

The Supreme Court's Decision in SFFA v. Harvard and UNC and its Implications for DE&I in Employment and Beyond




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Today's Agenda

- 
- Review of the recent Supreme Court rulings about race and college admissions
 - Legal effect of the rulings in employment and supplier practices
 - Practical implications
 - Doing DEI right



Supreme Court Rulings Regarding Race and Admissions

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SCOTUS Speaks on Race in Admissions

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Students for Fair Admissions, Inc. (“SFFA”) v. President and Fellows of Harvard College, and SFFA v. University of North Carolina, et al.

Decided June 29, 2023

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SFFA v. Harvard and UNC

The admissions policies permitted a student applicant's race to be considered as part of an overall "holistic" assessment of the individual, along with things like grades, references, and extracurricular activities.

The UNC case alleged discrimination against White and Asian American students in violation of the Equal Protection Clause of the 14th Amendment.

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Harvard case alleged discrimination against Asian Americans in violation of Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color or national origin by federally funded programs.

SFFA v. Harvard and UNC

Both schools had relied on the 2003 Supreme Court case of *Grutter v. Bollinger* under which an educational institution may consider an applicant's race as one factor in an admissions policy *so long as* the policy satisfied "strict scrutiny" test:

- a) is narrowly tailored to the compelling interest of promoting a diverse student body (because of the proven educational benefits of diversity), and
- b) uses a holistic process to evaluate each applicant, where race/ethnicity is just one of many considerations (i.e., no quota system).

SFFA v. Harvard and UNC

- UNC Process:
 - “Readers” review applications and are required to consider race and ethnicity as one factor
 - Other factors are academic performance and rigor; standardized test results; extracurricular involvement; essay quality; personal factors and student background

SFFA v. Harvard and UNC

- UNC Process:
 - “School group review” receives a report on each student
 - May consider applicant’s race
 - Goal to ensure that minority enrollment percentage was not lower than the minority representation in North Carolina’s general population

SFFA v. Harvard and UNC

- Harvard's Process:
 - "First Readers" screen applications
 - Assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall
 - Race can be considered in the "overall" score

SFFA v. Harvard and UNC

- Harvard's Process:
 - Full committee votes on each applicant
 - Racial composition of pool of tentatively admitted students is disclosed
 - Final cuts made - any applicants at risk of being cut are on a list with their legacy status, recruited athlete status, financial aid eligibility, and race
 - Race is a "determinative tip" for a significant % of admitted African American and Hispanic students

SFFA v. Harvard and UNC

- The Ruling:
 - “Strict scrutiny” invokes a two-part standard:
 1. Is the racial classification used for “further compelling government interests?”
 2. If so, is the use of race “narrowly tailored” to achieve that interest?
- The UNC and Harvard policies failed both.

SFFA v. Harvard and UNC

- No concrete way to measure progress towards the goals articulated by the schools as reasons they need to increase numbers of students who are not Asian or White – goals such as encouraging a robust exchange of ideas, fostering innovation and problem-solving and training future leaders.
- The Court reasoned, “[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny.”

SFFA v. Harvard and UNC

- The Court reviewed the admission rates of different races of candidates, finding that race was used as both a positive and negative factor in evaluations.
- The Court also repeatedly expressed concern that there is no “end point” to the schools’ race-based admission policies.
- By treating race as an evaluative factor, the schools were incorrectly assuming that all persons in a race share similar views or experiences.

SFFA v. Harvard and UNC

Bottom Line

Colleges and universities may no longer consider race as part of the college admissions process

SFFA v. Harvard and UNC

- The Court left the door slightly cracked open to allow for the discussion of “how race affected [a candidate’s] life, be it through discrimination, inspiration or otherwise.” But the Court cautioned that race itself cannot be a factor:
 - *“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.” (emphasis added)*

Legal Implications for Employers and Suppliers

Legal Effect of Ruling on Private Employers

NO IMMEDIATE DIRECT LEGAL IMPACT ON PRIVATE EMPLOYERS

Not a decision based on federal law that applies to employers - Title VII

Employers are not legally required to make any changes to DEI, EEO, or affirmative action policies if such practices comply with existing employment law

Employers can still have and focus on diversity as a core value

Employers can still commit to a culture of inclusion

Employers can and should maintain their EEO policies

Legal Effect of Ruling on Private Employers

- Confusion around the reach of the rulings in part because of the use of “affirmative action” in both educational and employment contexts.
 - In education, “affirmative action” had historically permitted colleges and universities to consider race as one factor that determined admissions. (See Grutter)
 - This is different from employers.
- **The law does not and never has recognized the ability for employers to make decisions of who to hire or promote based on the person’s race or gender, rather than who is the best candidate for the role.**

Legal Effect of Ruling on Private Employers

- **Mandatory Affirmative Action (Employment)**
 - In employment, some employers are federal contractors and subject to requirements under the Office of Federal Contract Compliance Programs (“OFCCP”).
 - These OFCCP requirements expect companies to make *targeted diversity recruiting efforts* aimed at increasing the diversity of applicant pools and pipelines.
 - In this context “affirmative action” is different from affirmative action in the education context.
 - **The final hiring decision still should be based on selecting the best qualified person, without regard to their race (or other protected status).**


Legal Effect of Ruling on Private Employers

- **Voluntary Affirmative Action (Employment)**
 - Employers can establish affirmative action programs compliant with Title VII and EEOC guidance.
 - To be lawful, the employer is required to show a manifest imbalance in the workforce based on race or gender when comparing representation to availability.
 - These programs must be temporary in nature (just long enough to remedy the imbalance)
 - May not unnecessarily trammel the interests of non-minority employees
 - A self-analysis that identifies policies or practices that have led to racial imbalances in traditionally segregated job categories and the action taken pursuant to the program is reasonable in relation to the problems identified by the self-analysis
 - Difficult to lawfully implement

Practical Implications

Practical Implications of the Rulings

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- We are seeing legal challenges to some employer DEI efforts and expect more to come.
 - This is not expected to impact many employer DEI efforts such as trainings, inclusion efforts, inclusive employee affinity groups.

Practical Implications of the Rulings

- After the SFFA decision, so called “Reverse” discrimination claims may increase.
- Title VII protects employees against discrimination based on race:
 - **White**
 - Black or African American
 - American Indian or Alaska Native
 - Asian
 - Native Hawaiian or Other Pacific Islander

Legal Challenges

- ***Duvall v. Novant* (W.D.N.C Nov 18, 2019)**
 - \$10m jury verdict in 2022
 - Plaintiff was a Senior VP of Marketing & Communications
 - Several white male leaders were terminated and many women/minorities were promoted
 - Company had Long-Term Incentive plan that financially benefited senior leadership for improving D&I
 - Plaintiff was terminated in July 2018 without notice
 - No documented performance issues
 - Replaced by a white female and a black female
 - Bottom line -- Assumption that diversity efforts led to termination
 - Case is on appeal
- ***DiBenedetto v. AT&T Services, Inc.* (N.D. Ga. Nov 02, 2021)**
 - Alleging similarly that the company’s diversity hiring practices discriminated against him
 - The supervisor allegedly told him he was unpromotable because he was a “58-year-old white guy”

Legal Challenges

- *Powers v. Broken Hill Proprietary Inc.* (S.D. Texas, 2022)
 - Mining, metals and petroleum company
 - 2016 goal to achieve gender balance
 - Progress toward goal to achieve gender balance was a factor in overall bonus pool and in individual bonuses
 - In 2016 women were 10% of new hires; in 2019-20 women were 60% of new hires

Legal Challenges

- *Powers v. Broken Hill Proprietary Inc.* (S.D. Texas, 2022)(con.)
 - Plaintiff lost his job in a restructuring
 - Applied for 4 jobs over 7 months
 - Women hired for all 4 roles
 - A woman hired into a job with similar title as Plaintiff's eliminated role

Legal Challenges

- *Powers v. Broken Hill Proprietary Inc.* (S.D. Texas, 2022)(con.)
 - Although no final court decision on the case, the court decided the case should continue to move forward in the litigation because it could be possible that the company considered gender in the decisions that limited Powers' employment opportunities
 - The company would need to present evidence to show otherwise
 - Case settled in February/March 2023 - no court decision
 - **Bottom line** - *Could the employer show that it was making hiring decisions based on the most qualified candidate?*

Legal Challenges

- *Bradley et al v. Gannett Co., Inc.* (E.D. Va. Aug 18, 2023)
 - Ongoing class action
 - Commitment to “achieve racial and gender parity with the diversity of our nation, throughout our workforce”
 - Alleged to be a quota and commitment to hire a % of individuals based on race without regard to the applicant pool

Legal Challenges

- **13 Attorneys General** and Senator Tom Cotton sent letters to business leaders
 - Warning against racial preferences or quotas in employment and contracting
- **21 Attorneys General** then sent letters urging businesses to continue to use recruitment initiatives and vendor diversity programs
 - Acknowledging the barriers that women and PoC often face in the workplace and the value of DEI efforts
 - Making the business case for diversity efforts
 - Clarifying the holding of the SCOTUS decision

Legal Challenges

- Actual and threatened shareholder litigation over DEI practices alleging corporate mismanagement
 - ***Craig v. Target, et al.*** (M.D. Fla. Aug 8, 2023)
 - LGBTQ merchandising
 - Adoption of ESG and DEI “mandates”
 - **Letter to Kellogg CEO** (Aug 9, 2023)
 - LGBTQ merchandising
 - Alleged race-based hiring/employment practices
 - Commitment to diverse suppliers
 - Employee training limited to employees of a certain protected classes

Legal Challenges

- In 2022, The American Civil Rights Project also threatened to sue the McDonald's Corp., the Starbucks Corp. and Novartis AG over diversity policies.
 - [McDonald's](#) - diversity goals for the composition of its senior leadership
 - American First Legal has asked the EEOC to investigate McDonald's DEI practices (4/23)
 - Strive Asset Management Fund wrote an additional letter challenging its DEI practices (7/23)
 - [Starbucks](#) - diversity goals for workers and suppliers
 - Suit filed 8/22 and dismissed 9/23
 - [Novartis](#) - [preferred program](#) for outside law firms that commit to diversity minimums
 - The group wrote a similar letter challenging Coca-Cola's proposed diversity requirements for outside counsel
 - Coca-Cola never implemented the plan

Legal Challenges

- In late August, two large law firms were sued over their Fellowship programs
 - One limited to persons of color, LGBTQ, and/or people with disabilities
 - If heterosexual and non-disabled, excluded if white
 - One limited to persons of color and LGBTQ
 - If white and heterosexual, excluded
- In early October, the lawsuits were dropped against both firms as the firms adjusted the requirements clarifying that all law students may apply (with no limitations based on protected class)
- Other large firms have recently received similar demand letters

Legal Challenges

- **Supplier Diversity Generally**
 - Supplier diversity challenges are largely brought under Section 1981
 - Which prohibits race discrimination in making and enforcing contracts
 - Courts have applied Title VII's voluntary affirmative action standard in both the employment and education-related space
 - We have yet to see if courts would apply a similar voluntary affirmative action standard in the supplier diversity space

Legal Challenges

- ***American Alliance for Equal Rights (“AAER”) v. Fearless Fund Management LLC*** (Aug 8, 2023 ND Ga.)
 - AAER alleged that the Fund that provides grants and other perks to small businesses owned by Black women violates Section 1981
 - AAER's complaint requested a preliminary injunction to prevent the Fund from awarding this cycle of grants
 - The district court denied AAER's preliminary injunction request (finding that a 1st Amendment argument may be dispositive)
 - The 11th Circuit granted AAER's request for preliminary injunction on emergency appeal

Legal Challenges

- *Ultima Servs. Corp. v. United States Dep't. of Agriculture* (E.D. Tenn. Mar 4, 2020)
 - Ultima (a company owned by a White woman) sued the USDA in 2020 after it lost a contract that had been moved to the 8(a) program
 - The TN District Court struck down a government program providing preferences to minority-owned businesses under the Small Business Act
 - In an opinion that heavily cites to *SFFA*, the court concluded that the government's challenged minority-owned business program violated the Equal Protection Clause with regard to its methodology for applying a "rebuttable presumption of social disadvantage" to individuals of certain minority groups

Legal Challenges

- *Bolduc v. Amazon.com Inc.* (E.D. Tex. Jul 20, 2022)
 - Amazon faces a lawsuit alleging that the company's \$10,000 startup bonus offered to "Black, Latinx, and Native American" delivery service partners (independent businesses contracted to deliver Amazon packages to customers' homes) violates "§ 1981 by excluding Whites and Asian-Americans"

Legal Challenges

- Some states have laws that also would support legal action by contractors for discrimination based on race, gender, other protected characteristics (e.g. New Jersey, California)

Doing DEI Right



What Does This Mean for DEI Initiatives?



DEI Remains Important!

Potential Benefits of DEI

- Education of employees
- Create stronger sense of community and greater retention
- Sense of wellbeing and belonging
- Connect to wider audience/clients
- Being allowed to be authentic creates psychological safety and leads to “best work”
- Belief in availability of opportunities for development/advancement
- Increased empathy leads to stronger teams
- Many others!!

Doing DEI Right

- Understand what DEI programs are: DEI programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce, such as women, people of color, LGBTQ+ individuals, and people with disabilities
 - It is NOT “affirmative action”
 - It is not making decisions based on protected class status
- Can still have diversity, equity, inclusion, belonging, and accessibility policies and a culture grounded in these values

Doing DEI Right

- DEI programs might include:
 - outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent
 - creating non-exclusive mentoring programs aimed at supporting diverse talent within a company (beware of exclusive accelerated development programs)
 - unconscious bias training, bystander intervention training, how to be an ally training
 - skills based training to develop employee skills to be better qualified to move into other roles
 - having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events (open to all)

Doing DEI Right

- DEI programs cannot include:
 - using protected categories, such as race, to decide who to hire or promote, or
 - setting aside positions to be filled by a woman or racial/ethnic minority, or
 - setting a quota for a specific number of individuals to be hired based on a protected class.

Doing DEI Right

- Materials should continue to reference hiring and promoting the person best qualified
- They should not indicate that a woman or minority is wanted for the role

Doing DEI Right

- **Explain why DEI Programs are important**
- Reiterate and be educated on how increased diversity can improve the company's bottom line through increased collaboration, employee engagement, and better decision-making

Doing DEI Right

- Speak in terms of diversity of thought, inclusion, equity, and wide-ranging perspectives and experiences - not just in terms of demographic diversity (e.g., race, gender, etc.)

Doing DEI Right

- **Example:** Smith Anderson's Excellence in Diversity 1L Fellowship - The fellowship is open to first-year students who are enrolled full-time at ABA-accredited law schools who have demonstrated a commitment to promoting diversity and inclusion through their activities, background and life experiences, as well as members of groups that have been historically underrepresented in the legal profession, including first-generation college students and those from disadvantaged socioeconomic backgrounds.

Doing DEI Right

- *Be Inclusive*

- Employee development programs and affinity groups are designed to eliminate barriers and increase belonging
- Be clear to employees that participation in an affinity group or advancement program, while focused on a certain group, is open to anyone

Doing DEI Right

Consider Race-Neutral Diversity Factors in Hiring

- Criteria that, while race neutral, nonetheless tend to increase racial diversity in the workplace
- Such factors may include socioeconomic status, first generation professionals, unique personal circumstances or geographic diversity
- Continue to always hire the best qualified person for the role

Doing DEI Right

- Consider requiring that qualified diverse candidates be part of every pool of candidates for positions
 - doesn't mean you have to hire a diverse candidate
 - but that qualified diverse candidates are considered

Doing DEI Right

- Remember not to use race or other protected categories when making employment decisions - even for purposes of furthering diversity objectives
- Hires should not be based on “fit”- can allow for unconscious bias
- Be careful about linking compensation directly to increased hiring/promotion of individuals in a protected class

Do an Inventory of DEI Initiatives



Examples of Activities in Each Category

Permissible	Uncertain/Caution	High Risk	Impermissible
<ul style="list-style-type: none"> Recruiting using affinity-based job fairs, diverse media, HBCUs, and similar organizations Equal employment opportunity to all employees and applicants Defining “diversity” broadly (not limited to protected classes only) Providing disability accommodations for applicants and reviewing job descriptions for accessibility Trainings on anti-harassment, implicit bias, and anti-discrimination Maintaining demographic data for EEO-1 forms and assessment of selection processes (with proper storage and appropriate access) Mandatory (under EO 11246 and OFFCP regulations) and Voluntary Affirmative Action programs (compliant with Title VII and EEOC guidance) Factoring in compliance with the EEO policy and Affirmative Action policies with compensation For suppliers - fostering relationships with organizations that provide diverse business accreditation; asking vendors to describe their DEI programs/commitments 	<ul style="list-style-type: none"> Pipeline, mentorship, training, and sponsorship programs for individuals based on protected classes (consider opening to all employees to opt-in) Statements discussing DEI goals (should be vetted by counsel to ensure not to inadvertently say anything impermissible or something that could be used as evidence of reverse discrimination) Employee Resource Groups (should be open to all employees in and outside of the unifying protected class) Aspirational goals for diversity of a workplace (allowed but careful not to be a quota; how goals are achieved matters) Consideration of a diverse slate of qualified applicants Practices that may be interpreted as employment decisions based on the employee’s or applicant’s protected class; Facially neutral policies/practices that may have adverse impact Engaging suppliers based on diverse ownership The use of self-identification surveys requesting more demographic information than required (permissible with proper procedures in place) 	<ul style="list-style-type: none"> Allowing those with hiring decision-making power to have access to demographic information creates a presumption that information was used in the decision-making process Commitment to a certain dollar number to racially diverse suppliers (challenged under Section 1981 and various state law); a points-based system awarded to diverse vendors Tying in compensation with certain diversity hiring targets 	<ul style="list-style-type: none"> Protected class quotas Job openings, scholarships, and internships limited only to those of a certain protected class Employment decisions based on the individual’s protected class

DEI is Legal and Makes Organizations Better

"Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers."

"The [rulings] do not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background."

"It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure that workers of all backgrounds are afforded equal opportunity in the workplace."

Statement of EEOC Chair Charlotte A. Burrows, June 29, 2023

Questions?



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