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The Supreme Court's Prohibition on the Consideration of Race in Student Admissions and the Impact on Employer DEI&A Programs

Presented By:

The Supreme Court and Employer DEI&A Programs

- ***Students for Fair Admissions v. Harvard:* The Facts**
  - SFFA filed separate lawsuits in 2014 against Harvard College and UNC, arguing that the schools' admissions programs violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.
  - Harvard and UNC both consider race as part of their process, including as a "plus factor" for students on the cusp (others include legacy and recruited athlete status).
  - In both cases, the district court upheld the school's approach as consistent with federal law and the Supreme Court's precedent on the consideration of race in admissions. The First Circuit affirmed the district's court's ruling. The Supreme Court then granted certiorari in January 2022.

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- ***Students for Fair Admissions v. Harvard:* The Holding**
  - On June 29, 2023, the U.S. Supreme Court held that both Harvard and University of North Carolina violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 by impermissibly using race in their undergraduate admissions processes.
  - The Court explained that a race-conscious admissions program needs to satisfy three criteria in order to be consistent with the requirements of equal protection. The program must: (1) satisfy strict scrutiny; (2) not use race as a stereotype or negative; and (3) eventually end. The Court held that both programs failed to satisfy all three criteria.

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- ***The Aftermath: Race No Longer A Factor in Student Admissions?***

  - Institutions of higher education can continue considering *race as a plus factor* in its admissions programs so long as those programs *satisfy strict scrutiny*
    - Narrowly tailored to achieve a compelling interest.
    - for example, *remedying specific acts of an institution's past and present discrimination*, or
    - potentially *addressing pervasive racial harassment* on campus caused in part by the reduced number of students of color on campus.

  - The Court emphasized these decisions do not prevent institutions of higher education from considering an applicant's racial experiences in the admissions process, so long as those *lived experiences* are linked to what a particular student can uniquely contribute to the institution.

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- ***The Aftermath: Implications Beyond Admissions***

  - The Court's decision is limited to the consideration of race in college admissions for the pursuit of the educational benefits of diversity.

  - The Court's decision also has no direct impact on outreach; recruitment; affinity groups; *employment*; contracting; race-neutral policies governing K-12 selective admissions programs; and *diversity, equity, inclusion, and accessibility (DEIA) programs*.

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- ***The Aftermath: The Impact on Employers***
  - ***Is there an impact on employers?***
  - The Harvard decision did not interpret Title VII of the Civil Rights Act of 1964, which governs the employment practices of private employers.
  - The Equal Protection Clause applies only to federal and state actors, and the protections from discrimination under Title VI apply only to recipients of federal funding.
  - Bottom line:
    - Legal impact: Employers are already prohibited from using protected classes as a factor.
    - Practical impact: The Court's decision turns a spotlight on employer DEI&A programs.

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- ***The Aftermath: Response from the EEOC***

The following is a statement from U.S. EEOC Chair Charlotte A. Burrows, in response to today's Supreme Court decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*:

"Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on colleges and universities to provide a diverse pipeline of talent for recruitment and hiring. Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers".

However, the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* 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.

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- ***Affirmative Action Plans***
  - Under court precedent, a voluntary affirmative action plan is generally permissible only if:
    - It is designed to eliminate a manifest imbalance in traditionally segregated job categories (i.e., it is remedial).
    - It does not unnecessarily trammel the interests of non-diverse candidates.
    - It is a temporary measure intended to attain, not maintain, a balanced workforce.
  - Employers who wish to develop written affirmative action plans should:
    - ensure that their plans are remedial,
    - narrowly tailored to cure documented and identified statistical imbalances in specific jobs,
    - temporary, and
    - do not unduly harm non-beneficiaries of the preference.

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- ***DEI&A Programs***
  - DEI&A programs in the employment context are policies and practices aimed at ensuring equal opportunities and outreach to certain underrepresented groups in the workforce.
  - DEI&A programs might include:
    - outreach to diversity-focused recruitment sources to identify a strong pipeline of diverse talent,
    - creating training and mentoring programs aimed at supporting diverse talent within a company, and
    - having other policies and practices to champion and promote diversity within the workforce, such as affinity groups and awareness events.
  - DEI&A initiatives cannot involve using protected categories, such as race, to make employment decisions or to create set asides or hiring quotas.

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- ***The Impact on DEI&A Programs***
  - The Court's decision does not necessarily mean an end to affirmative action plans and DEI&A programs.
  - However, plaintiffs might use the Court's reasoning to challenge voluntary workplace affirmative action programs on the basis that such programs are no longer necessary to eliminate a manifest imbalance in a job category.
  - The Court's reasoning can also be used to support challenges to common DEI&A initiatives, such as diversity fellowships or internships, on the basis that these programs place too much emphasis on an applicant's or employee's protected class membership.

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Changes to Diversity Program Eligibility Criteria

Organizations have altered DEI language after facing suits

Company/Firm	Program	Old Criteria	Revised Criteria
Pfizer	Breakthrough Fellowship Program	Applicants "must meet the program's goals of increasing the pipeline for Black/African American, Latino/Hispanic, and Native Americans."	You can apply "regardless of whether you are of Black/African American, Latino/Hispanic, or Native American descent."
Gibson, Dunn & Crutcher	2L Diversity & Inclusion Scholarships	Gibson Dunn offers scholarships to "students who identify with an underrepresented group in the legal profession and who have demonstrated resilience and excellence on their path toward a career in law."	Gibson Dunn offers scholarships to "students who have demonstrated resilience and excellence on their path toward a career in law."
Morrison Foerster	Keith Wetmore Fellowship	Program "recognizes and supports the career advancement of highly motivated first-year law students who are members of historically underrepresented groups in the legal industry."	Program "has recognized and provided exceptional first and second-year law students with a demonstrated commitment to diversity and inclusion in the legal profession, with the training, mentorship, and exposure" for development.

Source: Bloomberg Law, law firms, and company websites.

Bloomberg Law

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- ***Takeaways and Considerations***

  - **Do Not** use race or gender as a plus factor to improve workplace diversity.
  - **Do** use race or gender to enhance pipeline of diverse candidates (sourcing and recruiting).
  - **Do** use life experiences as plus factor.
  - **Avoid** zero sum game.
    - Expand opportunities for underrepresented groups.
    - Avoid negatively impacting opportunities for those in majority groups.

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- ***Takeaways and Considerations***

  - Review DEI&A communications and programs for red flags.
    - Limiting who benefits from the policy.
    - Statements that could be used as admissions.
  - Assess justification for the DEI&A programs.
    - Rectifying traditional imbalances
    - Represent/expand customer base.
  - Train decision-makers.
  - Monitor legal developments in this area.

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- ***Takeaways and Considerations***
- **Examples – "All Clear" or "Asking for Trouble" ??**
- **We strongly encourage candidates from a wide range of backgrounds and experiences to apply *so we can build a team that reflects the diversity of the customers we wish to serve*.**
- **We view diversity as *multi-dimensional* and *intersectional*, encompassing race, ethnicity, gender identity, sexual orientation, religion, age, ability, class, geography, veteran status, *lived experiences*, and more.**
- **We know there are excellent candidates *who might not have all the skills and experience that we have outlined*. If that describes you, please apply and tell us about yourself.**

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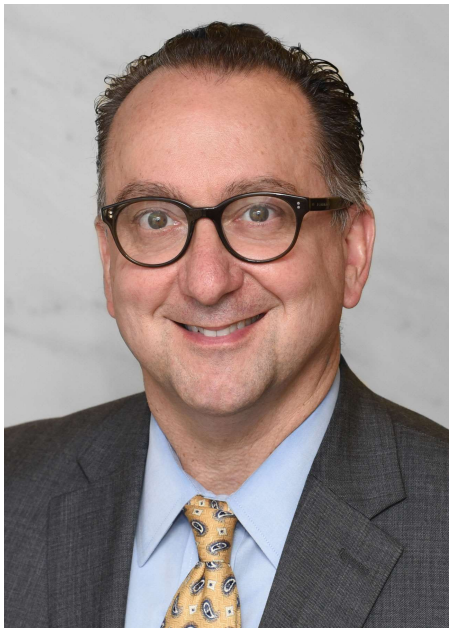
Walter M. Stella

Walter has more than 30 years of experience advising employers on challenging workplace issues and providing practical solutions that minimize legal exposure in a heavily regulated business environment. Walter is widely respected for his ability to assess problems, design smart legal strategies, and oversee cost-effective resolutions.



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Thank You