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U.S. Supreme Court Takeaway: Two Key Decisions For Employers

Before ending its most recent term, the U.S. Supreme Court issued several controversial opinions. Two of these decisions have particular relevance for employers.

The first opinion addressed whether the admissions programs at Harvard and the University of North Carolina may consider an applicant's race as a factor in their admission decisions. The Supreme Court held the race-based admissions programs before it violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court's decision, however, does not change any existing employment-related law and does not modify whether employers may take employment actions based on an employee's or job applicant's protected class status.

The second opinion clarified an employer's obligation when considering an employee's request for religious accommodation. The Supreme Court explained that an employer experiences an "undue hardship" in the context of an employee's request for religious accommodation not when an employer shows a burden creates "more than a *de minimis* cost," but when an employer shows "a burden is substantial in the overall context of an employer's business." As set forth below, employers should expect an upswing in religious discrimination claims.

I. The U.S. Supreme Court's Decision Invalidating Race-Based University Admission Systems and the Potential Impact on Employers

On June 29, 2023, the Supreme Court issued its decision in two companion cases, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al.*, holding Harvard's and the University of Carolina's race-based admissions programs were invalid under the Equal Protection Clause of the Fourteenth Amendment.[1]

[1] Harvard's admission program included an initial screening of each application in which the "first reader" could consider an applicant's race. Harvard's admissions subcommittees then reviewed applications from a particular geographic area and made recommendations to the full admissions committee, taking into account an applicant's race. When the full admissions committee began its deliberations, it discussed the relative breakdown of applicants by race, with the goal to ensure there was no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes would be tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool was disclosed to the committee. During the "lop," which was the last stage of Harvard's admissions process, applicants whom Harvard considered cutting were placed on the "lop list," which contained four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race.
UNC had a similar process whereby every application was initially reviewed by an admissions office reader who was required to consider the applicant's race as a factor. Readers then made a recommendation on each assigned application, and they could provide an applicant a substantial "plus" depending on the applicant's race. At this stage, most recommendations are provisionally final. A committee of experienced staff members then conducted a "school group review" of every initial decision made by a reader and either approved or rejected the recommendation. In making those decisions, the committee may consider the applicant's race.

The Supreme Court's decision does not change existing law on a company's ability to consider the race of its employees or job applicants. It does, however, provide some indication as to how the Court may view race-based policies in the employment context and could lend support to challenges of corporate diversity, equity, inclusion and accessibility programs, as well as affirmative action policies.

The Supreme Court's Decision

The question presented to the Supreme Court was "whether admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment," which states that no State shall "deny to any person . . . the equal protection of the laws."

In holding the race-based admissions programs at issue violated the Equal Protection Clause of the Fourteenth Amendment, the Court reasoned that its precedent permitted race-based college admissions only within narrow limitations: (1) they must comply with strict scrutiny, (2) they may never use race as a stereotype or negative, and (3) they "must—at some point—end."

"Strict scrutiny" invokes a two-part inquiry. First, the court asks whether the racial classification is used to "further compelling governmental interests." Second, if yes, the court asks whether the government's use of race is "narrowly tailored" (i.e., "necessary") to achieve that interest. The Court held the admissions systems at issue, "however well intentioned and implemented in good faith," failed both of these inquiries.

The Court stopped short of holding an applicant's race should never be considered in connection with college admission: "[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." However, the Court cautioned that universities should not attempt to circumvent its ruling by using application essays or other means:

> A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Potential Impact on Employers

In response to the Supreme Court's decision, the Chair of the U.S. Equal Employment Opportunity Commission issued a statement reminding companies that it remains lawful to establish workplace diversity, equity, inclusion and accessibility programs that seek to ensure workers of all backgrounds are

afforded equal opportunity in the workplace. The Chair also criticized the impact the Court's decision will have on recruitment and hiring:

> Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on colleges and universities to provide a diverse pipeline of talent for recruitment and hiring. Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers.

This sentiment about the impact on recruitment and hiring was echoed in a statement by the Secretary of the U.S. Department of Health and Human Services:

> The Supreme Court ruling today weakens efforts to make higher education more accessible to members of historically underrepresented groups. People of color have been excluded from attending medical school and joining medical organizations for generations. While progress has been made, there is still a significant deficit in the number of Black and Latino doctors and medical students. . . . This ruling will make it even more difficult for the nation's colleges and universities to help create future health experts and workers that reflect the diversity of our great nation.

Importantly, the Supreme Court's decision does not change any existing employment-related laws. For example, companies still may maintain legally compliant equal employment opportunity and affirmative action policies.

Even though the Court's decision applies to universities governed by Title VI of the Civil Rights Act of 1964[2] and not private employers governed by Title VII of the Civil Rights Act of 1964, lower courts may analogize the Court's decision to employment discrimination cases brought under Title VII. Indeed, Justice Gorsuch's concurring opinion highlighted similarities between Title VI and Title VII, noting they both "codify a categorical rule of 'individual equality, without regard to race." As a result, the Court's decision may necessarily impact diversity, equity and inclusion initiatives, as there may be heightened scrutiny on such efforts. Employers covered by Title VII should remain careful not to institute racial hiring quotas or take employment action based on the employee's protected class status. This decision also may encourage race-based litigation, and employers may experience an increase in so-called "reverse" race discrimination claims.

[2]Title VI states, "[n]o 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. The U.S. Supreme Court has held that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.

II. From "More Than a *De Minimis* Cost" to "Substantial Increased Costs": The Supreme Court Clarifies an Employer's Obligation When Considering an Employee's Request for Religious Accommodation

After nearly 50 years, the Supreme Court revisited its decision in *Trans World Airlines, Inc. v. Hardison*[3] to "clarify what Title VII requires" when employers covered by Title VII consider whether an employee's request for religious accommodation constitutes an "undue hardship on the conduct of the employer's business" in the landmark case of *Groff v. DeJoy*.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it unlawful for a covered employer to discriminate against any individual in the employment context because of an individual's race, color, sex (including pregnancy, childbirth, and related conditions, sexual orientation, and gender identity), national origin, or in this case, religion[4]. Moreover, Title VII obligates covered employers to provide reasonable religious accommodations for their employees unless an accommodation creates an "undue hardship on the conduct of the employer's business."[5]

Since the Supreme Court's 1977 decision in *Hardison*, however, lower courts seem to have missed the mark in determining what constitutes an "undue hardship" for employers when considering religious accommodations for employees.

Notably, Title VII's "undue hardship" standard as applied in the religious accommodations context is distinguishable from the "undue hardship" standard applied in the context of the Americans with Disabilities Act of 1990 ("ADA").[6] Generally, under the ADA, employers must provide reasonable accommodations to an otherwise qualified employee with a disability, unless the employer can demonstrate that the accommodation would create an undue hardship on the employer's business.[7]

Trans World Airlines, Inc. v. Hardison

In *Hardison*, an employee began missing work on Saturdays due to religious reasons, which his employer initially accommodated by amending the employee's work schedule. The employer was able to change the employee's work schedule to avoid having him work Saturdays because the employee obtained the requisite seniority status at his then-jobsite as set forth by his union's collective bargaining agreement. Thereafter, however, the employee was transferred to a separate worksite where he lacked requisite seniority to avoid working on Saturdays. Although the employer allowed the union to seek a change of work assignment for the employee, the union refused to violate the seniority provisions in the collective bargaining agreement.

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[3] 432 U.S. 63 (1977).
[4] 42 U.S.C. § 2000e-2(a).
[5] 42 U.S.C. § 2000e(j).
[6] 42 U.S.C. § 12101, *et seq*.
[7] 42 U.S.C. § 12111(10)(B).

The employee was the only individual who could perform his job duties during his scheduled shifts on Saturdays, and if his position was vacant for a shift, the employer would suffer "impaired supply shop functions, which were critical to [the employer's] operations[.]" Moreover, finding coverage for his position "would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required [the employer] to pay premium wages." Further attempts to accommodate the employee failed, and after refusing to work his designated Saturday shifts, the employee was terminated for insubordination. The employee then filed suit against his employer and union for religious discrimination in connection with his termination.

Upon review, the Supreme Court determined the "principal issue" in *Hardison* was whether Title VII "require[d] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." The Court held that Title VII did not impose such a requirement, reasoning that this conclusion was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." The deprivation of employees' seniority rights under the collective-bargaining agreement was likewise held to constitute an undue hardship. Before concluding, the Court in *Hardison* noted that "[t]o require [the employer] to bear more than a *de minimis* cost in order to give [the employee] Saturdays off is an undue hardship."

This quoted language has since been interpreted by various lower courts to mean that an "undue hardship," for purposes of providing employees religious accommodations under Title VII, is any effort or cost that is "more than . . . *de minimis*." On June 29, 2023, the Supreme Court told lower courts to ditch their erroneously literal interpretation of what constitutes an "undue hardship" and set forth a clarified standard.

Groff v. DeJoy

The Supreme Court held in *Groff v. DeJoy* "that showing 'more than a *de minimis* cost,' does not suffice to establish 'undue hardship' under Title VII." The *Groff* Court clarified that Title VII's "undue burden" standard is met "when a burden is substantial in the overall context of an employer's business." The Court's justification for this reading of *Hardison* hinged upon *Hardison's* various references to "substantial additional costs" and "substantial expenditures" that employers may face in granting religious accommodations to employees.

The Court further clarified that "undue hardship on the conduct of a business" may also include "undue hardship on the business's employees." The Court reasoned that the "conduct of [a] business" includes "the management and performance of the business's employees[.]" Therefore, it logically follows that "undue hardship on the conduct of a business may include undue hardship on the business's employees."

After setting forth this clarified undue hardship standard, the *Groff* Court vacated the lower court's opinion and remanded the case for further proceedings consistent with its clarified ruling. The Court further left the context-specific applications of this standard to the lower courts.

Employer Takeaways Following *Groff*

The Supreme Court clarified that an employer experiences an "undue hardship" in the context of an employee's request for religious accommodation not when an employer shows a burden creates "more than a *de minimis* cost," but when an employer shows "a burden is substantial in the overall context of an employer's business." Because the Supreme Court tasked lower courts with applying the clarified undue hardship standard, employers should be on alert and prepare for an increase in religious discrimination claims.

We will closely follow any legal developments that impact employers' ability to foster diverse and inclusive workplaces, as well as any new precedent involving religious accommodations. In the meantime, if you have questions about how these recent Supreme Court decisions may impact your organization and its employment practices, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.

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