CLIENT ALERTS & INSIGHTS

On June 29, 2023, the United States Supreme Court Released Two Opinions that will have Widespread Effects on Employers

JUNE 30, 2023

Authors: Adam Primm, W. Eric Baisden, Grace M. Karam

In Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, the Court held that race may not be used as a factor in college admissions decisions. While this holding is only related to higher education, it may soon raise challenges to similar programs created by private employers to address diversity and equity in the workplace.

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Students for Fair Admissions (SFFA) sued both Harvard University and the University of North Carolina, claiming that the consideration of race as a factor in admissions by these universities was in violation of the Equal Protection Clause of the 14th Amendment and Title VII of the Civil Rights Act. SFFA sought to overrule the Court's 2003 decision in *Grutter v. Bollinger*, which held that race could be used as a factor in admissions so long as it was used in a narrowly tailored way to advance the diversity of the student body. As one example, educational institutions could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks," or "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." Notably, Justice O'Connor's 20-year-old opinion in *Grutter* expected such programs would "no longer be necessary" in 25 years.

The lower courts in the UNC and Harvard cases held that the institutions' admissions policies complied with the holding in *Grutter*, upholding the affirmative action programs. However, the Supreme Court rejected the arguments made by Harvard and UNC. The Court held that the institutions did not have any "compelling interest" that could be "subjected to meaningful judicial review," and that the "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."

In overruling the lower court opinions, Chief Justice Roberts wrote that "[c]ollege admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter." Chief Justice Roberts also wrote that, although universities are not prohibited from considering how race may have impacted an applicant's life, as long as it is tied to the applicant's character or skills, universities have "wrongly concluded" that the applicant's identity is not based on the "challenges bested, skills built, or lessons learned, but the color of their skin." While this decision is directed at college admissions, the rationale embedded in these determinations can easily be applied to private employer affirmative action programs by the Court in the future.

Justice Thomas' concurring opinion addressed the idea of racial stereotyping, referring to Justice Scalia's *Grutter* separate opinion. "Justice Scalia criticized universities for 'talk[ing] of multiculturalism and racial diversity,' but supporting 'tribalism and racial segregation on their campuses,' including through 'minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.'" Lamenting that the programs upheld in *Grutter*, rather than foster increased equality enabling universities to "voluntarily end their race-conscious programs", instead contributed to the opposite result, Justice Thomas (citing an *Amicus Curiae* brief authored by Benesch Partner Peter Kirsanow) wrote that "[t]his trend has hardly abated with time, and today, such programs are commonplace."

Though the Court's decision is focused on affirmative action in higher education, this ruling will likely impact employment initiatives and policies related to diversity and equity. While the future impact of this decision on employers is currently unknown, the U.S. Equal Employment Opportunity Commission (EEOC) issued a statement addressing the Court's holding and ensuring employers it "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." Nonetheless, Chief Justice Roberts' opinion provides the analysis and standard to enable future challenges to employer affirmative action programs in the coming years.

In *Groff v. DeJoy*, the Supreme Court ruled that under Title VII of the Civil Rights Act of 1964 (Title VII), employers must now meet a heightened standard in order to deny an employee's request for religious accommodations.

Religious accommodation requests have long been governed by Federal law under Title VII of the Civil Rights Act of 1964. Title VII provides that "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business," the accommodation should be granted. 42 U.S.C. § 2000e(j). In interpreting the meaning of "undue hardship," the Supreme Court established the "*de minimis*" standard in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), holding employers could demonstrate "undue hardship" by showing that an accommodation would force them "to bear more than a de minimis cost."

Gerald Groff, a Christian former U.S. Postal Service worker, sought to overturn the *Hardison* holding in its entirety. The Court declined to overturn *Hardison*, instead clarifying that "*Hardison* does not compel courts to read the 'more than de minimis' standard 'literally' or in a manner that undermines *Hardison's* references to 'substantial' cost." The Court found that in "describing an employer's 'undue hardship' defense, *Hardison* referred repeatedly to 'substantial' burdens, and that formulation better explains the decision." Thus, in order to decline an employee's religious accommodation request, the employer must now show that the burden of granting the accommodation would result in *substantial* increased costs in relation to the conduct of its particular business as opposed to claiming that "a pittance might be too much for an Employer … to endure" as Justice Alito wrote in the unanimous decision.

However, after clarifying "undue hardship", the Court stated that the lower courts should determine when an accommodation is a hardship based on the context of a particular employer. The Court

said, “[w]hat matters more than a favored synonym for ‘undue hardship’…is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, ‘size and operating cost of [an] employer.’” Although a variety of factors should be assessed, a hardship cannot be considered “undue” if it is attributable to animosity to a particular religion, to religion in general, or to the notion of accommodating a religious practice. Moreover, the Court reiterated that Title VII requires an employer to reasonably accommodate an employee’s religious practices, “not merely that it assess the reasonableness of a particular possible accommodation or accommodations.” Thus, when faced with an accommodation request, “it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

Employers must be aware that the requirements for denying religious accommodations are now subject to a stricter standard than previously applied. While there is uncertainty as to how this new standard will be applied, employers should continue to carefully assess the circumstances behind an accommodation request to determine whether the request is an undue burden to the company. Employers should consult with counsel before making these determinations.

To learn how this can affect your business, contact a member of Benesch’s Labor & Employment Practice Group.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.

W. Eric Baisden at ebaisden@beneschlaw.com or 216.363.4676.

Grace M. Karam at gkaram@beneschlaw.com or 216.363.1502.