EEOC Affirmative Action Guidance Poses Risk for Employers in Facing Reverse Discrimination Suits After SCOTUS' Decision in Students for Fair Admissions v. Harvard

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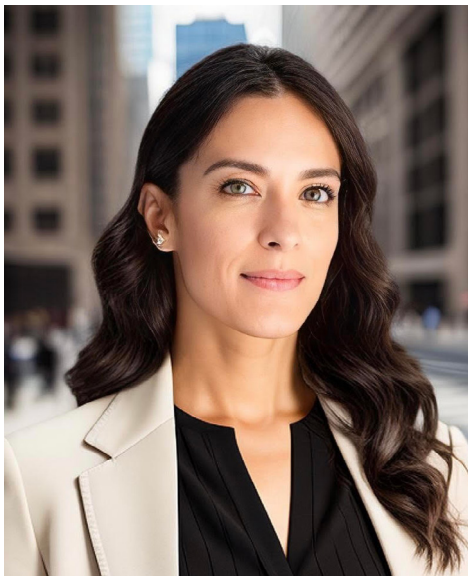
The Equal Opportunity Employment Commission (EEOC) has yet to provide Affirmative Action Guidance that addresses the Supreme Court's ruling from *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 US 181 (2023), and employers who follow the current Guidance may consequently face reverse discrimination lawsuits.

As background, the EEOC is the federal agency entrusted with enforcing employment civil rights laws and combating workplace discrimination. As part of its mission to promote equal employment opportunities, the EEOC offers guidance to employers, helping them to ensure that their policies, practices, and procedures comply with federal discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII). Incident thereto, EEOC issued Affirmative Action Guidance, CM-607, in 1979, which was expressly intended to address the apparent conflict between Title VII's prohibition on considering race, sex and national origin in employment decisions with "the need, often through affirmative action, to eliminate discrimination and to correct the effects of prior discrimination" (see Section 607.1). According to the Guidance, there is no conflict; to wit: Title VII generally permits wholly voluntary affirmative action plans, which are defined as those that were "developed on the employer's own initiative, and not ordered or approved by a governmental agency or court" (see Section 607.11). This 607.11 position, if left unchanged and adhered to by employers, could result in accusations of reverse discrimination, EEOC complaints and litigation.

The current EEOC's Guidance, codified by 607.11, relies on *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which dealt with affirmative action in university admissions (see Section 607.11(a)(2)). In *Bakke*, the Supreme Court considered whether racial quotas in higher education affirmative action programs violated the Equal Protection Clause of the United States Constitution. Therein, the Supreme Court held that racial quotas were unconstitutional, but authorized race to be considered as one factor, amongst others, in admissions decisions to achieve diversity. This was the basis for EEOC's Guidance that remains published, and strangely, this Guidance on affirmative action is the only topic that EEOC offers employers guidance upon with respect to Diversity, Equity and Inclusion (DEI) programs.



The problem for employers who follow this EEOC Guidance is that *Bakke* is arguably no longer good law. The Supreme Court, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*, 600 U.S. 181 (2023), struck down race-based affirmative action in college admissions. In holding that the use of race, as even a "plus factor" among other criteria, violated the Equal Protection Clause and Title VI, the Court arguably overturned the long-standing precedent articulated in *Bakke*.

Although the Supreme Court's ruling in *Students for Fair Admissions* does not directly implicate affirmative action in the Title VII employment context, it implicitly undermines EEOC's reliance on *Bakke*, which was also from the educational context and applied to employment. In fact, Circuit Courts have consistently held that "[f]or additional guidance, we look to cases interpreting Title VII: because of the similarities between Title VI and Title VII, courts frequently have looked to Title VII in determining rights and procedures available under Title VI." *Smith v.*

Barton, 914 F.2d 1330 (9th Cir. 1990). Therefore, EEOC should look to Equal Protection Clause and Title VI precedent from *Students for Fair Admissions* and swiftly update its 607.11 position from Affirmative Action Guidance, CM-607, so that employers can once again rely on EEOC Guidance without risk of being sued for reverse discrimination.

In recent years, there has been an uptick in reverse discrimination lawsuits challenging affirmative action and other aspects of DEI, on the basis that they unconstitutionally factor in race, gender, and other protected categories, mirroring the Court's reasoning in *Students for Fair Admissions*. Beyond these legal attacks, reverse discrimination has become political dynamite that can result in a business being cancelled.

To illustrate the problem, consider the perspective of billionaire entrepreneur and "Shark Tank" investor Marc Cuban, who recently shared his hiring philosophy on a social media platform X (formerly Twitter) as follows: "I only ever hire the person that will put my business in the best position to succeed," said Cuban. "And yes, race and gender can be a part of the equation. I view diversity as a competitive advantage." Cuban's viewpoint underscores a growing trend towards embracing DEI in the workplace and beyond. While this trend, and Cuban's hiring philosophy, are consistent with Affirmative Action Guidance CM-607, they are inconsistent with *Students for Fair Admissions*, which was best articulated by EEOC Commissioner Andrea R. Lucas's strongly worded reply to Mr. Cuban on X, stating, "[u]nfortunately you're dead wrong on black-letter Title VII law. As a general rule, race/sex can't even be a "motivating factor"—nor a plus factor, tie-breaker, or tipping point. It's important employers understand the ground rules here."

If a sophisticated employer like Cuban is confused by EEOC Guidance, which, again, conflicts with Supreme Court precedent, one can only imagine how many others share the same misunderstanding. Without prompt EEOC action to issue DEI Guidance as a replacement for its outdated Affirmative Action Guidance, companies adopting policies to benefit historically marginalized groups or otherwise promoting DEI initiatives will be placed in the lawsuit chopping block. Without DEI Guidance in the face of *Students for Fair Admissions*, a number of prominent companies including Google, Meta and Zoom have rolled back their DEI programs ostensibly fearing that such programs will result in lawsuits. This reality exists given that prominent conservative organizations including American Alliance for Equal Rights and America First Legal have both signaled their intentions to initiate such lawsuits. Plus, considering the Court's treatment of affirmative action in higher education, such attacks have a high likelihood of success.

As can be seen, the EEOC's Guidance is important to employers seeking guidance in amending or developing their workplace diversity, equity, and inclusion initiatives. It is therefore imperative that EEOC immediately updates its Guidance to furnish employers with the information that they need to craft compliant DEI policies. Simply, the world has changed since 1979. Now, 45 years later, in 2024, EEOC needs to publish DEI Guidance because, in the vacuum, companies could be tempted to take their compliance cues from a billionaire's battle with an EEOC Commissioner on X. That is why your authors have submitted a request to EEOC for an Opinion Letter rectifying this issue with the hope that that this request will spur an update to the Guidance. Until then, employers should proceed with caution.