

Small Business Notes

In this issue:

- Sixth Circuit U.S. Court of Appeals Says U.S. Small Business Administration Cannot Use Sex and Race of Applicants in Allocating Restaurant Revitalization Funds for Award

Sixth Circuit U.S. Court of Appeals Says U.S. Small Business Administration Cannot Use Sex and Race of Applicants in Allocating Restaurant Revitalization Funds for Award

Antonio Vitolo and his wife were each 50 percent owners of Jake's Bar and Grill and applied for Restaurant Revitalization funds on the first day that the program opened. Under the program's rules, priority in application during the first twenty one days was to be given to restaurants owned and controlled at least 51 percent by women, veterans, or socially and economically disadvantaged persons (which includes racial minorities). Vitolo was informed that because his restaurant was not 51 percent owned or controlled by a woman or a veteran he would need to submit additional evidence that he qualified as socially and economically disadvantaged. With program funds being rapidly disbursed, Vitolo sought a restraining order and then an injunction to prohibit SBA from continuing to grant out funds (thus depleting the total amount of funds available) unless it did so in a manner that ignored race and sex. The district court denied his requests on the grounds that Vitolo was unlikely to succeed on the merits of his claims. Vitolo then appealed.

In a lengthy opinion the court made a significant point: that the court could not uphold a race-conscious policy unless it "is satisfied that no workable race neutral alternative" was available.

Here, the court said, there was an obvious race neutral alternative, "The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic." Regarding the gender specific aspect of the priority, the court said that "There is no need to use sex as a proxy when the government seeks to remedy a problem that is purely economic."

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Department of Employment and Economic Development

1st National Bank Building, 332 Minnesota, Suite E200, Saint Paul, MN 55101-1351
651-259-7114 | Toll Free: 800-657-3858 | Fax: 651-296-5287 | TTY/TDD: 651-282-5909 | [MN DEED](#)

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