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

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Laura H. Harshbarger

Curtis A. Johnson



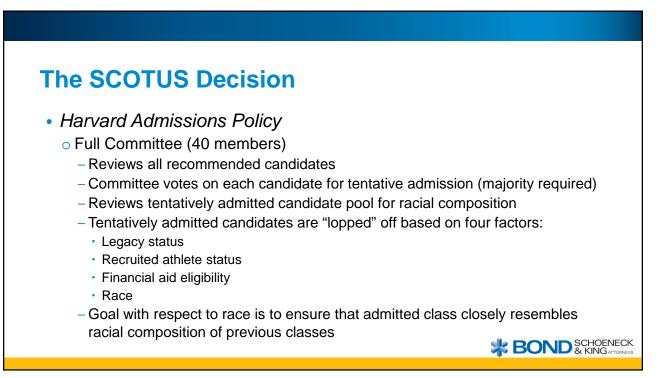
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The SCOTUS Decision

- 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

- Harvard Admissions Policy
 - o 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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- UNC Admissions Policy
 - o UNC admits 9.66% of applicants

o 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



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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SCOTUS Precedents in College Admissions Area

- o Regents of University of California v. Bakke
 - UC Davis Medical School set aside of 16 of 100 seats for certain minority groups <u>unconstitutional</u> – 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"





- SCOTUS Precedents in College Admissions Area
 - o 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

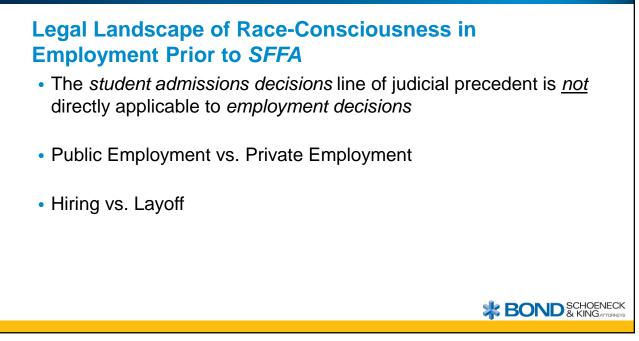


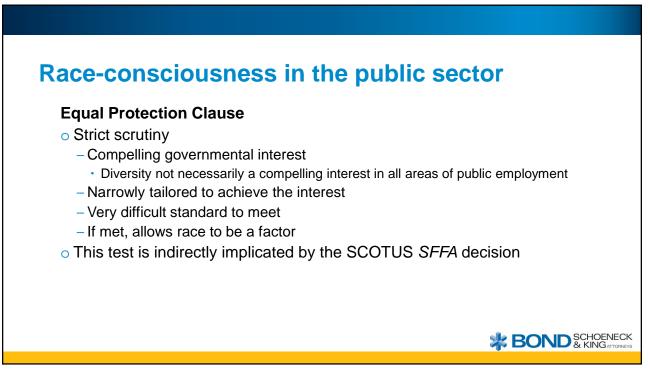
- SFFA v. Harvard
 - Noted that 20 years passed since Grutter, and colleges had no plan to end racial preferences in admission
 - No way to measure impact of a diverse student body on educational outcomes to know when goals of diversity have been met
 - Racial classifications used by schools do not make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



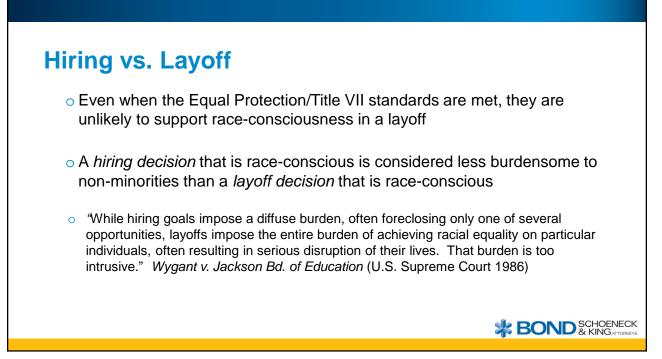


Race-consciousness in the private sector

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"
- o 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

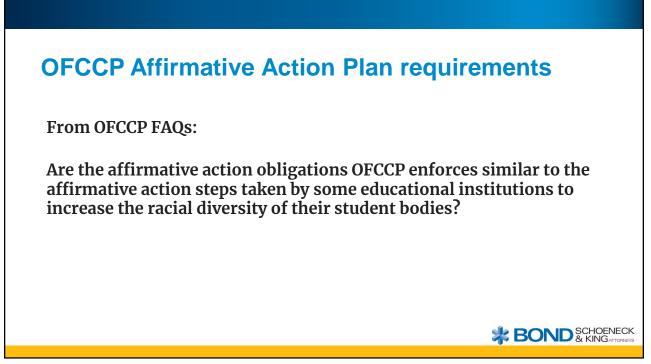
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EEOC Guidance on affirmative action plans

- CM-607
- <u>https://www.eeoc.gov/laws/guidance/cm-607-affirmative-action</u>
- 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

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SCHOENECK & KING ATTORNEYS 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 postsecondary 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 setasides. 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). BOND SCHOENECK

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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
 - o 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

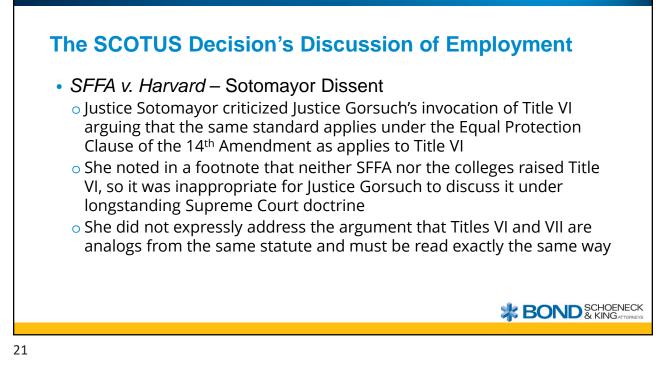
The SCOTUS Decision's Discussion of Employment

- SFFA v. Harvard Gorsuch Concurrence
 - o 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
 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."



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"



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









Common DEI Initiatives

- Mentorship programs post-hire
 - o Inclusive on all bases
 - o No direct tie to compensation, promotion, etc.

Advantages in promotion or training opportunity

o But could be based on demonstrated need for increased skills

Affinity groups

o Tied to any employment benefits or advantages?

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Going forward

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

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