DEI Programs as a Source of Liability for Law Firms and Other Businesses

William "Billy" Jones*

Abstract: *Two recent cases against international law firms point to this emerging trend in litigation that could have widespread implications for diversity, equity, and inclusion (DEI) programs. In the wake of this year's U.S. Supreme Court opinion striking down the use of race in college admissions, there was much speculation about the impact these rulings might have outside of the academic context—and that remains an unanswered question. However, two recent cases filed against international law firms for their DEI fellowships could be indicators of the impact for law firms and other private businesses.*

The Legal Challenges to the Use of Race in College Admissions

On June 23, 2023, the U.S. Supreme Court handed down its consolidated opinion in two related cases involving the use of race[1] as a factor in college admissions. In two companion cases, one against a private university—Harvard[2]—and one against a public university—the University of North Carolina[3]—an interest-group plaintiff named Students for Fair Admission (SFFA) challenged the use of race as a factor in college admissions.

As was common in college admissions at Harvard, the University of North Carolina, and countless other universities throughout the country, the admissions process incorporated race and ethnicity as a plus factor in admissions decisions. In pursuing diversity within the student body, college admissions decisions involved the consideration of race and ethnicity within the decision-making process. Although the particulars of each university's admissions process are beyond the scope of this article, applicants of certain races received

Journal of Emerging Issues in Litigation / Winter 2024, Vol. 4, No. 1, pp. 53–64.

ISSN 2835-5040 (print) /ISSN 2835-5059 (online).

advantages in the college admission process that were not available to other applicants of a different race. These practices flowed from earlier U.S. Supreme Court precedent, which had permitted the consideration of race as a compelling factor in the context of diversity of the student body under *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas at Austin* (2013), along with their related progeny.

The U.S. Supreme Court's opinion in June (the *SFFA* opinion) overruled this prior line of cases, holding that the use of race in college admissions was unlawful discrimination. The Court reviewed the equal protection clause of the Fourteenth Amendment, along with the historical racial discrimination that nonetheless followed.[4] The Court noted the holding in *Brown v. Board of Education* that racial discrimination had no place in public education, disposing of the "separate but equal" jurisprudence that had preceded the *Brown* decision.

In the 6-3 majority opinion, the Court asserted that "[e]liminating racial discrimination means eliminating all of it,"[5] acknowledging that constitutional equal protection is "universal in its application"[6] and "applies without regard"[7] to any differences in race or nationality. Applying these principles, the Court analyzed the use of race as a factor in college admissions by Harvard and UNC under strict scrutiny,[8] finding both universities' efforts failed to meet that demanding standard.

As its conclusion, the Court noted that students should be treated based on an individual's experiences, rather than based on a student's race.[9] The ruling said:

> Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built or lessons learned, but the color of their skin. Our constitutional history does not tolerate that choice.[10]

Broader Impact of the SFFA Opinion Discussed in Justice Gorsuch's Concurring Opinion

The impact of the SFFA opinion on college admissions will be substantial, and universities around the country are grappling

with its effect on their applications process. Although not directly at stake in the SFFA opinion, a variety of business practices and programs, particularly in relation to diversity, equity, and inclusion (DEI) programs, may also be affected across the country.

As a practical matter, the equal protection clause applies well beyond the limited realm of college admissions, and there is no reason why these same principles would not apply in a broader business setting. However, in a concurring opinion drafted by Justice Neil Gorsuch and joined by Justice Clarence Thomas, the broader application of the SFFA opinion is clearly stated, with implications for businesses across the board.[11]

Gorsuch wrote separately to emphasize that the protections of the Fourteenth Amendment that drove the opinion of the court applied equally from another source: Title VI of the Civil Rights Act of 1964.[12] Gorsuch noted the precise language contained in Title VI, which applies to any institution (including both Harvard and UNC) that accepts federal funds of any type.[13] In language Gorsuch describes as "powerful,"[14] Title VI states:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d.[15]

Gorsuch's concurrence analyzes this statutory language in detail to demonstrate that it prohibits any differential treatment of persons on the basis of race.[16] In the context of Harvard's and UNC's use of race in admissions, the concurrence asserts that Title VI of the Civil Rights Act would also prohibit this use of racial factors in college admissions.[17] Specifically, Gorsuch writes that "Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color or national origin."[18]

The concurrence then makes the direct point that this same language in Title VI also exists, in substantially the same form, in the next section of the Civil Rights Act: Title VII.[19] Title VII prohibits racial discrimination in employment, stating that "Congress made it unlawful . . . for an employer . . . to discriminate against any

individual . . . because of such individual's race, color, religion, sex or national origin," § 2000e-2(a)(1).[20]

With a passing citation to his own opinion in *Bostock*,[21] Gorsuch makes a direct connection between the constitutional prohibition on the use of race as a factor in college admissions and the use of race as a factor in employment under Title VII of the Civil Rights Act.[22] Gorsuch noted that both Title VI (for college admissions) and Title VII (for employers) require, "individual equality, without regard to race."[23]

The legal analysis under the SFFA opinion that applies to the use of race in college admissions may equally apply to similar practices in an employment setting. However, any doubt that the claims could be made in business setting is dispelled by the roadmap to those claims set forth in Gorsuch's concurrence.

DEI Fellowships and Programs in Law Firms (and Other Businesses)

Like many businesses and industries throughout the country, the legal profession has been an adopter of diversity and inclusion policies. Historically, certain racial groups have been underrepresented in the legal profession. Although statistics and assessments may vary, it is accepted throughout the legal profession that steps can be taken to attempt to address the underrepresentation of various racial groups in the legal profession.

The common format for addressing these issues falls into two categories. First, state bar associations have recently begun to require continuing legal education programs focused on DEI principles. This has resulted in the requirement that attorneys complete DEI programs to maintain their licensure and ability to practice law. Although the adoption has varied significantly from state to state, a meaningful number of states have incorporated these types of requirements over the past several years.

The other track involves various programs at private law firms. Most firms have, at minimum, statements about diversity and inclusion on their websites. Many firms participate in various organizations devoted to DEI, including the American Bar Association and other certification programs such as Diversity Lab's Mansfield Rule.

Many law firms also have specific committees or leadership positions devoted to DEI principles and programs within the law firm.

As an outgrowth of these practices, law firms have begun to offer specific programs that are limited to members of some racial groups under the aegis of DEI programs. For example, many firms have specific internship programs or employment programs that are limited to members of certain underrepresented groups, all in the name of DEI.

Just as the use of race as a factor in college admissions was subject to successful challenge in the *SFFA* cases, there was no reason why similar challenges couldn't be brought against DEI policies in law firms (or other businesses) on the same rationale.

The Two Recent Lawsuits Challenging DEI Fellowships at International Law Firms

Now, these challenges are here. Recently, an organization known as the American Alliance for Equal Rights (AAER) filed two lawsuits against well-known national law firms Perkins Coie LLP and Morrison & Foerster LLP. The plaintiff is a Texas-based organization whose mission includes "challenging distinctions and preferences made on the basis of race or ethnicity."

In the lawsuits filed against Perkins and Morrison, the AAER directly challenges specific DEI internships at each firm largely in reliance on the *SFFA* opinion. The specifics of the challenged programs and lawsuits are described below.

Perkins' Diversity Fellowships

Perkins is an international law firm with offices throughout the nation, including, as relevant here, offices in Dallas and Austin.[24] According to the allegations in the lawsuit, Perkins established a 1L Diversity Fellowship in 1991, and has maintained this program each year thereafter. The fellowship provides a paid summer intern position for eligible law students who have completed their first year of law school, along with a $15,000 stipend. The Perkins lawsuit alleges that the rate of pay for 1L Diversity Fellows is consistent

with the rate of pay for a new attorney at the firm, around $190,000 per year.

To apply for Perkins' 1L Diversity Fellowship, a law student must meet four criteria. This includes a requirement that the applicant must have:

> Membership in a group historically underrepresented in the legal profession, including students of color, students who identify as LGBTQ+ and students with disabilities.

Providing further definition, Perkins' website FAQ answers the question of, "What does the firm define as 'diverse'?" by stating the Perkins' definition of diversity "encompasses students of color, students who identify as LGBTQ+, and students with disabilities. If you feel that you are diverse in one or more of these ways, please apply."

Following its long-standing 1L Diversity Fellowship, Perkins added a separate 2L Diversity Fellowship in 2020 containing the same application criteria, including the limitation to candidates who meet Perkins' definition of diversity. Like the 1L Diversity Fellowship, those law students who receive a 2L Diversity Fellowship receive a paid summer position, along with a prorated $25,000 stipend, payable in $15,000 at the conclusion of the summer and another $10,000 if the law students return to work at Perkins following law school. More importantly, Perkins states that the participants in its 2L Diversity Fellowship are a "primary source for new associate hires."

Interestingly, Perkins appears to offer summer internships to law students outside of the 1L and 2L Diversity Fellowships, but these internships do not appear to receive the same stipend or other benefits.

Morrison's Fellowship Program

Similarly, Morrison is an international law firm with offices throughout the United States.[25] In 2012, Morrison initiated its Keith Wetmore 1L Fellowship for Excellence, Diversity and Inclusion. According to the lawsuit, Morrison has continuously offered this

fellowship each summer, awarding about 136 fellowships over the years in various offices.

The Wetmore Fellowship is limited to first-year law students. Recipients are paid for the summer at the rate of a starting attorney at Morrison (about $215,000 annually). In addition, a $50,000 stipend is provided with payment of $25,000 at the completion of the 1L summer and another $25,000 after the 2L summer if the candidate accepts a starting position as an associate with Morrison. 1L recipients of the Wetmore Fellowship can be invited back as 2L summer associates.

To be eligible for a Wetmore Fellowship, a candidate must meet five criteria. This includes a diversity requirement, stated as, "[m]embership in a historically underrepresented group in the legal profession, including racial/ethnic minority groups and members of the LGBTQ+ community." Morrison's website also provides further definition for these terms as "specifically African American/Black, Latinx, Native Americans/Native Alaskans and/or members of the LGBTQ+ community."

AAER's Legal Challenges to Perkins and Morrison

In challenging these two programs, AAER filed two separate lawsuits, one against Perkins in Dallas federal court[26] and one against Morrison in Miami federal court.[27] Both lawsuits make a single identical claim. In respect to each law firm's diversity fellowships, AAER alleges that the programs violate 42 U.S.C. § 1983 by excluding applicants from participation in the fellowships on the basis of race. AAER asks for a declaration that the fellowships violate 42 U.S.C. § 1983, a permanent injunction against the use of race in connection with the fellowships, nominal damages, and attorney fees.

Procedurally, AAER filed motions for preliminary injunctions in each case. Because both firms are engaged in ongoing receipt of applications and intend to select fellowship participants for the upcoming summer of 2024, AAER argues that each court should preliminarily enjoin the firms from operating the fellowships using their racial criteria for the remainder of the lawsuit. Presently, both courts are setting briefing and hearing schedules for the pending preliminary injunctions.

It is uncertain how these two cases may go. Both law firms have hired counsel to appear on their behalf, and the extent to which the litigation may be pursued or resolved is uncertain. How the district courts (and any appellate courts) may ultimately rule cannot be fully predicted. However, following the precedent in *SFFA v. Harvard*, the specific fellowships in these two cases would appear to have significant issues.

While many might argue that DEI programs are not discriminatory and are, in fact, intended to have the exact opposite effect by addressing historic and systemic biases and barriers affecting attorneys of color, LGBTQ+ attorneys and attorneys belonging to other underrepresented groups, when considered in light of the *SFFA* opinion, it is possible that the U.S. Supreme Court might view such DEI programs differently.

Since both fellowships appear to have a specific criterion prohibiting application or participation for people whose race does not comply with the definitions of "underrepresented" or "diverse," these fellowships may be challenging to defend under the precedent in the *SFFA* opinion.

A Legal Wrinkle: An Attorney's Ethical Obligations

Both lawsuits contain an additional wrinkle arising from the ethical duties that apply to attorneys. Both lawsuits expressly reference an attorney's ethical duties. In the first paragraph of the Perkins lawsuit, AAER expressly quotes from the Texas Rules of Professional Conduct, stating:

> The ethical rules punish lawyers who "manifest by words or conduct, bias or prejudice based on race."[28]

In the Morrison lawsuit, AAER makes a similar reference to the Florida Rules of Professional Conduct, stating:

> The ethical rules punish lawyers who "engage in conduct in connection with the practice of law" that discriminates "on account of race."[29]

Unlike other professions whose conduct standards are regulated differently, the ethical obligation of attorneys to refrain from conduct that is racially discriminatory is an additional layer of complication for law firms, above and beyond the legal obligations imposed on law firms as with other employers. Whether or not participation in similar fellowships or other questionable programs rises to the level of an ethical violation for various attorneys or a law firm is beyond the scope of this article. However, it is important to note that this wrinkle from each state's ethical obligations that apply to attorneys is worth additional consideration.

What Does This All Mean, and What Should We Do?

It is important to recognize that these two lawsuits are in their initial stages. Much remains to be done, and there is no way to know how the cases may ultimately resolve. These filings, however, suggest that challenges to DEI fellowships and programs could increase in the coming years, both against law firms and against businesses across the country.

Looking into this coming trend, practitioners should consider some of the following factors. First, law firms should realize that they can be targets for these types of lawsuits. Public interest groups like AAER are aware of the issues and are taking direct legal actions against large, international law firms. In the lawsuits, the majority of the allegations come directly from the law firms, by taking language from their own websites about fellowships and other DEI initiatives. Any law firm, regardless of size, could be a target.

From a risk management perspective, law firms should engage in an internal review of their own DEI initiatives and programs. As with college admissions prior to the *SFFA* opinion, the prevailing authority quite recently contained some justification for using race or ethnicity as a "plus" factor, as well as having programs limited to members of some races to the exclusion of others. Law firms have been leaders in initiating and promoting DEI initiatives, which may be contrary to applicable law in the wake of the *SFFA* opinion. Practices and programs that were once compliant with applicable law may no longer be.

Law firms should therefore conduct an internal audit and analysis of their DEI efforts and programs. Determining what practices and policies the law firm follows can provide a basis to test those practices to ensure they are compliant with governing law. Firms should be on the lookout for programs that provide economic benefits or career enhancements that are restricted to members of certain races or ethnicity, rather than open to all qualified applicants. To the extent such programs exist, law firms should have discussions about how the programs can be changed to decrease the firm's risk profile.

Law firms should also carefully review their internal and external communications related to DEI that intersect with fellowships or other programs. Statements on a website can provide easy fodder for a creative plaintiff's attorneys, and law firms should consider the risk that such statements may carry, particularly if the law firm is committed to programs, which create a litigation risk.

The impact of this trend extends far beyond the law firms themselves. Businesses throughout the country face the same challenges for DEI programs that may provide employment benefits that are only available to members of some, rather than all, races. Lawyers should be raising this issue with their clients and evaluating whether any programs or policies may run afoul of this change in governing precedent. Businesses may have only a passing understanding that an opinion about college admissions could impact their business practices.

Finally, whether internally or with clients, law firms should consider changes to programs that may still meet the goal of increasing underrepresented populations without running afoul of claims alleging racial discrimination. For example, evaluating economic triggers, need or other factors (such as first family members to graduate from college) may provide meaningful contributions to diversity in the profession without reliance on prohibited factors like race. Creative solutions may be available, and attorneys should be discussing these options with their clients.

Conclusion

There are no guarantees about how this emerging legal trend will ultimately play out. But the first actions against law firms are now underway, and astute practitioners should take notice.

Notes

* William "Billy" Jones (billy.jones@moyewhite.com) is an attorney at Moye White in Colorado, where he focuses on complex civil litigation and business disputes. He defends business clients involved in product liability defense, franchise and distribution disputes, insurance defense and coverage issues, trust and estate litigation, as well as real estate litigation.

1. Although the legal issues addressed herein would equally apply to factors other than race, such as ethnicity and gender, this article will only discuss race for ease of reference.

2. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (U.S. 2023).

3. *Students for Fair Admissions, Inc. v. University of North Carolina* came to the U.S. Supreme Court as a separate case from the Fourth Circuit Court of Appeals, but this case was decided in a joint opinion with the case against Harvard College.

4. *SFFA v. Harvard*, 143 S. Ct. at 2159-2160.

5. *SFFA v. Harvard*, 143 S. Ct. at 2161.

6. *See SFFA v. Harvard*, 143 S. Ct. at 2162, *citing Yick Wo v. Hopkins*, 118 U.S. 356 at 369, 6 S. Ct. 1064, 30 L.Ed. 220 (1886).

7. *Id.*

8. *SFFA v. Harvard*, 143 S. Ct. at 2162.

9. *SFFA v. Harvard*, 143 S. Ct. at 2176.

10. *Id.*

11. *SFFA v. Harvard*, 143 S. Ct. 2208-2222.

12. *Id.*, 143 S. Ct. at 2208.

13. *Id.*

14. *Id.*, 143 S. Ct. at 2221.

15. *Id.*, 143 S. Ct. at 2208.

16. *Id.*, 143 S. Ct. at 2208-2209.

17. *Id.*, 143 S. Ct. at 2208.

18. *Id.*, 143 S. Ct. at 2209.

19. *Id.*

20. *Id.*

21. *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020).

22. *SFFA v. Harvard*, 143 S. Ct. at 2209.

23. *Id.*

24. The factual statements contained in this article are drawn from the complaint filed against Perkins, and subsequent developments in the case may shed different light of the factual allegations.

25. The factual statements contained in this article are drawn from the complaint filed against Morrison, and subsequent developments in the case may shed different light of the factual allegations.

26. *Alliance for Equal Rights v. Perkins Coie LLP*, Case No. 3:23-cv-01877-L, U.S. District Court for Northern District of Texas.

27. *Alliance for Equal Rights v. Morrison & Foerster LLP*, Case No. 1:23-cv-23189-KMW, U.S. District Court for the Southern District of Florida.

28. Texas Disciplinary Rules of Professional Conduct 5.08.

29. Florida Rules of Professional Conduct 4-8.4(d).