FORD & HARRISON LLP
THE RIGHT RESPONSE AT THE RIGHT TIME
LEGAL ALERT

Legal Alert: Supreme Court Grants Review of University Affirmative Action Practice

2/27/2012

Executive Summary: In what will likely be the most significant decision regarding affirmative action since the U.S. Supreme Court's 2003 decision in *Grutter v. Bollinger,* 539 U.S. 306 (2003), the Court has granted certiorari in a case challenging the use of race in the undergraduate admission practices of the University of Texas. *See Fisher v. University of Texas* (cert. granted Feb. 21, 2012).

In *Grutter,* a 5-4 decision, the Court held that the University of Michigan Law School's use of race as a "plus" factor in making an individualized determination of admission to the law school is constitutional.[1]

In *Grutter*, the Court held that student body diversity is a compelling state interest that can justify the use of race in university admissions. The Court then held that even if there is a compelling governmental interest in a diverse student body, the means to achieving this end must be narrowly tailored. To be narrowly tailored, a race-conscious admissions program cannot use quotas – it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants. Instead a university may consider race or ethnicity only as a "plus" in a particular applicant's file. The Court held that the Law School's admissions program was narrowly tailored because it used race in a flexible way that considered the applicant's individual qualifications. The Court also noted that the law school considered other characteristics besides race and ethnicity that contribute to a diverse student body.

Shortly after this decision, the University of Texas adopted an affirmative action program similar to that approved by the Court in *Grutter.* Under Texas law, all students in the top ten percent of a high school's graduating class receive automatic admission to any Texas state university. At the time the lawsuit was filed, the University of Texas used a system that considered race, along with a number of other factors including grades, a personal essay, demonstrated leadership qualities, awards and honors, work experience, involvement in extracurricular activities and community service, and special circumstances, such as the socio-economic status of the student's family, in filling the remaining openings. Fisher, who is white, claims this system is discriminatory because under it, she was denied admission while some minority students with a lower grade point average were admitted.

The Fifth Circuit upheld the system in 2011. The Supreme Court granted

certiorari on February 21, 2012. Justice Kagan has recused herself from the case, thus it will be decided by eight Justices. Only two of the current Justices ruled in favor of the affirmative action plan in Grutter.

Employers' Bottom Line:

This case may determine to what extent a state university itself may decide that campus diversity is a legitimate academic consideration and to what degree the university can continue to consider race and ethnicity as a factor in its admissions process. We will continue to keep you updated on the status of this case. If you have any questions regarding this case or other labor or employment related issues, please contact Kathryn Pascover,kpascover@fordharrison.com, a partner in our Memphis office and head of our Higher Education practice group, or the Ford & Harrison attorney with whom you usually work.

[1] In a companion case to *Grutter*, the Court held that the University of Michigan's undergraduate admissions program's use of an automatic point system based on race is unconstitutional. *See Gratz v. Bollinger*, 539 U.S. 244 (2003).