The End of Affirmative Action?

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After decades of chipping away at the doctrine, on Thursday, June 29, the Supreme Court ended affirmative action entirely.

The Supreme Court's decision was rendered in a pair of cases brought by a group called Students for Fair Admissions (SFFA) challenging the admissions policies of Harvard and the University of North Carolina. SFFA argued that the diversity rationale is "grievously wrong" and produces "crude stereotyping." The universities defended their practices, saying that a racially diverse student body is as vital as ever to their mission, because it "leads to greater knowledge for everyone" and "mutual respect," and that race-based preferences remain necessary to achieving it.

The Supreme Court ruled that both programs violate the Equal Protection Clause of the Constitution and are therefore unlawful. In prior decisions, the Supreme Court had ruled that schools did have a "compelling interest" in the educational benefits of having a diverse student body, which allowed them to consider race as one of many factors considered for admissions. But, the Supreme Court decided that those compelling interests no longer exist. The Court also stated that Harvard and UNC's programs lacked 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.

Importantly, the Court did note that "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." In response to this decision, may universities are turning to a more subjective admissions process. Officials at some universities predict that there will be less emphasis on standardized metrics like test scores and class rank, and more emphasis on personal qualities, told through recommendations and the application essay — the opposite of what many opponents of affirmative action had hoped for.

Historical Context

Since 1978, colleges and universities were permitted to use race as part of a holistic review of applicants in an effort to create a diverse student body. This practice is most commonly referred to as "affirmative action." Affirmative action policies became common in the 1960s and 1970s as college administrators looked to increase racial and gender diversity on their campuses, and challenges to them have taken place ever since.

In the landmark case, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Supreme Court addressed a voluntary plan designed to eliminate racial imbalances in a company's craft workforce. The Supreme Court upheld the voluntary program, finding that the plan was consistent with Title VII of the Civil Rights Act of 1964's objective of "break[ing] down old patterns of racial segregation and hierarchy."

The Supreme Court later extended the *Weber* decision to gender-based preferences in the 1987 case *Johnson v. Transportation Agency*. There, the employer implemented a voluntary affirmative action plan to address the significant underrepresentation of women in certain job categories. But the Supreme Court's holdings in *Weber* and *Johnson* did not grant employers carte blanche to implement voluntary affirmative action plans however they saw fit. Instead, according to these decisions, voluntary affirmative action plans must: 1) be designed to eliminate imbalance in traditionally segregated job categories; 2) not unnecessarily trammel the interests of non-diverse candidates; and 3) be a temporary measure intended to attain, not maintain, a balanced workforce.

What Does This Mean for Private Employers?

The Court's affirmative action decision will have wide-ranging implications for the private workforce, particularly as investors are asking companies to disclose their DEI goals, strategies, and demographic makeup. Also, the public's expectations for companies have dovetailed with the growing interest of investors in diversity and inclusion. Many private companies use voluntary affirmative action plans as one mechanism to increase diversity in the workforce.

Since the Supreme Court uses affirmative action decisions as precedent for many other employment based diversity decisions, the upending of affirmative action may also mean the end of similar voluntary programs as well as federal affirmative action plans for federal contractors or subcontractors.

McGlinchey's Labor and Employment team continues to closely monitor emerging issues and legislative and judicial updates impacting businesses nationwide. Stay tuned for further updates regarding recent Supreme Court decisions of interest to employers and management.

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