Affirmative Action and DEI: Considerations for Employers after the SCOTUS Decision

July 20, 2023

Laura H. Harshbarger

Curtis A. Johnson

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The SCOTUS Decision

- *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199
  - Court reviewed the admissions policies of Harvard College and the University of North Carolina under the 14th Amendment Equal Protection Clause
  - Found that admissions policies taking race into consideration violated the Equal Protection Clause

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The SCOTUS Decision

- *Harvard Admissions Policy*
  - Harvard admits 3.33% of applicants
  - First Reader
    - A “first reader” reviews each application and assigns scores in six categories: academic, extracurricular, athletic, school support, personal and overall on a 6 point scale with a score of 1 being the best
    - A student receiving an overall score of 1 has a >90% chance of admission
    - First readers can and do take race into account when issuing scores
  - Admissions Subcommittees
    - Re-reviews all applicants from specific geographic areas
    - Take race into account
    - Recommends applicants for admission

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The SCOTUS Decision

- *Harvard Admissions Policy*
  - Full Committee (40 members)
    - Reviews all recommended candidates
    - Committee votes on each candidate for tentative admission (majority required)
    - Reviews tentatively admitted candidate pool for racial composition
    - Tentatively admitted candidates are “lopped” off based on four factors:
      - Legacy status
      - Recruited athlete status
      - Financial aid eligibility
      - Race
    - Goal with respect to race is to ensure that admitted class closely resembles racial composition of previous classes

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The SCOTUS Decision

- *UNC Admissions Policy*
  - UNC admits 9.66% of applicants
  - Readers
    - One of 40 admissions office readers reviews each application (5 per hour)
    - Factors reviewed include academics, standardized test scores, extracurriculars, essay quality, personal factors, student background and race
    - Applicants then recommended or not recommended for admission
    - Race is a factor in the recommendation as a “plus” which may have a significant impact on a recommendation

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The SCOTUS Decision

- *UNC Admissions Policy*
  - School Group Review
    - Committee of experienced staff reviews decisions of admissions readers
    - Looks at report containing
      - Class rank
      - GPA
      - Test scores
      - Residence (in or out of state)
      - Legacy status
      - Special recruits
      - Race

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The SCOTUS Decision

- SCOTUS Precedents in College Admissions Area
  - *Regents of University of California v. Bakke*
    - UC Davis Medical School set aside of 16 of 100 seats for certain minority groups unconstitutional – minority applicants on separate admissions track from other applicants
    - School proffered for basis for policy:
      - Reducing historical deficit of minorities in medical schools – rejected
      - Remedying effects of societal discrimination – rejected
      - Increasing the number of doctors working in underserved areas – rejected
      - Educational benefits of a diverse student body – accepted as part of a plurality decision with Justice Powell speaking for himself and only 4 other justices concurring in the result but not his reasoning
    - Would allow the consideration of race as a "plus"

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The SCOTUS Decision

- SCOTUS Precedents in College Admissions Area
  - *Grutter v. Bollinger*
    - University of Michigan Law School was permitted to consider race, but could not establish quotas or insulate minority candidates from others in admission process and could not set a goal of a certain percentage of diversity
    - Court warned that admissions could not unduly harm nonminority students
    - Court held that race-based admissions must end at some point
      - Noted that it had been 25 years since *Bakke* and that in another 25 years the consideration of race in admissions should no longer be necessary

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The SCOTUS Decision

- *SFFA v. Harvard*
  - Noted that 20 years passed since Grutter, and colleges had no plan to end racial preferences in admission
  - No way to measure impact of a diverse student body on educational outcomes to know when goals of diversity have been met
  - Racial classifications used by schools do not make sense and are too broad
  - By admitting certain minorities, others were being excluded in a zero-sum game
  - Not all minorities share a single viewpoint that adds to diversity of thought

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The SCOTUS Decision

- *SFFA v. Harvard*
  - Door left open for some consideration of the impact of race on an individual applicant
    - "[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise"
    - "A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."

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Legal Landscape of Race-Consciousness in Employment Prior to *SFFA*

- The *student admissions decisions* line of judicial precedent is *not* directly applicable to *employment decisions*
- Public Employment vs. Private Employment
- Hiring vs. Layoff

Race-consciousness in the public sector

Equal Protection Clause

- Strict scrutiny
  - Compelling governmental interest
    - Diversity not necessarily a compelling interest in all areas of public employment
  - Narrowly tailored to achieve the interest
  - Very difficult standard to meet
  - If met, allows race to be a factor
- This test is indirectly implicated by the SCOTUS *SFFA* decision

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Race-consciousness in the private sector

Title VII

- *Weber* (U.S. Supreme Court 1979)/*Johnson* (U.S. Supreme Court 1987) standard
  - Necessary to remedy past discrimination
  - To achieve but not maintain a remedy for a “manifest racial imbalance”
  - Temporary
  - Cannot unnecessarily “trammel the rights” of non-minorities
  - If met, allows race to be treated as a “plus factor”
- *Ricci v. DeStanfano* (U.S. Supreme Court 2009)
  - Applies where race-conscious decision is made to avoid disparate impact
  - Requires a “strong basis in evidence” that action is necessary to avoid disparate impact violation

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Hiring vs. Layoff

- Even when the Equal Protection/Title VII standards are met, they are unlikely to support race-consciousness in a layoff

- A *hiring decision* that is race-conscious is considered less burdensome to non-minorities than a *layoff decision* that is race-conscious

- “While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.” *Wygant v. Jackson Bd. of Education* (U.S. Supreme Court 1986)

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EEOC Guidance on affirmative action plans

- CM-607
- https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action
- Sets forth rules for affirmative action plans that are instituted voluntarily by an employer vs. those that are court-ordered or are in connection with a settlement of a discrimination charge

OFCCP Affirmative Action Plan requirements

From OFCCP FAQs:

Are the affirmative action obligations OFCCP enforces similar to the affirmative action steps taken by some educational institutions to increase the racial diversity of their student bodies?

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- **No.** While OFCCP seeks to increase the diversity of the federal contractor workforce through the variety of affirmative action obligations described above, the obligations it enforces are wholly distinct from the concept of affirmative action as implemented by some post-secondary educational institutions in their admissions processes. **In contrast to the affirmative action implemented by many post-secondary institutions, OFCCP does not permit the use of race to be weighed as one factor among many in an individual's application when rendering hiring, employment, or personnel decisions, as racial preferences of any kind are prohibited under the authorities administered by OFCCP.** See 41 CFR 60-1.4(a), 60-300.5(a) and 60-741.5(a). OFCCP, therefore, does not permit the use of race as a factor in contractors' employment practices to achieve diversity in the workforce, either by using race as one factor among many to achieve a "critical mass" of representation for underrepresented minorities or through direct numerical quotas or set-asides. See, e.g., Fisher v. University of Texas, 136 S. Ct. 2198, 2214-15 (2016); Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003); Regents of University of California v. Bakke, 438 U.S. 265, 324 (1978). OFCCP's affirmative action regulations expressly forbid the use of quotas or set asides, provide no legal justification for a contractor to extend preferences on the basis of a protected status, and do not supersede merit selection principles. See 41 CFR 2.16(e).

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State Laws

- State EEO laws do not necessarily follow the Equal Protection/Title VII standards for race-conscious decisions discussed above
- New York State Human Rights Law
  - Prohibits discrimination on the basis of race, national origin, gender, etc.
  - "Limited exception to increase employment of members of minority group, if such minority group "has a state-wide unemployment rate that is disproportionately high in comparison with the state-wide unemployment rate of the general population." N.Y. Exec. Law § 296(12).
    - Requires a written plan submitted to and approved by the Division of Human Rights.
    - Must be specific, limited in time and may not result in the discharge of any non-minority

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The SCOTUS Decision's Discussion of Employment

- *SFFA v. Harvard* – Gorsuch Concurrence
  - Justice Gorsuch tied the issue back to the Civil Rights Act of 1964
    - Notes that not only is admissions discrimination barred by the 14th Amendment but also by Title VI, which words its prohibition against discrimination differently
    - Title VI states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
    - Title VI applies to colleges which receive federal government funding, including through federally backed student loans
    - According to Justice Gorsuch, Title VI creates an even stronger prohibition against racial discrimination than the 14th Amendment's Equal Protection Clause

The SCOTUS Decision's Discussion of Employment

- *SFFA v. Harvard* – Gorsuch Concurrence
  - Justice Gorsuch compared Title VI (discrimination by entities receiving federal funds) with Title VII (employment discrimination)
    - He argued that Title VI and Title VII are analogs, found in the same statute, with the same drafter, and must mean the same thing
    - Title VII states
      - "It shall be an unlawful employment practice for an employer—
        - **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin
        - **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

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The SCOTUS Decision's Discussion of Employment

- *SFFA v. Harvard* – Sotomayor Dissent
  - Justice Sotomayor criticized Justice Gorsuch's invocation of Title VI arguing that the same standard applies under the Equal Protection Clause of the 14th Amendment as applies to Title VI
  - She noted in a footnote that neither SFFA nor the colleges raised Title VI, so it was inappropriate for Justice Gorsuch to discuss it under longstanding Supreme Court doctrine
  - She did not expressly address the argument that Titles VI and VII are analogs from the same statute and must be read exactly the same way

Where does this leave DEI initiatives?

- Increased attention and challenge
- July 13, 2023 Post-*SFFA* letter signed by Attorneys General of 13 States and sent to Fortune 100 CEOs
  - *"In an inversion of the odious discriminatory practices of the distant past, today's major companies adopt explicitly race-based initiatives which are similarly illegal. These discriminatory practices include, among other things, explicit racial quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences."*
  - *"If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed.*
  - *"Your company must overcome its underlying bias and treat all employees, all applicants, and all contractors equally, without regard to race"*

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The Future of DEI initiatives

- DEI initiatives are not necessarily illegal
  - Fact-dependent analysis
  - Key is whether the initiative resulted in a racial preference with respect to terms and conditions of employment (hiring, promotion, layoff, etc.)
  - Even if legal, the vigor of DEI initiatives may be used as evidence of discriminatory motive in a reverse discrimination claim
- Organizational values and risk tolerance

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Common DEI Initiatives

- **Increasing the diversity of the applicant pool**
  - Choice of media outlets where positions are publicized
  - Outreach to minority populations through schools, churches, personal contacts
  - Receptions or facility tours targeted to underrepresented populations
- **Measures to increase those selected for interview**
  - Unclear
  - Method-dependent?

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Common DEI Initiatives

- **Diversity of personnel committee**
  - Depends on method
- **Organizational statements, internal and external**
  - May be closely scrutinized
  - Welcoming, encouraging vs. implied preference
  - Visual images on organizational website
  - Promote success stories

Common DEI Initiatives

- **Workplace training for employees to eliminate bias and foster an inclusive and supportive working environment**
  - Content likely should be reviewed carefully
  - Speak in advance with trainers and messaging
- **Train hiring personnel on legal requirements**
  - Subjective factors still permissible
    - Could include overcoming challenges
  - But cannot be subterfuge for race preference

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Common DEI Initiatives

- **Mentorship programs post-hire**
  - Inclusive on all bases
  - No direct tie to compensation, promotion, etc.
- **Advantages in promotion or training opportunity**
  - But could be based on demonstrated need for increased skills
- **Affinity groups**
  - Tied to any employment benefits or advantages?

Common DEI Initiatives

- **Diversity officer positions**
  - Open to all applicants
  - Reflects commitment to EEO values
- **Bonuses or other incentives for leaders who demonstrate diversity commitment**
  - Not dependent on hiring or promotion of employees based on race
  - May not influence manager's decisions about individual applicants or employees
  - Better tied to positive mentoring more broadly

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Going forward

- Legal landscape in flux
- Expect more legal challenges
- Consult internally
- Consult with legal counsel

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