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COMMUNITY COLLEGE FORUM: A DISCUSSION OF LAW & POLICY ISSUES FROM THE UNIQUE PERSPECTIVE OF COMMUNITY COLLEGES

By:

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I. INTRODUCTION

My co-presenter, Peter B. Kushibab, is going to address legal and policy issues surrounding some substantive topics under frequent discussion at community colleges, including governance models, and open records law. Below, after covering some general discrimination issues which have recently faced community colleges, a series of recent court decisions involving community colleges on a variety of topics will be noted.

II. THE IMPACT OF THE RECENT SUPREME AFFIRMATIVE ACTION CASES ON COMMUNITY COLLEGES

Community college clients have during the past year commonly asked about the impact of the 2003 U.S. Supreme Court decisions on a community college’s general affirmative action policies and practices.

A. A Summary of the Supreme Court Cases and Their Impact on Community Colleges

On June 23, the United States Supreme Court handed down two separate opinions regarding the constitutionality of the admissions policies at the University of Michigan.

In *Grutter v. Bollinger*, No. 02-241, 2003 WL 21433492, 539 U.S. ____ (2003), the Court, on a 5-4 decision, endorsed Justice Powell’s principal opinion in the landmark *Regents of Univ. of California v. Bakke* decision [438 U.S. 265 (1978)]. Justice Powell had concluded that the educational benefits that flow from a diverse student body present a compelling state interest that justifies the use of race as a “plus” factor, among many factors, in the admissions process at a professional school. The *Grutter* majority opinion, authored by Justice O’Connor and supported by Justices Stevens, Souter, Ginsberg, and Breyer, found that application of the *Bakke* standards to the University of Michigan Law School’s admissions process, including an individualized review of each application, was sufficiently “narrowly tailored” to be lawful.

On the other hand, in *Gratz v. Bollinger*, No. 02-516, 2003 WL 21434002, 539 U.S. ____ (2003), the Court held, in a 6-3 vote, that the University’s undergraduate admissions process, where minorities automatically received 20 points on a 150 point scale, with 100 points being the general admission threshold, was not tailored narrowly enough to survive the strict scrutiny applied to racial classifications, and therefore violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. Section 1981.
Basis for The “Diversity as a Compelling State Interest” Conclusion

The law of equal protection requires that racial classifications are *suspect* – subject to the Supreme Court’s strict scrutiny and justified only where there is a compelling state interest. The Court found that the educational benefits that flow from a diverse student body result in a compelling state interest to use race as a plus factor, based upon five principal reasons. First, the Court relied upon social science evidence introduced at trial, including expert studies and reports. Second, the Court noted that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints,” citing the “friend of the court” briefs filed by the 3M Company et al., and General Motors Corporation. Third, the Court noted that retired officers and civilian leaders of the U.S. military asserted in their friend of the court brief that “a highly qualified, racially diverse officer corps … is essential to the military’s ability to fulfill its principle mission to provide national security,” with those leaders coming primarily from the Reserve Officer Training Corps (ROTC) sponsored by colleges and universities. Fourth, the Court cited the brief of the United States, which asserted that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” Finally, the Court noted that universities in general, and law schools in particular, “represent the training ground for a large number of our Nation’s leaders” and that in order for our leaders to have legitimacy, it is “necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”

Application of the “Narrowly Tailored” Standard
To The Law School Process and the Undergraduate Process

Even with compelling state interests, the use of race as a factor has to be, according to established Supreme Court precedent, “narrowly tailored.” The Court in Grutter found that the admissions process at the Law School was narrowly tailored because it did not provide quotas for minorities, it did not include separate admission tracts, there was no insulation of minorities from competition with the entire pool of candidates, there was an individualized, holistic consideration of each application, and the process considered multiple factors other than race to create a diverse pool of admitted candidates. Other possible bases for diversity admissions pursuant to the admissions policy at the Law School included “examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.” The Court also concluded that race-neutral alternatives had been seriously considered in good faith, that there was no undue harm to
non-minority candidates, and that it took the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and that it would “terminate its race-conscious admissions program as soon as practicable.” The Court suggested that 25 years had passed since the Justice Powell opinion in *Bakke*, and that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

As to the undergraduate admissions process, the Court in *Gratz* found that the process was not narrowly tailored, since it did not provide for individualized consideration of each application, and minorities automatically received 20 points for being a minority.

**Practical Impact of the Court’s Decisions**

* The Court made clear that the Justice Powell opinion in *Bakke* is the law of the land, and rejected conclusions in the Federal 5th and 11th Circuit Courts of Appeal that Justice Powell’s diversity rationale was not the holding of the Supreme Court. As the *Grutter/Gratz* Court noted, the finding of diversity as a compelling state interest was critically important to hundreds of entities that had filed friend of the court briefs in support of diversity, including colleges and universities, businesses, and military leaders.

* The Court affirmed its past commitment to strict scrutiny of any use of race, rejecting “quotas,” and requiring that, even when there is a compelling state interest such as diversity to justify using race as a plus factor, the use must be narrowly tailored, not “automatic,” and characterized by holistic individualized review, competition among the entire pool, and multiple factors other than race for diversity consideration. The Court also endorsed prior requirements that race-neutral alternatives be considered, that the process not unduly burden non-minority candidates, and that it have a “sunset” or at least periodic review as to whether its continuation is necessary.

* Given that the Court cited with approval and without qualification its prior decisions limiting the constitutionality of minority contractor “set aside” programs, the Court’s *Grutter/Gratz* decisions do not appear to have changed the law in this arena. The prior minority set aside cases cited by the Court in *Grutter* or *Gratz* include *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In *Adarand*, the Court held that a subcontractor compensation program where the federal government offered financial incentives to prime contractors for hiring disadvantaged subcontractors was subject to a heightened level of scrutiny to the extent that “disadvantage” was based on race. In *City of Richmond*, the Court considered a city program that required prime contractors who were awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each
contract to minority businesses. The Court held that the city failed to sufficiently prove that its set aside program was designed to remedy past discrimination where the city did not show past discrimination in the local construction industry.

* Given that the Court cited with approval and without qualification its prior classic decisions regarding affirmative action in employment, the Court’s Grutter/Gratz decisions do not appear to have any significant potential impact on affirmative action in employment law. The prior cases cited by the Court in Grutter or Gratz that dealt with affirmative action in employment include Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986), Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986), and Johnson v. Transportation Agency, Santa Clara City, 480 U.S. 616 (1987). In Sheet Metal Workers, the Court upheld the principle of remedying violations of Title VII by imposing affirmative race-conscious relief where the lower court ordered a union who had been found guilty of violating Title VII by discriminating against nonwhite workers to establish a 29 percent non-white membership goal. In the Wygant case, the Court held unconstitutional a provision in a collective bargaining agreement under which the school board extended preferential protection against layoffs to some minority employees. The Court further instructed that a public employer, like the school board at issue in Wygant, who seek to remedy the effects of past discrimination must ensure that it has convincing evidence that remedial action is warranted before it embarks upon an affirmative-action program. Finally, in Johnson, the Court held that a public agency could voluntarily adopt a narrowly-tailored affirmative action program based upon an appropriate statistical analysis that certain job classifications were underrepresented in the employer’s workforce.

* Colleges and universities and any other educational institutions that use race as a factor in their admissions policies will obviously need to review these policies in light of the standards applied in Grutter/Gratz. Automatic preferences for race, separate admission or consideration tracks, and review of applications that is not “individualized” will need to be promptly addressed. The narrow tailoring standards, including no quotas, no insulation of minorities from competition with the pool as a whole, no undue harm to non-minorities, good faith consideration of race-neutral alternatives, and time limitations (sunset or periodic review) will need to be addressed.

* Although not directly addressed by the Court, any race exclusive scholarship, preference, or honors program which is financed or administered by colleges or universities or other educational institutions should be reviewed in light of the standards set by the Court in Grutter/Gratz.
B. Continuing Effect of Executive Order 11246

The Supreme Court’s decision had no impact on the two-tiered obligations generally imposed by EO 11246 and implementing regulations on government contractors, grant-recipients, and subcontractors. In a shall, if a community college receives a federal grant or contract exceeding $10,000, the community college must adhere to certain non-discrimination principles, and pass on that adherence to any subcontractor. If a federal grant or contract exceeds $50,000, then the government contractor must adopt an affirmative action plan, consistent with applicable federal regulations, and pass through that obligation to any subcontractor.

III. THE NEAREST NON-DISCRIMINATION TREND -- REQUESTS FOR PROHIBITION OF HARASSMENT BASED UPON GENDER IDENTITY/TRANSGENDER STATUS

There is an escalating trend across the country to specifically include anti-discrimination protection to persons on the basis of gender identity or transgender status. A representative example of how laws and ordinances define this protected status can be found in the definition in the State of Rhode Island statute:

“Gender Identity or Expression” includes a person’s actual or perceived gender, as well as a person’s gender identity, gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth.”

A. State Statutes And Municipal Ordinances Prohibiting Discrimination On The Basis Of Gender Identity Or Transgender Status

As listed by the Transgender Law & Policy Institute, at www.transgenderlaw.org/ndlaws/index.htm., two states (Rhode Island and Minnesota), eight counties, and 45 cities have laws which generally prohibit discrimination on the basis of gender identity or expression. In addition, six cities and one county are listed as prohibiting such discrimination in public employment only.

B. Federal Cases Holding That Discrimination On The Basis Of Gender Non-Conformity Or Transgender Status Is A Form Of Discrimination On The Basis Of Sex

The National Center for Lesbian Rights has collected federal cases holding at least in some part that discrimination on the basis of gender non-conformity and/or transgender
status is a form of discrimination on the basis of sex. This collection includes one U.S. Supreme Court citation [Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), cited as recognizing that “sex stereotyping” can constitute sex discrimination], nine federal Circuit Court of Appeals decisions, and thirteen federal District Court decisions. This compilation, with short summaries, can be accessed at www.ncirights.org or at www.transgenderlaw.org/cases.federalcases.htm.

C. State Cases Recognizing Protection For Transgender People Under State Law

The Transgender Policy Institute has summarized, at www.transgenderlaw.org.org. ndcaselaw.index.htm, the following compilations. Three states [New York, Massachusetts, and New Jersey] have court interpretations concluding that sex discrimination protection includes transgender people. Two States, Connecticut and Hawaii, have state fair employment agency rulings to the same effect. Two state courts [Massachusetts and New Jersey] and two state administrative agencies [Florida and Illinois] have ruled that transsexual people are protected under state disability laws, and the Oregon Bureau of Labor and Industry found the same in limited circumstances. In addition, the D.C. Superior Court, with jurisdiction over the District of Columbia, has interpreted a D.C. statute prohibiting discrimination based upon ‘personal appearance’ to include transgender people.

D. Colleges And Universities With “Transgender Inclusive” Policies

As listed by the Transgender Law & Policy Institute, at www.transgenderlaw.org/college/ index.htm., the following colleges and universities have “pro-actively” adopted transgender inclusive non-discrimination policies: American University, Brown University, DePauw University, University of Iowa, Kalamazoo College, Knox College, Rutgers University, and the University of Washington.

In addition, the same website indicates that other colleges have adopted policies pursuant to state or municipal requirements: University of Minnesota system and other colleges and universities in Minnesota; colleges and universities in Rhode Island; and colleges and universities in New York City, including City University of New York, Columbia University, and New York University.

E. Other Recent Case Law

In Cruzan v. Special School District No. 1, 294 F.3d 981 (2002), the court held that a Minnesota school district which allowed a “transgendered” co-worker to use the women’s faculty restroom did not unlawfully discriminate on the basis of sex by creating a “hostile environment” for the plaintiff co-worker.
F. OCR Guidance

The OCR “Revised Sexual Harassment Guidance” previously cited states:

“Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student’s ability to participate in or benefit from the educational program.”

IV. FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003

Prior interpretations of the Federal Trade Commission had promulgated that before an employer could have a third party conduct an investigation into employee misconduct, the employee had to be given prior notice and had to consent in writing. After much lobbying by employer organizations, Congress included in the Fair and Accurate Credit Transactions Act of 2003, which will take effect in March, relief from this unreasonable interpretation.

Section 601 of the Act amends previous definitions of a “consumer report” to exclude communications made by a third party to an employer in connection with an investigation of suspected misconduct related to employment or to compliance with federal, state, or local law or regulations, or pre-existing written policies of the employer, provided that the report is not given to any person except the employer or specified government officials. If adverse employment action is taken against an employee based upon a third party report, the employer must give the affected employee a summary of the report.

IV. RECENT COURT DECISIONS INVOLVING COMMUNITY COLLEGES

The following summaries are ten selected recent decisions involving community colleges. The practical or policy impact of the cases will be briefly discussed in the oral presentation.


A contractor brought a breach of contract action, and was awarded three million dollars regarding a construction project. A Texas state appellate court ruled that a public junior community college district in Texas was not immune from suit. The ruling was based upon a finding that the legislature had waived such immunity by including
community colleges in the legislation regarding independent school districts, which allowed such districts to sue and be sued.

B. **Board Of Trustee Of Community College District No. 508, County Of Cook v. Coopers & Lybrand, 2203 WL 22967260 (December 18, 2003)**

A community college sued its external auditors on a negligence theory, asserting failure to notify the college of allegedly illegal, inappropriate, and highly risky investments by the college treasurer. The Court found negligence, but ruled that the college was 45% “comparatively negligent” due to misleading oral representations made by the treasurer to the auditors.

C. **Caldwell v. Board Of Trustees Of Broward Community College, 858 So.2d 1199 (Fla.App. 4 Dist. 2003).**

The plaintiff employee filed a whistleblower complaint with the State Commission on Human Relations. The Commission dismissed the complaint for lack of jurisdiction. The appellate court agreed, holding that the board of a community college in Florida is not party of the “executive branch” of the State, and therefore not a “stage agency” covered by the whistleblower statute relied on by the plaint, so the Commission did not have jurisdiction to investigate.

D. **Gaby v. Board of Trustees of Community Technical Colleges, 348 F.3d 62 (2003)**

A retired professor sued his community college employer, arguing that the denial of his request for emeritus status violated the First Amendment and the Equal Protection Clause of the U.S. Constitution. The Second Circuit Court of Appeals held that the board of the college was not a “person” under 42 U.S.C. Section 1983, and upheld summary judgment for the college.

E. **Snider v. Jefferson State Community College, 344 F.3d 1325 (11th Cir. Ala.)**

The plaintiffs were male security officers who sued the President and the Dean of Business Operations of their community college employer. The security officers alleged that their supervisors had violated the Equal Protection clause of the U.S. Constitution by committing same-sex harassment against them. The Eleventh Circuit Court of Appeals affirmed dismissal of the suit relying upon by “qualified immunity” doctrine, since at the time the harassment occurred, it was not clearly established that same-sex harassment violated an employee’s constitutional rights. The Eleventh Circuit’s Downing decision, which was handed down after the facts occurred in the Snider case, did subsequently make it clear that in the Eleventh Circuit, same-sex harassment of employees can constitute a violation of Equal Protection constitutional rights.

A student in a class designed to train guides for horse packing trips was injured off-campus while on a class assignment. The student claimed that the community college was negligent in planning and supervising the assignment. A basis for this claim was that the instructor had not checked the driving record of the third party student who was driving a pickup truck, from the bed of which the plaintiff student was thrown and injured. The Court of Appeal affirmed summary judgment for the college, holding that the college had not duty to insure that the student had safe means of transportation for performing an off-campus assignment. The court ruled in part on a California statute to the effect that student participants in field trips or excursions are deemed, as a matter of law, to have waived claims for injuries.

G. **Avila v. Citrus Community College District**, 4 Cal.Rptr. 3d 264 (Cal.App. 2 Dist. 2003)

A suit by a community college baseball team member was filed against his opposing team’s community college, alleging negligence. The specific claim was that the opposing team’s pitcher had deliberately hit him in the head with a pitched ball. The Court of Appeal held that the California statute granting government immunity from a hazardous recreational activity did not apply, and furthermore that the opposing team’s community college had a duty under the circumstances pled to exercise reasonable care.

H. **California School Employees Association v. Fremont Newark Community College District** (Cal.App. 1 Dist. 2003).

A union and a former community college office assistant sued regarding the employee’s job classification and termination. The Court of Appeal affirmed dismissal of the suit, holding that the Public Employee Relations Board had initial exclusive jurisdiction, and that since a community college in California is an arm of the State, it was not subject to suit under 42 U.S.C. Section 1983.


The community college sued the County Board, demanding that the Board appropriate sufficient funds or issue bonds to finance a capital project proposed by the college. The trial court ordered the Board to fund the project, or if the Board members did not, they would be incarcerated. The Supreme Court of New Jersey reversed, on grounds that the college could not mandate the Board to appropriate funds.

An African-American Associate Dean of Students alleged racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The suit alleged discrimination based on the location of and signage regarding the plaintiff’s office; her non-appointment to a diversity committee; and a failure to promote. The Court dismissed the claim, holding that the location of one’s office is not an ”adverse employment action” under Title VII, and that the evidence did not establish the basis for the other allegations.