, the Supreme Court in City *of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) held that only where a particular interest "could not have been a goal" will the Court decline to consider it. No such contention is made here regarding educational diversity, nor would the evidence support it if it were made. Third, no/withstanding the statement in *Croson*, both *Wygant v. Jackson v. Board of Education*, 476 U.S. 267 (1986) and *Adarand Constructors, Inc. v. Penal*, 515 U.S. 200 (1995) utilized the method of analysis applied in *Bakke;* i.e., evaluating the possible interests served by an affirmative action plan rather than focusing on the subjective goals of the particular officials who had adopted the program in question. *4*

Finally, the admissions policies upheld as consistent with *Bakke* in *McDonald v. Hogness*, 92 Wn. 2d 431, 598 P. 2d 707, (1979), *cert. denied* 445 U.S. 962 (1980), and *DeRonde v. Regents of University of Cal.*, 28 Cal. 3d 220, 625 P. 2d 220, *cert. denied* 454 U.S. 832 (1981) had avowedly been adopted, not only to assure student body diversity, but also to increase diversity in the relevant profession. [5] Plaintiffs' erroneous view of qualified immunity causes them to largely ignore these decisions. [6] However, given the specificity of their application to the facts of this case, *McDonald* and

4 A racial classification"must be justified by a compelling governmental interest." *Wygant,* 476 U.S. at 274. *See also,* 476 U.S. at 285-87 (O'Connor, J, concurring) (to the same effect); Racial classification permitted if narrowly tailored and "necessary to further a compelling interest". *Adarand,* 115 S.Ct. at 2117.

[5] See, McDonald, 92 Wn 2d at 442. ("In the instant case the trial court determined the school had decided that in order to serve the educational needs of the school and the medical needs of the region the school should seek greater representation of minorities where there has been serious under-representation in the school and in the medical profession.") added). Plaintiffs assert that *McDonald* held in n. 8 that diversity was the sole reason for the plan in question. (Plaintiffs' Memorandum, p.22). In fact, that footnote expressly notes the existence of both goals; *DeRonde v.Regents of University California,* 625 P. 2d at 223 ("the University's reasons for considering minority stains were primarily twofold: First, an appreciable minority representation in the student body will contribute a valuable cultural diversity for both faculty and students end, second, a minority representation in the legal pool from which future professional and community leaders, public and private, are drawn will strengthen and preserve minority participation in the democratic process at all levels.")

6 Plaintiffs' claim that decisions of state courts should not be considered is directly contrary to the 9th Circuit's "survey of the legal landscape" approach. *See, Capoeman K Reed,* 754 F.2d 1512, 1514 (9th Cir. 1985) (decisions of states' high courts should be considered). The case cited by plaintiffs for the contrary proposition, *Hal/strom K City of Garden City,* 991 F.2d 1473, 1483 (9th Cir. 1993), merely holds that where there is controlling Supreme Court or circuit authority, public officials are charged with knowledge of those decisions and may not rely on inconsistent district court decisions.

DeRonde preclude a showing of violation of clearly established law under plaintiffs' mixed motive theory.

Plaintiffs also attempt to create an issue of fact by suggesting that former Dean Wallace Loh had a bias against whites (or at least white males), and that he intended to increase the racial diversity of the school during his deanship. [7] However, plaintiffs' attack on Dean Loh is insufficient to preclude summary

judgment. First, they have not shown that Dean Loh's allegedly improper motives resulted in admissions practices that were clearly unconstitutional. *See, Bakke,* 438 U.S. at 319, n. 53. As demonstrated above, the notion that a Harvard Plan is unconstitutional because it would have the effect of increasing minority participation in the Law School is unsupported. Second, in order to establish liability under § 1983, plaintiffs must show an affirmative link between the personal acts of a state agent and the alleged constitutional injury. *Rizzo v. Goode*, 423 U.S. 362 (1976); *Taylor v.* List, 880 F.2d 1040,1043 (9th Cir.1989). Plaintiffs have not shown how Dean Loh could have affected the outcome of their applications. To the contrary, defendants have shown that he did not, and could not, have done *so. See,* declarations of Wallace Loh and Sandra Madrid; supp. dec. of Richard Kummert.

Plaintiffs' claim that the AALS influenced the Law School to improperly limit its consideration of diversity factors to race and ethnicity is not based on admissible evidence, and therefore should be disregarded. [8] Moreover, as with their claims concerning Dean Loh, plaintiffs have failed to show any causal connection between the alleged attitude of the AALS and a constitutional violation at the Law

'Dean Loh has responded to these claims by sworn declaration filed herewith.

8 [8] [8] F.>R P 56 requires affidavits to set forth facts that would be admissible in evidence. The deposition of former Texas Dean Yuden, taken in the *Hopwood* litigation is not admissible under F.R.Civ. P. 32(a) against a party who was not present at the deposition. Moreover, like the statement of Dean Huffman, the cited portions of the Yuden deposition constitute inadmissible speculation about the state of mind of a non-party, the AALS, and the affect of that supposed state of mind on defendants. Accordingly, defendants object to, and move to strike, the Yuden deposition and Huffman statement.

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School. Indeed, as shown below, they have completely failed to show that the "weight" given to race in the Law School's process was such as to render it clearly unconstitutional.

II. **There Is No Clearly Established Constitutional Requirement Regarding How Much "Weight" Can Be Given to Racial Diversity**

Plaintiffs urge that there are factual issues regarding whether the Law School's plan gives disproportionate "weight" to racial and ethnic diversity. Plaintiffs' Memorandum at 21 -22. The precise legal standard that plaintiffs claim has been violated is unclear, since they concede that "Justice Powell's *Bakke* decision did not require that all diversity factors be of precisely the same weight." (Id. at 22 n. 7). Plaintiffs do not refer to any Supreme Court or Ninth Circuit decision that they contend established, or even discussed, constitution limitations on the comparative weight of diversity factors in a Harvard plan.

Justice Powell in *Bakke* required only that a Harvard plan "consider all elements of diversity", and expressly noted that such a plan was not required to attach "the same weight" to each element. 438 U.S. at 317. "Indeed," Justice Powell noted, "the weight attributed to a particular qualify may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." 438

U.S. at 317-18. If there is a constitutional rule regarding how much weight may be "attributed to a particular quality", it is not to be found in *Bakke,* which clearly disavows any such approach, and which expressly acknowledged that under a Harvard Plan educators could give race sufficient weight to bring about sufficient minority representation to actually contribute significantly to the educational environment of the school. 438 U.S. at 323.

Plaintiffs appear to contend that the Constitution now requires that all diversity candidates be given a "plus" of more or less equal weight, and that the choice among them must then be made solely on the basis of "academic credentials." (Plaintiffs. Memorandum, p. 22 n. 7). But plaintiffs' paradigm is palpably inconsistent with the actual Harvard plan approved in *Bakke.* That plan was not structured to

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identify a substantial number of students with a diversity "Flu," give equal weight to that "plus," and then make the final decision based on the same "academic credentials" that limit diversity in the first place. Rather, the policy was framed to bring about significant "distribution among many types and categories of students," 438 U.S. at 325 (emphasis added), and to produce a student body that had substantial, multi-faceted diversity, not a student body whose "diversity" students had the highest possible "academic credentials." Thus, the Harvard plan might deliberately result in a class with a substantial and comparable number of both southern and western students, even though there might be many rejected southern applicants with better academic credentials than the accepted westerners. Such a result would not reflect, as plaintiffs suggest, a conviction by Harvard that being a [westerner] so outweighed [being a southerner] that the comparison itself was a meaningless exercise,"9 but a conclusion that having significant numbers of students from both areas is important. Thus, a pivotal focus of the Harvard plan was not whether some categories of admittees had higher or lower academic credentials than other categories of admittees, but whether the school in fact enrolled substantial numbers of students in both categories, as well as in many others.

Plaintiffs specifically contend that, in choosing among applicants with LSAT scores between 150 and 164 and grade point averages of more than 3.24, the Law School unfairly discriminated against white applicants. Plaintiffs' Memorandum, p. 9 (chart). The actual numbers of students admitted from this group, stated below, belie any claim that there was a systematic exclusion of whites in this process:

Year	Whites	Blacks	Mexican Americans
1994	63	9	7
1995	100	10	9
1996	124	8	8

[9] Plaintiff Memorandum at 22, n. 7.

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Rosman statement, exs. 17-20; Kummert supp. dec. 8a. [10]

If, as plaintiffs seemingly contend, the Constitution forbids a law school diversity plan from admitting even this modest number of black and Mexican American students, then the Harvard Plan itself would be unconstitutional. The Supreme Court may some day so hold by overturning *Bakke,* but that assuredly is not clearly established law today.

III. There Is No Clearly Established Constitutional Requirement Regarding The Dates On Which Admission Offers Must Be Made Under a Harvard Plan

Plaintiffs' third argument relates similarly to an April 15, 1991 memorandum describing practices utilized years before the plaintiffs ever applied for admission. Rosman statement, ex. 16; Kummert supp. dec. They object that under the admissions process described in that memorandum, minority diversity admittees received admission offers earlier than white diversity admittees. The 1991 memorandum

describes the manner in which the diversity program had been administered during "the pest two years" (id. at p.2), i.e. from 1989-1991. The process described in exhibit 16 was not in effect at any other time, particularly not during 1994-96, and is therefore irrelevant to this case. Kummert supp. dec. 7b.

With respect to plaintiffs' claim that the Law School inappropriately accelerates decisions on high scoring minority applicants, the evidence is undisputed that the Law School makes decisions at the same time on high scoring white applicants. Kummert supp. dec. 7b; Kummert (Dec. 19, 1997) dec. 4- Likewise, Dean Madrid and the Admissions Committee consider minority and non-minority applicants at the same point in time, under the same criteria. Kummert (Dec. 19, 1997) dec. 5-6. Nothing in *Bakke,* or any other reported case, has purported to decide, or even consider, the point in time

'° It is also undisputed that the Law School admitted many whites, and rejected many minorities, with scores in the same or lower LSAT/GPA ranges than plaintiffs, based on application of the diversity criteria set forth in the 1989 admissions policy. Kummert supp. dec. 8a; Kummert (Dec. 19, 1997) dec. 10-12. This shows, not only the absence of systematic exclusion, but a policy of individual comparison.

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when, or order in which, the Constitution might require that particular admissions decisions or offers be made.

IV. **Plaintiffs' Rule 56(F) Request Should Be Denied.**

The discovery cut-off in this case is June 10, 1998. Defendants have produced thousands of pages of documents in response to discovery. Nevertheless, plaintiffs request that the Court deny defendants' motion until such time as they can complete a laundry list of discovery, and expert analysis of several thousand admissions files, supposedly designed to flesh out their "motive" and "weight" claims. Rosman statement at 11 21-22. As demonstrated above, neither of these claims involves a disputed issue of fact which is material to qualified immunity. Moreover, defendants have already provided plaintiffs with all documents setting forth the purpose, standards and procedures of the admissions program. [11] Aside from an over-strenuous protest about an obvious typographical error (see supplemental declaration of Richard Kummert, p. 5, 8), plaintiffs do not dispute the reliability of these materials or dispute the accuracy of anything in Professor Kummert's declaration. Rather, plaintiffs' request for delay is addressed primarily to issues that would be material only if it were shown that the novel legal arguments which they now advance had been clearly established two years ago. However, because these theories were not then-and are not now-clearly established, discovery on these matters cannot affect the qualified immunity defense.

" Plaintiffs have had documents since October 1997, which indicate the ethnicity, undergraduate school, undergraduate grade point average, LSAT, and index score of every applicant to the Law School since 1994. Madden supp. declaration, ex. 1. Plaintiffs also have "applicant profiles" (e.g. exs. 17, 18, 19 and 203 that show, by ethnic group, grade point average

and LSAT, the numbers of persons who applied, were admitted, and who registered. These documents also indicate, for each applicant, how the index score was calculated, and the distribution of index scores by decision (admitted, rejected, registered). Rosman statement, 14 and ex. 19. Thus, plaintiffs' complaint that they have not been provided with "a breakdown of applicants offered admission or rejected by index score and ethnicity" (Rosman statement 13) is true only in the literal sense that the school does maintain such records (Rosman statement ex. 3 [defendant's answer to interrogatory. No. 3]). However, as plaintiffs submission clearly demonstrates, this information can be ascertained from the data available.

Also, plaintiffs' request for full-blown discovery prior to resolution of the qualified immunity motion runs head long into the Supreme Court's direction to resolve the immunity issue quickly; qualified immunity motions should be decided at the "earliest possible stage of the litigation" and ordinarily discovery should not be allowed until the issue is resolved. *Hunter v. Bryant,* 502 U.S. 224, 227 (1991); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). [12] This is because qualified immunity is meant to give defendants "a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery...." *Behrens v. Pelletier, --- U.S.* ---, 116 S.Ct. 834, 839 (1996) (internal quotes omitted, emphasis in original). Where discovery is allowed prior to resolution of the qualified immunity motion, it should be limited to matters relevant to the issues raised by defendants' motion. *Anderson v. Creighton,* 483 U.S. 635, 646 n.6 (1987).

Additionally, plaintiffs have given the Court no adequate explanation for their failure to obtain the requested discovery. [13] While complaining that defendants have been slow to provide them access to the files of non-party applicants, they make no showing as to what additional material evidence they expect to glean from examining these approximately 6,000 files, and have provided no excuse for their failure to obtain discovery concerning the alleged statements by Dean Loh, the role of the AALS, or the drafting of the 1989 policy. For these reasons, the Court should deny plaintiffs' request for delay.

[12] *Klingele v. Eikenberry,* 849 F.2d 409, 412 (9th Cir. 1988), cited by plaintiffs, does not authorize a wholesale override of these principles; rather, it counsels that "the burden is on the nonmoving party...to show what materials facts would be discovered that would preclude summary judgment...." Under Rule 56(f), the party requesting delay must show that additional discovery will uncover specific facts that would preclude summary judgment. *Maljack Prods., Inc. v.Good Times Home Video Corp.,* 81 F.3d 881, 888 (9th Cir. 1996). The requesting party must also show why the requested discovery has not been obtained earlier. *Hauser v. Farrel,* 14 F.3d 1338, 1341 (9th Cir. 1994); *Fennell v. First Step Designs, Ltd.,* 83 F.3d 526, 531 (1st Cir. 1996).

[13] The instant motion was filed five weeks before its initial submission date, and plaintiffs' counsel was advised that the motion would be filed a week or more before that. Additionally, defense counsel offered to extend the time for plaintiffs' to respond. Plaintiffs declined that offer, and have noted no depositions during the time this motion has been pending. Madden supp. dec.

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CONCLUSION

Plaintiffs arguments for limitations or restrictions on the type of admissions programs approved in *Bakke* are not supported by authorities clearly establishing their theories at the relevant times. They have cited no cases sufficiently analogous to this one from which it would have been apparent that the Law School's admissions program was unconstitutional. Accordingly, the individual defendants are entitled to qualified immunity, and dismissal of the monetary claims against them.

Respectfully submitted this 29th day of January 1998.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF

AT SEATTLE

RODNEY WHITE,

Plaintiff,

v.

STATE OF WASHINGTON,,

and THE UNIVERSITY OF

WASHINGTON,

Defendants.

CAUSE NO. C92-1864C

ORDER ON MOTIONS TO RECONSIDER

This matter is before the court on defendants' motion for partial reconsideration of the court's April 22, 1993 order, and on plaintiff's motion to reconsider the same order. No party requests oral argument. After reviewing all relevant documents and being fully informed, the court finds and rules as follows:

A. The State's Motion for Partial Reconsideration

The court's previous order dismissed plaintiff's § 1981 claim on the grounds that allegations of racial discrimination in the making of contracts against public officials must be brought under § 1983, not §1981. Accordingly, the court dismissed the § 1981 claim, but afforded plaintiff leave to file an amended complaint asserting § 1983 claims within 30 days. No such amended complaint was filed. The State moves for partial reconsideration, arguing that a § 1983 claim against the State and the University of Washington, a state agency, is barred by the Eleventh Amendment. But because plaintiff chose not to amend her complaint to include a § 1983 claim, the issue is moot and need not be addressed. Accordingly, without addressing the merits of defendants' Eleventh Amendment argument, the motion for partial reconsideration is DENIED as moot.

B. Plaintiff's Motion for Reconsideration

1. § 1981 and the Civil Rights Act of 1991

In its April 22, 1993 order, the court dismissed plaintiff's § 1981 claim, concluding that § 1983 was the proper cause of action. Plaintiff argues that the court misapprehended the effect of the 1991 Civil Rights Act, which reads in pertinent part: (c) Protection against impairment The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis supplied).

As defendants' correctly point out, however, plaintiff's 1991 Civil Rights Act argument begs the question. The issue here is not whether individuals may be sued for discrimination when acting under color of State law, which the above language clearly provides, but rather, whether a State and its agencies may be so sued. The 1991 Civil Rights Act language cited by plaintiff simply does not specifically address the latter question.

The Supreme Court has repeatedly held that where Congress intends to abrogate Eleventh Amendment immunity, it must be done by "a clear legislative statement." Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2584 (1991); see also Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989) (congressional intent to eliminate Eleventh Amendment immunity must be "unmistakably clear in the language of the statute."); Because the language in the Civil Rights Act of 1991 does not unambiguously permit states and their agencies to be sued under § 1981, plaintiff's motion for reconsideration is DENIED IN PART.

2. Plaintiff's Continuing Violation Theory

The Ninth Circuit has recognized a continuing violation exception to Title VII's limitation periods. Under the continuing violation doctrine, "a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." Sosa v. Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990) (quoting Williams v. Owens-Illinois, Inc., 665 F.2d 918, 924 (9th Cir. 1982)). The reasoning underlying the continuing violation doctrine is that "the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period." Id. As such, if plaintiff can show that the retaliation alleged in his third EEOC petition was part of a "systematic policy of discrimination," then acts evidencing that policy are actionable despite the fact that they would be time barred had they occurred in isolation. Id. Plaintiff may establish a continuing violation "not only by demonstrating . . . [an employer] wide policy or practice, but also by demonstrating a series of related acts against a single individual," that is, against plaintiff alone. Id.

In the initial round of briefing, plaintiff did not adequately address the continuing violation doctrine, and thus the allegations stemming from the first two EEOC complaints were dismissed. The further briefing on the motion to reconsider, however, persuasively demonstrates that if the retaliation alleged in the third EEOC petition, which was unquestionably timely, was part of a systematic policy of discrimination, then the acts evidencing that policy are actionable despite the fact that they would be time barred had they occurred in isolation. Accordingly, plaintiff's motion to reconsider is GRANTED IN PART, and the court's April 22, 1993 order is therefore amended to reflect that defendants' motion to dismiss plaintiff's Title VII claims is denied in its entirety.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 3rd day of August, 1993.