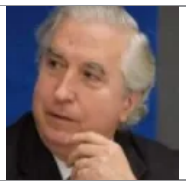

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Skadden Discusses Corporate DEI Policies After SCOTUS Affirmative Action Decision

By Lara A. Flath, David E. Schwartz and Amy Van Gelder September 29, 2023

Comment

The U.S. Supreme Court's historic ruling on affirmative action is limited to college admissions and not directly applicable to private employers. But the June 29, 2023, decision has already emboldened those who are seeking to challenge private sector diversity, equity and inclusion (DEI) initiatives.

This article highlights some of the ways the opinion has already been invoked, to assist companies in understanding the still-evolving landscape and potential risks.

Background

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, the Supreme Court held that the universities' consideration of race in admissions systems — "however well intentioned and implemented in good faith" — violated the equal protection clause of the 14th Amendment and Title VI of the Civil Rights Act of 1964.[1]

The Court offered several rationales:

- The universities' proffered interests to support their consideration of race, while commendable, were not sufficiently measurable because courts cannot determine when the claimed benefits — such as fostering innovation and enhancing cross-racial understanding — have been reached.
- Contrary to prior precedent expressly permitting the use of race as a "plus" factor, the Court focused on the "zero-sum" nature of the admissions decision outcome and found that a benefit provided to some applicants but not others is necessarily discriminatory. Similarly, race-conscious decisions inherently engage in stereotyping.
- The consideration of race lacked a logical or defined end point.

Impact on DEI Initiatives

SFFA does not interpret or address Title VII of the Civil Rights Act or 42 U.S.C. Section 1981. Indeed, it was already the law that race generally cannot be a factor in making employment decisions. But a federal district court opinion issued shortly after the *SFFA* decision applied the Supreme Court's reasoning to hold that certain racial preferences in government contracting violated constitutional guarantees of equal protection.

Private litigation challenges invoking *SFFA* have already begun and are expected to continue.

Allegations of individual discrimination. The most straightforward challenges have included individual discrimination lawsuits alleging that adverse employment actions were the result of DEI policies.

- An August 18, 2023, lawsuit alleging a media company fired or did not promote plaintiffs due to an allegedly discriminatory policy that favors women and minority candidates in violation of Section 1981.
- A July 17, 2023, lawsuit challenging a government program under Section 1981 as well as 42 U.S.C. Sections 1983 (civil action for deprivation of rights) and 1985 (conspiracy to interfere with civil rights) because program administrators use a scoring methodology that gives preferences based on race and gender.

- A June 30, 2023, lawsuit alleging a state government department's use of DEI training materials is discriminatory and violates Sections 1981 and 1983 as well as Title VII.

Lawsuits initiated by nonprofit organizations. Membership and nonprofit organizations have also recently challenged various programs.

- A membership organization filed a lawsuit on August 2, 2023, alleging that a small business grant program violates Section 1981 because Black women are the only eligible participants.
- A nonprofit filed a putative class action on August 16, 2023, alleging that a program offering grants only to Black-owned small businesses is in violation of Section 1981.

Even before *SFFA*, corporate DEI programs were facing scrutiny. America First Legal, a national nonprofit organization, has in the last few years filed complaints, including with the Equal Employment Opportunity Commission alleging that various companies engaged in race- and sex-based discrimination.

Since *SFFA*, these organizations have continued to challenge DEI initiatives and have threatened to bring suit, including through a public warning stating "all DEI programs, and all 'balancing' in employment, training, scholarships, and promotions, based on race, national origin, or sex are illegal" and by establishing a tips hotline.

Activist investors have similarly initiated demands against *Fortune* 500 companies, insisting that they retract policies adopted in the name of DEI initiatives or face litigation. Such demands are likely to continue, but the recent dismissal of one such complaint demonstrates that such activists may face hurdles meeting the legal standard to bring derivative litigation, including establishing that they fairly and adequately represent the interests of all shareholders (as opposed to their own private interests).

Considerations Going Forward

Keeping these trends and potential challenges in mind, employment law has not changed, and companies can choose to continue to implement DEI policies designed to eliminate bias, cultivate a diverse pipeline of talent and promote equal opportunity in hiring, promotion and procurement.

Companies that value diversity should regularly review DEI initiatives and employment policies to ensure full compliance with the law. In the wake of *SFFA* and increased scrutiny, companies may want to consider reviewing DEI initiatives with the following types of questions in mind:

- Are DEI objectives clear and connected to specific business goals?
- Are DEI initiatives and programs distinct from and able to succeed without the use of impermissible racial quotas?
- Are DEI initiatives and programs open to all?
- Do any DEI policies potentially provide a zero-sum advantage on account of race?
- Do company statements accurately describe DEI initiatives and policies?

Through the exercise of informed business judgment, companies should consider how such policies advance the mission and operations of their business. If they do, the threat of increased scrutiny need not compel companies to abandon lawfully implemented programs.

ENDNOTE

1 Lara Flath and Amy Van Gelder were counsel to the University of North Carolina at Chapel Hill in the *SFFA* litigation.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm's memorandum, "Corporate DEI Policies Face Scrutiny Following SCOTUS Affirmative Action Decision," dated September 2023 and available here.