Insight

IN-DEPTH DISCUSSION

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Supreme Court Upholds Consideration of Race in a College Admissions Program – What Does This Mean for Employer Diversity Efforts?

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On June 23, 2016, the U.S. Supreme Court issued an opinion for the second time in *Fisher v. University of Texas at Austin, (Fisher II)*, a case that directly questioned whether race can be considered at all in college admissions, and had the potential to call into doubt the legality of federal affirmative action requirements for government contractors as well as some employer diversity programs. In a 4-3 decision, the Court determined that the University of Texas' race-conscious admissions program in use when the complainant applied to the school is lawful under the Equal Protection Clause. The decision is a positive development for proponents of affirmative action programs in both higher education and in employment.

Background

The University of Texas at Austin (UT) is the flagship public university in Texas. UT describes its central mission as educating the future leaders of Texas, a state that is increasingly diverse with over half its population identifying as Hispanic or non-white. For years, the University struggled to enroll a diverse student body that would meet this objective, and attempted many different means of achieving its goal. The Fifth Circuit invalidated one of the ways in which UT had considered race in *Hopwood v. Texas*,[1] after which the university implemented new programs to address its diversity concerns. However, diversity plummeted under these new programs.

The Texas Legislature responded by passing the Top 10% Law, which guaranteed admission to any student who graduated in the top 10% of his or her high school class. The law leveraged the racial segregation in Texas

1 78 F.3d 932 (1996).

high schools to increase the number of minority students admitted to the University, but UT found that relying on just one criterion did not result in sufficient diversity to achieve its academic goals.

Following the Supreme Court's decision in *Grutter v. Bollinger*,[2] which approved the limited use of race in college admissions, UT revised its admission process again. It maintained the Top 10% Plan for automatic admissions (roughly 75% of admissions), but adjusted its second level of review for the remaining applicants (roughly 25% of admissions). For those applicants, UT used the Academic Index (AI)/Personal Achievement Indices (PAI). The PAI was a numerical score based on a holistic review of an application. Admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admitted all of the applicants who were above that cutoff point. In setting the cutoff, those admissions officers only knew how many applicants received a given PAI/AI score combination. Race was not a consideration in calculating an applicant's AI or PAI. Under this holistic process, the University considered the applicants' standardized test scores and grade point averages as well as application essay scores and other relevant factors. After *Grutter* and extensive analysis, the University inserted "race" as one of the many factors to be considered in the "Personal Achievement" subcomponent of the AI/PAI analysis applicable to University applicants. As the Court noted, race was a "factor of a factor of a factor" in the overall University student admissions decision.

Fisher is a white female who was denied admission to UT for the entering class of 2008. On April 7, 2008, Fisher filed suit in the Western District of Texas challenging the admissions process as a violation of the Equal Protection Clause of the Fourteenth Amendment and various federal statutes. After discovery, the district court granted summary judgment in favor of UT, finding UT's process satisfied the strict scrutiny requirements of Grutter. Fisher appealed her claim to the U.S. Court of Appeals for the Fifth Circuit, which also found UT's process constitutional. In reaching its conclusion, the Fifth Circuit gave deference to UT's belief that diversity served a compelling interest in filling out its student body, and the holistic approach was narrowly tailored to serve that interest.

Fisher appealed her case to the U.S. Supreme Court, which heard her claim for the first time in 2012. The Court issued its opinion on June 24, 2013 *(Fisher I)*. Rather than reaching a sweeping conclusion on the use of race in college admissions, the Court, in an opinion authored by Justice Kennedy, remanded the case to the Fifth Circuit to apply a higher strict scrutiny standard of review to the University's program. The Fifth Circuit again considered Fisher's claim in light of the Supreme Court guidance and once again found that the UT program passed constitutional muster.

Fisher again sought relief from the Supreme Court, and the Court agreed to again hear the case on December 9, 2015. Over 80 amicus briefs were submitted by various parties, including a brief in support of the University filed on behalf of over 40 Fortune 100 companies. Justice Kagan had previously recused herself from the case, presumably because she worked on *Fisher I* while Solicitor General. With Justice Scalia passing away after oral arguments, the issue was decided by just seven of the Justices.

The Holding

In a majority decision written by Justice Kennedy, the Court explained that under *Fisher I*, the University's consideration of race must be subject to strict scrutiny and that, in applying that scrutiny, some deference will be afforded to an educational institution's conclusion that there is a need for diversity, but that no deference will be afforded when deciding whether the consideration of race has been "narrowly tailored" to achieve a permissible goal.

2 539 U.S. 306 (2003).

Applying these standards to UT's program, the Court first found that the University had articulated concrete and precise goals including destroying stereotypes, promoting cross-racial understanding, preparing students for a diverse workforce and society, and cultivating leaders, thereby establishing a compelling educational benefit for a diverse student body. The Court next held that UT had provided a reasoned and principled explanation for its decision to pursue these goals, which was supported by multi-year studies and analysis.

Next, the Court rejected an argument that the University had no need to consider race because it had already reached a critical mass as a result of Texas's Top 10% Plan and holistic application review. The University had provided evidence that it continued to assess its need for a race-conscious review after that plan went into effect, and the Court found that the University made a reasonable determination that its previous efforts, including the University's utilization of the Top 10% Plan, had not accomplished the University's stated goals with respect to diversity and, indeed, without further action, the University's diversity results had stagnated.

Third, the Court rejected Fisher's argument that race was not a necessary consideration because it had a "minimal impact" in advancing the University's compelling interest. The percentages of minority students enrolled through holistic review provided evidence that consideration of race had a meaningful impact on diversity. Moreover, the Court noted that even if the impact of race is minimal, consideration of race in a university admissions process may still withstand the narrowly tailored requirement of strict scrutiny. As the Court noted, minimal impact may, in fact, be the hallmark of narrow tailoring.

Finally, the Court rejected Fisher's argument that there are other race-neutral means available to achieve the University's compelling interest. The University demonstrated that it had spent years attempting to achieve its compelling interest goals through race-neutral holistic review in conjunction with the Top 10% Plan, and that those efforts were not successful. The Court also rejected Fisher's suggestion that UT look to socioeconomic factors and class rank as substitutes for any consideration of race, recognizing that focusing on such metrics will not necessarily lead to increased diversity. The Court concluded that none of the alternatives suggested by Fisher were available and workable means to achieve the University's compelling interest in educational diversity.

The Dissent

A very long dissenting opinion by Justice Alito (joined by Chief Justice Roberts and Justice Thomas) confirms what many suspected: that *Fisher I* had been intended, by at least some of the Justices, to create a framework that would result in a later decision effectively ending affirmative action in higher education. The Dissent argues that the University's stated goals were amorphous and lacked concrete specificity. Because the University's studies and assessments pointed to numerical evidence of the racial makeup of the student body, the Dissent concludes that the University's real goal was "racial balancing" – which the Court has held is unconstitutional. The Dissent would choose to read *Fisher I* as essentially reversing Grutter and imposing a level of scrutiny so strict as to be impossible to satisfy. This position has, of course, now been rejected by the majority.

Implications for Affirmative Action Programs

While the decision is a victory for the University and others supporting the consideration of race as a tool toward achieving diversity in admissions programs, it remains clear that institutions with race-conscious admissions programs will need to articulate specific goals and values for achieving diversity, demonstrate how they measure that value, and ultimately, consider race-neutral alternatives and be able to document how those alternatives do not achieve the stated goals. State university admission plans seeking to use race

as a factor toward achieving the educational benefits of a diverse student body will require much planning and thought in order to withstand strict scrutiny. Nothing in the opinion changes the fact that institutions looking to implement these plans must be prepared to defend their efforts by producing significant evidence of the steps they have taken over an extended period of time to satisfy their goals.

Justice Kennedy, who in past opinions has appeared wary of race-based affirmative action programs, clearly remains cautious, noting in this decision that because of the specific nature of UT's plan, the holding "may offer limited prospective guidance." Nevertheless, by following *Grutter*, the Court has ended a period of great uncertainty regarding the future of affirmative action and increased confidence that such programs can be maintained without undue risk.

Employers that are looking to this opinion for guidance should note that much of the constitutional analysis the Court uses in evaluating diversity programs in which race is a "factor of a factor" is not directly relevant to private employers seeking to reap the benefits of a diverse workforce. Most noteworthy is the fact that, under Title VII of the Civil Rights Act of 1964, as amended, using a factor like race as a "motivating factor" is unlawful. Unless a private employer is engaging in voluntary remedial affirmative action under the authority of *United States of America v. Weber*[3] or *Johnson v. Santa Clara County*,[4] private employers cannot take race into account in making employment decisions; rather, private employers must resort to other means to expand recruitment pools and engage in appropriate training while insulating employment decisions from race-consciousness in order to lawfully pursue diversity and inclusion in their workforces.

3 443 U.S. 193 (1979).

4 480 U.S. 616 (1987).