IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

JENNIFER GRATZ AND PATRICK HAMACHER,

for themselves and all others similarly situated,

Plaintiffs,

v.

LEE BOLLINGER, ET AL.,

Defendants,

and

EBONY PATTERSON, ET AL.,

Intervening Defendants.

Civil Action No. 97-75231
Hon. Patrick J. Duggan
Hon. Thomas A. Carlson

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

CLASS ACTION

Plaintiffs, by and through counsel, hereby respectfully move this Court for an order as follows:

1. Amending this Court's Order filed January 30, 2001, by granting partial judgment in favor of plaintiffs and the class declaring the admissions systems of defendants' College of Literature, Science & the Arts ("LSA") for years 1995-2003 unconstitutional under the Fourteenth Amendment to the United States Constitution and unlawful under 42 U.S.C. § 1981 and 42 U.S.C. § 2000d (Title VI).

In support of this motion, Plaintiffs submit the accompanying memorandum of law.

On December 7, 2004, the undersigned counsel had a conference with attorneys for defendants, explained the nature of the motion and its legal basis, and requested but did not obtain concurrence in the relief sought.

Dated: December 7, 2004

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CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

STATEMENT OF ISSUES

1. Whether on the remand from the Supreme Court's decision in this case and its instructions for further proceedings consistent with the Supreme Court's opinion, this Court should amend its January 30, 2001, order by granting plaintiffs' motion for partial summary judgment declaring the admissions systems for defendants' College of Literature, Science & the Arts ("LSA") for years 1995 through 2003 unconstitutional and unlawful.

CONTROLLING AUTHORITIES

Cases

Gratz v. Bollinger, 539 U.S. 244 (2003)

Statutes and Rules

Federal Rule of Civil Procedure 56

42 U.S.C. § 1981

42 U.S.C. § 2000d

INTRODUCTION

On June 23, 2003, the United States Supreme Court rendered its opinion and decision in this case with respect to the issue on which it granted the petition for certiorari: Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights of 1964 (42 U.S.C. § 2000d) or 42 U.S.C. § 1981? The Court answered the question in the affirmative, deciding that the admissions systems in effect for the defendants' College of Literature, Science & the Arts ("LSA") beginning in 1999 were unconstitutional and violative of both Title VI and 42 U.S.C. § 1981. Because this Court had in an order filed January 30, 2001, granted defendants' motion for summary judgment with respect to the admissions systems in effect beginning in 1999, the Supreme Court "reverse[ed] that portion of the District Court's decision granting [defendant's] summary judgment with respect to liability and remand[ed] the case for proceedings consistent with [its] opinion." *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003). Consistent with the Supreme Court's direction, plaintiffs have brought the present motion for the purpose of obtaining a final judgment declaring the defendants' LSA admissions systems for years 1995-2003 unconstitutional and unlawful under 42 U.S.C. § 1981 and § 2000d. This requires no more than to amend the Court's January 30, 2001, order, which had declared unconstitutional the LSA admissions systems for years 1995-1998.

PROCEDURAL HISTORY

Plaintiffs commenced this action in September 1997, challenging the admissions systems for the LSA in effect from 1995 forward as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, and unlawful under Title VI and 42 U.S.C. § 1981. Plaintiffs sought declaratory and injunctive relief and damages, both against the Board of Regents of the University of Michigan ("University"), and certain individual defendants responsible for

administering the challenged programs. They commenced the case as a class action, and in an opinion and order filed on December 23, 1998, this Court certified the case as class action under Federal Rule of Civil Procedure 23(b)(2). The Court defined the class to be all "[t]hose individuals who applied for and were not granted admission to the College of Literature Science & the Arts of the University of Michigan for all academic years from 1995 forward and who are members of those racial or ethnic groups, including Caucasian, that defendants treat less favorably on the basis of race in considering their application for admission." *See* Order filed December 23, 1998, at p. 2.

In the same opinion and order granting class certification, the Court bifurcated trial of liability and damages, with liability to be determined first. After extensive discovery, the Court heard the parties' motions for summary judgment on November 16, 2000. In an opinion filed on December 13, 2000, and order filed on January 30, 2001, the Court made various rulings, including the following:

1. Granting summary judgment in favor of plaintiffs with respect to the LSA's admissions programs from 1995-1998 and declaring the admissions programs for those years to be unconstitutional;

2. Granting summary judgment in favor of the University defendants with respect to the LSA's admissions programs for 1999 and 2000;

3. Denying plaintiffs' request for injunctive relief;

4. Granting defendants Bollinger's and Duderstadt's motion for summary judgment on grounds of qualified immunity;

5. Denying defendant Board of Regent's motion for summary judgment on grounds of Eleventh Immunity.

In the same order, the Court made the determination under 28 U.S.C. § 1292(b) that the case presented certain controlling issues of law on which there was a substantial ground for difference of opinion, justifying an immediate appeal to the Sixth Circuit. Pursuant to this certification, defendants filed a petition for appeal and plaintiffs filed a cross-petition. Plaintiffs also filed an appeal as a matter of right, pursuant to 28 U.S.C. § 1292(a), of this Court's order denying an injunction. Finally, the intervening defendants filed an appeal from this Court's separate order rejecting the intervenors' independent justifications of the defendants' admissions programs.

The *en banc* Sixth Circuit ultimately heard the parties' various appeals on December 6, 2001, on the same day that it heard the University of Michigan Law School's appeal from Judge Bernard Friedman's decision in *Grutter v. Bollinger*. While the Sixth Circuit rendered a 5-4 decision reversing Judge Friedman on May 14, 2002, *see Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (*en banc*), it did not issue a decision in this case. Plaintiffs subsequently filed a petition for certiorari before judgment in the United States Supreme Court, which was granted on December 2, 2002, with respect to the following question:

> Does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), or 42 U.S.C. § 1981?

While the defendants had appealed this Court's order granting summary judgment in favor of plaintiffs on the unlawfulness of the 1995-1998 admissions systems, defendants did not file a petition or cross petition for certiorari in the Supreme Court. In their merits brief to the Supreme Court, defendants even expressly "disavowed" the admissions programs in effect from 1995 through 1998 that this Court had ruled unconstitutional and which defendants had

vigorously defended in this Court and the Sixth Circuit. *See* Brief for Respondents on Writ of Certiorari Before Judgment 5 n.7.

The Supreme Court heard oral argument in both this case and *Grutter v. Bollinger* on April 1, 2003, and issued its separate opinions and decisions in both cases on June 23, 2003. In a 5-4 decision, it affirmed the Sixth Circuit's decision in *Grutter*, concluding that the University of Michigan Law School's use of race in admissions was narrowly tailored to achieve a compelling interest in educational diversity. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In this case, however, the Supreme Court reversed this Court's order granting summary judgment in favor of defendants with respect to the admissions programs in effect beginning in 1999. In its 6-3 decision, the Court concluded that the admissions programs were not narrowly tailored to achieve a compelling interest in diversity for reasons explained in detail in the Court's opinion. The Supreme Court held that these admissions programs violated the Equal Protection Clause of the Fourteenth Amendment, Title VI and 42 U.S.C. § 1981. *Gratz v. Bollinger*, 539 U.S. at 275-76 & n.23. Accordingly, the Supreme Court "reverse[ed] that portion of the District Court's decision granting respondents summary judgment with respect to liability and remand[ed] the case for proceedings consistent with this opinion." *Id*. at 276. On October 29, 2003, the Sixth Circuit issued an order remanding the case back to this Court, hence dismissing the appeals before it. Plaintiffs have brought this motion and several others before it in conformance with the Supreme Court's direction for further proceedings consistent with its opinion and decision in this case.

ARGUMENT

Plaintiffs Are Entitled to Summary Judgment in Their Favor on the Unconstitutionality and Unlawfulness of the LSA's Admissions Programs for All Years Challenged in This Action (1995-2003).

The Supreme Court's opinion and decision removed any doubt about whether the admissions programs challenged in this case violate the Equal Protection Clause of the Fourteenth Amendment and two federal civil rights statutes, Title VI and 42 U.S.C. § 1981. In furtherance of the Supreme Court's order of a remand for "proceedings consistent with [its] opinion," *Gratz*, 539 U.S. at 276, plaintiffs respectfully request this Court to amend its January 30, 2001, order so that it conforms to the Supreme Court's opinion in this case. Just as this Court had earlier granted plaintiffs' motion for summary judgment in part and issued a declaration that the admissions systems in effect for 1995 through 1998 were unconstitutional, the amended order should declare unconstitutional the admissions programs of the LSA for years 1999 through 2003. In addition, the Supreme Court's opinion in this case establishes that the programs violated both Title VI and 42 U.S.C. § 1981, explaining that discrimination that violates the Equal Protection Clause also violates Title VI and Section 1981. *See Gratz*, 539 U.S. at 276 & n.23.[1] Accordingly, while this Court's January 30, 2001, order did not explicitly address the Title VI and Section 1981 claims, the determination that the 1995 through 1998 programs were unconstitutional compels the conclusion that these programs also violated Title VI and Section 1981, just as the Supreme Court held that the programs in effect beginning in 1999 violated both the Constitution and these statutes.

[1] "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz*, 539 U.S. at 276 n.23 (citing *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *Alexander v. Choate*, 469 U.S. 287, 293 (1985)). In addition, "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981." *Gratz v. Bollinger*, 539 U.S. at 276 n.23 (citing *General Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 389-90 (1982)).

Plaintiffs' request for an amended order granting the judgment and declaratory relief requested herein is nothing more than a request that the Court enter the same order as to the admissions systems in effect from 1999 to 2003 that it did previously as to the 1995-1998 systems, and that the declaration be extended for all years to encompass the plaintiffs' claims under Title VI and Section 1981, in addition to the Equal Protection Clause claim. Partial summary judgment and a declaration of rights for all years at issue (1995-2003) is appropriate and necessary for the same reason that it was appropriate and necessary when this Court properly granted summary judgment and a declaration with respect to the 1995-1998 admissions programs. There are no genuine issues of material fact in dispute with respect to the unconstitutionality and unlawfulness of these programs, and plaintiffs are entitled to a judgment as a matter of law declaring them unconstitutional and violative of Title VI and Section 1981, as prayed for in their Complaint.

The appropriateness of a judgment in the form of a judicial declaration of rights is also implied from this Court's decision to bifurcate the determinations of liability and damages. A judicial determination that the challenged admissions systems are unlawful should precede proceedings to determine the damages or other specific remedial relief to which the plaintiffs or class members are entitled.[2] This is true regardless whether claims for damages or other remedial relief are eventually pursued on a class-wide basis, or on an individual basis following any decertification of the class. Accordingly, plaintiffs respectfully request the Court to amend its January 30, 2001, order by declaring defendants' LSA admissions programs from 1995 to 2003 unconstitutional and unlawful under Title VI and 42 U.S.C. § 1981.

[2] This Court's opinion granting class certification essentially acknowledges this point: "If the Court enters a finding that defendants' admissions policy is unconstitutional, the Court will then make a determination as to how to proceed with the damage phase of the trial." Opinion filed December 23, 1998, at p. 16.

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request the Court to grant their motion for partial summary judgment and an order amending the Court's January 30, 2001, order to include a declaration that defendants' admissions systems of the LSA for years 1995 through 2003 are unconstitutional and unlawful under 42 U.S.C. § 1981 and 42 U.S.C. § 2000d.

Dated: December 7, 2004

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RE: ***Jennifer Gratz and Patrick Hamacher v. Lee Bollinger, et al.***
Court File No.: 97-75231

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2004, I electronically filed

1. Plaintiffs' Motion for Partial Summary Judgment on Liability;

2. Memorandum of Law in Support of Motion for Partial Summary Judgment on Liability

with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Mail the papers to the following non-ECF participants:

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