CAMPUS COUNSEL

A Legal Blog Written for Administrators, HR professionals, in-house counsel, and deans at colleges and universities

Post-Trial Arguments Heard in Harvard Admissions Discrimination Case

BY JACOB A. TOSTI • FEBRUARY 22, 2019

In a prior blog post, we discussed some of the latest legal challenges to the operation and limits of the currently-prevailing affirmative action principles set forth in the 2013 United States Supreme Court case *Fisher v. University of Texas* (*Fisher I*) and its progeny, including a lawsuit filed in the United States District Court for the District of Massachusetts against Harvard University by the group Students For Fair Admissions ("SFFA"), in which it has been alleged that Harvard unlawfully discriminates against Asian-American applicants for admission. We noted that we expected the Court to issue a decision in that lawsuit after hearing post-trial arguments set for February 2019. Those post-trial arguments were recently heard and have brought the legal issues before the Court into focus.

As a reminder, *Fisher I* established three controlling principles used to assess the legality of a higher education institution's race-conscious practices. First, an institution cannot use race as a factor in conferring benefits or opportunities to individual students, unless such practice can withstand "strict scrutiny," which is a standard that requires an institution to show that its race-conscious practice is "narrowly tailored" to achieve a "compelling interest."

Second, while achieving the educational benefits that flow from student body diversity can constitute a compelling interest, an institution cannot impose a "fixed [racial] quota" or otherwise define "diversity" as some specified percentage of a particular group merely because of its race or ethnic origin.

And third, in order to establish that its practice is "narrowly tailored," the institution must demonstrate that any "available" and "workable" race-neutral alternatives would not be able to sufficiently promote its interest in educational diversity.

A subsequent 2016 United States Supreme Court case, also captioned as *Fisher v. University of Texas* (*Fisher II*), affirmed that institutions may use race as one "plus factor" among others in admissions, so long as none of the three above principles are violated.

©2019 Bowditch & Dewey LLP. All Rights Reserved.

The crux of SFFA's argument in the Harvard admissions case—which SFFA reasserted in the recent post-trial session—is that Harvard has gone beyond using race as simply one "plus factor" among many, and instead has used its race-conscious admissions program to engage in unlawful discrimination against Asian-American applicants, as allegedly evidenced by such applicants being assigned lower "personal ratings" compared to other racial and ethnic groups. Harvard, on the other hand, has denied that its race-conscious admissions program has violated the principles set forth in *Fisher I* and *Fisher II*.

The parties' post-trial arguments touched on several sub-issues that have arisen within the context of this broad disagreement. Harvard, for example, not only disputed the propriety of the statistics used by SFFA to allegedly demonstrate the existence of an "Asian penalty" in the admissions process, but also raised issue with the fact that during the trial, SFFA failed to produce as a witness a single Asian-American applicant who claims to have been subjected to unlawful discrimination.

SFFA, in response, argued that the statistics and evidence of admissions practices it put forward are sufficient to prove its case, and that it is not required to produce an individual "victim." The parties additionally expressed opposing views about the legal standard the Court should use to decide the case. Harvard argued that SFFA bears the burden of proving intentional discrimination and conscious "racial animus" in order to prevail on its claim, and that SFFA failed to meet its burden of proof. SFFA, in contrast, argued that it has produced evidence sufficient to demonstrate a pattern of discrimination, and that *Harvard* bears the burden of proving that it did *not* unlawfully discriminate.

These issues will be addressed by the Court in its forthcoming opinion, which we expect will be published sometime within the next few months. However, that will likely not be the end of the story. It is widely expected that the case will be appealed regardless of which party prevails at the trial court level, and it is not beyond the realm of possibility that the case will reach the Supreme Court, where the principles set forth in *Fisher I* and its progeny may be modified or even overruled.

Client Tip: For the time being, race-conscious practices and policies of higher education institutions remain subject to the general Fisher *principles described above. Stay tuned for any relevant updates.*

©2019 Bowditch & Dewey LLP. All Rights Reserved.