McGuireWoods

RETAIL INDUSTRY LEADERS ASSOCIATION

Defending Corporate DEI Programs After the Supreme Court's Students for Fair Admissions Decision

October 2023

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Agenda

Overview of *Students for Fair Admissions (SFFA) v. Presidents & Fellows of Harvard College* and *SFFA v. University of North Carolina*

Defenses to Traditional Employment Law Claims Under Title VII of the Civil Rights Act & 42 U.S.C. § 1981

Defenses to Shareholder Derivate Claims and Other Business and Securities Claims Concerning DEI Programs

Strategies for Attorney General and Congressional Investigations

Benefits of an Attorney-Client Privileged DEI Audit

Students for Fair Admissions (SFFA) v. Presidents & Fellows of Harvard College and *SFFA v. University of North Carolina*

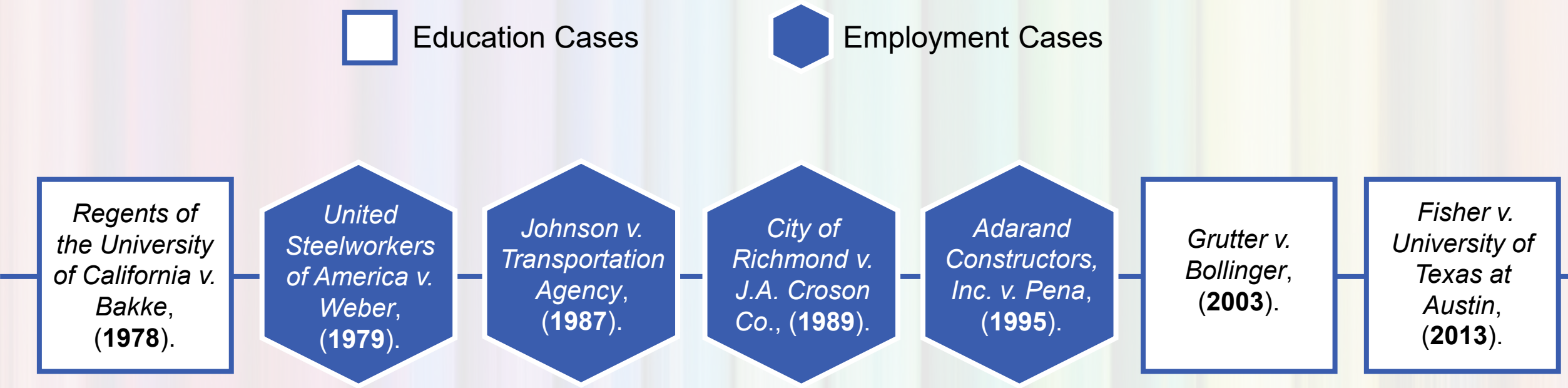
- Considering race in college and university admissions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (This ruling does not apply to military academies).
- Consideration of race in collegiate admissions was an exception for a limited period of time.
- The holding does not directly impact employment law, ***but*** it's a potential shot across the bow.
- Majority opinion relies on an employment case, *Richmond v. J.A. Croson Co.* (1989), and criticizes the dissents' failure to address *Croson.*
- Tip of the anti-DEI iceberg
- Tension with Federal Agencies & Shareholder Groups

Justice Gorsuch's Concurrence

If this exposition of Title VI sounds familiar, it should. **Just next door, in Title VII, Congress made it "unlawful . . . for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."** Appreciating the breadth of this provision, just three years ago this Court read its essentially identical terms the same way. This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race."

(Internal citations and quotations omitted).

SCOTUS Education and Employment Decisions on Racial Preferences



Johnson v. Transportation Agency, 1987.

1. A race-based or sex-based employment preference must:
   - Be justified by a documented, employer-specific “manifest imbalance” in “traditionally segregated job categories”
   - Be temporary
   - Not unnecessarily trammel the rights of non-preferred individuals or act as an “absolute bar” to their advancement
2. The Court emphasized set-asides and quotas are not permissible.
3. This standard is difficult to satisfy – arguably an admission against interest.

Are DEI Programs Unlawful?

- Employers may still value diversity, equity, and inclusion.
- Race-based, sex-based, national-origin based, color-based, or religion-based employment decisions still are and have been unlawful under Title VII of the Civil Rights Act of 1964.
- DEI ***programs*** generally are not unlawful *per se* (but check state laws, i.e. OH, FL, and TX).
- Carefully consider the method to achieve DEI ***goals***.
  - No Quotas
  - No Set-Asides

Title VII of the Civil Rights Act of 1964

- Candidate solicitation process (e.g. broaden applicant pool, standardized interviews, inclusive job descriptions)
- Focus on what the candidate/employee can do and not on who the candidate/employee is
- Document legitimate, non-pretextual reasons for employment decisions
- Decision by committee – in a multitude of counselors, there is safety
- Take advantage of applicable inferences
- Check insurance coverage

Title VII v. 42 U.S.C. Section 1981

- Title VII addresses protected characteristics other than race; Section 1981 does not.
- Title VII requires exhaustion of administrative remedies (filing EEOC charge); Section 1981 does not.
- Title VII prohibits disparate impact discrimination; Section 1981 does not.
- Title VII has a cap on compensatory and punitive damages; Section 1981 does not have any cap on damages.
- Section 1981 has a longer statute of limitations (4 years in length) than Title VII.

Groff v. DeJoy, 2023 – Religious Accommodations

- The test is no longer a more than a *de minimis* cost test.
- "Undue hardship" is shown when the burden is substantial in the overall context of an employer's business.
- An employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.
- Relevant factors include:
  - Particular accommodations at issue; and
  - Practical impact in light of nature, size, and operating cost of employer.

Shareholder Derivative Suits & Other Business & Securities Claims

- Avoidance: Be Careful with Disclosures
- Forum Selection Clauses
  {watch for resolution of split in SCOTUS or Supreme Court of Delaware}
- Common Legal Defenses Apply
  - Lack of Standing
  - Failure to Make a Demand
  - Business Judgment Rule
  - Statute of Limitations
  - Lack of Causation

Keystones: DEI Congressional Investigations

Know the Rules

Subpoena Powers

Congressional Committee Interviews vs Depositions or Testimony

Hearing Testimony

Meetings with Committee Members & Staff

Keystones: DEI Inquiries from State Attorneys General

Know Your Audience & the Information Sought

Refusing to Produce Documents Can Lead to Major Consequences

Produce Responsive Materials, Not a “Document Dump”

Keep Lines of Communication Open Upon Completion of Any Production

After a Production, Be Prepared to Wait it Out

Attorney-Client Privileged DEI Audit

- How do you define DEI?
- Employment Policies
- Recruitment Practices and Policies
- Statements by Decision-Makers in Employment or the Corporation's Officers
- ESG Statements
- Insurance Policies and Coverage
- Online DEI commitments
- Membership in Associations with Specific Commitments

Questions or Comments?