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Affirmative Action Has Been Resuscitated in Michigan

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On July 1, 2011, the U.S. Sixth Circuit Court of Appeals ruled unconstitutional Michigan's 2006 voter-approved state constitution amendment prohibiting sex- and race-based preferences in university admissions, government hiring and contracting. The amendment, commonly known as "Proposal 2," prohibits universities and governments in Michigan from using affirmative action programs that give "preferential treatment" to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment, education or contracting purposes.

The court held that Proposal 2 violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution because it burdens racial minorities by altering Michigan's political process along racial lines. In other words, the Court concluded that because less onerous avenues to effect political change remain open to those advocating consideration of non-racial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to go down a more arduous road than others without violating the Fourteenth Amendment.

The 2-1 decision, which reverses the decision of the U.S. District Court, may not be the final word on the matter since it could be appealed to the full Sixth Circuit bench or the U.S. Supreme Court. Thus, public universities and employers should carefully monitor the legal battle that may ensue.

For now however, there are two important lessons. First, sex and race based preferences in university admissions, government hiring and contracting are still currently prohibited under Michigan law with the exception of affirmative actions that are mandated by the federal government as a condition of receiving federal funds. As a result, until it is clear that the Sixth Circuit's recent decision is binding no drastic measures should be taken to radically alter admissions and/or hiring policies. Notwithstanding this fact, public universities and employers should cautiously prepare for the sweeping implications that this decision will have on the way in which they operate in the future. Second, provided the Appellate decision stands - universities will once again be allowed to consider race as a factor when making admission decisions, and will be able to administer scholarships and other financial aid to certain targeted groups based on race or sex, subject to the strict limitations established by the U.S. Supreme Court in Gratz v. Bollinger, 539 U.S. 244 (2003) and Grutter v. Bollinger, 539 U.S. 306 (2003).

In addition, although the Sixth Circuit did not specifically address the use of affirmative action in public contracting or public employment, it is clear that the court has deemed the entire state amendment unconstitutional. Therefore, it is conceivable that not only will educational institutions be impacted by the Court's decision, but government entities as well. Consequently, entities such as municipalities may be allowed to consider race and/or gender in the area of public contracting provided other previously established constitutional hurdles are satisfied.