

Creative Management Approaches: Legal Limits

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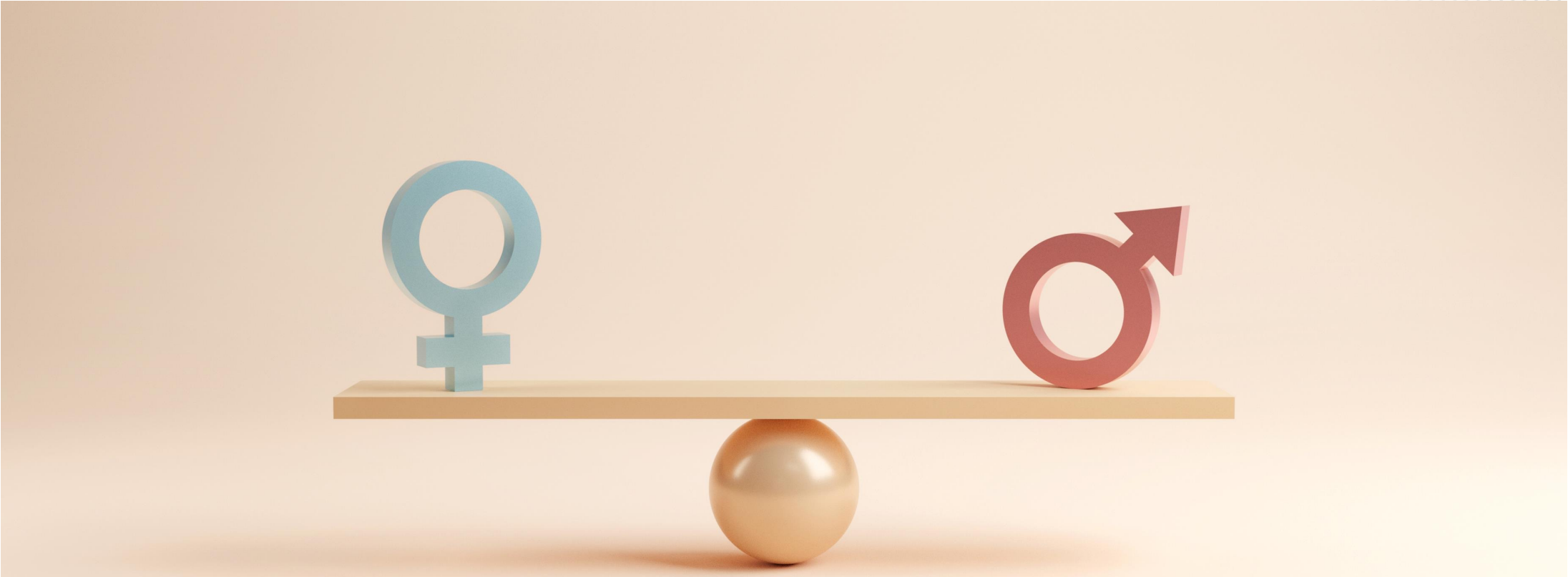


Agenda

Gender Identity in the
Workplace

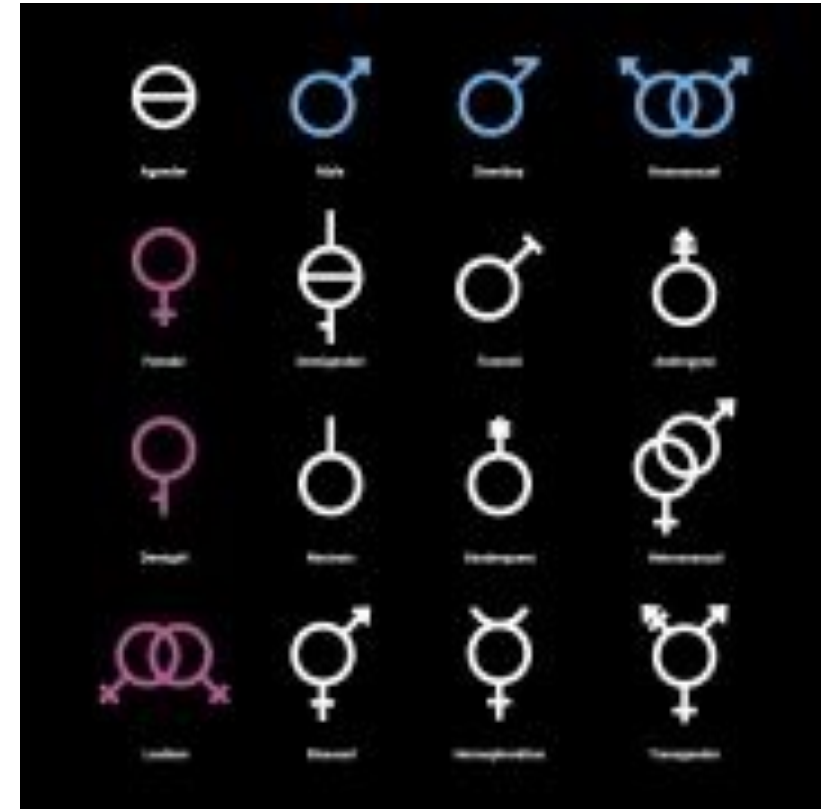
The Future of Affirmative
Action

Gender Identity Discrimination Law



Gender Identities

- Male
- Female
- Transgender
- Non-binary . . . and more!
- People impacted gender identity discrimination includes: “anyone who might express their gender in any way that does not conform to preconceived notions about how people of a particular gender should express themselves.” U.S. Dept. of Labor, DOL Policies on Gender Identity: Rights and Responsibilities.



The Landmark Case of *Bostock v. Clayton County*, 2020

- Virginia Human Rights Act, 2020: Gender identity and sexual orientation added as protected categories
- ***Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)**: Discrimination based on sexual orientation or gender identity constitutes discrimination “because of ... sex” in violation of Title VII of the Civil Rights Act of 1964
- January 20, 2021, President Biden’s Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- Office of Personnel Management (OPM) *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*

U.S. Department of Labor Technical Assistance Document, June 2021

- “Managers should ... make clear that employees should respect the gender identity and expression of all coworkers and customers. . . . [M]anagers should discuss appropriate behavior with employees like **using correct pronouns for coworkers and customers** and **speaking up if transgender and non-binary coworkers are demeaned** because of their gender identity or expression.”
- “Refer to each person **by the name and the pronoun(s)** by which the person wants to be referred.”
- “Whenever possible, **use gender-neutral language** to avoid assumptions about employees’ sexual orientation or gender identity.”
- “A person’s transgender or non-binary status should be treated with **sensitivity and confidentiality**, just as one would treat any other personal life experience.”
- Update HR and payroll documentation to reflect gender identity

EEOC Adds Non-Binary Gender Option to Discrimination Charge Intake Process

- As of March 31, 2022 individuals may select a nonbinary “X” gender marker during the voluntary self-identification questions in the EEOC Charge intake process.
- EEOC updated to voluntary demographic questions relating to gender
- EEOC modified its charge of discrimination form to include “Mx.” in the list of prefix options.
- Federal Government updated forms to include gender designation of “X”
- **“[I]ntentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.”** See EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity* (June 15, 2021).

Gender Identity Employment Discrimination Cases

Haskins v. Bio Blood Components (Feb. 17, 2023)

- Plaintiff, a believing Christian, brings lawsuit against former employer for discrimination based on religion
- Plaintiff asked for a religious accommodation to avoid the use of ‘new’ pronouns to refer to a co-worker who now identified as a man
- The employer said that accommodations proposed, including transferring the Plaintiff to another work location, imposed an undue hardship on the employer
- The court found that: “the complaint alone does not demonstrate that Defendant [the employer] could not reasonably accommodate Plaintiff’s beliefs without undue hardship.”

Gender Identity Employment Discrimination Cases

Texas v. EEOC (Oct. 1, 2022)

- Court finds that guidance from the EEOC and from Health and Human Services (“HHS”) regarding gender identity discrimination and gender affirming care is unlawful.

Tennessee et al. v. U.S. Department of Education et al. (July 15, 2022)

- Court issued a preliminary injunction temporarily blocking the EEOC from enforcing the EEOC’s and HHS’s guidance in 20 states pending litigation (excluding Virginia).

Affirmative Action at SCOTUS



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Regents of the University of California v. Bakke (1978)



White man with higher test scores than minority students denied admission twice to medical school. He alleged the university's quota system was unlawful under Title VI and the 14th Amendment

16 out of 100 spots reserved for minorities
Special Admissions Committee selection
No competition against general admissions
Different academic standards



California Supreme Court ruled in favor of Bakke.



SCOTUS Decision: Quota system unconstitutional and affirmative action to remedy past discrimination is not a legitimate interest of higher education. Diversity is the only compelling interest for considering race as a “plus.”

Grutter v. Bollinger (2003)



White Michigan law school applicant, 3.8 GPA and 161 LSAT score alleged race discrimination under Title VI and the 14th Amendment



Alleged that race was the “predominant” factor to her denial with no compelling interest



University of Michigan asserted their compelling interest in promoting diversity for educational benefits



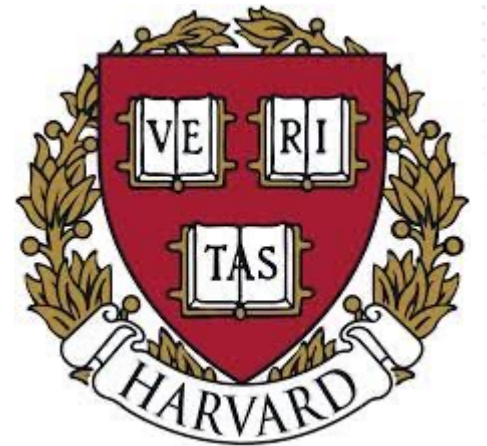
District Court ruled unconstitutional because they “clearly consider” race and was “practically indistinguishable from a quota system”. 6th Circuit reversed.



SCOTUS RULING: “Race-sensitive” admissions programs that consider race as only one factor and gives individual consideration to each applicant is **lawful**

Students for Fair Admissions v. Harvard (2022)

- Plaintiff sued Harvard alleging its admissions process violates Title VI of the Civil Rights Act by discriminating against Asian Americans in favor of White applicants
 - Racial balancing
 - Failure to use race merely as a “plus” factor
 - Failing to use race-neutral alternatives
- Harvard admits to using race as a factor but in line with *Grutter*
- Harvard won after 15-day bench trial; 1st Circuit affirmed.
- Questions:
 - May higher education institutions use race as a factor in admissions?
 - If so, does Harvard’s process violate Title VI of the Civil Rights Act of 1964?



Students for Fair Admissions v. UNC (2022)

- Plaintiff sued UNC alleging its admissions process violates Title VI of the Civil Rights Act by discriminating against White and Asian-Americans in favor of underrepresented minorities in violation of Equal Protection and Title VI
- UNC uses holistic application process with 40 admissions criteria in 8 categories. Race may be used but no evidence of grouping of candidates by race.
- UNC won at trial based on its highly individualized, narrowly tailored, race-flexible approach; bypassed 4th Circuit to get to SCOTUS



SCOTUS Oral Arguments

” Oral Arguments heard on October 31, 2022



Plaintiffs seek to ban “race-conscious” affirmative action programs for higher education



Harvard and UNC defended processes as merely using race as a “plus” factor in their holistic review



Questions followed philosophical lines, foreshadowing a 6-3 ruling against Harvard and UNC



Conservative justices unpersuaded by value of racial diversity and diversity goals in college admissions



Liberal justices emphasized how race was not determinative or singular

Predicted Impact

- Title VI similar to Title VII
- If SCOTUS removes diversity as a “compelling interest” employers may have a harder time justifying voluntary affirmative action programs for the sake of racial diversity in the workplace
- Employers may engage preferences in decisions if there is a “strong basis in evidence” that remedial action is necessary because of a demonstrated history of past discrimination . . . *for now*
- Employer Takeaway: Recognize the spectrum of risk you are on and make sure you are using and communicating about the business case to justify DEIB initiatives

Questions?

Thank you for your time!



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