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In the Face of Affirmative Action: Persisting With Law Firm Diversity Efforts

By Shelley Smith
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Since the U.S. Supreme Court granted certiorari in the *Students for Fair Admissions v. Harvard,* 600 U.S. 181 (2023), businesses that have been committed to diversity initiatives have been worried about what the decision would mean for their DEI programs. Last summer, as feared, the decision in the case ended affirmative action programs in college admissions.

A close reading of the case, however, reveals that the case does not invalidate private diversity efforts, notwithstanding political efforts to conflate the two issues. Thus, the legal industry must press ahead aggressively to achieve better representation in business for all demographic groups.

The below article discusses the *SFFA* decision, its impact on private employment, and how law firms can continue working to achieve a more diverse and inclusive industry.

Shelley Smith of Archer & Greiner.

The Decision

The court's decision in *SFFA* was both disturbing and unsurprising: disturbing because for the first time in its history of considering the issue, the Supreme Court declared that diversity on college campuses is not a compelling interest that can withstand the first prong of a strict scrutiny constitutional analysis; unsurprising because for the past 45 years, the court has been signaling a retreat from support of laws consistent with the original purpose of the Fourteenth Amendment's equal protection clause, which was to remedy "the harmful effects of entrenched racial subordination on racial minorities and American democracy," see *SFFA v. Harvard*, 600 U.S. at 328 (Sotomayor, J., dissenting).

In the years of decisions following *Brown v. Board of Education*, the court adhered to the principle that the Fourteenth Amendment was intended to correct this specific problem, and rejected the arguments of opponents of integration that the intent of the amendment was to achieve color-blindness.

The court held repeatedly that race-neutral "solutions" were inadequate to address the problem of racial inequality in education, and that *Brown* imposed a duty on governments to act affirmatively to address it. However, in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), considering a challenge to a special admissions program that had denied admission to Allan Bakke despite the availability of slots set aside for minority

students, a plurality of the court endorsed the view that diversity, not race, was a legitimate compelling state interest. Sixteen years later, in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger,* 539 U.S. 244 (2003) a majority of the court, drawing on *Bakke*, adopted the view that diversity, rather than race, was a compelling interest in public university admissions.

Now, with its decision in *SFFA,* the court has fully abandoned any commitment to correcting the racial disparities in public education, as it has rejected the notion that even diversity can be a compelling interest in public university admissions, because the concept is "not sufficiently measurable," *SFFA v. Harvard*, 600 U.S. at 214, fulfilling its *Grutter* prophecy that "in 25 years" diversity admissions would no longer be necessary.

College Admissions Are Not Private Employment

Opponents of affirmative action wasted no time seizing on the decision as fatal to corporate, and particularly law firm, diversity efforts. As if legislative fingers had been poised above their "send" keys, in July, Sen. Tom Cotton of Arkansas disseminated letters to at least 50 of the nation's largest law firms threatening Congressional action against law firms who continued "to advise clients regarding DEI programs or operate one of their own." (July 17, 2023 Letter from Cotton to various law firms.)

In August, on the heels of Cotton's threat, the American Alliance for Equal Rights initiated lawsuits against two national law firms, Morrison & Foerster and Perkins Coie, challenging their law student fellowship programs as violative of 42 U.S.C. Section 1981, which prohibits discrimination in private employment.

However, public higher education is not private employment. Indeed, in invalidating a special admissions program intended to rectify historic injustice against racial minorities, Justice Lewis Powell claimed in *Bakke* not only that prior school desegregation cases were inapposite, but so were the employment discrimination cases the university petitioner offered to bolster the validity of its program. *Bakke*, 438 U.S. at 300. After *Bakke* was decided—and, notably, also after the court had acknowledged the standing of white plaintiffs under Section 1981 in *McDonald v. Santa Fe Trail Transportation,* 427 U.S. 273 (1976)—the Supreme Court decided *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), which held that voluntary, private, race-conscious, affirmative-action programs were consistent with the purpose of Title VII of the Civil Rights Act of 1964, 42 U.S. Section 2000e, whose disparate treatment analysis applies to claims under §1981. See *McDonnell Douglas v. Green,* 411 U.S. 791 (1973).

Nothing in *Grutter*, *Gratz* or *SFFA* disturbs the holding of *United Steelworkers*, nor has any other decision of the court reversed it. Thus, voluntary programs in private employment remain a legally acceptable remedy for past exclusion of underrepresented groups.

Underrepresented Groups Are Even More Underrepresented in the Legal Field

According to a recent CNN article, "The legal field is among the least diverse professions, according to the Bureau of Labor Statistics. Last year, 9% of legal workers were Black, 5% Asian and 11% Hispanic or Latino. In contrast, 84% were white."

Similarly, Bloomberg Law's 2021 DEI framework study reveals that, "nine out of 10 top law firm leaders are white and 81% are male. Practice heads and department leaders do not fare much differently: Only 27% are white women, 6% are minority men, and 4% are minority women."

This lack of representation is critical to a profession governed by the rule of law: the principle under which all persons, institutions, and entities are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles. The success of these principles is dependent upon the credibility of the system across demographic groups.

Increasingly, too, the rules of professional conduct applicable to lawyers expressly forbid conduct in the practice of law that a lawyer knows is harassment or discrimination on the basis of race, sex, religion, sexual orientation or other forbidden classification. See, e.g., Rule 8.4(g), ABA Model Rules of Professional Conduct; PA R.P.C. 8.4(g); 22 NYCRR 1200.0 Rule of Professional Conduct 8.4(g) (prohibiting, inter alia, "nonverbal conduct such as gestures or

facial expressions that are … derogatory or demeaning"). The diversity of the profession is critical to the meaningful enforcement of these standards of conduct.

Next Steps

So, what does this mean for law firms moving forward? While law firms have made significant inroads in the recruitment of lawyers from underrepresented populations, they are challenged to retain them. See NALP 2022 report on diversity at 2-3. According to the NALP survey, retention lags because the culture of law firms fails to promote inclusion and belonging by developing policies, procedures and practices that are equitable to all staff.

Notwithstanding the current attacks against affirmative action, firm leaders must maintain a steadfast commitment to diversity:

- **Leadership on Diversity Starts at the Top**

Law firm leaders know their business, and they know their clients' business. They understand how well their firm demographics match client demand for services, how able their negotiation or litigation teams are to connect with any audience of clients, opponents, courts or juries. They understand, whether or not skeptics are persuaded, that a diverse team of lawyers is essential to a firm's success. They must tell that story.

- **Effective Diversity Efforts Are Based on Your Firm's Particular Needs**

To engage in meaningful diversity efforts, your firm needs a baseline. Where does your staff think deficiencies exist? Do you need better mentoring, more progressive and even-handed policies, greater transparency? All of these? Your staff will tell you—conduct a survey and ask them.

- **Establish Metrics to Measure Improvement**

Once you've obtained a baseline assessment of your firm's needs, develop metrics to track your success in addressing them. How many more underrepresented lawyers or staff are being promoted? How much more client responsibility is being assigned to underrepresented lawyers? How many more diverse lawyers or staff are being included in pitch meetings, or on firm committees, or are considered for leadership roles? Is your retention rate improving? Establish metrics to measure factors like these and revisit them annually to track progress.

- **Pay Attention to Firm Culture**

Are your firm policies related to mentorship, partnership, and promotion posted and readily accessible to firm staff? Does your firm engage in community activities and pro bono work that provide opportunities for firm staff to become involved with issues of broader significance than firm business? Does your organization promote the development of affiliations like employee resource groups (ERGs) that foster a diverse and inclusive workplace aligned with their values? Firm culture is one of the primary drivers of employee retention.

- **Work With Clients to Support Your, and Their, Diversity Efforts**

Law firm clients also need diverse teams to serve an increasingly diverse population. Programs like the Diversity Lab encourage in-house legal departments to work with outside counsel to increase the diversity of their legal teams. The resulting surveys and conversations can encourage firms to assign more diverse staff to legal work, in turn encouraging efforts to retain diverse lawyers. Even if you're not part of a Diversity Lab project, you can work with like-minded clients to build these synergies.

Although we can no longer rely on the courts, there are other means to pursue what lawyers, law firms, and their clients know is a compelling interest. Our continued commitment can help shift the dialogue.

Shelley Smith *serves as the chief diversity, equity, and inclusion officer with Archer & Greiner and is a partner in the firm's business litigation and labor and employment groups. She can be reached at srsmith@archerlaw.com.*