Lawyer Insights

Racial Stereotypes' Use May Doom Some Employers' DEI Initiatives

Hunton Andrews Kurth's Amber Rogers and Meredith Gregston say that the Supreme Court's affirmative action decision should make employers wary of how they use racial categories in DEI programs.

By Amber Rogers and Meredith Gregston
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The Supreme Court's recent decision striking affirmative action programs at two universities put a spotlight on employers' need to avoid categories that could be deemed racial stereotypes. Businesses need to examine their diversity, equity, and inclusion programs to ensure that racial stereotypes aren't driving their definitions of DEI.

Racial stereotypes involve exaggerated and constructed beliefs that all members of the same race share given characteristics. Stereotyping based on race eliminates the ability to take into account individual differences and places a sheen of generalization over entire groups of people with the assumption that they all think and act alike.

Racial stereotypes arise in many contexts, but within the employment sphere, DEI initiatives have the potential—sometimes inadvertently—to implicate racial stereotypes in a negative manner.

The US Supreme Court ruled in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, that the race-based admissions programs at Harvard College and the University of North Carolina were violated the Equal Protection Clause of the Fourteenth Amendment. Among other things the court determined the programs engaged in stereotyping and used race in a negative manner.

The court's decision is a landmark ruling that implicates situations far beyond the classroom, including DEI efforts in the workplace. In the wake of this decision, the question remains as to whether case precedents discussing racial stereotyping in the employment law context will be affected by its reasoning.

The majority reasoned that a benefit provided to some applicants but not to others "necessarily advantages the former at the expense of the latter." The court also faulted the schools for assuming students of a particular race "think alike, at the very least alike in the sense of being different from nonminority students."

In his concurring opinion, Justice Clarence Thomas noted that "all racial categories are little more than stereotypes; suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities."

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"Members of the same race do not all share the exact same experiences and viewpoints; far from it, "Thomas continued. In his opinion, race "[c]lassifications rest on incoherent stereotypes" that assume synchronized characteristics that are fabricated and exclude the effect of an individual's personal choices and different experiences.

In her dissent, Justice Ketanji Brown Jackson argued it "is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters."

The Decision's Impact on DEI

Amongst the disagreement between the justices lies the question of how one could use this decision within the DEI program context. DEI programs purport to encourage increased diversity, equity, and inclusion, however, this decision, and particularly Thomas's concurrence, may impact their effectiveness.

Take, for example, a DEI mentorship program that specifically caters to racial minorities. One could argue that the mentorship program, in providing "extra help" and guidance, is based on racial stereotypes that all persons in a particular group will not only perform at a lower level, but need extra help to perform equally as well as other, nonminority people.

The *Students for Fair Admissions* decision could easily impact DEI programs by providing challengers an additional avenue to argue their invalidity and, in line with Thomas's dissent, allow them to argue that the goals of these programs are "nothing short of racial determinism."

The prohibition of stereotyping in the workplace is not a new concept. Case law began to emerge in 1971with *Sprogis v. United Air Lines, Inc.,* where the US Court of Appeals for the Seventh Circuit Court approved a wrongful termination claim. The court included a reference to stereotyping in "forbidding employers to discriminate against individuals because of their sex," because in enacting Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Guidance for Employers

Based on the Supreme Court's critical eye toward diversity based solely on race rather than relating toother characteristics, such as socio-economic status or ideological beliefs, employers' DEI programs maybe vulnerable to challenges.

While courts have previously determined examples of overt racial stereotyping to be actionable under Title VII, it is unclear how employer DEI programs may implicate challenges of racial stereotyping in attempts to create diverse, equitable, and inclusive workplace environments.

DEI programs that specifically highlight broad racial diversity rather than diversity of other characteristics will likely face the most scrutiny. Seeking to increase racial diversity through DEI programs that broadly implicate and "evaluate employees by assuming or insisting that they matched the stereotype associated with their group" could suffer challenges as they relate to the Supreme Court's opinion that there may beno tangible or identifiable tether between the benefits of racial diversity versus diversity as a general concept.

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Following this decision, employers need to be explicitly clear about their goals of implementing DEI programs. DEI programs that generalize racial minority groups and suggest that racial diversity alone is sufficient to achieve diversity in the workplace not only involve racial stereotyping but are vulnerable to challenges in light of the *Students for Fair Admissions* decision. Employers should engage counsel to review such programs for possible concerns considering the court's decision, as well as existing precedent in the employment context.

The case is Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., U.S., No. 20-1199,6/29/23.

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