



MCAD Commissioners Meeting Policy Question – 03 [A Statement from the Commissioners of the Massachusetts Commission Against Discrimination on Workplace Diversity, Equity and Inclusion Programs and Positions]

Decided at open meeting held on January 23, 2024

We, the Commissioners at the Massachusetts Commission Against Discrimination (“MCAD” or “Commission”), are aware that since the issuance of the U.S. Supreme Court’s consolidated decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (“SFA decision”), on June 29, 2023, employers across the Commonwealth have increasingly expressed concerns and anxieties about the viability of workplace initiatives commonly known as diversity, equity and inclusion (“DEI”) and equal access programs or positions. These fears and anxieties have been stoked by, among other things, public declarations in the wake of the SFA decision that employer DEI programs by necessity convey workplace benefits and /or deny opportunities based on race and are accordingly illegal.

As an important preliminary matter, the SFA decision does not address unlawful discrimination in employment. Moreover, since 1946, discrimination based on race, national origin and other protected class membership in hiring, retention, promotion, and other employment practices has been illegal in the Commonwealth under Chapter 151B. Employment discrimination based on race, color, national origin, and other protected categories has been and continues to be unlawful in Massachusetts.

Broadly speaking, equity work in the DEI space acknowledges and engages with the effects of centuries of systemic discrimination in American society with respect to numerous historically marginalized groups, including people of color, and it does not, in and of itself, and without more, constitute race or other unlawful discrimination under Chapter 151B. It is not unlawful for employers to contemplate or address the ways in which racism or other forms of discrimination have affected its workforce or the composition of its teams, divisions, units, programs, culture, or other workplace conditions. To the contrary, employers have an affirmative duty to ensure that their workplaces are free from unlawful discrimination based on race and other protected class membership. Examining ways to guard against implicit bias in hiring or promotional processes, for example, is just one way in which DEI work might serve employers’ affirmative duties under

the law, not undermine them. Training that addresses both implicit and explicit biases, bystander intervention, and inclusive practices and strategies for greater understanding of differences within a workforce is another. Mentoring programs and ombudsman mediators that can facilitate acceptance, empathy, and equal opportunity for growth, are yet another. These and many other types of DEI work are designed to address barriers and eliminate discrimination in the workplace, not introduce it. The pursuit of diversity, equity, inclusion, and equal access is not inherently a zero-sum endeavor, necessitating that if some are included, others must be excluded based on their membership in a protected class.

For these reasons alone, we, the MCAD Commissioners, reject the notion that employer DEI efforts are categorically unlawful under Chapter 151B. The details regarding DEI programs, initiatives, or efforts in any one workplace are entirely fact-specific and must be examined on a case-by-case basis. In short, so long as employers do not discriminate against employees in the terms or conditions of their employment based on race, color, national origin, or other protected categories as proscribed by Chapter 151B, they are free to creatively engage in how to develop and maintain diverse, equitable and inclusive work environments that provide equal opportunities to their employees. Moreover, to the extent that DEI work facilitates workplaces free of unlawful discrimination, such work aligns with employers' affirmative duties under the law.