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Supreme Court's Affirmative Action in Education Ruling Leaves Employment Diversity Initiatives Untouched – for Now

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On June 29, 2023, the US Supreme Court held in ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*** (decided with *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*) that race may not be used as a factor in college admissions. Although the case related solely to higher education, employers should remain alert to the ripple effect that the ruling could have on employment law.

Background

In 2014, an organization opposing affirmative action, Students for Fair Admissions (SFFA), sued Harvard University and the University of North Carolina, alleging that both improperly used race as a factor in their admissions processes. Specifically, SFFA claimed that Harvard violated Title VI of the Civil Rights Act by favoring Hispanic and Black applicants, thereby discriminating against Asian Americans in admissions. The SFFA similarly claimed that UNC violated Title VI by discriminating against white and Asian American students and, as a public institution, violated the 14th Amendment of the US Constitution.

Both universities use race and ethnicity as one of many factors in their admissions processes. The universities argued that because race is just one of many "plus" factors in a comprehensive process, their affirmative action programs tracked the Supreme Court's 2003 *Grutter v. Bollinger* decision. In *Grutter*, the Supreme Court held that race may be used as one of many factors in college admissions because of the educational benefits that flow from student body diversity. However, the court's ruling in *Grutter* recognized the remedial nature of using race as a factor in admissions, expressing its expectation that in 25 years, "the use of racial preferences will no longer be necessary to further the interest" of fostering diversity in higher education.

The lower courts in both the UNC and Harvard cases held that the universities' respective admissions policies complied with the standards set forth in *Grutter* and upheld the universities' programs. SFFA argued before the Supreme Court that *Grutter* should be overturned because permitting universities to consider race in admissions violates equal protection principles, delays the development of a "colorblind" society, and discriminates against Asian American and white students. SFFA also argued that neither admissions policy met the standards set forth in *Grutter* for using race as a factor in college admissions.

Ruling

The Supreme Court held on June 29 that both universities' admissions programs did not comply with the standards set forth in *Grutter* because the programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points." As a result, the programs violate the equal protection clause. Chief Justice John Roberts, writing for the court, wrote that students must be evaluated based on their experiences "as an individual – not on the basis of race," thereby effectively ending the use of race as a factor in college admissions.

The court noted, however, that "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." The court did not explicitly overrule *Grutter*, although Justice Clarence Thomas noted in his concurring opinion that *Grutter* was at least implicitly overruled.

Implications for employment

Other than sharing a name, "affirmative action" in the employment context has no relation to "affirmative action" as the term is used in higher education. Indeed, under Title VII of the Civil Rights Act, employers are expressly forbidden from using race, ethnicity, gender or any other protected characteristic in personnel decisions, with a couple of limited exceptions. Still, there may be significant ramifications from the court's ruling that affect employment policies related to diversity.

Permissible uses of race, ethnicity and gender in employment

Employers that can demonstrate a manifest imbalance of an underrepresented group within their workforce may voluntarily institute an affirmative action policy. In order to take protected category status into account in an employment decision (hiring, recruiting, promoting, etc.), the employer must be able to establish that:

1. There has been a manifest imbalance among its workforce involving an underrepresented group.
2. The measures implemented to correct the imbalance are narrowly tailored and do not unnecessarily impinge upon the rights of other groups (i.e., employers cannot implement a quota).
3. The affirmative action program is temporary.

Although the court's holding did not affect the propriety of these voluntary affirmative action programs, the ruling may spark challenges to such programs.

Additionally, private employers that contract with the federal government have certain affirmative action requirements under the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Federal contractors must conduct a statistical analysis of their employment decisions to ensure that no particular race, ethnicity or gender is adversely impacted, and they must institute diversity-focused recruiting of women, minorities, veterans and disabled individuals. Federal contractors, however, are prohibited from considering race, ethnicity, veteran status, disability or any other protected trait in making employment decisions. As with voluntary affirmative action programs, while OFCCP requirements have not changed, the reasoning underscoring the court's June 29 ruling could be used in efforts to end federal contractor affirmative action requirements.

Diversity, equity and inclusion (DEI) initiatives

The Supreme Court's holding in the Harvard and UNC cases also could have a cascading effect on support for employer DEI initiatives. Many employers have built DEI programs around efforts to increase employment opportunities, community and innovation at their companies, with a particular focus on broad recruitment efforts to ensure opportunities are promoted to qualified applicants from varying backgrounds. The court's decision says nothing about the legality of these programs. Indeed, in a **statement issued by the US Equal Employment Opportunity Commission (EEOC) addressing the court's holding**, the agency stated, "[i]t remains lawful for employers to implement diversity, equity, inclusion and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

However, despite the clear distinction between the higher education and workplace contexts, and applicability of different laws governing employers and colleges, potential future plaintiffs could read the decision as casting doubt on the effectiveness or

propriety of DEI programs, such as diversity-focused recruitment, mentoring programs, diversity metrics and other policies intended to promote diversity in the workplace. Potential challengers of DEI programs could use the court's ruling to argue that such efforts are no longer needed and even have a negative effect on racial diversity by disfavoring certain groups at the expense of promoting other groups. Others may view DEI programs as fundamentally unfair, which also can affect employee morale. In addition, employers may see an increase in reverse discrimination claims, and a "chilling effect" among leadership in efforts to promote diversity.

Considerations for employers

Employers must be careful that they do not institute quotas or make any personnel decisions in which an individual's protected class status is a factor, and they must ensure that hiring managers receive thorough training. Employers also should be ready to defend the justification for and effectiveness of their DEI initiatives in the face of increased scrutiny of strategies used to increase diversity. While the Harvard and UNC holdings in no way affect the legality of DEI initiatives, employers should expect backlash and have a response strategy ready.

As a final consideration, employers may need to think broadly about their recruiting efforts. If, as many predict, the court's decision results in decreased representation of members of underrepresented racial groups in higher education, employers' applicant pools also may change. Supporting workplace community, fostering innovation, and meeting client needs remain crucial goals that are supported by a pipeline of qualified and diverse future workers. Employers should reevaluate their recruitment efforts and think creatively about how to reach applicants from diverse backgrounds. As EEOC Chair Charlotte A. Burrows observed in her statement, "diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers."

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