Business Better (Season 3, Episode 15): Is DEI at Risk? Considerations on the US Supreme Court Ruling Against Affirmative Action Programs

Speakers: Brian Pedrow, Dee Spagnuolo, Bill Rhodes, and Lizzie Wingfield

Bill Rhodes:

Welcome to Business Better, a podcast designed to help businesses navigate the new normal. I want to welcome my fellow guest speakers and the audience to one of our continuing series on current legal developments. Today we're going to discuss the recent US Supreme Court ruling in the Students for Fair Admissions Inc.'s lawsuits against Harvard University and the University of North Carolina, which challenged the constitutionality of their race conscious admission policies. This decision resides at the unique intersection of educational law and diversity, equity, and inclusion programs, which leads us to consider its implication across multiple settings, from university admissions policies, to workplace and other DEI programs, each of which we'll touch upon today.

My name is Bill Rhodes and I will be moderating today's podcast in my role as leader of Ballard Spahr's Education Industry Group. I'm a partner in the public finance group and our finance department based in our Philadelphia office where I've been practicing for 30 years. I represent a range of public and private higher educational institutions in a wide variety of finance matters, including bond financings, credit facilities, and interest rate hedging strategies.

I'm delighted to be joined today by three colleagues, Brian Pedrow, Dee Spagnuolo and Lizzie Wingfield. Brian is a long-standing partner in the labor and employment group within the litigation department and is based in our Philadelphia office, where he has represented employers for more than 36 years. Brian's a co-leader of the firm's DEI client initiative, helping clients to build and enhance their DEI programs. He also leads the firm's accessibility initiative, providing advice to clients in the ADA and public accommodation area. And Brian serves on Ballard's Diversity Equity Inclusion Council, where he leads the firm's DEI educational committee and serves as liaison to our global cultures business resource group.

Dee is a partner in our white collar defense internal investigations group, and is also based in our Philadelphia office where she's representing corporate and educational clients for 20 years. Dee also leads our DEI client initiative with Brian. Dee is a member of the firm's executive team and the partner in charge of attorney career advancement at Ballard. She's responsible for the recruitment, professional development, compensation, evaluation, promotion for approximately 350 lawyers across our firm's 15 offices. She also serves as a member of Ballard's Diversity Equity Inclusion Council and Equality Ballard, the firm's LGBTQ+ business resource group. Outside of Ballard, Dee also finds time to serve as a trustee of her alma mater, Bowdoin College.

Lizzie is an associate in litigation department and is also based in Philadelphia. Lizzie's practice has a focus on representing educational institutions in litigation and internal investigations. She's a member of the steering committee for our industry group and also serves on our firm's hiring committee. So Lizzie, to lay the groundwork for today's discussion, what were the holdings in these two cases?

Elizabeth Wingfield:

So first, I want to take a step back about where we were before this decision. So, as far back as 1978 with the Bakke decision, the Supreme Court had consistently held that the consideration of race and admissions was lawful under a narrow set of circumstances. Specifically, the court applied strict scrutiny and stated that schools may consider race and admissions in order to achieve the compelling state interest of diversity on college campuses.

The court in Bakke, and also in subsequent decisions like Grutter, clarified that schools in order to narrowly tailor their consideration of race and admissions to achieve diversity, could consider race in the context of holistic review. So, that meant the schools could not use quotas, but they could consider whether a student was a member of an underrepresented race when

considering other potential plus factors, like being a talented flutist or having demonstrated a commitment to service. The key in this plus factor regime was that race alone should not have been determinative of admission.

Now, that was a world before this Harvard UNC decision. Sitting here today, we're in a different world. Robert's majority decision sets forth a new regime where diversity is no longer a compelling state interest. That means that the giving of a plus factor for students on account of their race can no longer pass constitutional muster. So, I want to pause for a second. We're going to be talking a lot about the constitution, and if you're a listener who's not state affiliated, you might be thinking, "I don't have constitutional obligations. This doesn't impact me." But under this decision, Title XI analysis is co-extensive with equal protection jurisprudence. So, if your school accepts federal funds, which it probably does, this restriction on the use of race and admissions applies to you too

Bill Rhodes:

Thanks. And so, given the new rulings, what are the implications now for admissions officers?

Elizabeth Wingfield:

Sure. So, Roberts does suggest at least one way that schools may still consider race and admissions that he says would pass constitutional muster. And that is if a student as part of their narrative in an essay or otherwise in their admissions package, explains how race has impacted them, like by influencing their character, their interests, something like that, schools can consider that. But, I want to be careful about this. This does not mean that schools can give a plus factor just because a student mentions race in their admissions essay, what it does mean is that they can weigh how a student's unique experience with race has shaped them into the kind of student who would be an asset to their school.

Also, in the wake of this decision, it's become clear that schools should be careful about other plus factors they may be using in admissions. So, a recent lawsuit, which cited the UNC and Harvard decision, has already challenged the preferential treatment of legacies in admissions. Now, of course, whether or not your parent went to a school is in and of itself race neutral, but the lawsuit argues that the favoring of legacies and admissions disproportionately favors white applicants.

Now this case, since it cites the UNC and Harvard decision, is brand new, it's in its infancy. We do not know how it's going to turn out. What the case does tell schools though is it's a warning for them to work with their counsel to identify potential vulnerabilities in their admission system in the wake of this decision. And those vulnerabilities might be race neutral, like legacy admissions.

Bill Rhodes:

So Dee, first, those schools that may have already faced state level restrictions on affirmative action or schools that have otherwise started preparing for this anticipated outcome, which most of us were not surprised with, what can we or should we learn from these institutions that have been in this world already?

Dee Spagnuolo:

Yeah Bill, so you're right, this is not the first time that any school in the country is facing this juncture. There's a roadmap of sorts for some level of diversity in a world where we cannot consider race, even if race is just one factor among many. For example, we see that in the University of California system, after California voters banned race conscious admissions in public institutions, and that was back in 1996. We see that top schools in the UC system in the immediate aftermath of that vote saw a drop in the representation of Black and Latino students.

However, in the decades since that time, the UC system has found a way to achieve some level of diversity without race conscious decisions, and that's through what's called a socioeconomic disadvantage scale. So, for example, looking at factors such as family income, looking at parental education. And in fact, President Biden even alluded to this so-called adversity approach on the day of the decision in SFFA. And as Lizzie though just articulated, alternatives to race conscious decisions. In other words, race neutral factors cannot though, as the majority stressed in SFFA, cannot become proxies for race.

And this juncture here, I suspect will be just fertile ground for a lot of litigation of where that line exists in the coming years. So, this decision certainly isn't the end of the discussion here. And as Lizzie mentioned, that legacy case filed, I believe it was just on Monday this week, really is the signal that there is much more to come.

Bill Rhodes:

And Brian, the case certainly focused quite a bit on Title VI, but does this analysis apply to Title VII, also?

Brian Pedrow:

It seems likely Bill, that it could. And I say that based on the breadth of the majority opinion as well as the additional analysis by Justice Gorsuch who joined the majority and then wrote a separate concurring opinion in which he addressed the parallels between Title VI and Title VII, which of course are neighboring provisions in the Civil Rights Act of 1964. So, the argument has been teed up that if affirmative action in university admissions violates Title VI, it's not so far a leap to say that DEI workplace initiatives could run a foul of Title VII, they are after all neighboring provisions in the Civil Rights Act of 1964. Certainly that could be the case for race conscious workplace initiatives.

If we look at the Supreme Court's opinion, race conscious DEI workplace programs, it could be argued, suffer from some of the same infirmities as race conscious university admissions programs do. They are not necessarily tied to remediating specific identified instances of past discrimination. Workplace programs may use race or ethnicity as a negative, in the same way that admissions programs did, in the sense that hiring or promotion, like admissions, can be a zero sum game. Advantaging one person necessarily disadvantages another. In the words of the majority, the quote, "Amorphous ends, end quote, of workplace diversity programs are not measurable. Goals like new knowledge through diverse outlooks or promoting a robust exchange of ideas, fostering innovation and problem-solving and breaking down stereotypes, these are all often workplace DEI, programmatic goals as well.

And finally, the workplace DEI programs often utilize the same, again using the majority's word, opaque racial and ethnic categories as admissions programs do, which the majority characterized as overly broad, ill-defined, and/or under-inclusive. So, we definitely see parallels between race conscious admissions programs in universities and race conscious workplace programs furthering DEI in corporate America.

Bill Rhodes:

So Brian, pulling out your crystal ball here or speculating a bit, how would you predict based on your experience that this is going to play out in terms of impact on employers, beyond admissions?

Brian Pedrow:

I would point, Bill, to two primary areas of impact. First, employers should definitely be reassessing their DEI programs to determine where they fall along the race ethnicity continuum. The more race conscious the initiative is, the more risk or vulnerability likely exists.

So for example, many employers have adopted diverse slates for their hiring or promotion processes. Similar to the Rooney Rule in football, or the Mansfield Rule in law firms, a commitment's made by the employer to include a person of color or a woman on slates to ensure consideration of diverse candidates. This clearly is a DEI initiative that advances the interest of the candidate based on their race or their ethnicity. And the question then becomes does it run afoul of Title VII? Again, looking at the zero sum game of hiring or promotions where there are only so many positions or only so many people who are going to be interviewed. If inclusion of one person based on race necessarily excludes another, that's starting to sound like the admissions programs that were struck down by the Supreme Court.

On the other end of the continuum, you have outreach programs that are designed to educate and attract diverse candidates to your workplace and encourage them to apply for openings. These seem less vulnerable because no employment decision is being made based on race or ethnicity.

I mentioned two primary impacts. The second one is likely to be in the arena of reverse discrimination litigation. Even before the court's decision, we've seen an uptick in reverse discrimination cases being filed, especially cases that point to DEI programs as the catalyst for the alleged discrimination.

For example, a Title VII lawsuit was filed against a manufacturing company by a white male, claiming that he was passed over for promotion that was awarded to a female in the face of the company's quote, "Diversity fueled push," end quote, to advance women into leadership roles. This included, by the way, the company having a goal to have at least 35% women in those leadership positions.

In another case filed more recently, just this past May, a former University of California professor has sued the system for requiring diversity statements from candidates that purportedly detail the candidate's commitment to DEI. This is a brand new case we'll be watching.

These cases are one aspect among others that are indicative of a general pushback on DEI initiatives. These kind of cases suggest again that employers need to be thoughtful and careful about their workplace initiatives, how they communicate those initiatives, and what their impact is.

Bill Rhodes:

Dee, with Brian's outline of his thoughts on how the SFFA decisions might impact the workforce aspect of corporate DEI programs, do you see potential reach beyond workforce issues from this ruling?

Dee Spagnuolo:

I do see this decision as potentially impacting DEI programs, beyond the workforce pillar. While workforce is often the most robust aspect of corporate DEI programs, most programs also embed DEI initiatives into the governance and procurement aspects of their businesses and I can certainly see a pathway between the court's decision and these two pillars of corporate DEI programs.

So Bill, let me start with governance. In the DEI setting, the governance pillar focuses on not only the role that leadership must play in promoting DEI efforts, which we know that role is critically important to the success of any DEI program, but also the diversity of that leadership itself. Who are your individuals who are leading the program and where do they come from? What are their backgrounds?

And we've seen this most recently in the countless initiatives to promote the diversification of boards of public and private companies, with the idea being that diverse leadership yields diversity of thought, it yields creativity, it yields innovation which come together to result in a stronger bottom line. That's what McKinsey has called the diversity dividend.

Similarly, when we think about that concept in relation to the SFFA decision, several amicus briefs were filed in support of the universities, and those briefs emphasized the importance of diversity in organizational leadership. That's what governance is about in the corporate setting as well.

So, for example, we saw in the case, that top military leaders wrote that ignoring race and admissions would impede our military's ability to acquire essential, entry level leadership attributes that are critical to cohesion in the military context. We saw that several states wrote in support of the universities, writing that effective state government requires leadership that is broadly representative of the state's population. And of course, we also saw a number of corporations write in support of the universities, to stress the importance of diversity in not only the workforce overall, but in business leadership roles.

So, no doubt that diverse leadership has its benefits. Yet, when we talk about it in the context of these board seats, these board seats are coveted positions. And in the case of boards for for-profit organizations, these board seats can pay well too. So, there's a financial benefit to holding one of these seats.

So, as Brian outlined in the employment context, a seat on a board is typically a zero sum game. Most corporations would have a fixed number of seats, or even if it's a range, that might be set by their bylaws. So certainly, the definition of a zero sum game, so that the selection of one director candidate is the rejection of others, almost by definition there. Which, notwithstanding the benefits of diverse governing bodies, would open up the potential for legal exposure when ethnicity or potentially other protected classes drive the ultimate selection of who gets to sit on that board. So, the bottom line here with

respect to governance and board diversity initiatives, which again are common practices in the governance pillar of corporate DEI programs, that these initiatives could be ripe for legal attack in the wake of the SFFA decision.

So, let's now turn to procurement and governance. It's a key pillar in most corporate DEI programs, often referred to as supplier diversity. And I want to start with a little bit of level setting here on the federal level, section 1981 of the Civil Rights Act of 1866, and I do mean 1866 not 1964, prohibits discrimination and contracting on the basis of race and ethnicity. While section 1981 itself is not at issue in the SFFA case, its federal anti-discrimination focus like that of Title VI, and like that of Title VII, provides a roadmap for how a creative reverse discrimination plaintiff might rely on the SFFA decision in an action under section 1981.

So for starters, as Brian unpacked, Title XI, and Title VII, and section 1981, all speak in terms of making discrimination unlawful. And I want to read some of the language from section 1981. The statute itself specifically provides that quote, "All persons within the jurisdiction of the United States shall have the same right to make an enforced contracts as is enjoyed by white citizens." And I'll get to the significance of that last part in a moment, "As is enjoyed by white citizens."

So, when we compare the text of section 1981 against Justice Gorsuch's concurring opinion, which allows for no discrimination on the basis of race in the context of Title VI and the context of Title VII, we see how the court's decisions combined could embolden and reverse discrimination claims by business owners claiming that supplier diversity programs violate section 1981 by promoting greater opportunities for racially diverse businesses to compete for contracts. So really, that's the core of the issue here under section 1981.

So, I just want to bring this back to what I mentioned a moment ago. I mentioned that Section 1981 is not at issue in the SFFA case, and that's true. However, it's worth noting that Justice Sonya Sotomayor's dissenting opinion directly links equal protection, which is the bulk of the analysis in the majority opinion, and section 1981 itself. So specifically, Justice Sotomayor's dissent emphasizes that Congress passed the 14th Amendment contemporaneously with the Civil Rights Act of 1866, and that the acts focus on, as I alluded to previously, the rights of white citizens as the benchmark i.e. The reference to quote, "Those rights enjoyed by white citizens," was an explicit recognition that the Act and the 14th Amendment were decidedly not colorblind. So, while not an issue in the court's case, we see that section 1981 is certainly in the mix in the dialogue among the justices, and it's not too far a leap to assume that section 1981 will be in the mix in the uptick of anticipated litigation around when a statute is colorblind and when it is not.

But having said all of that, not all is lost for supplier diversity programs. I want to be clear about that. Like Brian unpacked in the employment context, there is a spectrum of initiatives in supplier diversity programs, with race neutral programs creating the least potential for legal exposure.

But I want to start, I'm going to give two examples, one on the riskier end of that spectrum, and that's numerical goals. And I really see numerical goals as being probably among the most risky initiatives in supplier diversity programs and I would say that even aspirational goals. Calling them aspirational still has a level of risk to them.

As we see in the majority's opinion, the court focused on, in the admissions context, on the problematic nature of trying to achieve parity with the community at large, trying to create a class of students that is in line with the demographics of larger ... of the community or society at large. And by way of analogy in the supplier diversity context, if we set diverse spending goals with diverse-owned businesses, and this may be the focus of a claim, these kind of numerical goals could be the focus of a claim premised on racial balancing. That was the term that the court used in the majority. Or even more problematically, there could be an allegation that this is an unlawful quota, which frankly quotas outside of very prescriptive settings have been unlawful in the contracting space for a long time.

So, let's go to the other end of the spectrum. Outreach to or education of diverse-owned businesses is unlikely to form the basis for a legal claim under section 1981 or other applicable state and local laws, especially if the information provided during that outreach is generally available to all businesses through what we commonly see the organization's website or a supplier portal, where current or aspiring vendors can register to keep up to date on procurement opportunities.

The information is out there equal to everyone. Taking that step to outreach to diverse businesses is unlikely to be problematic from a legal perspective. In addition, outreach is arguably far enough away from the ultimate decision of selection of a contractor that it would probably be difficult to prevail on this idea of a zero sum argument that we saw in the governance

setting with the diverse boards that we see in the employment context. And this idea of a zero sum argument just does not align with educating and encouraging diverse-owned businesses on how to contract with organizations.

So again, two bookends there. That's where I see the spectrum in the supplier diversity space. So Bill, the bottom line is stay away from zero sum game scenarios, focus on outreach, focus on education, cast a wide net to create an environment where a more diverse range of individuals can compete on equal footing.

Bill Rhodes:

Thanks, Dee. So Lizzie, looking at these rulings in a broader context of existing laws, how might the ruling impact existing affirmative action laws and regulations?

Elizabeth Wingfield:

So, the same day as the ruling, the White House released a statement which committed the Department of Education to provide guidance by mid-August, to provide clarity on what admissions practices and additional programs to support students remain lawful, and also to provide assistance to colleges and universities in administering programs to support students from underserved communities. So, if you are an administrator wrangling with admissions decisions and educational institution, that will obviously be key to you.

In the employer context, the EEOC also jumped on a statement also the same day as the ruling. And that statement emphasized that the court's decision does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers regardless of other background. The EEOC said that it remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs and seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace. But EEOC does have voluntary affirmative action rules that will likely be rethought in the wake of this decision.

Brian Pedrow:

Yeah, Lizzie, if you don't mind, let me jump in and comment on those because I recently reread them myself. The EEOC issued regulations in 1979 when the interplay of affirmative action, including voluntary affirmative action, affirmative action in other words that's not mandated, for government contractors and Title VII, and they have a chapter in their compliance manual dedicated to the subject that dates back to 1981. So, the rules are 44 years old. While this makes me feel old to say it, that's before I even started practicing law, they are that aged.

And interestingly, when you read the rules in the compliance manual, they encourage the adoption of employment practices and systems that are designed to improve employment opportunities for minorities and women. And according to the EEOC, voluntary affirmative action, what many today consider DEI, is encouraged and protected by Title VII if it's designed to correct the effects of prior discriminatory practices based in part on measuring the workforce against the labor force.

Examples offered by the EEOC include establishing short and long-term goals with regular monitoring. Minority focused recruiting programs and diverse slates. They are all specifically enumerated as acceptable actions. So, the question now is, do these regulations and guidance comport with the Supreme Court's decision in SFFA? I think it's hard to say they do. So, I would say at this point, there's no word from the EEOC on what they're going to do with these regulations and guidance. But I would expect it's time to revisit them.

Elizabeth Wingfield:

And to continue answering your question, Bill, there are certain affirmative action laws on the books that actually mandate affirmative action for covered governmental contractors that we think are likely to come under scrutiny after SFFA. One of the key examples of this, which is not so catchily named, is Executive Order 11246.

So, the majority opinion did not address these laws, but Justice Thomas' concurrence is really telling of where we think future challenges to these affirmative action laws are going to go. His entire opinion speaks in the terms of affirmative action generally, and he stated that all forms of discrimination based on race, including so-called affirmative action, are prohibited

under the Constitution. So, given these statements from Justice Thomas, it's reasonable to expect that there are going to be legal challenges to these affirmative action laws, including 11246.

Bill Rhodes:

Thanks, Lizzie. Well, we've covered a lot of material in a short time, and the three of you have flagged several areas with the potential for some serious legal exposure for our clients. Dee, what do you think the bottom line is here? The bottom line takeaway?

Dee Spagnuolo:

Bill, I think it's worth emphasizing that we are by no means suggesting that organizations should rush out to dismantle years of work in building their DEI programs. To the contrary, and this is an important point, we'd encourage organizations to take this opportunity to carefully assess their initiatives to both the evaluate the legal risks in this constantly evolving legal landscape, but also to determine whether these initiatives that they're dedicating time and resources to, are meeting with success for their organization at this point in time. We often say that DEI programs are not a one size fits all, so these are healthy steps to take at any juncture, not just in the wake of a significant Supreme Court decision.

Bill Rhodes:

Thanks. Well, I want to thank Brian, Dee, and Lizzie for their time today discussing the SFFA decision and its implications both for higher education settings as well as corporate DEI programs generally. Make sure to visit our website, www.ballardspahr.com, where you can find the latest news and guidance from our attorneys. Subscribe to the show on Apple Podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email podcast@ballardspahr.com. If you would like to reach out to Brian, or Dee, or Lizzie, their contact information is on the website. And stay tuned for a new podcast episode that will be coming soon. Thank you for listening.