AFFIRMATIVE ACTION AND CORPORATE AMERICA

An Employment Law Perspective on the United States Supreme Court's Rulings in Gratz v. Bollinger and Grutter v. Bollinger

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I. Introduction

Affirmative action continues to evoke strong opinions. Many regard affirmative action as the best means toward achieving equal opportunity for women and people of color, while others view it as "reverse discrimination." The latest United States Supreme Court rulings on affirmative action in higher education have brought the debate to the headlines in the popular press. The decisions of *Gratz v. Bollinger* and *Grutter v. Bollinger* also contain several lessons for employers.

II. The University of Michigan Cases

a. The Court ruled on two cases involving lawsuits filed against the University of Michigan. The suits challenged the university's affirmative action policies in the undergraduate and law school programs, alleging they discriminate in favor of "under-represented" applicants. In both programs, the university adopted admissions guidelines that would weigh various factors, including the applicant's race. The justices upheld the law school program entirely but struck down the undergraduate program, which awarded extra points to minority applicants. While the justices upheld some affirmative actions measures, they indicated that such measures should be used less and less over time.

b. *Gratz v. Bollinger*[1]

Petitioner Jennifer Gratz, a hopeful for the freshman class at the University of Michigan, brought a suit challenging the University's affirmative action policies in the undergraduate program. Gratz claimed the policy, which gave minority applicants twenty points out of a needed one hundred for admission, unfairly discriminated against non-minority applicants. Gratz's application was denied and she filed a class action alleging that the University's use of racial preferences in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964,and 42 U.S.C. § 1981.

The Court ruled that the undergraduate program was unconstitutional. The Court found that the University established a "compelling governmental interest" for implementing the policy and that policy was narrowly tailored to that interest.[2] In the majority view, the desire for diversity was found to be a compelling governmental interest. However, the Court held that the use of race in the

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1 No. 02-516, slip op. at 1 (U.S. June 23, 2003).

2 *Id.* at 21.

undergraduate admission program was not tailored narrowly enough to survive strict scrutiny because the program assigned automatic credit for race, instead of providing for "individualized consideration" of the applicants' characteristics.[3]

c. *Grutter v. Bollinger*[4]

Petitioner Grutter applied to the University of Michigan Law School and was denied admission. Grutter, a white Michigan resident with a 3.8 GPA and 161 LSAT score, filed suit alleging that the Law School had discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U. S. C. § 1981. She claimed that she was rejected because the Law School uses race as a "predominant" factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race.

The Court held that the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981.[5]

d. What do the decisions mean for affirmative action?

Taken together, the Court's opinions in *Grutter* and *Gratz* reinforce the importance of flexible and holistic admissions policies that employ a limited use of race. The Court's opinion in the law school case, *Grutter v. Bollinger*, confirms that admissions programs which consider race as one of many factors in the context of an individualized consideration of all applicants can pass constitutional muster. The Court's decision to strike down the undergraduate program as unconstitutional also makes clear that policies that automatically and inflexibly assign benefits on the basis of race, such as the point system, are constitutionally suspect.[6]

III. Business and Employment Implications

a. Corporate America Responds

Sixty-five major corporations having annual revenue that exceeds $1 trillion filed a friend-of-the-court brief with the U.S. Supreme Court "to add their collective voice in support of the importance of racial, ethnic, and other diversity in our

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3 *Id.* at 22-28.

4 No. 02-241, slip op. at 1 (U.S. June 23, 2003).

5 *Grutter*, No. 02-241, slip op. at 3-4.

6 "Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases: A Joint Statement of Constitutional Law Scholars," *at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/MIReaffirming.php

leading institutions and higher education." The companies included Alcoa, American Express, Boeing, John Hancock, Hewlett-Packard, and Microsoft. They argued that race-conscious pursuit of diversity is constitutional.[7] Many of these firms viewed the decision as an implicit endorsement of their ongoing race conscious practices in hiring, training, and development as they strive to improve the racial diversity of their talent pipeline and executive ranks.[8] Business leaders say the decisions will help guarantee a diverse pool of graduates available for jobs in private industries and at public institutions.

In most private companies, affirmative action has been a fairly prosaic reality. Conference rooms rather than courtrooms more frequently provide the venue for discussion on the topic. While corporate diversity initiatives tend to address matters that are far more extensive than race or gender, such initiatives that seek to increase opportunities for minorities or women to advance require careful analysis of the legal principles under consideration in the Michigan cases. This is because the Fourteenth Amendment principles of equal protection used to challenge state university admissions decisions have analogs in statutes that apply to private sector businesses as employers, vendors of goods and services to the federal government, and to private colleges, universities, and proprietary institutions that receive federal funds for student financial aid or research.[9]

b. What It Means

The University of Michigan decisions involve public university admissions policies, but the decisions have significant implications both inside and outside of higher education. The rulings imply that student body diversity supplies justification for race-conscious recruitment and outreach. Although the Supreme Court has yet to address the constitutionality of diversity-based affirmative action programs outside of higher education admissions, language in the *Grutter* opinion acknowledges the importance of other contexts, including K-12 education, government, and private employment and business.[10] In fact, the Court gave great weight to the briefs submitted in the case from large corporations, citing the importance of maintaining diversity in a global market: "the benefits of affirmative action are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from them."[11] Companies also argued

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7 Frank Scruggs, "Cases Involving Admissions Have Business Implications," THE SOUTH FLORIDA BUSINESS JOURNAL, ¶ 3 (2003), *available at* http://www.bizjournals.com/southflorida/stories/2003/05/26/focus4.html.

8 Judy Olian, "Business and the Supreme Court of 2003," *at* http://www.smeal.psu.edu/news/releases/jul03/business.html.

9 *See supra* note 7.

10 *Id.*

11 *Grutter v. Bollinger*, No. 02-241, slip op. at 18.

that they need qualified applicants to avoid disparate impact lawsuits. The Court's reference to those briefs suggests that a majority of justices might be willing to extend its ruling to some employment lawsuits.[12]

The University of Michigan decisions may not discourage other challenges to the legality of race conscious decisions outside of academia. Taken together, these decisions accentuate the need for employers in the public and private sectors, government contractors, colleges, and universities to determine whether their initiatives to improve opportunities for minorities comply with principles established by the Supreme Court.[13]

c. The Rulings' Affect on Employment Law Issues

Corporate executives and employment law experts agree that the Supreme Court's ruling about diversity in higher education may contain lessons for employers who use race as a factor in hiring. The *Gratz* decision accentuates the need for businesses to focus on the specifics of how initiatives designed to improve employment opportunities for minorities and women actually operate. An employer that has a poorly executed diversity program can find itself between a reverse discrimination suit and a class action discrimination lawsuit by minority or women employees. The decisions overall lead to greater scrutiny of the inner workings of corporate workplace policies designed to benefit minorities and women.

Many employers will have difficulty reconciling these decisions with the Court's early ruling in *Adarand Construction v. Pena*.[14] In that case, the Court held that when it comes to awarding minority contracts, the government may grant a preference to minority contractors only when necessary to remedy past discrimination.[15] The standard appears to differ depending on the circumstances and causes anxiety and hesitation for employers when determining employment policies due to the threat of litigation.

1. What Should Employers Do?

The legality of the implementation and maintenance of voluntary private sector affirmative action plans under Title VII of the Civil Rights Act has been affirmed by the Supreme Court in both *United Steelworkers of*

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[12] David Zeman and Maryanne George, "U-M Hails Top Court's Support of Race Factor: Justices Say No to Points for Minorities," DETROIT FREE PRESS, June 24, 2003, *available at* http://www.freep.com/cgi-bin/forms/printerfrinedly.pl.

[13] Frank Scruggs and Joe Reeder, "Supreme Court Decisions in the University of Michigan Affirmative Action Cases Have Important Implication for Employers, Federal Contractors, and Institutions Across the Fabric of American Life," July 2003, *at* http://www.gtlaw.com/pub/alerts/2003/scruggsf_07.pdf.

[14] 965 F.Supp. 1556 (1997).

[15] *Id.*

America v. Weber[16] and *Johnson v. Transportation Agency.*[17] Initially, the Court noted that an interpretation of Title VII to forbid all race-conscious affirmative action would be contrary to the purpose sought to be achieved by the law. The statute was intended to cause employers to evaluate their employment practices and attempt to eliminate "the last vestiges of an unfortunate and ignominious page in this country's history."[18] Title VII was not meant as a purely reactionary statute for prosecuting offenders, but was also intended to spur proactive conduct by employers aimed at preventing discrimination.[19] The Court suggested several criteria to consider in determining whether an affirmative action plan is "bona fide" in the sense that it is consistent with the policy and purpose of Title VII. First, the plan must be designed to break historic patterns of racial segregation in employment opportunities and jobs. Second, the plan must not unnecessarily trammel the interests of white employees. Last, the plan must be a temporary measure designed to eliminate racial barriers to employment, not to maintain an already achieved racial balance.[20]

One commentator noted that: "If employers have a system that assigns numbers routinely to all minority job applicants or employees, as well as other quantifiable values, that sends up a red flag. Businesses utilizing such determinates should rethink their practices beginning now."[21] In other words, businesses must continue to avoid strict quotas. Some organizations now may hesitate to adopt race conscious initiatives because of concerns that they will not succeed in narrowly tailoring policies that can withstand strict scrutiny. Others that remain committed to their affirmative action programs will analyze the recent decisions carefully to assess potential liabilities and to refine their policies. All decision makers who seek to hire, retain, or advance minorities will want to evaluate their policies in light of the Michigan cases.[22]

Although employers that practice affirmative action can be confident the Court isn't trying to overturn those programs, companies with aggressive affirmative action hiring policies should nonetheless heed the split decision. Employers can recheck their policies to make sure that race is just one of many factors taken into consideration for employment

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16 443 U.S. 193 (1979).

17 480 U.S. 616 (1987).

18 *Weber*, 443 U.S. at 204 (citing Albermarle Paper Co. v. Moody, 442 U.S. 405, 418 (1975).

19 Barbara J. Fick, *The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 161 (1997).

20 *Weber*, 443 U.S. at 200.

21 Thora Qaddumi, "University Discrimination Ruling Applies to the Workplace, Too, Local Attorney Says," Houston Business Journal, July 7, 2003, *available at* http://www.houton.bizjournals.com/houston/stories/2003/07/07/focus2.html (quoting attorney Marty Wickliff).

22 *See supra* note 13.

decisions and try to draw from a broader group of candidates by keeping in touch with minority publications and interest groups.[23] "Businesses can celebrate [the Supreme Court's] ruling, but they cannot get complacent. Like the universities that feed them, they must still actively recruit to gain a well-educated and well-rounded workforce."[24]

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[23] Stephen Roth, "Companies Keep Affirmative Action Ruling in Mind," THE BUSINESS JOURNAL, July 7, 2003, *available at* http://kansascity.bizjournal.com/kansascity/stories/2003/07/07/story7.html.

[24] "Racial Realities: Mixed U-M Rulings Still Make Clear the Value, Fairness of Affirmative Action," Detroit Free Press, June 24, 2003, *available at* http://www.freep.com/cgi-bin/forms/printerfriendly.pl.