Supreme Court Upholds Michigan Ban on Affirmative Action

Labor & Employment Law Update

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Yesterday the Supreme Court upheld Michigan's ban on affirmative action programs overturning a 6th Circuit Court of Appeals decision which had ruled the ban an unconstitutional violation of the U.S. Constitution's Equal Protection Clause.

Michigan's ban on affirmative action was enacted as Article I, Section 26 of its State Constitution and, in relevant part, prohibits governmental entities, including public colleges and universities, from granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin. Michigan voters passed the ban in response to a pair of 2003 U.S. Supreme Court decisions. *Gratz v. Bollinger* struck down the University of Michigan's undergraduate affirmative action program as unconstitutional while *Grutter v. Bollinger* upheld the more limited affirmative action program used at the University of Michigan's law school.

Although the decision was 6-2 in favor of upholding the ban, the Justices splintered on how they arrived at that decision. Justice Kennedy delivered the plurality opinion and was joined by Justice Alito and Chief Justice Roberts (who also wrote his own concurring opinion). Justice Scalia wrote a concurring opinion which Justice Thomas joined and Justice Breyer also wrote a concurring opinion. Justice Sotomayor wrote an impassioned dissent which Justice Ginsburg joined. Justice Kagan recused herself.

Justice Kennedy made clear the decision does not outlaw affirmative action. This case, he said "is not about the constitutionality or the merits of race-conscious admissions policies in higher education." This opinion does "not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met." The question here, he explained, is "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."

The decision distinguished cases in which voter-approved bans had a "serious risk, if not purpose, of causing specific injuries on account of race" citing cases dealing with voter-approved bans on fair housing measures and busing aimed at

desegregating schools. Those bans remain unconstitutional, the Court reasoned, because they encouraged discrimination. The Court viewed the Michigan ban differently, stating the "question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued." Here, the Court concluded, "there was no infliction of a specific injury" and declined to extend its prior decisions "to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended."

The Court focused on race-based affirmative action programs in public higher education, but the long term effects of the ruling are likely much broader. As the Court noted, similar bans exist in other states. To date seven other states, California, Florida, Washington, Arizona, Nebraska, Oklahoma and New Hampshire, have bans similar to Michigan's. The case represents another blow to what remains of affirmative action programs in general and paves the way for other states to enact similar bans. However, employers with affirmative action obligations based on their status as a federal or state contractor should note that this decision in no way removes those obligations.