DEI Task Force Update

June 5, 2024

Gibson Dunn's Workplace DEI Task Force aims to help our clients develop creative, practical, and lawful approaches to accomplish their DEI objectives following the Supreme Court's decision in *SFFA v. Harvard*. Prior issues of our DEI Task Force Update can be found in our DEI Resource Center. Should you have questions about developments in this space or about your own DEI programs, please do not hesitate to reach out to any member of our DEI Task Force or the authors of this Update (listed below).

Fearless Fund Decision

On June 3, 2024, the Eleventh Circuit held in a 2-1 decision that American Alliance for Equal Rights (AAER) is entitled to a preliminary injunction in *American Alliance for Equal Rights v. Fearless Fund*, No. 23-13138 (11th Cir.). Judge Kevin Newsom, joined by Judge Robert Luck, concluded that AAER has Article III standing to sue even though it is suing on behalf of pseudonymous members, and that preliminary injunctive relief is appropriate because Fearless' program is substantially likely to violate Section 1981 and is not protected by the First Amendment. This decision overturns the district court's denial of AAER's requested preliminary injunction and remands the case with instructions to the district court to enter a preliminary injunction preventing Fearless from closing its contest.

Fearless Foundation operates a charitable grant program providing $20,000 grants to businesses that are majority-owned by Black female entrepreneurs. AAER contends that the grant program violates Section 1981 because it racially discriminates against non-Black female entrepreneurs, including AAER's members (referred to only as Owners A, B, and C). The district court denied AAER's request for a preliminary injunction on the grounds that the First Amendment likely

protects the program. A 2-1 divided motions panel of the Eleventh Circuit subsequently temporarily enjoined the program pending appeal.

After considering the parties' briefing and oral argument, the majority opinion for the merits panel held that the plaintiff had standing to sue and that preliminary injunctive relief is appropriate. As to standing, the panel held that AAER does not need to name its members to establish organizational standing because the members' declarations were sufficient to show that they were "able and ready" to apply to the program and that there was a "likelihood that they will actually take the proscribed action" of applying for the program. In reaching this holding, the court recognized that it had split with the Second Circuit's decision in *Do No Harm v. Pfizer*, 96 F.4th106 (2d Cir. 2024).

As to the merits, the majority accepted AAER's argument that the program is a contract subject to Section 1981, reasoning that there is a bargained-for exchange in which Fearless Foundation receives certain publicity rights in return for granting a contest winner $20,000. The majority disagreed with the district court's decision that the First Amendment likely protects the program, deeming the program's refusal to consider certain applications based on race to be conduct rather than First Amendment-protected expression. The court also concluded that AAER had satisfied the additional preliminary injunction factors, holding that the lost opportunity to compete for the program irreparably harms AAER's members, and the equities and public interest weigh in favor of stopping impermissible discrimination.

Judge Rosenbaum dissented from the opinion, accepting Fearless' argument that AAER lacks standing to sue because its barebones member declarations lack the particular and concrete facts necessary to indicate that the pseudonymous members have a "genuine interest" in applying for the program. Judge Rosenbaum also observed that Ed Blum, the leader of AAER and the architect of many challenges to affirmative action initiatives, has contrived this and other lawsuits to challenge race-conscious programs across the country, using pseudonymity to cloak the tenuous connection between these programs and any real-world harm. She compared the anonymous declarants to "floppers" who did not actually experience a foul.

Gibson Dunn represents Fearless Fund and Fearless Foundation in this matter. We are evaluating all options.

Other Key Developments:

On May 21, 2024, the United States District Court for the Northern District of Ohio dismissed a challenge to Hello Alice's grant program that awards funding to Black entrepreneurs to support their small businesses in *Roberts & Freedom Truck Dispatch v. Progressive Preferred Ins. Co., et al.*, No. 23-cv-1597 (N.D. Ohio 2023). Plaintiffs, represented by America First Legal (AFL), argued that Hello Alice's program was a discriminatory contract in violation of Section 1981. The court accepted the defendants' argument that the plaintiffs lack Article III standing because they fail to allege any injury in fact. The court noted that the application period for the grant the plaintiffs claimed to want to apply for had already closed by the time they filed their lawsuit, and the plaintiffs did not allege that the defendants would offer a grant with similar race-based eligibility criteria in the future. The case has garnered significant attention, with amicus curiae briefs from the EEOC, the Southern Poverty Law Center, the Lawyers' Committee for Civil Rights Under the Law, the National Hispanic Bar Association, and Asian Americans Advancing Justice.

On May 23, 2024, the plaintiffs filed a notice of appeal to the Court of Appeals for the Sixth Circuit.

On May 21, 2024, the Seventh Circuit heard oral arguments in *Charles Vavra v. Honeywell International, Inc.*, No. 23-2823 (7th Cir.). Vavra, an engineer at Honeywell, brought a retaliation suit under Title VII and Illinois state law after he was terminated for refusing to watch a training video he claimed discriminated against white people. Vavra claimed in an email to HR that the training turned white people into "villains." The district court granted summary judgment on Vavra's claims last August after finding that he failed to show either that he was terminated due to bias or that the training itself was racist. Vavra appealed, and argued before the Seventh Circuit that the video crossed a line when it stated that workers carry unconscious biases. The panel, consisting of Judges St. Eve, Scudder, and Kirsch, appeared skeptical about how Vavra could know that the video was discriminatory since he did not watch it.

On May 22, 2024, Florida Attorney General Ashley Moody filed a complaint with the Florida Commission on Human Relations against Starbucks, arguing that its DEI policies violate Florida's anti-discrimination laws. The complaint alleges that statements on the Starbucks website raise concerns that it is using racial quotas in violation of the Equal Protection Clause. Specifically, the complaint points to information regarding "annual inclusion and diversity goals," and statements that executive compensation is tied to meeting DEI objectives. The complaint also urges the Commission to investigate Starbucks's anti-bias training to determine whether such trainings constitute an "abusive work environment." In support of the investigation, Florida Governor Ron DeSantis stated that programs such as the ones implemented by Starbucks "determine whether [employees] are the problem based on the color of their skin."

On May 23, 2024, CBS Studios and parent company Paramount Global moved to dismiss a straight white male writer's reverse discrimination suit, arguing that the First Amendment protects their rights to select their stories and storytellers. *Beneker v. CBS Studios*, No. 2:24-cv-01659 (C.D. Cal. 2024). The plaintiff, represented by America First Legal (AFL), claims that CBS violated Section 1981 and Title VII by refusing to hire him as a staff writer on the TV show "SEAL Team," instead hiring several Black, female, and lesbian writers. He is seeking a declaratory judgment that CBS's de facto hiring policy violates Section 1981 and/or Title VII, injunctions barring CBS from continuing to violate Section 1981 and Title VII, a full-time job as a producer, and damages. The defendants argued that because CBS is an "expressive enterprise," the First Amendment protects its right to convey an artistic message and "select which writers are best suited" to convey that message. In the alternative, the defendants argued that the plaintiff's claims are time-barred.

On May 23, 2024, a class action complaint was filed against the City of Evanston challenging a program meant to address historic racial injustice. *Flinn v. City of Evanston*, No. 1:24-cv-04269 (E.D. Ill. 2024). Evanston's Restorative Housing Program compensates Black residents for housing discrimination they or their ancestors may have faced between 1919 and 1969. It assists eligible applicants with buying or improving their homes, and in some cases qualifies households for direct payments of up to $25,000. The plaintiffs allege that the program violates Section 1983 because it is limited to only Black residents or their ancestors. The suit seeks to certify a class of "all individuals who are able and ready to apply for the program and are eligible for a $25,000

payment but for the program's race-based eligibility requirement." The plaintiffs are asking for declaratory and injunctive relief, and an award of $25,000 to "all eligible individuals."

On May 30, 2024, Judge Vernon S. Broderick dismissed a straight white male law student's reverse discrimination suit against NYU for lack of subject-matter jurisdiction and failure to state a claim in *Doe v. New York University*, No. 1:23-cv-09187 (S.D.N.Y. 2023). The plaintiff claimed that the NYU Law Review's policy to seek a diverse staff of editors and solicit personal statements discussing candidates' experiences with diversity violates Title VI, Title IX, and Section 1981. The court held that the plaintiff lacks standing because his "speculative" injury is "riddled with contingencies" and his claim is not yet ripe because the Law Review's policy has not yet been implemented. The court also concluded that even if the plaintiff had standing, his conclusory allegations would fail because the "Law Review's continued commitment to diversity" does not give rise to a "plausible inference of unlawful conduct."

Media Coverage and Commentary:

Below is a selection of recent media coverage and commentary on these issues:

- Law360, "11th Circ. Backs Freeze Of Grants For Black Women Only" (June 3, 2024): Law360's Chart Riggall reports on the Eleventh Circuit's opinion in *Fearless Fund*, explaining that Judge Newsom, writing for the majority, concluded the Fearless Strivers Grant Contest "had stepped well beyond the bounds of First Amendment protections by refusing to award grants to applicants who were not Black females." In rejecting Fearless Fund's First Amendment argument, Judge Newsom stated that "Fearless's position—that the First Amendment protects a [] categorial race-based exclusion—risks sowing the seeds of antidiscrimination law's demise." Riggall also reported on Judge Rosenbaum's skepticism regarding AAER's standing to bring this suit in the first place, noting that Rosenbaum wrote that "no one doubts the sincerity of American Alliance for Equal Rights's desire to challenge what it views as 'distinctions and preferences made on the basis of race and ethnicity' . . . But as American Alliance has portrayed its members' alleged injuries, it has shown nothing more than flopping on the field." Riggall explains that the case is far from over. As Gibson Dunn Partner and counsel for Fearless Fund Jason Schwartz explained, "this is not the final outcome in this case; it is a preliminary ruling without a full factual record." Schwartz also noted that "this is the first court decision in the 150+ year history of the post-Civil War civil rights law that has halted private charitable support for any racial or ethnic group. The dissenting judge, the district court and other courts have agreed with us that these types of claims should not prevail."

- Wall Street Journal, "Appeals Court Blocks Venture Firm's Grant Program for Black Women" (June 3): The Journal's Erin Mulvaney reports on the Eleventh Circuit's decision reversing the denial of a preliminary injunction against Atlanta-based investment firm Fearless Fund, calling it "a blow against diversity and inclusion programs that have been under increasing legal attack." Judge Newsom, writing for a two-judge majority, wrote that if Fearless Fund's decision not "to entertain applications from business owners who aren't 'black females'" was protected under the First Amendment "then so would be every act of race discrimination." In dissent, Judge Rosenbaum wrote that the court lacked standing to review the merits of the suit because AAER had not made the requisite showing that its

anonymous white male members were able and ready to apply for a Fearless Fund grant—and thus were harmed by theoretical exclusion from the contest. Jason Schwartz, Gibson Dunn partner and counsel for Fearless Fund, noted that this was the first court decision to stop private charitable giving based on race or ethnicity. "The discrimination in access to funding that the Fearless Foundation seeks to address is long-standing and irrefutable," said Schwartz. Mulvaney noted that, although legal challenges to diversity and inclusion programs have met with mixed success, the "ultimate outcome of the Fearless Fund case and others like it could have broad ripple effects."

- Bloomberg Law, "Black Women Entrepreneur VC Grant Funds Block in Bias Case" (June 3, 2024): Writing for Bloomberg Law, Khorri Atkinson and Chris Marr cover the Eleventh Circuit's recent ruling against the Fearless Fund. Atkinson and Marr note that the Eleventh Circuit was "unconvinced" by Fearless Fund's characterization of its program as nothing more than a "commitment" to "the Black women-owned business community." Instead, Atkinson and Marr note that the majority held that the real question was whether Fearless's contest should receive First Amendment protection "by virtue of its rule excluding non-black entrants." As Atkinson and Marr explain, Judge Rosenbaum offered a notable dissenting opinion questioning AAER's standing to sue Fearless Fund, and noting that AAER appeared to have "manufacture[d] an injury" by claiming that its members were "ready and able" to participate in the Fearless Strivers Grant Contest. Edward Blum, the leader of AAER, expressed gratitude for the ruling, stating that "our nation's civil rights laws do not permit racial distinctions because some groups are overrepresented in various endeavors, while others are under-represented." In Blum's view, "programs that exclude certain individuals because of their race such as the ones the Fearless Fund has designed and implemented are unjust and polarizing."

- The Washington Post, "Appeals court blocks Fearless Fund from awarding grants to Black women" (June 3, 2024): The Washington Post's Julian Mark and Taylor Telford report on the Eleventh Circuit's ruling against the Fearless Fund. Mark and Telford note that the case "is being closely watched because of its possible implications for race-conscious programs in the private sector, particularly in the world of grant-giving and foundations." Mark and Telford report that the majority "brushed aside" the fund's arguments that a contest solely for Black women was a form of protected expression under the First Amendment, and also rejected the argument that it was a valid program meant to remedy racial imbalances in the venture funding world. Arian Simone, the chief executive of Fearless Fund, called the decision "devastating" and said that "America is supposed to be a nation where one has the freedom to achieve, the freedom to earn, and the freedom to prosper. Yet, when we have attempted to level the playing field for underrepresented groups, our freedoms were stifled." But Jason Schwartz, Gibson Dunn partner and counsel for Fearless Fund, said that "this is not the final outcome in this case" and said that Fearless Fund and its legal team are evaluating their options."

Law.com, "'Legal Version of Flopping': Judges Spar Over Standing in Blocking Funding for Black Business Women" (June 4, 2024): Law.com's Avalon Zoppo reports on the Eleventh Circuit's decision in Fearless Fund, noting the exchanges between the majority opinion and the dissent on the question of whether AAER had established standing. Zoppo reports that in her dissenting opinion, Judge Rosenbaum said that none of the three members on whose behalf AAER is suing showed they were "able and ready" to actually apply for the program, and compared AAER to

athletes who feign injury in an effort to get the referee to call a foul on their opponent. Judge Rosenbaum wrote that "[a]lthough three of American Alliance's members pay lip service to the idea they are 'ready and able' to participate in Fearless's Contest, their declarations show, in context, that none has a genuine interest in actually entering the Contest." The majority opinion took issue with Judge Rosenbaum's characterization of the plaintiff as "floppers," saying "[r]espectfully, victims of race discrimination—whether white, black, or brown—are not floppers." But Judge Rosenbaum criticized the majority opinion for "mischaracteriz[ing]" her dissent and said that the majority's "failure to grapple even a little bit with the deficiencies in American Alliance's standing allegations, speak volumes about the impropriety of assuming jurisdiction here."

- Bloomberg Law, "What's Changed in Corporate America Since George Floyd's Murder?" (May 25): Bloomberg Law's Simone Foxman and Jeff Green discuss quantitative findings on changes in corporate America since George Floyd's death in 2020. While Foxman and Green note a modest increase in Black people in influential roles like chief executives or attorneys, they write that "Black people control a smaller percentage of US household wealth than they did four years ago." While they highlight a series of McKinsey & Company studies between 2015 and 2020 that demonstrate benefits to corporate America's bottom line from emphasizing diversity in its workforce, they note that increased profits are not a shield from criticism from anti-DEI proponents. Foxman and Green note a silver lining that the many challenges to corporate DEI programs have revived DEI discussions among company executives, restoring "mentions of DEI or diversity in conference calls, earning calls and investor calls to pre-2020 levels."

- Law360, "Burrows Warns Against 'Attacks' On Diversity Efforts" (May 22): Writing for Law360, Amanda Ottaway covers EEOC Chair Charlotte Burrows' speech at the 76th Annual Conference on Labor & Employment Law at NYU Law School. Commissioner Burrows discussed the confusion that the Supreme Court's ruling in SFFA has caused in the private sector, offering her thoughts on how corporate DEI programs can continue to exist and thrive moving forward. Relying on the reasons Congress enacted Title VII of the Civil Rights Act, she explains that the Act "encompass[es] actions that make the workplace not just less discriminatory, but more fair." To that end, she notes that corporations should take advantage of the fact that antidiscrimination laws also protect "people of goodwill" acting to ensure increased equity and inclusion within their ranks and beyond.

- Law360, "ABA Faces Racial Bias Complaint Over Diversity Programs" (May 21)): Law360's Ryan Boysen reports on a complaint the Wisconsin Institute for Law & Liberty's (WILL) filed with the United States Department of Justice against the American Bar Association (ABA). Boysen reports that WILL accuses the ABA of administering multiple programs and initiatives on a "racially discriminatory" basis in violation of Title VI of the Civil Rights Act. For example, WILL asserts that the ABA's Judicial Clerkship and Judicial Intern Opportunity Programs—initiatives designed to aid minority and LGBTQ applicants by leveling the playing field for prestigious clerkship and internship opportunities—"employ racial quotas and preferences," and treat "race as a negative," preventing some law students and attorneys from competing fairly due to their race. In addition to calling for an investigation into these ABA programs, Boysen reports that WILL is also seeking an investigation into any universities that have participated in the initiatives.

Case Updates:

Below is a list of updates in new and pending cases:

1. Contracting claims under Section 1981, the U.S. Constitution, and other statutes:

- ***Alexandre v. Amazon.com, Inc.***, No. 3:22-cv-1459 (S.D. Cal. Sept. 29, 2022): White, Asian, and Native Hawaiian entrepreneur plaintiffs, on behalf of a putative class of past and future Amazon "delivery service partner" (DSP) program applicants, challenged a DEI program that provides $10,000 grants to qualifying delivery service providers who are "Black, Latinx, and Native American entrepreneurs." Plaintiffs allege violations of California state civil rights laws prohibiting discrimination and Section 1981. On December 6, 2023, Amazon moved to dismiss, and plaintiffs opposed the motion on February 16, 2024. Amazon filed a reply on March 20, 2024.
    - **Latest update:** On May 23, 2024, Judge Michael M. Anello granted Amazon's motion to dismiss. The court held that plaintiffs did not have standing to sue because they were "unwilling to apply for DSP contracts" and therefore their purported injury was "merely hypothetical and conjectural." The court alternatively granted Amazon's motion on the merits as to all three of the plaintiffs' claims. The court dismissed the plaintiffs' claims under Section 1981 because plaintiffs did not respond to Amazon's argument that they did not suffer a loss of contractual interest because they were unwilling to apply to the program, and therefore "effectively abandoned their claims." The court also dismissed both of plaintiffs' claims under the Unruh Civil Rights Act, holding that the Act does not apply to relationships between two businesses.
- ***Do No Harm v. Gianforte***, No. 6:24-cv-00024 (D. Mont. 2024): On March 12, 2024, Do No Harm filed a complaint on behalf of "Member A," a white female dermatologist in Montana, alleging that a Montana law violates the Equal Protection Clause by requiring the governor to "take positive action to attain gender balance and proportional representation of minorities resident in Montana to the greatest extent possible" when making appointments to the twelve-member Medical Board. Do No Harm alleges that since the ten filled seats are currently held by six women and four men, Montana law requires that the remaining two seats be filled by men, which would preclude Member A from holding the seat. On May 3, 2024, Governor Gianforte moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that Do No Harm lacks standing because Member A has not applied for or been denied any position.
    - **Latest update:** On May 24, 2024, Do No Harm filed an amended complaint, describing additional Members B, C, and D, who are each "qualified, ready, willing, and able to be appointed" to the board.

2. Employment discrimination and related claims:

- ***DiBenedetto v. AT&T Servs., Inc.***, No. 21-cv-4527 (N.D. Ga. 2021): On November 2, 2021, the plaintiff, a white male former executive, brought claims against AT&T under

Title VII, Section 1981, and the Age Discrimination in Employment Act (ADEA), alleging that he was wrongfully terminated due to his race, gender, and age.

- **Latest update:** On May 20, 2024, the plaintiff stipulated and agreed to dismiss with prejudice his race and gender discrimination claims. The plaintiff's ADEA claim remains.

3. Challenges to agency rules, laws and regulatory decisions:

- ***American Alliance for Equal Rights v. Ivey***, No. 2:24-cv-00104-RAH-JTA (M.D. Ala. 2024): On February 13, 2024, AAER filed a complaint against Alabama Governor Kay Ivey, challenging a state law that requires Governor Ivey to ensure there are no fewer than two individuals "of a minority race" on the Alabama Real Estate Appraisers Board. The Board has nine seats, including one for a member of the public with no real estate background (the at-large seat), which has been unfilled for years. Because there was only one minority member among the Board at the time of filing, AAER asserts that state law will require that the open seat go to a minority. AAER states that one of its members applied for this final seat, but was denied purely on the basis of race, in violation of the Equal Protection Clause. On March 29, 2024, Governor Ivey answered the complaint, admitting that the Board quota is unconstitutional and will not be enforced. On May 7, 2024, the court granted a motion to intervene by the Alabama Association of Real Estate Brokers (AAREB), a trade association and civil rights organization for Black real estate professionals, who moved to intervene to "oppos[e] the parties' position that the race-based provisions are unconstitutional." On May 14, 2024, AAREB answered the complaint, seeking a declaration that the challenged law is valid and enforceable.

    - **Latest update:** On May 20, 2024, AAER moved for judgment on the pleadings, arguing that the racial requirement for appointments to the Board is unconstitutional and there are no unresolved questions of material fact. Governor Ivey's and AAREB's responses are due on June 10.

4. Actions against educational institutions:

- ***Chu, et al. v. Rosa***, No. 1:24-cv-75 (N.D.N.Y. 2024): On January 17, 2024, a coalition of education groups sued the Education Commissioner of New York, Dr. Betty A. Rosa, alleging that its free summer program discriminates on the bases of race and ethnicity in violation of the Equal Protection Clause of the Fourteenth Amendment. The Science and Technology Entry Program (STEP) permits students who are Black, Hispanic, Native American, and Alaskan Native to apply regardless of their family income level, but all other students, including Asian and white students, must demonstrate "economically disadvantaged status." On April 19, 2024, Rosa moved to dismiss the amended complaint for lack of subject-matter jurisdiction, arguing that neither the organizational plaintiffs (groups of parents) nor the named plaintiff, also a parent, have suffered any personal or individual injury, and that the plaintiffs cannot sue for alleged violations of members' rights as prospective STEP applicants.

- **Latest update:** On May 24, 2024, the plaintiffs opposed the defendant's motion to dismiss, arguing that the plaintiffs do not need to "take futile actions" to apply for the STEP program as a prerequisite for standing because their "injury is the inability to compete on an equal footing," not whether they can secure a spot in the STEP program.

DEI Legislation:

Below is a list of legislative developments relating to DEI:

- On May 17, 2024, Colorado Governor Jared Polis vetoed House Bill 1260, or the "Worker Freedom Act," which would have barred employers from requiring employees to attend meetings related to religious or political matters. The bill sought to prevent "captive audience meetings," or mandatory meetings used by employers to discuss union organizing, but it expressly excluded DEI trainings and legally required harassment trainings. In a veto letter, Governor Polis cited the breadth of the bill's provisions and language, concluding it was "too broad and too ambiguous to apply uniformly and fairly, leading to unintended consequences." The Democrat-sponsored bill was one of six that Polis, also a Democrat, vetoed the same day, resulting in intra-party frustrations and a rally at the state capitol by union members.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Blaine Evanson, Molly Senger, Zakiyyah Salim-Williams, Matt Gregory, Zoë Klein, Mollie Reiss, Jenna Voronov, Alana Bevan, Marquan Robertson, Janice Jiang, Elizabeth Penava, Skylar Drefcinski, Mary Lindsay Krebs, David Offit, Lauren Meyer, Kameron Mitchell, Maura Carey, and Jayee Malwankar.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following practice leaders and authors:

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