Court Rulings Stress National Importance of Diversity Goals But Set Limits on Methods

On June 23, 2003, the United States Supreme Court ruled in two of the most highly-anticipated cases pending before the Court in years. Both cases arose from the admissions procedures followed by the University of Michigan, and the decisions are significant for employers because they may affect the use of race as a factor in any employment-based preferential treatment program.

At issue was the University’s practice of considering race as one factor in determining applicant admissions to achieve a diverse student body. Finding that having a diverse student body serves a compelling state interest, the Court held that as long as the University’s admission policy is “narrowly tailored” to achieve this goal, the policy is constitutional. In separate decisions, the Supreme Court ruled that the University failed to make this showing with respect to the undergraduate admissions policy, but that the Law School admissions policy satisfied this standard.

The need for diversity in today’s business world was a factor that influenced the Supreme Court’s determination that achieving a diverse student body serves a compelling governmental interest. The Court recognized the unique nature of higher education as a feeder system for business, politics and the judiciary, especially at top tier schools. A lack of diversity at top schools likely would have affected the recruitment of minorities; employers would have inherited the burden of a “Hobson’s choice” between applicants’ academic credentials and diversity. This recognition by the Court should be of special interest to private employers struggling to articulate a lawful basis for diversity initiatives.

Existing Affirmative Action Legal Framework for Employers

Even before these decisions, employers faced potential reverse discrimination claims stemming from “goals-based” programs where percentage or numerical targets are set. When such “goals” are set separately from or in excess of any federal affirmative action obligations, companies face potential reverse and traditional discrimination liability under federal civil rights laws, such as Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981, as well as state law. Because the Title VII and Section 1981 guarantees of equal opportunity and fair treatment apply in the private sector employment context, employers should carefully monitor developing case law to see whether courts begin to relax standards for voluntary affirmative action goals.

Generally, it is unlawful for employers to hire employees or make other employment decisions due to an employee’s race, sex, or other classification, even when it is for the laudable purpose of creating workplace diversity. However, the United States Supreme Court held in the seminal case of United Steel Workers v. Weber, 443 U.S. 193, 200-08 (1979) that Title VII’s prohibition against racial discrimination does not condemn all voluntary race-conscious actions. The Supreme Court standard (which also has been adopted by the EEOC in its voluntary affirmative action guidelines) is three-fold. A voluntary plan to address lack of diversity may be lawful if it: 1) is designed to eliminate manifest imbalances in traditionally segregated job categories 2) does not unnecessarily trammel the interests of non-minority workers or create an absolute bar to the advancement of non-minority employees; and 3) is a temporary measure to eliminate a manifest racial imbalance and is not intended to maintain racial balance. Thus, for such “voluntary” goals to be lawful (as set forth in the EEOC’s guidelines), they must be predicated upon acknowledgement by the employer of some problem that must be remedied, such as the effects of prior discriminatory practices, a historically limited labor pool or adverse impact in hiring, and must otherwise be designed to satisfy the Weber standards. The same standards apply under Section 1981.
Failure to identify and acknowledge such problems and then to develop a comprehensive and lawful written plan designed to address these problems, prior to setting a “goal,” exposes employers to liability for reverse discrimination by non-minorities who are excluded from the program. Proving reverse discrimination claims in many jurisdictions requires, in addition to the traditional *prima facie* case of discrimination, a showing of unique circumstances that the employer actually encouraged discrimination against the “majority.” Affirmative action or diversity programs that provide financial incentives or rewards to managers for diversity successes are particularly at risk in these jurisdictions because they characterize the employer as the kind that discriminates in favor of minorities and against non-minorities. Even in other jurisdictions, such programs certainly could be evidence that race played an unlawful role in a manager’s decision making process. Furthermore, if goals are set, but not met, minority candidates themselves could use the employer’s acknowledgement of prior or existing imbalances and failure to eradicate them, as proof of continuing discrimination.

**Impact of Supreme Court Decisions on Employers’ Affirmative Action and Diversity Initiatives**

While the new Supreme Court decisions did not address race as a factor in employment selections, they are likely to generate continued uncertainty regarding the lawfulness of diversity and affirmative action initiatives in the employment context. In endorsing the principle of racial and ethnic diversity, the Court in *Grutter* recognized the particular importance of diversity in today’s business environment: “American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”

Such language may provide a strong signal to corporate America to utilize diversity and affirmative action initiatives in hiring and promotion decisions, however, employers also must pay heed to the potential legal pitfalls of such initiatives. For instance, under *Weber* and the EEOC guidelines, affirmative action preferences *still* must be connected to an employer’s efforts to correct past or present discrimination. In *Grutter*, the Court ruled that the law school admissions policy was not only constitutional, but also held it was lawful under the statutory provisions of Title VI and Section 1981. The Supreme Court leaves unanswered whether courts will continue to hold that affirmative action or diversity preferences under Title VII and Section 1981 in the employment context can be implemented only to remedy past or present discrimination.

In evaluating diversity and affirmative action initiatives, employers must consider the Supreme Court’s admonition that a “university may consider race or ethnicity only as a plus in a particular applicant’s file without insulat[ing] the individual from comparison with all other candidates for the available seats.” Further, it is clear that the Supreme Court will look unfavorably upon diversity or affirmative action initiatives that award “mechanical, predetermined diversity bonuses based on race or ethnicity.” Finally, and consistent with its decision in *Weber*, the Supreme Court continues to expect that organizations undertaking such initiatives will establish some time limits on the duration of such programs.

The Supreme Court decisions raise a number of difficult issues that employers will need to consider, such as:

- Can “diversity considerations” play a role in individual employment decisions?
- Can managers and executives be rewarded or penalized for their performance in achieving diversity hiring or promotion goals within their divisions?
- To what extent can employers implement scholarship, mentoring or internship programs that are intended solely or predominantly for minority employees?
- Are affirmative action or diversity initiatives that have no end point vulnerable to legal attack?
- Can an employer with nationwide or global operations now cite diversity as a compelling justification for minority preferences under Title VII and analogous state laws?

**Practical Steps for Identifying Potential Liability in Diversity Initiatives and Similar Workplace Programs**

Employers maintaining or establishing voluntary affirmative action and diversity programs would be prudent to consider the following suggestions to minimize risk in implementing such programs:

- Conduct an inventory of all diversity, affirmative action and similar programs that afford preferences on account of race, such as scholarship, mentoring and internship programs, vendor set aside programs.
- Review such programs to see if they specifically set numerical or percentage goals or targets or otherwise require attainment of a fixed objective, such as providing incentives to managers for achieving their diversity numbers or requiring a certain level of minority owned businesses in a procurement program.
- If numerical or percentage goals or targets are set or managers are rewarded for successfully achieving diversity, ascertain the basis for such goals or targets or the measures of successful
diversity achievement.

- If the goals or targets or measures are not based on (or exceed) existing goals in a plan required by the federal contractor affirmative action guidelines, then determine if they are based on some other form of analysis.
- If based on some other form of analysis, review to determine if the analysis satisfies the requirements of voluntary affirmative action plans set forth in Weber and codified in the EEOC’s Voluntary Affirmative Action Guidelines.
- If the analysis does not comply or there simply is no analysis or other legal basis for the goals, targets or measures of success, the program should not be used until your company can assure lawfulness.
- Review company communications, such as handbooks, websites, promotional materials, etc. to identify troubling language that suggests your company is the type of employer that discriminates against non-minorities.

In light of these landmark Supreme Court decisions, it is critical for employers to review existing diversity initiatives, affirmative action programs and other preferential selection systems. By not undertaking such a review, an organization may face significant legal risks. For information about how to conduct a vulnerability audit of potential liability stemming from diversity initiatives and similar programs, please contact the firm’s Affirmative Action and Diversity Practice Group.

View Grutter v. Bollinger decision (.PDF file/964 KB/95 pgs.)

View Gratz v. Bollinger decision (.PDF file/886 KB/68 pgs.)