

March 13, 2023

The University of Oregon Senate
1208 University of Oregon
Eugene, OR 97403

Senators,

I understand that following the Supreme Court's ruling in *Students for Fair Admission v. Harvard* and *Students for Fair Admission v. UNC* (collectively "*SFFA*") questions have arisen over the Office of the General Counsel's ("OGC") guidance related to attracting and retaining diverse faculty. To be clear, OGC's advice concerning hiring and retention following *SFFA* has suffered no change from that which preceded the decision: race preference is prohibited by law; an examination of campus's use of race in its employment practices is necessary; but no substantive changes are currently recommended. The need for such little movement post-*SFFA* is due in part to the scope of the decision. But also, to OGC's focused adherence to established precedent and university administration's careful consideration and application of that advice.

Ahead of today's Faculty Senate meeting, Dr. Gerard Sandoval provided OGC with a set of questions that when answered, might provide some clarity on the topic. I certainly hope that the responses below offer as much.

- 1. What advice is the UO administration, specifically the General Counsel's office, giving to units, schools, and departments across campus regarding using race and other protected status as a preference or consideration in hiring processes for faculty and staff?**

As an initial matter, please understand that *SFFA* is not a case explicitly about employment. Rather, the questions before the *SFFA* Court poked at the use of race as a factor in university admissions; seeking to reconcile the waxing and waning of prior judicial guidance concerning racial preferences in that arena – *See Bakke* (1978), *Grutter* (2003). The *SFFA* decision applies most directly to UO's undergraduate and graduate admissions practices/policies, though it is also informative more generally of the Court's view of permissibly race-neutral decision-making criteria under a strict scrutiny rubric.

Turning then to OGC's *long-standing* guidance regarding the use of race in hiring and retention decisions: units may consider an individual's lived experiences or their reflections on their race, but race-based preferences, plus-ups or requirements are impermissible and inconsistent with the United States Constitution. For many years, OGC has based its advice on the bedrock of Title VII of the Civil Rights Act of 1964 and *Wygant v. Jackson* (1986) and the limitations that case imposed on race-conscious employment decisions under the 14th Amendment/Equal Protection Clause of the Constitution. Campus clients have routinely received guidance from OGC that eligibility requirements, benefit distributions and/or other employment practices animated by a racial preference, would not satisfy a court's "strict scrutiny" review requiring an employer's action be (1) justified by a compelling governmental interest; and (2) narrowly tailored to achieve that goal. Simply put, OGC has advised that requiring that an individual belong to a racial group in order to gain access to employment or an employment benefit cannot pass judicial muster.

Alongside this advice, of course, OGC has worked proactively help the Office of the Provost ("OTP") and other campus units evaluate their goals and craft legally compliant strategies to achieve them. While promoting bald race requirements

is not permissible under the law, many alternative structures may be explored to generate the diversity campus desires. Indeed, *SFFA* lends some detail to this effort. OGC has sought problem-solving conversations and will continue to offer diligent, comprehensive advice to campus clients as the University marches toward its future.

2. How has this advice affected the allocation of funds (from the provost's office or otherwise) previously earmarked for recruiting and retaining faculty of color?

OGC's advice related to the use of race in hiring and retention is not intended to, nor should it be interpreted to directly affect the allocation of any funds intended to support the pursuit of diversity among faculty.

It is important to understand that OGC provides campus clients with legal review, risk assessment, and advice. It does not make administrative decisions or funding distributions. OGC's advice with respect to the use of race in employment decisions has never prohibited the pursuit of increased diversity among faculty or the allocation of funding necessary to realize success in those efforts. Any growth or reduction in funding earmarked toward promoting diversity is beyond OGC's authority and would be unrelated to the content of its advice.

It may be of note, however, that OGC has recently provided the OTP with guidance on transitioning the Underrepresented Minority Recruitment Program ("UMRP") into its new life as the Inclusive Excellence Fund ("IEF"). Under its former structure as the UMRP, OGC advised that granting departments additional funding based on a diversity-hire metric was legally permissible. To my knowledge, the UMRP operated in that fashion for some time. But as OTP recently augmented the program away from that distribution schema and toward directly providing individual faculty additional resources, OGC advised OTP away from using race as a *necessary* qualification for the acquisition of those dollars. OGC has, at numerous points in the last several months, discussed with OTP a host of alternative methods to aid in capturing diverse employee applicant pools and retain diverse faculty through focusing on candidates' lived experiences and other observable traits that might promote population diversity. In each instance, it has done so without reference to the level of funding or resources made available to the relevant campus units.

3. What is the current law related to affirmative action in recruiting and retaining faculty of color?

As described above, the University of Oregon – as a public employer - has obligations to Title VII of the Civil Rights Act of 1964 and the 14th Amendment/Equal Protection Clause of the United States Constitution. The 14th Amendment provides that no State shall "deny to any person . . . the equal protection of the laws" and has submitted issues of race classification to a strict scrutiny test. Thus, in order to maintain viability, governmental action using preferences based on race must be (1) justified by a compelling governmental interest; and (2) narrowly tailored to achieve that goal. Courts have identified only two compelling interests that support race-based governmental action: 1) rectifying *specific*, identified instances of past discrimination that violated the Constitution or statute and 2) avoiding imminent and serious risks to human safety in prisons. Neither of these interests are routinely found in hiring and retention efforts and the *SFFA* Court was clear in stating that racial preferences lack sufficient narrow tailoring.

Under this relatively prescriptive rubric it is not an issue of *can* a public employer seek diversity through recruitment and retention efforts. Rather, it is the *how* that matters. Employers may examine applicants for employment and candidates for exclusive benefits under criteria that observes that individual's lived experiences, reflections on their race, and their achievements in light of the personal circumstance. However, those recruitment and retention actions must promote diversity through race-neutral efforts that do not preference one classification over another.

4. In your view, what is the likelihood that the Supreme Court will make this work more difficult in the future based on future cases?

And

5. How do the ripples of the decision shape DEI programs at UO? And not just limited to the actual division itself but more generally.

DEI and affirmative action initiatives are nearly certain to continue to receive significant attention in the courts. The yawning split within today's America related to diversity is at times startling. Many individuals work for and believe in the importance of initiatives focused on increasing diversity, while others hope to turn the idea completely away. And as you well know, these programs are currently serving as a sort of political football, the opposition to which has gained observable purchase within political campaigns and even state legislatures. Well-heeled special interest groups antagonistic to the efforts often carry the legal water for opposition as we witnessed in *SFFA*, and I think it fair to identify this Supreme Court as more open to those arguments than past benches. Rolled up, that lays out a fertile landscape suitable for increasing litigation seeking to undermine institutional DEI.

That said, it is difficult to know exactly how and when the Supreme Court might weigh in. *SFFA* anticipates forceful challenges to the use of race in issuing benefits beyond admission, including student financial aid, scholarships, employment and other zero-sum resources. And Justice Gorsuch's concurring opinion reflecting on the slight distance between Title VI and Title VII compliance all but guaranteed as much. In this way, the Supreme Court is almost assured to make the circumstances for institutions more challenging, not less.

At UO, the steady state of OGC's counsel related to admissions has left the need for only slight tweaks in process to ensure safe compliance with the race-neutral admission mandates of *SFFA*. And as described above, the office's enduring attention to *Wygant's* precedent where public-sector employment, hiring and retention criteria are concerned has firmly established a habit of permissible behavior. Nonetheless, UO should continually assess its practices to identify areas for improvement as well as areas of success. DEI programs and units will continue to receive guidance from OGC that explicit race-preferences and other methods that focus on an individual's race should be sidelined for broader, race-neutral criteria that operate to produce similar diversity outcomes.

Thank you for the opportunity to present these answers and to engage an ongoing dialogue about how UO may realize its diversity aims.

Sincerely,



Carson Gabriel Campbell
Associate General Counsel