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Supreme Court Reinforces Strict Standard of Review of Affirmative Action Programs

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In *Fisher v. University of Texas*, No. 11-345 (U.S. June 24, 2013), the Supreme Court vacated the Fifth Circuit's decision upholding a university's affirmative action plan that considered race as one of the factors in its undergraduate admissions process. The Court remanded the case, finding that the Fifth Circuit did not hold the university to the demanding burden of strict scrutiny previously articulated by the Court in prior affirmative action rulings.

Background

In 2008, petitioner Abigail Fisher, a Caucasian woman from Texas, applied for and was denied admission to the University of Texas at Austin ("UT" or the "University"). Fisher filed a lawsuit alleging that the University discriminated against her based on her race in violation of the Equal Protection Clause of the Fourteenth Amendment by denying her admission while admitting less-qualified minority applicants.

Under state law, UT, a publicly funded university, is required to admit all in-state applicants in the top ten percent of their high school class. UT accepts the vast majority of its students pursuant to this law. For in-state applicants who, like Fisher, are not within the top ten percent of their high school classes, UT uses academic and personal achievement indices. The academic index is based on standardized test scores and high school class rank. The personal achievement index takes into account additional factors including "special circumstances," which may include socioeconomic status, family status and race. The University considers an applicant's personal achievement scores holistically, meaning it does not consider any factor individually or assign any numerical value to any one factor.

Fisher filed suit in the United States District Court for the Western District of Texas, claiming that UT impermissibly considered race as a factor in denying her admission in violation of the Equal Protection Clause and Title VI. The district court granted summary judgment for UT, and the Fifth Circuit affirmed, finding that UT's consideration of race in admissions passed the strict-scrutiny test articulated by the Supreme Court in *Grutter*.

Decision

In a 7-1 decision (with Justice Kagan recused), the Court vacated and remanded the case to the Fifth Circuit, finding that the Fifth Circuit did not apply the strict scrutiny standard laid out in *Grutter* and overly relied on the University's "good faith" in adopting its affirmative action program. Accordingly, the Court found that the Fifth Circuit's decision affirming the district court's grant of summary judgment should be overturned. On remand, the Fifth Circuit must determine whether the University's affirmative action program is "narrowly tailored" to achieve diversity in its student body.

In discussing what methods a university may use to achieve its goal of, the Court noted that such methods must be narrowly tailored to meet its essential educational mission. The Court explained that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative," but does require a court to determine whether the university considered in good faith any workable alternatives. Accordingly, to meet the strict scrutiny test, a university's affirmative action program must be "necessary . . . to achieve the educational benefits of diversity," and "the court [reviewing the program] must be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."

In short, the Court reinforced that affirmative action must be strictly reviewed, but did not outlaw those programs or overrule its decision in *Grutter*. The Court emphasized that courts may no longer rubber-stamp a university's use of race in its admissions policy. Rather, courts will need to confirm that the manner in which race is used is actually "necessary" to achieve diversity.

Takeaways for Employers

Fisher is not an employment case and did not opine on the lawfulness of affirmative action and diversity initiatives utilized by employers. Notably, the decision is quite narrow in that it does not endorse diversity as a goal that may be pursued by employers through affirmative action. Rather, the Court notes that universities, in particular, may have a compelling interest in ensuring the educational benefits that flow from a diverse student body. The Court specifically points out that the academic mission of a university is a "special concern of the First Amendment."

Nevertheless, the decision goes on to say that the higher education dynamic does not change the strict scrutiny standard applicable to racial classifications used in other contexts, such as employment. Accordingly, the opinion in *Fisher* offers some insights on how the Court might view race-conscious affirmative action and diversity programs of employers, especially public employers who must comply not only with employment statutes like Title VII, but also have the same obligations as public universities with respect to employees' Constitutional rights.

The decision highlights that any voluntary affirmative action program must be carefully vetted to comply with prevailing standards articulated by the U.S. Supreme Court in *United Steelworkers v. Weber*, 443 U.S. 193 (1979),and *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616 (1987). In *Weber* and *Johnson*, the Court endorsed the use of narrowly tailored affirmative action plans that are designed to eliminate conspicuous racial imbalance in traditionally segregated job categories so long as they do not unnecessarily trammel the interests of other employees and are designed as a temporary measure, not to simply maintain racial balance. 443 U.S. at 208-09; 480 U.S. at 630-39.

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