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What Does the *Fisher* Case Mean for K-State?

In its long-awaited ruling, on June 24, 2013, the U.S. Supreme Court in *Fisher v. University of Texas at Austin* sent the case back to the 5th Circuit Court of Appeals, holding that the lower court did not apply a strict enough standard of review when it upheld the university's race-conscious admissions program.

The Supreme Court left intact the existing case law established by the University of Michigan cases, *Grutter* and *Gratz*. Those cases held that a court may give some deference to a university's judgment that the benefits of diversity are essential to its educational mission and therefore serve a compelling governmental interest. But diversity cannot be defined as mere racial balancing and a university may not use any particular race or ethnicity as a determinative factor or to award extra points in the admissions process.

In *Fisher*, the Supreme Court considered the constitutionality of UT's using race as one of many factors in the admissions process. The Court stated that doing so could be permitted, but only if the university could affirmatively demonstrate that its method was "narrowly tailored" to achieving the educational benefits of diversity. The Court made clear that universities must be given no deference in this regard and must prove that no workable race-neutral alternatives would produce the educational benefits of diversity.

Admissions. Since K-State does not use race as a factor in admissions, we do not need to evaluate our admissions policies under this line of cases to ensure their constitutionality. However, the legal standards and analysis used in admissions cases such as *Fisher*, *Grutter*, *Gratz* and the seminal *Bakke* decision provide applicable guidance for other programs we administer.

Scholarships and other programs. *Fisher* appears to leave open the possibility that K-State could use race generally as one of many factors to be considered in awarding scholarships, so long as no points are assigned for race and people are not excluded because they don't belong to a certain race. But *Fisher* puts us on notice that including race in the list of factors will subject our policy to

"strict scrutiny" by the courts, because using race is "inherently suspect" under the Equal Protection Clause of the U.S. Constitution.

So even if we evaluate each scholarship or program applicant holistically as an individual and in a way that does not make race the defining feature of his or her application, if we use race at all we have the heavy burden to show that our method is "narrowly tailored" to achieving a "sufficiently diverse" student body and that doing so is not possible without using race as a consideration. Further, the Supreme Court has said that a school may not define "diversity" as involving race only, but instead the interest of a diverse student body "is complex, encompassing a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Exactly what evidence a university must present remains an open question, but it is the opinion of many legal analysts that the required proof will be so difficult to produce that it will make the university's burden essentially impossible to meet. We will know more after the 5th Circuit rules on the remanded case and applies strict scrutiny to UT's admissions program.

An alternative practice that can more easily withstand judicial scrutiny is to not use race as a factor, but to include people in scholarship and other selective programs based on a holistic, individualized assessment, using race-neutral qualities such as, for example, demonstrated service to particular groups or causes, commitment to diversity, leadership abilities, status as a first-generation college student, having English as a second language, socioeconomic status, and/or a personal history of overcoming hardships. Recruitment and retention efforts can also continue to be used to encourage and increase participation by underrepresented individuals. The focus of this holistic approach is on inclusive conduct and commitment to diversity — and on the resulting excellence and educational benefits for all in the university community and in the larger society we serve. K-State has long been a proud leader in this regard.



Lawyer as Fiduciary

The Office of General Counsel provides legal advice and representation for the University. But how do we tailor our advice to meet the desires of particular people or groups within the University? We don't. In fact, we are required by law to prioritize the interests of Kansas State University — our only client — over those of any person or group, including ourselves and even the President. This legal requirement results from the “fiduciary duty” owed by lawyers to their clients.

A fiduciary relationship is one where there is a special trust and confidence placed in the fiduciary. Other common examples include the doctor/patient and trustee/beneficiary relationships. These special relationships impose certain duties on the fiduciary. The most basic

fiduciary duties applicable to attorneys are: (1) the duty of loyalty, which requires that attorneys put their client's interests first; and (2) the duty of care, which requires attorneys to carry out their responsibilities in an informed and considered manner.

As attorneys in the Office of General Counsel, therefore, we are legally bound to be objective and to have no agenda other than to serve the University's best interests as a whole institution. Thus, the OGC is ideally situated to assist the many various individuals and groups who are acting on behalf of the University in problem-solving, planning and implementing actions as the University moves forward in pursuing its mission and achieving its goals.

Featured FAQ

Q: What should I do if I receive a subpoena, court order or search warrant pertaining to the University?

A: Contact the Office of General Counsel at 785-532-5730 immediately and provide us with a copy of the document. Do not contact or discuss the document with the issuing party until you have received guidance from our office. In most cases we will be the appropriate office to handle communications with the issuing party. Note: Our office cannot provide advice and assistance regarding such documents if they are unrelated to University business.

Q: What should I do if I receive a records request that is not a subpoena?

A: Immediately contact and forward the request to the appropriate Designated Records Custodian. Under the Kansas Open Records Act, the University has three (3) business days to respond. See Policies and Procedures Manual, chapter 3060 Kansas Open Records Act at k-state.edu/policies/ppm/3000/3060.html.

For more FAQs, please visit our website at k-state.edu/generalcounsel/faq

Visit our website:

k-state.edu/generalcounsel

Our website gives an introduction to the services we provide and addresses frequently asked questions. It also houses a list of resources for easy access to laws and policies applicable to University operations.

Questions Left Unanswered After DOMA Ruling

On June 26, 2013, the United States Supreme Court decided *United States v. Windsor*, also known as the “DOMA” case. DOMA stands for the Defense of Marriage Act, a federal law that limited the interpretation of “marriage” in the federal context to one between a man and a woman. The Court found that DOMA violated the Constitution, and that a state's definition of marriage should govern. Therefore, same-sex couples married in states that legally recognize same-sex marriages are now eligible for federal benefits equal to those of opposite-sex married couples.

The Supreme Court's decision, however, leaves many questions unanswered. Primarily, the decision is silent on what happens when a same-sex couple is married in a state recognizing same-sex marriage but later moves to a state

that does not recognize it. As of now, there is nothing indicating that any state-administered rights or benefits of same-sex couples residing in states such as Kansas, which does not permit same-sex marriage, will change as a result of the DOMA case. But at least one federal agency, the IRS, has issued a ruling stating for federal tax purposes, same-sex married couples will be deemed married so long as they validly entered into marriage in a jurisdiction whose laws authorize such a marriage, regardless of where they currently reside. Other federal government departments with authority over rights and benefits of “spouses” and “dependents,” are expected to also issue guidance in the near future. Areas impacted at universities could include immigration, payroll, housing, financial aid and many others.

Resource Reminders

The Student Access Center, formerly Disability Support Services, is available to answer questions and provide support regarding accommodations for our students with disabilities. Among the many services they provide, the Student Access Center staff can help adapt course content to ensure accessibility. For more information, visit the center's website at: k-state.edu/accesscenter.

Copyright and fair use information and guidance can be found in the K-State Libraries LibGuides at: <http://guides.lib.k-state.edu/content.php?pid=451943>

About this Publication:

This newsletter is designed to serve as a practical informational tool, bringing you topics of interest and practical tips. It should not be relied on as a substitute for legal advice. Laws, regulations and policies change frequently, and legal advice requires careful consideration and application of all relevant facts. If you have legal questions or need legal advice concerning any University matter, please contact the Office of General Counsel directly at 785-532-5730 or attys@k-state.edu