



THE BUCKEYE INSTITUTE

March 11, 2024

Eastman & Smith LTD
Attn: Carrie A. Johnson, DEI Committee Chair
One Seagate, 27th Floor
550 North Summit Street
Toledo, Ohio 43604

Re: Minority Clerkship Program

Dear Ms. Johnson:

It has come to our attention that Eastman & Smith LTD is operating a race-based program in violation of federal law. As the Supreme Court recently explained, the Equal Protection Clause and federal civil rights laws apply equally to all races, colors and nationalities. “If both are not accorded the same protection, then it is not equal.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (SFFA) (internal citation omitted).

The Columbus Bar Association has long run the **Minority Clerkship Program**, a program which has “contributed more than \$6 million in salaries to students in the program” and is only “[o]pen to 1L and 2L students of color.” **Eastman & Smith LTD** participates in the Columbus Bar Association’s Minority Clerkship Program, the dual purpose of which “is to provide both legal experience and education to law students from under-represented groups such as African American, Asian, Hispanic and Native American as well as retain attorneys from under-represented groups.” *While the sentiments of this program may be laudable, it is inconsistent with federal law.*

42 U.S.C. § 1981 prohibits race discrimination in contracting. It provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981(a). This extends to “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* § 1981(b). Further, “[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.” *Id.* § 1981(c). Section 1981 “is applicable to racial discrimination in private employment against white persons.” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976). And, 42 U.S.C. § 1985(3) prohibits private conspiracies to deprive individuals of their constitutional and statutory rights. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 314 (6th Cir. 2005).

Last year, the United States Supreme Court struck down race-based college admissions policies and reaffirmed “the absolute equality of all citizens of the United States politically and civilly

before their own laws.” *SFFA*, 600 U.S. at 201. Notably, the Court also recognized that federal civil-rights statutes prohibiting private entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause. *Id.* at 198, n.2. And the Court reiterated that this commitment to racial equality extends to “other areas of life,” such as employment and contracting. *Id.* at 204. The Court powerfully reinforced the principle that all racial discrimination, *no matter the motivation*, is invidious and unlawful: “Eliminating racial discrimination means eliminating all of it.” *Id.* at 206 (emphasis added).

Recently, several lawsuits have successfully challenged minority programs such as the Columbus Bar Association’s Minority Clerkship Program. See Monnay, *Morrison Foerster Changes DEI Fellowship Criteria Amid Lawsuit*, Bloomberg (Sept. 6, 2023); Raymond, *Second Major US Law Firm Changes Diversity Fellowship After Lawsuit*, Reuters (Oct. 6, 2023). We ask that you comply with the race-neutral-principles pronounced by the Supreme Court. To avoid litigation, The Buckeye Institute asks that you answer the following questions by February 23, 2024:

1. Will Eastman & Smith LTD immediately cease and desist from participating in the Minority Clerkship Program, or any program like it that discriminates based on race, color, or nationality?
2. Does Eastman & Smith LTD plan to proceed with the Minority Clerkship Program in 2024?
3. If Eastman & Smith LTD replaces or changes the program, will the new or revised program refrain from asking applicants their race, color, or nationality and from considering race as a factor when making selections?
4. If the new program will not be strictly race neutral, what role will race, color, or nationality play when making selections?

Thank you in advance for your cooperation.

Sincerely,

David C. Tryon

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