Case Pending Before the United States Supreme Court May Affect the Use of Race in College/University Admissions Policies: Fisher v. University of Texas at Austin

The Equal Protection Clause of the Fourteenth Amendment mandates that no state shall deny to any person within its jurisdiction the equal protection of the laws. Manipulated in Plessy v. Ferguson, vindicated in Brown v. Board of Education, and challenged in Fisher v. University of Texas at Austin, interpretation of the Equal Protection Clause is once again under the scrutiny of the Supreme Court. In brief, the Fisher case came about after two in-state applicants to the University of Texas at Austin, Abigail Fisher and Rachel Michalewicz, were denied admission. Fisher and Michalewicz, both white, subsequently brought an action against the university and certain university officials alleging that the university’s admissions policies discriminated against them based on their race (Michalewicz has since dropped out of the suit). In August 2009, the United States District Court for the Western District of Texas granted summary judgment to the University, concluding that the University was entitled to judgment in its favor as a matter of law. Fisher appealed and the United States Court of Appeals for the Fifth Circuit affirmed the lower court’s decision. Next, Fisher petitioned the United States Supreme Court for a writ of certiorari in February 2012 and the Supreme Court agreed to consider the case. The Supreme Court heard oral arguments for the case in October 2012.

The facts and circumstances of Fisher have prompted the Supreme Court to consider whether its decisions interpreting the Equal Protection Clause of the Fourteenth Amendment permit the University of Texas at Austin’s use of race in its undergraduate admissions decisions. The race-conscious admissions policy giving rise to Fisher has two parts: the first part guaranteed admission to Texas students graduating in the top ten percent (Ten Percent Plan) of their high school class. The second part considered race as one factor among many others when reviewing applications and admitting students from its undergraduate university applicant pool.
Fisher contends that the second part of the University of Texas at Austin’s admissions policy violates the Equal Protection Clause of the Fourteenth Amendment. She asserts that the Ten Percent Plan affords the University of Texas at Austin with a diverse student body, achieving its compelling interest of diversity and obviating the second part of the admissions initiative. Fisher claims that when government action – the second part of the admissions policy of the state school in this case – sets forth racial classifications, the government action will only be upheld by a reviewing court if it is narrowly tailored to achieve a compelling governmental interest. Fisher argues that the second part of the plan fails the Equal Protection Clause’s requirements on two levels: one, because the objective is unnecessary because, in part, the Ten Percent Plan already achieves the interest, and, two, because its implementation is defective. The University contends that its admissions policy is supported by a compelling educational interest in achieving a “critical mass” of minority students, on campus and in the classroom. It is the University of Texas’ professional educational opinion that the critical mass has yet to be achieved; therefore, the two-part admissions policy in place is a means by which the University is able to work towards it.

The Supreme Court must consider the Court’s prior rulings concerning affirmative action when deciding the Fisher case. In 1978, in Regents of the University of California v. Bakke, the Supreme Court decided that a race-conscious medical school admissions policy that reserved a number of seats in the class for persons of preferred minorities was unconstitutional. The Supreme Court will also need to consider its 2003 decisions in Gratz v. Bollinger and in Grutter v. Bollinger. In Gratz, the Supreme Court struck down a race-conscious admissions policy at the undergraduate level of the University of Michigan that afforded a predetermined number of points, with one hundred points necessary for admission, to applicants of certain minority racial classifications. The Supreme Court struck down the race-conscious point system in place, holding that it violated the Equal Protection Clause of the Constitution because it granted a fixed number of points to certain preferred races, as opposed to reviewing each application separately and making determinations accordingly.

In Grutter, an in-state applicant to the University of Michigan’s School of Law was denied admission, and she subsequently brought suit, alleging that as a result of the race-conscious admissions plan in place, she had suffered discrimination on the basis of her race in violation of the Fourteenth Amendment of the Constitution. Because the University of Michigan Law School evaluated each student’s application individually, deeming race a “plus factor” in the overall determination that led to admission and utilizing this policy so as to achieve a “critical mass” of minority students in the class, the Supreme Court found this race-conscious admissions policy to be a narrowly tailored use of race, necessary to achieve a compelling interest – diversity. The Court in Grutter stated, “Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government’s reasons for using race in a particular context.” Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

The decision in the Fisher case has the potential to affect admissions policies for most higher education institutions across the country. Any institution receiving federal financial assistance of some form may qualify as a “government actor,” under certain conditions, subject to the Fourteenth Amendment in particular circumstances.

Fisher implicates all three of the cases discussed above. For example, if the University of Texas at Austin instituted the second part of its policy in addition to the state Top Ten Plan so as to achieve a “critical mass” of minority students on campus, how will it know when it will have achieved a critical mass? As Justice Alito asked during oral arguments, will that be when the racial composition of the student body reflects the racial composition of Texas’s population? If not, when will that be? If and/or when the University achieves such a “critical mass,” would that figure not constitute a “quota” of minority students in violation of Bakke? And finally, what are the legal implications of achieving diversity on a college campus? A decision is expected in this case in late spring 2013.
Question: Our department would like to trademark either a logo or a phrase to draw attention to the accomplishments of our unit. Will we be able to trademark the logo or phrase?

What is a trademark?
The University would need to apply for trademark protection from the U.S. Patent and Trademark Office. Generally, trademark protection applies only to words, names, symbols, logos and slogans that (1) distinguish a user's goods or services, (2) are used in commerce, and (3) are not functional.

Does the logo or phrase distinguish the user’s goods or services?
To trademark a logo or phrase, it must be distinctive enough to identify the source of a particular good or service. Proposed trademarks are evaluated at several levels of distinctiveness and not all marks will be eligible for trademark protection. This is particularly true for logos or phrases which are merely descriptive or generic. In contrast, a logo or phrase may be more likely to receive trademark protection if it has no relationship to the service to which it applies. For example, the Nike “swoosh” ™ and the Apple ™ logo are not related to the products to which they apply, i.e. sneakers or computers. This makes the logo “inherently distinctive,” and therefore a stronger trademark.

Is the mark used in commerce?
When an institution applies for trademark protection, it must show that it has used the mark in commerce. This means that the University must be able to show that it used the mark in the course of its business, such as on marketing materials or a website. In its trademark application, the University must submit examples of how the logo has been used. Federal trademark law also allows registration of marks that are planned for use but are not being used yet. Registration of “intent to use” trademarks generally requires proof within a certain period of time that the logo or slogan actually has been used.

Is the mark functional?
Attributes of a service that impact how the service actually works (or how other similar services might work) are not eligible for trademark protection. For example, Owens-Corning was able to enforce its trademark rights to protect the company's recognizable pink insulation (recall the Pink Panther commercials?). The color pink had no impact on the actual functioning of the product, and competitors of Owens-Corning had no reason (except to mimic Owens-Corning) to use the color pink. As a result, the color pink was considered nonfunctional and thus eligible for trademark protection. Note: for a recent illustration of whether color can be trademarked, see the discussion in the case highlighted below.

How is trademark protection acquired?
A trademark is protected once it is used in commerce or once it is registered with the U.S. Patent and Trademark Office. Registration of a trademark is not required for trademark protection, but registration has several benefits, including the right to use the mark nationwide, and to enforce its rights against others who might be infringing or diluting the trademark.

Why might a trademark be rejected?
A trademark can be rejected for several reasons, including if a similar (or the same) mark already exists and might confuse a consumer. A proposed trademark also may be rejected if it is descriptive, or if it is generic. Common phrases are particularly likely to be considered “generic” and therefore ineligible for trademark protection. While a trademark applicant may feel a phrase or graphic is obviously connected to its business and its service, it may not be unique enough to earn trademark protection.

If your University department has a new logo or phrase which it would like to use, you first must contact the University’s Office of Marketing and Communication at x5718. This department has the authority to approve your logo. Approval will depend on several factors, including whether it is consistent with the University’s brand. MarComm then will work with the General Counsel’s Office to determine whether and how the University will seek trademark protection.
HAVE YOU HEARD?

Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.:
Use of a Color in Fashion may be Trademarked...Sometimes.

On September 3, 2012, the United States Court of Appeals for the Second Circuit (New York) held that the famous shoe designer, Christian Louboutin, was entitled to trademark protection for its distinctive use of red outsoles on its shoes. In 2011 Louboutin had brought suit against Yves Saint Laurent, seeking to stop YSL from marketing a heel that was entirely red, include a red outsole. In denying Louboutin's request a lower court maintained that a single color could never be protected by trademark in the fashion industry. Louboutin appealed the lower court’s decision and the Second Circuit agreed with Louboutin, finding that the high-fashion high heel’s red outsole satisfied the basic requirements for trademark protection.

As noted in the Question and Answer above, trademark can be used to protect company names like Apple, product names like Tide, and even people's names like Brad Pitt. Logos, slogans, symbols, phrases, product design and packaging, and even sound and scent can all be trademarked. The ability to trademark a single color, however, has been a somewhat uncertain question throughout trademark history. It was not until 1995 that the Supreme Court decided that a single color, on its own, can be trademarked, provided that it meets the basic requirements for trademark protection. Specifically, the color must be distinctive and it must not be functional or essential for effective competition in the market.

In order for a color to be distinctive, the color must have a “secondary meaning.” That is, the color must, in the minds of consumers, identify the source of the product more so than it identifies the product itself. In this case, the Court of Appeals determined that the Louboutin heel had garnered the requisite “secondary meaning” through over 20 years of use. Even YSL recognized that Louboutin’s red outsole had garnered reputation and notoriety such that the “flash of a red sole’ is today ‘instantly' recognizable, to ‘those in the know,’ as Louboutin’s handiwork. The Court of Appeals did, however, limit Louboutin’s trademark to the use of red outsoles with a contrasting color upper (part of the shoe). Therefore, the YSL red monochrome heel did not infringe Louboutin’s trademark because the upper part of the shoe was also red. The Appeals Court did not address any functionality issues. Both Louboutin and YSL call this decision a win.

Question: I received a phone call from a debt collection agency inquiring about the whereabouts and work history of a former colleague. I did not respond to the request for information; is that the right thing to do?

From time to time, your department may have received unsolicited phone or electronic inquires from debt collectors about current or former employees and/or current or former students. It is against Massachusetts law for debt collectors to engage in unfair or harassing debt collection practices. If debt collectors are contacting you about the debt of another individual, such as a current or former co-worker or student, the activity may be in violation of the law. If you receive calls of this type, please contact our Office for further guidance.

You may also contact of Consumer Protection Division of the Massachusetts Office of Attorney General at (781) 727-8400 for information on this topic.

Finally, employee personnel record information is confidential. Therefore, your decision not to respond to the request for information was appropriate. Please contact our Office for advice if you receive unsolicited calls from third parties of this nature.
New Contract Cover Sheet!

As you may know, there is a new contract cover sheet available on the Office of General Counsel website. Please use this new cover sheet when submitting contracts to our Office for review. Various template agreements are also available on our website for use by your department. If you use a template agreement, simply complete the blank fields in the template. Prior consultation with the Office of the General Counsel is necessary if you wish to add terms or otherwise alter the text of the template to make sure the additions are consistent with University business practices and applicable laws.

To access the new cover sheet please follow this link:
http://www.northeastern.edu/general-counsel/docs/transactional/ContractCoverSheet.pdf/.

Use of the new contract cover sheet and templates will simplify review of your department’s contracts.

New Center for Research Innovation Disclosure Form

When you develop a new invention at the University, it is important to complete an invention disclosure form. The Center for Research Innovation has implemented the use of a NEW invention disclosure form; older versions will no longer be accepted by the CRI. When completing the invention disclosure form, remember to fill in all blanks and physically sign the form; electronic signatures will not suffice.

To access the updated invention disclosure form, please follow this link:
http://www.northeastern.edu/research/cri/tech-transfer/submit-invention-disclosure-form/. Instructions are provided with the form and if you have any questions, please contact the CRI at 617-373-8810.

Reminder: University’s Appropriate Use of Computer and Network Resources Policy

The University’s Appropriate Use of Computer and Network Resources Policy sets the terms and conditions of use of the University’s information systems. This is a reminder that members of the University community must utilize their University email addresses and phone numbers when conducting University business. Communications transmitted through the University’s information systems are the property of the University. In instances where the University may need to gather and review information related to its business, the University may exercise its right to gather and inspect University computers, devices, and any information from the data storage mechanisms of such devices, and/or information maintained in University information systems. For example, this may occur in connection with a potential legal action or allegation of potential wrongdoing. The University may exercise its right to obtain and inspect such devices with or without prior notice or permission of the user(s). The University also retains access rights to all files and electronic mail on its systems. Additionally, privately owned devices and data storage connected to the University network or used to conduct University-related business also may be subject to inspection by authorized University personnel under such circumstances as described above. Please also be reminded that all users of the systems are required to observe the confidentiality and privacy of others’ information accessed through the University’s information systems.

Full details can be found in the University’s full Appropriate Use of Computer and Network Resources Policy. Please follow this link to review the policy: http://www.northeastern.edu/infoservices/?page_id=97.

Questions about the Appropriate Use of Computer and Network Resources Policy can be directed to Janet Faulkner at x2157 or Mark Nardone, the Director of Information Security, at x7901
If you have any questions you would like to see answered in this space, please submit them to the Office of the General Counsel at 378 Columbus Place. Depending upon the nature of your question, we will either answer you personally or address your issue in a future edition of this newsletter.

Of Counsel has been prepared as a general summary of important developments. It is not intended as individual legal advice. Should you have any questions or need information concerning a specific situation or any of the content of this advisory, please contact the Office of the General Counsel, 378 Columbus Place, ext. 2157.

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