Recent Supreme Court Decisions Affect Educational Institutions

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Recently, the United States Supreme Court issued several opinions that affect educational institutions. This update summarizes some of the most significant decisions and explains their impact on public and private educational institutions.

TITLE IX PROHIBITS RETALIATION AGAINST INDIVIDUALS WHO REPORT SEX DISCRIMINATION

Title IX is a federal law that prohibits discrimination on the basis of sex by educational institutions that receive federal funds. It impacts private and public institutions alike, so long as the institutions receive federal funding. Last term, the United States Supreme Court issued its decision in Jackson v. Birmingham Bd. of Education, 544 U.S. 167 (2005). In that case, the girls' basketball coach at a public high school discovered that his team was not receiving equal funding and equal access to athletic equipment and facilities. He complained unsuccessfully to his supervisors, and then began receiving negative work evaluations and was ultimately removed from the coaching staff. He filed suit against the school board, alleging that it had retaliated against him because he had complained about sex discrimination in the high school's athletic program, and that such retaliation violated Title IX. The Court agreed with the plaintiff and held that Title IX creates a private right of action for retaliation for individuals who complain about sex discrimination.

In the wake of this decision, educational institutions receiving federal funds should review their policies banning sex discrimination, and make certain that those policies prohibit all forms of retaliation, even if the complaining individuals have not themselves been victims of discrimination. Additionally, such institutions should offer training to staff and students in an effort to prevent unlawful discrimination, and take care to see that the appearance of retaliation does not occur.

RELIGIOUS DISPLAYS BY PUBLIC ENTITIES

Last term, the United States Supreme Court issued decisions in two cases discussing the constitutionality of religious displays by public entities. Although the cases presented similar facts, the Court arrived at contrary conclusions, upholding the display in one case, and striking the display in the other case as an unconstitutional "establishment of religion."1 Neither case involved an educational institution, but the holdings could impact public schools and institutions. The decisions do not affect private institutions.

In Van Orden v. Perry, 125 S.Ct. 2584 (2005), the Court considered whether Texas' display of a monument inscribed with the Ten Commandments on its capitol grounds violated the Establishment Clause. The Court rejected the three-pronged test traditionally applied by the Court in Establishment Clause cases (i.e., determining whether the monument had a secular purpose, whether it resulted in advancement or inhibition of religion, and whether it resulted in excessive entanglement of government and religion). Instead, the Court relied on an analysis driven by the nature of the monument and American history. Using this analysis, the Court held that this particular governmental display did not violate the Establishment Clause because the monument, although it had religious significance, represented "the several strands in the State's political and legal history." The Court's primary basis for this conclusion was the fact that the monument was one of 17 different monuments and 21 historical markers on the capitol grounds. These monuments and markers depicted "people, ideals and events that compose Texan identity" and included Heroes of the Alamo, the Spanish-American War, Terry's Texas Rangers, and Hood's Brigade. According to the Court, none of the other monuments had any religious significance.

In McCreary v. A.C.L.U., 125 S.Ct. 2722 (2005), the Court held that the posting of the Ten Commandments at a Kentucky courthouse violated the Establishment Clause. This time, the Court relied on its traditional test and determined that the government's actions had no legitimate secular purpose. According to the Court, the government's display of the Commandments' bare text rather than related symbols broadcast a clearly religious message in violation of the

Constitution. The Court also noted that the government's attempts to modify the display by surrounding the text with other religious messages further undermined the government's efforts to demonstrate a secular purpose for the display.

Ultimately, these cases are difficult to reconcile and leave questions about how the Court is likely to decide future cases presenting similar issues. Fortunately for public primary and secondary schools, however, in Van Orden, the Court telegraphed its view of religious symbolism in those institutions. In rendering its decision, the Court stated that in light of the "particular concerns that arise in the context of public elementary and secondary schools," the Court has "been particularly vigilant in monitoring compliance with the Establishment Clause" in those institutions. Therefore, the Court would likely view religious symbolism in public primary and secondary schools quite differently from the way it viewed the display of the Ten Commandments in Van Orden.

EMPLOYMENT

In 2005, the United States Supreme Court issued a significant decision in federal age discrimination law. In Smith v. City of Jackson, 544 U.S. 228 (2005), the Court held that the Age Discrimination in Employment Act ("ADEA") permits disparate impact claims. This means that in addition to filing claims against employers based on deliberate discrimination, plaintiffs also can challenge an employer's facially neutral policies and procedures on the grounds that they have a discriminatory effect on an employee, or a group of employees because of their ages. The ADEA applies to public and private institutions alike, so long as they have twenty or more employees.

Although Smith is significant, the Court limited disparate impact ADEA claims in a way that may make them difficult for plaintiffs to establish. Under Smith, a policy or procedure that creates a disparate impact is lawful as long as the employer's conduct is based on a reasonable factor other than age. By contrast, under Title VII (the federal law that prohibits certain forms of discrimination in employment), a disparate impact is lawful only if an employer can demonstrate a "business necessity" for the policy or procedure. Therefore, the test for justifying a disparate impact under the ADEA is much less stringent than that which currently exists under Title VII, which means that disparate impact claims arising under the ADEA are somewhat less risky for employers than those that arise under Title VII.

Although the implications of Smith for educational institutions will likely be quite modest, institutions should review their employment practices, particularly those pertaining to reductions in force, salary and benefits modifications and retirement, to ensure that existing practices do not disparately impact persons over the age of 40, unless the disparities are based on factors other than age.

SPECIAL EDUCATION

In the thirty years since the Individuals with Disabilities Education Act ("IDEA") was enacted, the United States Supreme Court has decided only a handful of cases arising under the Act. During 2005, the Court decided one important case affecting special educational services for students with disabilities, and in 2006, the Court agreed to hear another case involving an interpretation of the IDEA. The IDEA applies to primary and secondary schools that receive federal funding. It does not apply to institutions of higher education.

Schaffer v. Weast, 126 S.Ct. 528 (2005), involved a dispute between parents and a school district regarding a student's Individual Education Program ("IEP"). Dissatisfied with the IEP proposed by the district, the parents enrolled their child in private school and sought reimbursement from the district for the private school tuition in an administrative hearing. The issue in the case was which party bore the burden of proof in an administrative hearing challenging an IEP. The Court held that parents, rather than the district, bear the burden of proof in such cases.

Arlington Central School District v. Murphy, 402 F.3d 332, cert. granted, 126 S.Ct. 978 (2005), involved a similar dispute between parents and a school district. At issue in this case was whether the parents, who had prevailed in the litigation with the school district, were permitted to recover from the district the costs of the expert consultant that they had relied upon in support of their case. Affirming the district court's decision, the U.S. Court of Appeals for the Second Circuit held that expert fees of prevailing plaintiffs are compensable as costs under the IDEA. On January 6, 2006, the Supreme Court agreed to review the decision and has not yet issued an opinion.

MILITARY RECRUITERS

A long-simmering dispute between law schools and the military over recruitment efforts that clash with school non-discrimination policies has culminated in a Supreme Court decision rejecting the law schools' First Amendment challenge to on-campus military recruitment. In Rumsfeld v. Forum for Academic and Institutional Rights, No. 04-1152, 2006 WL 521237 (U.S. Mar. 6, 2006), the Court held that military recruiters' on-campus presence did not violate the schools' First Amendment rights, "regardless of how repugnant the law school considers the recruiter's message."

The lawsuit raised a number of issues surrounding the constitutionality of the Solomon Amendment, a federal law that denies federal funds to "any institution of higher education" that prohibits or effectively prevents military recruiters from enjoying the same type of access to students as received by other employers. The amendment, first enacted in 1994, was a reaction to law schools' adoption or expansion of policies that prohibited employers from using a school's career services facilities if they discriminated on the basis of race, color, religion, national origin, sex, disability, age or sexual orientation. Prior to the amendment, military recruiters who discriminated on the basis of sexual orientation had been denied equal access to students and other law school resources. After the September 11, 2001 attacks, however, the military sought more stringent enforcement of the Amendment and this litigation ensued.

Based on this decision, institutions that provide military recruiters less or less effective access to students than recruiters from other employers should reevaluate their policies to ensure that military recruiters are not effectively prevented from enjoying the same type of access to students that other employers are allowed.

RACE-CONSCIOUS DECISION-MAKING IN EDUCATION

There have also been significant court decisions discussing the propriety of race-based decision-making. Last year, harkening back more than fifty years to its landmark decision in Brown v. Board of Education, 347 U.S. 493 (1954), the Supreme Court reaffirmed the principle that all "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." The case of Johnson v. California, 125 S.Ct. 1141 (2005), involved a suit by an inmate at the California Department of Corrections challenging the Department's practice of segregating inmates by race when making housing assignments. According to the Department, race was just one factor in a number of factors it considered when making housing assignments. Although there was no clear majority on the point, the Court held that strict scrutiny applies to all racial classifications imposed by the government.2 Under strict scrutiny, the state must prove that it has a compelling interest that justifies a racial classification, and that its plan or program narrowly tailored to serve that interest. The Court found that the state's interest in prison safety was compelling, but remanded the case for a determination of whether its housing segregation policy was narrowly tailored to achieve that compelling interest.

Although this case did not involve an educational institution, it is a reminder that racial classifications, even if they arguably have little or no adverse impact on members of a particular race, are immediately suspect and subject to strict scrutiny. Therefore, this case serves as an important reminder that public institutions and private institutions receiving federal funds3 must have a compelling interest for any racial classification used and that the classification must be narrowly tailored to achieve that compelling interest.

In 2003, the Supreme Court decided Grutter v. Bollinger, 539 U.S. 306 (2003) and Gratz v. Bollinger, 539 U.S. 244 (2003), the University of Michigan affirmative action cases. Those cases established the rule that a diverse student body is a compelling interest, and schools can use race as a factor in admissions so long as such use is narrowly tailored to achieve the goal of diversity. Following these cases, there is still much confusion surrounding the use of race in the education context, particularly in the K-12 context, because institutions are not yet certain how to structure admissions or student-assignment programs that are sufficiently tailored to achieve their compelling interest in student body diversity. In the years since the Supreme Court decided Grutter and Gratz, however, the lower federal courts have begun to provide some guidance by applying those cases to the K-12 context, and by refining the Supreme Court's analysis of race-based programs.

In Comfort v. Lynn School Committee, 418 F.3d 1 (1st Cir. 2005) (en banc), cert. denied, 126 S.Ct. 798 (2005), for instance, the United States Court of Appeals for the First Circuit considered a district's voluntary desegregation plan, which featured a "student assignment plan" that allowed students to transfer from certain schools only if the transfer would not increase the racial imbalance at either the sending or the receiving school. The Court upheld this plan as narrowly tailored to achieve the compelling interest of diversity.

Similarly, in Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), the Ninth Circuit considered a district's "tie-breaker" plan. Under the plan, when a high school had more applicants than seats, four tiebreakers were used to determine which students to admit. One of the tie-breakers used was race. This plan was also upheld as narrowly tailored to achieve diversity.

Lastly, in McFarland v. Jefferson County Public Schools, 330 F. Supp. 2d 834 (W.D. Ky. 2004), aff'd, 416 F.3d 513 (6th Cir. 2005), a district used race and gender as factors, among numerous other factors, in assigning students to the district's magnet schools. Like the others, this district's plan was upheld as narrowly tailored.

Although many of the cases in this area involve public institutions, private institutions should be mindful of the legal limitations on their use of race as a factor in student admissions and assignment decisions. For example, in Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 416 F.3d 1025 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that 42 U.S.C. § 1981 (a federal statute that prohibits discrimination on the basis of race in making and enforcing contracts) prohibits a private school (which received no federal funds) from employing "an express racial classification designed to deny admission to all students possessing no aboriginal blood, so long as qualified native Hawaiian applicants seek admission in sufficient number to fill the positions."

Unlike public schools, private schools are not subject to the Fourteenth Amendment to the United States Constitution. Many private institutions of higher education receive federal funding, however, and as a result, they are subject to the same standards as public schools pursuant to Title VI of the Civil Rights Act of 1964. Even schools and institutions that do not receive federal funding, however, are prohibited from discriminating on the basis of race pursuant to 29 U.S.C. § 1981.

According to the Ninth Circuit's decision in Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, racial classifications by private institutions that receive no federal funding are not subject to strict scrutiny. Rather, in that case, the Court applied Title VII's familiar burden-shifting framework to the plaintiff's § 1981 claim instead of the analysis that applies to public schools under the Constitution. Under that framework, once a plaintiff establishes a prima facie case of discrimination, the defendant must provide a legitimate, nondiscriminatory reason to justify its admissions decisions. Once such a reason is offered, the burden then shifts to the plaintiff to show that the reason is a pretext for unlawful race discrimination. In Kamehameha, the school argued that its program, which the court determined was "an absolute bar to admission for those of the non-preferred race," was a valid affirmative action plan.4 Rejecting this argument, the court held that an absolute bar to admission on the basis of race exceeds the scope of any reasonable affirmative action plan, and that the school's admissions program violated the law. This case is an important reminder that racial decisions by private educational institutions and private foundations associated with an educational institution are also subject to legal review.

Collectively, these cases highlight the significance of implementing clear rules and standards when institutions decide to use race as a factor in admissions, student assignments, and financial aid and ensuring that any use of race complies with the applicable legal standard. More litigation in this area is a virtual certainty as schools struggle to create lawful policies that address their needs, and as litigants test the strength of these precedents against recent changes in the Supreme Court's composition.

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[1] The phrase "establishment of religion" is excerpted from the first clause of the First Amendment to the United States Constitution, commonly referred to as "the Establishment Clause," which provides, "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. Amend. I. Generally, the Establishment Clause has been interpreted to mean that federal and state governments are prohibited from passing laws or implementing policies that favor one religion or system of belief over others. Because public institutions are considered "state actors," this prohibition extends to all public entities, including public schools.

[2] "Strict scrutiny" is a rigorous standard of review that courts apply to "suspect classifications," such as those based on race and national origin, or in cases involving encroachments upon fundamental rights.

[3] Pursuant to Title VI of the Civil Rights Act of 1964, which prohibits institutions that receive federal funding from discriminating on the basis of race, color, and national origin, racial classifications by private institutions receiving federal funding are also subject to strict scrutiny..

[4] In certain limited circumstances, Title VII permits private, voluntary race-conscious affirmative action plans. If a challenged decision is made pursuant to a valid affirmative action plan, the existence of the plan itself can form the basis of a legitimate nondiscriminatory rationale for the decision.

If you have any questions about these cases, or other legal issues affecting educational institutions, please contact Reagan Wilkins Oden at 612/632-3012, Abigail S. Crouse at 612/632-3044 or Tamara Hjelle Olsen at 612/632-3344. Click here to learn more about our Higher Education Law Team.