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SEARCH THE SITE
SITE MAP

SECTIONS:
Front Page
Today's News
Information Technology
Publishing
Money
Government & Politics
Community Colleges
Campus Life
International
People & Events
Opinion & Arts
Jobs

FEATURES:
Colloquy
Magazines & Journals
New Grant Competitions
Internet Resources
Facts & Figures
Issues in Depth
On-Line Market
Site Sampler

CHRONICLE IN PRINT:
This Week's Issue
Back Issues
Related Documents

SERVICES:
About The Chronicle
How to Register

Supreme Court Declares Moot a White Applicant's Lawsuit Over His Rejection by U. of Texas

By PATRICK HEALY

Washington

The University of Texas at Austin cannot be punished for using an unconstitutional affirmative-action policy to reject a white applicant, so long as the applicant would have been turned down anyway and the program is not now in use, the U.S. Supreme Court ruled on Monday.

The unanimous, tersely worded decision reversed an earlier finding by the U.S. Court of Appeals for the Fifth Circuit. That lower court stated that the university could be sued for rejecting François Daniel Lesage for a Ph.D. program in counseling psychology, because admissions officials were using an impermissible affirmative-action program at the time.

Susan Bradshaw, the university's associate vice-president for administration and legal affairs, said Monday that the Supreme Court had taken "a very common-sense approach" to deciding the issues. Ms. Bradshaw, who said she had not discussed the ruling with campus officials yet and was speaking for herself, noted approvingly that the Justices did not base their analysis on *Hopwood* v. *Texas*, a ruling by the appeals court that put strict limits on the use of college affirmative action in Texas. The appellate court had cited *Hopwood* in its decision favoring Mr. Lesage.

The Supreme Court, in effect, said Mr. Lesage was a poor candidate for the Ph.D. program, so the use of race in the admissions process and the impact of *Hopwood* were moot, based on the evidence in the

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case.

Mr. Lesage submitted one of 223 applications to begin in the Ph.D. program in counseling psychology at the university for the 1996-97 academic year. The university evaluated grades, standardized-test scores, and other factors -- including race -- in choosing about 20 students to admit. Mr. Lesage said he was rejected because he was white.

The university submitted evidence showing that at least 80 of the applicants had higher undergraduate grade-point averages than Mr. Lesage, and 152 had higher test scores; 73 had stronger records on both than he did.

A federal judge dismissed the case in 1997, concluding that Mr. Lesage was rejected on the merits, with race playing no role. But the appellate court disagreed a year later, saying the question was whether the university had used unconstitutional racial preferences that shut out some students.

But the Supreme Court said the issue was Mr. Lesage's qualifications, not whether he was harmed by an illegal racial-preference policy.

"[E]ven if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration," Monday's decision said.

"The Justices recognized that if the Fifth Circuit's approach had remained intact, and assuming affirmative-action policies were used in other places, anybody could become a successful plaintiff simply by applying to a school and not being admitted," said Ms. Bradshaw of Texas-Austin.

The Justices did permit Mr. Lesage to pursue in federal court the question of whether the university still uses race as a factor. Mr. Lesage's legal plans were unclear Monday, however; neither he or nor his lawyer could be reached for comment.

Background story from *The Chronicle:*

- Appeals Court Revives Reverse-Discrimination Lawsuit Against U. of Texas (10/23/98)

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- Background articles on affirmative action in Texas higher education

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