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High Court Opens Door To Race-Conscious Recruitment

U. of Mich. Ruling Provides Insights For Corporate Employers

LABOR & EMPLOYMENT

BY MICHAEL T. BURR

CREATING A DIVERSE classroom is a sufficiently compelling reason for instituting racial preferences—as long as those preferences don't constitute quotas. That's the message being sent by the Supreme Court in its recent decisions involving diversity-recruitment programs at the University of Michigan.

Although the scope of the decisions is limited to the academic sphere, the cases nevertheless provide insight into the court's view of diversity in the corporate world. Furthermore, the rationale used in the rulings might suggest a future line of argument for companies that find themselves defending their diversity-hiring policies.

"Companies are now open to argue that having a diverse workforce or leadership group is really important—not just rhetorically, but that it affects their ability to do what they need to do," says John Payton, counsel for the university in the two cases, and a partner with Wilmer, Cutler & Pickering in Washington, D.C.

Back To *Bakke*

After six years of litigation, the two major admissions-policy cases facing the University of Michigan—*Grutter v. Bollinger* and *Gratz v. Bollinger*—came to a conclusion in June with a Supreme Court ruling. The high court affirmed and clarified the landmark 1978 *Bakke* decision (*Regents of the University of California v. Bakke*), which held racial set-asides were an unconstitutional means of achieving ethnic diversity in the classroom, but less prescriptive means could be allowed.

Ruling in favor of the university in *Grutter* and against the university in *Gratz*, the Supreme Court affirmed *Bakke's* assertion that diversity in the student body is a sufficiently compelling reason for using racial preferences.

"[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination," wrote Justice Sandra Day O'Connor in the *Grutter* ruling. "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission."

On the other hand, the court didn't throw open the gates to race-conscious recruitment. To the contrary, the ruling underscored the *Bakke* precedent, which in 1978 struck down University of California admissions policies that, in the words of Justice Lewis Powell, "insulate the individual from comparison with all other candidates for the available seats."

In the *Grutter* ruling, the court determined the University of Michigan Law School was only considering race as a "plus" in its admission policies, not as a

UNIVERSITY OF MICHIGAN PHOTO SERVICES

In *Grutter,* the Supreme Court found the University of Michigan Law School (above) may use race as a factor in consideration for admission. Now in-house counsel must consider what this ruling means for corporate hiring practices.

The consequences of this decision stretch far beyond the walls of the University of Michigan.

—John Payton
Partner
Wilmer, Cutler & Pickering

basis for putting under-represented minorities on a separate admissions track.

"[T]he program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application," O'Connor wrote.

Conversely, in the *Gratz* decision, the court struck down the race-conscious admissions policies of the University of Michigan's College of Literature, Science and the Arts. In the undergraduate school, the admissions office automatically gave under-represented groups a 20-point advantage over other applicants in a 100-point scoring system. This procedure, the court said, didn't allow for individual treatment of applicants and thus was unconstitutional.

"Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis," stated Chief Justice William Rehnquist, writing for the court in *Gratz*.

Thus the University of Michigan cases affirm the *Bakke* doctrine, and leave intact both the Equal Protection clause of the 14th Amendment and the Civil Rights Act of 1964.

But that's not the end of the story.

Race In The Workplace

All three cases— *Bakke, Gratz* and *Grutter*— involved the admissions policies of state-owned institutions of higher learning. As a result, their applicability to the hiring practices of private businesses is limited.

"The press associated with the decisions might lead corporate America to believe there is greater flexibility—and perhaps even the impetus—to undertake diversity-hiring programs," says Robert Hale, a partner with Goodwin Procter in Boston. "But as a legal matter, that would be a misreading of those cases."

First, Hale explains, the primary dispute in the University of Michigan cases involved the state and its institutions—not private companies. And second, the court continued *Bakke's* tradition of deference to the academic freedom of colleges and universities.

"That doesn't translate well to private-sector employers that are looking to develop diversity-hiring programs," Hale says. "In the private employment area, you have a basic standard in the Civil Rights Act."

The Act and subsequent laws prohibit discrimination on any grounds, except insofar as it's used to remedy a past pattern of discrimination. So the University of Michigan decisions don't change the law for private-sector employers. However, they do offer insight into judicial thinking on matters of diversity and recruitment.

First, the court was impressed by a virtual who's-who of corporate America—more than 80 organizations—that filed amicus briefs in favor of the university.

"We recruit a lot of talent from the University of Michigan," says Rod Gillum, vice president of corporate responsibility at General Motors. "If the university needed an affirmative action tool to achieve a diverse student body, then we felt it was important to support them."

This was a key part of the university's legal strategy, and it seemed to work; the sentiments of amicus briefs were reflected in the rulings.

"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," wrote Justice O'Connor, citing amicus briefs filed by the likes of General Motors and 3M.

"The effect is to make the consequences of this decision stretch far beyond the walls of the University of Michigan," Payton says. "Our best companies rely on having a diverse workforce and management to deal with the issues that arise in a very diverse corporate world today."

Second, the rationale of the ruling suggests that a line of reasoning similar to the ones that prevailed for a state-owned school in *Grutter* and *Gratz* also might hold water for a private-sector employer.

"These decisions leave open the possibility that corporations can separately argue that they can use race to achieve a diverse workforce," Payton says. The Michigan cases underscored *Bakke's* assertion that a diverse learning environment yields a better education, and relied on briefs from corporate and military leaders to support that assertion.

"The corporate diversity movement helped the court recognize final acceptance of the proposition that excellence and racial diversity are compatible," says Frank Scruggs, a shareholder with Greenberg Traurig in Fort Lauderdale and Florida's former secretary of labor. "The briefs all proclaim not only the compatibility but the necessity of harmonizing diversity."

The ruling is not likely to spur a stampede of reverse discrimination, but it might offer a legal approach for diversity-hiring programs that push the envelope. Indeed, Justice Antonin Scalia suggested as much in his dissent to the *Grutter* ruling,

stating sardonically, "Surely private employers cannot be criticized—indeed, should be praised—if they also 'teach' good citizenship to their adult employers through a patriotic, all-American system of racial discrimination in hiring."

Whether *Bakke* or the Michigan cases can be applied to a corporate setting, they do suggest that companies must apply a great degree of diligence and care in crafting diversity-recruitment programs.

"The decisions embrace a principle that informs an immense amount of activity in corporate America, but also carry the implied caution that [diversity-hiring] initiatives must remain within constitutional and statutory parameters," Scruggs says.

Specifically, to defend a theoretically Bakke-compliant policy of race-conscious hiring, companies would first need to prove that they exhausted all other nondiscriminatory avenues for achieving diversity—avenues such as recruitment efforts targeting under-represented communities. Then they would need to convince the court that having a diverse workforce is necessary for a compelling business need—not just tactical benefits vis-à-vis opening doors into certain markets, but fundamental improvements in operations and management.

Such an application of *Bakke* is untested, but the University of Michigan cases might support such an argument.

"*Bakke* is reaffirmed, giving great credit to what the corporations say about needing a workforce that is trained in a diverse atmosphere," Payton says. "There is an acknowledgement [in *Grutter* and *Gratz*] that companies get a benefit out of having not just education that is diverse, but even a workforce that is diverse. It needs to be proved, but these cases create that opportunity."

In addition to the trailblazing nature of this argument, proving such a case might be tricky, particularly considering the role that academic freedom played in the *Bakke* and University of Michigan rulings.

"Companies may not receive the deference that universities received, once their race-conscious diversity initiatives are challenged," Scruggs says.

Fast Forward

The subtext of the University of Michigan rulings presents a broad spectrum of thought on the thorny issues of diversity, discrimination and race consciousness. From Justice Scalia's wry and incredulous dissenting opinion, to the surprisingly enthusiastic amicus briefs of corporate and military leaders, the cases reveal the convoluted and self-contradictory nature of the subject.

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—Frank Scruggs
Shareholder
Greenberg Traurig

"The public is like Janus looking in two directions at once," Scruggs says. "One side looks to a glorious past that involved the acceptance of people from the tempest-tossed and tattered ranks of the rest of the world, and the other is looking at the practicalities of paying the mortgage and sending the kids to college. These things are unreconciled in the public mind."

What the Michigan cases help to reconcile, however, is the sense that diversity is ultimately one of the country's greatest assets. Now America's corporate leaders face the challenge of fully capitalizing on those assets in a way that won't do more harm than good.

"The court isn't interested in quotas of any type, and neither is GM," Gillum says. "However, there is a compelling interest in this country to attach a value to diversity. Affirmative action is one tool among many tools necessary to accomplish it."

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