IADC COMMITTEE NEWSLETTER

Diversity, Equity, Inclusion and Belonging

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In This Issue

Through the first in a series of articles, Lucy R. Dollens and Kenneth E. Sharperson report on the recent developments related to challenges against diversity, equity, inclusion and belonging programs and policies.

A Series: Tackling the Recent Wave of Challenges to Diversity, Equity, Inclusion and Belonging Efforts

About the Authors

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About the Committee

The Diversity, Equity and Inclusion Committee is charged with actively increasing the involvement and participation of diverse attorneys in the organization through membership strategies and professional programming that recognizes the strength and benefits of inclusion and diversity in the practice of law. For these purposes, diverse attorneys include lawyers from groups of people who are underrepresented in the IADC's membership. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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In recent months, corporate diversity, equity, inclusion, and belonging ("DEIB) programs are being challenged as evidenced by an uptick in both the number and the scope of legal attacks against such corporate strategies. We intend to embark upon a journey through a series of articles for our IADC members that address the challenges, educate our readers on the developments, and reflect on how entities are tweaking, retooling, or in some cases revamping, their approach to DEIB.

To kick us off, in this article - the first in the series - we discuss the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard, UNC*, 600 U.S. 181, 198-201 (June 29, 2023) ("SFFA v. Harvard"), which catapulted the issues to the forefront of the discussion by significantly restricting universities' consideration of race in college admissions.

In *SFFA v. Harvard*, the Supreme Court concluded in a 40-page opinion that Harvard's and UNC's admissions programs violated the Equal Protection Clause of the 14th Amendment. The opinion was authored by Chief Justice John Roberts, and all six members of the Court's conservative justices agreed, some issuing concurring opinions. Originally filed as two separate lawsuits by SFFA – one against Harvard and one against UNC – the Supreme Court issued its opinion to address both cases. Justices Sotomayor and Kagan dissented from the majority, and Justice Jackson, who recused herself from the Harvard case, authored a dissent in the UNC case.

SFFA – a nonprofit organization which states its purpose is to defend human and civil rights, including the right of individuals to equal protection under the law – filed suit challenging the admissions programs of UNC and Harvard, both of which considered applicants' race in the process.

The admissions process of Harvard is comprised of the following (*Id.* at 192):

- Each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall.
    - For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race.
- Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee and, in doing so, they take an applicant's race into account.

- The next step involves the 40-member full admissions committee beginning its deliberations and discussing the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class.
    - An applicant receiving a majority of the full committee's votes is tentatively accepted for admission.
- At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee.
- The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. The full committee decides as a group which students to lop.
- Once the lop process is complete, Harvard's admitted class is set.

UNC's similar admissions process is comprised of the following (*Id.* at 192):

- Every application is reviewed first by an admissions office reader, who assigns a numerical rating to each of several categories.
    - Readers are required to consider the applicant's race as a factor in their review.
    - Readers then make a written recommendation on each assigned application, and they may provide an applicant a substantial "plus" depending on the applicant's race.
    - At this stage, most recommendations are provisionally final.
- A committee of experienced staff members then conducts a "school group review" of every initial decision made by a reader and either approves or rejects the recommendation. In making those decisions, the committee may consider the applicant's race.

Although the Supreme Court stopped short of granting SFFA's request to overrule *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) – its landmark opinion issued twenty years ago that protected race-based admissions considerations with narrow restrictions – the Supreme Court in *SSFA v. Harvard* nonetheless determined the admissions programs of UNC and Harvard failed to satisfy the strict scrutiny test required for exceptions to the Equal Protection Clause.

Twenty years ago, the court in *Grutter* found race-based college admissions policies permissible so long as they complied with strict scrutiny and never used race as a stereotype or a negative and came to an end. However, *Grutter* Court's stated it expected that 25 years from now, the use of racial preferences would no longer be necessary; yet as the Court in *SSFA v. Harvard* emphasized: "[t]twenty years later, no end is in sight." *Id.* at 213.

The majority in *SSFA v. Harvard* ruled that the stated goals of the universities' admissions policies (including training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens) are not sufficiently coherent to allow courts to conduct a strict scrutiny review. The majority explained that the use of race must be "concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." The court concluded that the universities' admissions policies failed to articulate a meaningful connection between the means they employ and the goals they pursue, which also precludes courts from conducting a strict scrutiny review. And the Supreme Court took issue with the fact that the admissions programs lack any logical endpoint.

Ultimately, the Court ruled that both UNC's and Harvard's admissions programs cannot be reconciled with the guarantees found in the Equal Protection Clause because 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." *Id.* at 230.

As a result of the Supreme Court's findings, educational institutions have been forced to reassess and quickly adjust. The decision also stoked the fire, giving challengers of corporate DEIB programs and policies ammunition to similarly attack such programs. Stay tuned for our next article focusing on the impact of the US Supreme Court's decision with respect to corporate America and recent developments in light of the decision, which challenges forcing corporations to carefully consider the ways in which they meet their DEIB objectives.

Past Diversity, Equity, Inclusion and Belonging Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

SEPTEMBER 2022
Inclusion Comes First: An Active Ally Profile Featuring Melanie Margolin, Chief Legal Officer at Thumbtack, Inc.

MARCH 2022
"The Right Thing to Do" An Active Ally Profile Featuring John Browning

DECEMBER 2017
Thought Leadership: Championing Diversity and Inclusion; A Conversation with Connie Lewis Lensing, Senior VP of Litigation Department at Federal Express
Pamela W. Carter

NOVEMBER 2017
Making the Case: How Diversity and Inclusion Can Improve Your Firm's Financial Outlook
Paul M. Fires and Kenneth E. Sharperson

JUNE 2017
Clarity on the Horizon? Another Appeals Court Grants En Banc Review of Sexual Orientation Discrimination under Title VII
Eve B. Masinter and Rachael M. Coe

SEPTEMBER 2016
Hively v. Ivy Tech Comty. Coll., S. Bend, 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016): Sexual Orientation Discrimination not (yet) Covered by Title VII
Eve B. Masinter and Rachael M. Coe

JANUARY 2015
Update on Transgender Rights in the Workplace
Eve B. Masinter, Rachael A. Jeanfreu and Rachael Coe