Salvaging Your DEIB Programs in an Era of Cultural Resistance – Some History

In *Students for Fair Admission v. President and Fellows of Harvard College v. University of North Carolina*, 143 S. Ct. 2141 (2023), the Supreme Court held that Harvard and University of North Carolina's admission programs violate the Constitution's Equal Protection Clause.

After finding that SFFA held organizational standing, the Court held that the admission programs did not withstand the strict scrutiny required for such programs. *Id.* at 2166. In particular, the Court found that the programs' interests were not capable of meaningful judicial review. Those interests, as articulated by the schools, were: (for Harvard) "(1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks.". (for UNC) "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."" *Id.* (internal citations omitted)) The Court held that those goals were not capable of being measured and that the universities could not determine when the goals were met. The Court also found that "respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue." *Id.* at 2167. As companies consider DEI programs, it makes sense to take a look at the interests that the Court held did not past muster in the academic setting.

The Court also found that the universities' programs did not meet the "twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype." *Id.* at 2168. Among its reasoning for this finding, the Court held that the programs assumed that all people of one race think alike: "when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students." *Id.* at 2170 (internal citations omitted)).

Another strike against the programs was that the universities did not articulate a logical end point. *Id.* at 2173. In finding that the programs violated the Equal Protection Clause, the Court wrote: "Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today." *Id.* at 2175.

The Court, in trying to address the dissent, said that "[a]t the same time, as all parties agree, nothing 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. *Id.*

SFFA was not an employment case, but it makes sense that employers would follow both the case and its progeny closely as potentially touching on DEI programs. After the Supreme Court ruling, the Chair of the Employment Equal Opportunity Commission, issued a statement that "the decision in [*SFFA*] does 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 workers of all backgrounds are afforded equal opportunity in the workplace." *EEOC: Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (June 29, 2023).)

States attorneys general have not agreed with each other on how SFFA impacts workplace DEI programs. Thirteen attorneys general sent a letter to Fortune 100 companies opposing their DEI programs and using SFFA to support their position. *See* Letter to Fortune 100 Companies (July 13, 2023)). In response, attorneys general from other states wrote a letter to the same CEOs disagreeing with the others' positions and claiming it "irresponsible and misleading to suggest that *SFFA* imposes additional prohibitions on the diversity, equity, and inclusion initiatives of private employers." *See* Letter to Fortune 100 Companies (July 19, 2023)).

State legislatures have also taken action. At least nine states—Florida, Idaho, Kansas, North Carolina, North Dakota, South Dakota, Tennessee, Texas, and Utah—have passed laws restricting DEI programs. These laws mainly restrict DEI in public education or public institutions. For instance, a law in Texas, in effect as of January 1, 2024, prohibits public institutions of higher education from establishing or maintaining DEI offices and requires such institutions to adopt new policies to ensure compliance by their employees.

Challenges to DEI programs are not new. *See Phillips v. Starbucks Corp*., Civil Action No. 19-19432, 2023 WL 5274541 (D.N.J. Aug. 16, 2023), a Caucasian woman filed a lawsuit for reverse discrimination alleging that Starbucks fired her and other white employees to rectify bad publicity from a racial incident. The case went to trial and the jury awarded the plaintiff over $25 million. *Id.* at *1; *see also, Walton v. Medtronic USA, Inc.,* Case No. 22-CV-50 (PJS/JFD), 2023 WL 3144320, at *8 (D. Minn. Apr. 28, 2023) (permitting a motion to amend a complaint by a white male alleging that the employer maintained a DEI program that sought to have 40% of leadership positions occupied by women and 20% of its leadership positions occupied by people of color)).

SFFA may give plaintiffs more ammunition to bring claims against employers for their DEI programs. After *SFFA* came out, one EEOC Commissioner publicly cautioned companies to evaluate their policies. She wrote, "Poorly structured voluntary diversity programs pose both legal and practical risks for companies. Those risks existed before the Supreme Court's decision today. Now they may be even higher." *With Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs,* Reuters, June 29, 2023. The Commissioner stated:

> The EEOC and DOJ's existing position is that Title VII bars discrimination in all actions affecting "terms, conditions, or privileges of employment" — including actions falling short of hiring, firing, or promotion. This expansive reading of Title VII could implicate a host of increasingly popular race-conscious corporate initiatives: from providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity "scholarships" that effectively provide more compensation for "diverse" summer interns.

Some organizations and companies have responded by changing the language of their policies. But this may not be enough. America First Legal recently filed a charge of discrimination with EEOC that NASCAR discriminates against white men through its "Drive for Diversity" program. The program previously was intended for women and ethnic minorities. On September 1, 2023, to language changed to applicants of "diverse backgrounds and experiences." Despite the language change, America First Legal alleged in its November 2, 2023, complaint that NASCAR continues to carry out unlawful hiring practices "under the cloak of a 'diverse backgrounds and experiences' rebranding." Lawsuits have also targeted law firm programs, for example a group sued Winston and Strawn challenging its diversity fellowships. In response, Winston changed its criteria for the fellowship and the lawsuit was dropped. America First Legal also filed complaints with the EEOC over several companies' DEI programs, aimed at increasing representation of women and racial and ethnic minority employees within their organizations. The complaints allege that the programs violate Title VII. The complaints cite the companies' publicly disclosed DEI goals and progress against such goals as evidence of the discrimination.

Some general guiding principles may be helpful as companies consider how to follow the law while also foster diversity and inclusion. DEI programs that are open only to certain applicants or that explicitly have a racial or gender focus are likely to bring scrutiny. Quota-based programs are also likely to face challenges. On the other hand if a program focuses on bias elimination and promoting equal opportunities for employees, that is likely to pass muster. But companies should be aware that their public statements about the programs and the written descriptions of the programs themselves are likely to be scrutinized. Race should not be used as a factor to "bump up" an applicant in a situation where hiring or promotion is a zero sum game.

While the jury is out on exactly what will happen with various DEI programs, companies need to pay attention both to the local landscape – what their particular state AGs are saying and the rulings coming out of their courts – and the national stage. The organizations who oppose these programs continue to have the motivation and economic backing to oppose the programs.