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DEI Task Force Update

October 10, 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).

Key Developments

On October 4, 2024, the U.S. Supreme Court granted a petition for certiorari to review a circuit split regarding a plaintiff's burden of proof in Title VII "reverse-discrimination" cases. The decision from the Sixth Circuit involved a former Ohio Department of Youth Services employee who claimed that the Department passed her over for a promotion and later demoted her because she was heterosexual, while simultaneously promoting LGBTQ candidates. The district court granted summary judgment to the Department on the sexual orientation discrimination claim. The Sixth Circuit affirmed, holding that plaintiffs in "reverse-discrimination" cases must make an additional showing that "background circumstances . . . support the suspicion that the defendant is that unusual employer who discriminates against the majority." The Seventh, Eighth, Tenth, and D.C. Circuits have also adopted the background circumstances rule, while the Third and Eleventh Circuits have expressly rejected it. The employee's petition argued that the Sixth Circuit's ruling improperly required more evidence from her as a member of a majority group,

when this higher burden is not imposed on minority plaintiffs. The case is *Marlean A. Ames v. Ohio Department of Youth Services*, case number 23-1039. Oral argument has not yet been scheduled.

On September 25, 2024, the U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit against a Southern sports bar chain, Battleground Restaurants, in federal district court in North Carolina. *EEOC v. Battleground Restaurants*, No. 1:24-cv-00792 (M.D.N.C. 2024). The lawsuit alleges that the chain refused to hire men for its front-of-house positions, such as server or bartender jobs, in violation of Title VII. The EEOC's suit is one of over 50 lawsuits the EEOC filed in the last week of September, prior to the end of its fiscal year on September 30, 2024. For more information about the EEOC's recent suits, including its strategic aims and enforcement priorities, see our client alert here.

Starting on September 16, 2024, Judge Richard Bennett of the District of Maryland held a bench trial in *Students for Fair Admissions v. United States Naval Academy*, No. 1:23-cv-02699 (D. Md. 2023). SFFA filed suit against the Naval Academy on October 5, 2023, arguing that the Academy's consideration of race in its admissions process cannot withstand strict scrutiny under the Equal Protection Clause. During the trial, which lasted nine days, SFFA argued that the Academy's use of race in its admissions practices violated the Constitution because it was not narrowly tailored to achieve a compelling interest. The Academy countered that its use of race is necessary to achieve a diverse officer corps, which furthers a compelling government interest in national security. Judge Bennett has said that he will issue a decision in November.

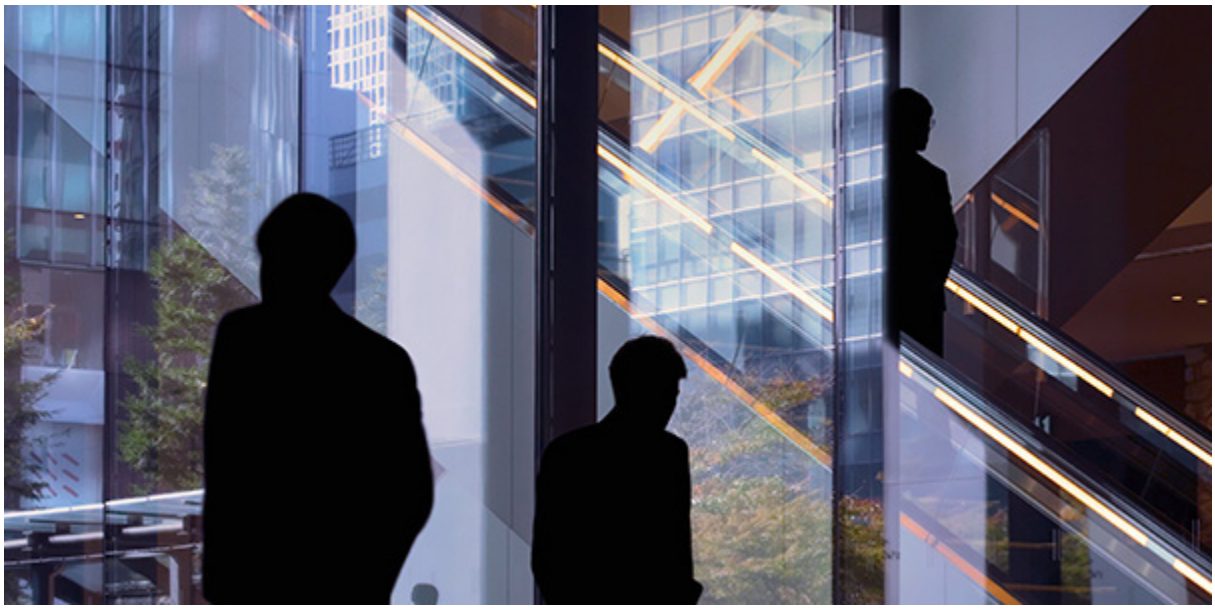
On September 24, Paradigm Strategy Inc., an organization that helps companies with their DEI strategies, released a report titled "Unlocking the Potential of Your Workforce: The Benefits of Belonging." The report discusses the benefits of developing a sense of belonging among employees, including increased engagement and innovation and improved organizational performance. The report focuses on a study of more than 38,000 employees across 53 organizations and finds that in companies where employees feel a strong sense of belonging, they are 10 times more likely to be engaged and 14 times more likely to feel confident in the organization's decisions. According to Paradigm's research, developing a sense of belonging requires both that employees see others like them succeed, and that employers develop policies and norms that encourage inclusion. To achieve this, Paradigm suggests identifying and focusing on the groups that feel most disconnected by creating trusting relationships, demonstrating that the company values difference, and building a culture of growth. Lastly, the report finds that when companies focus on developing a sense of belonging for the most marginalized members of the workforce, all employees feel a stronger sense of belonging.

Media Coverage and Commentary:

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

- Bloomberg, "Caterpillar Joins Ford, Lowe's in Diversity Rethink as Backlash Grows" (September 19): Bloomberg's Jeff Green reports on Caterpillar Inc.'s recent decision to revise aspects of its DEI policy following a threatened social media attack by conservative activist Robby Starbuck. In an internal memorandum, Caterpillar leadership indicated that it would focus future employee training programs on performance rather than diversity, require manager approval before engaging external speakers, and impose new rules on employee resource groups. A spokesperson for Caterpillar confirmed both the planned changes and that executives had spoken with Starbuck. But the spokesperson denied that Starbuck's threats also led Caterpillar to stop participating in the Human Rights Campaign's ranking of corporate LGBTQ+ policies, saying that the company independently decided last year to end its participation. Green reports that Caterpillar has faced—and resisted—similar challenges in the past. For example, in June 2023, 98.3% of Caterpillar shareholders rejected a proxy proposal from conservative group National Center for Public Policy Research asking the company to audit its DEI programming for potential negative impacts on hiring and promotion.

- Bloomberg, "Toyota Deflects Attack by Anti-DEI Activist Over LGBTQ Programs" (September 26): Bloomberg's Jeff Green reports on Toyota Motor Corp.'s response to Robby Starbuck's September 26 post on X (formerly Twitter) about the automaker's perceived LGBTQ+-friendly policies. Starbuck claimed, among other things, that Toyota supports trans-affirming legislation, funds LGBTQ+ groups and programs, and gives preferential treatment to diverse suppliers. Green reports that on October 3, Toyota told its employees that it will refocus its DEI program on business-related issues, halt sponsorship of LGBTQ events, and end participation in the Human Rights Campaign Corporate Equality Index. Green says that in recent weeks, the Human Rights Campaign has cautioned companies against backtracking on LGBTQ efforts and urged supporters to boycott many of the companies that have ended participation in its Corporate Equality Index.



- Litigation Daily, "Law Firms Mobilize To Respond to Anti-DEI Backlash" (October 3): Law.com's Charles Toutant interviews leaders at Gibson Dunn and three other law firms that have formed practice groups designed to support clients in navigating the dynamic legal landscape surrounding corporate DEI programs. Gibson Dunn's Jason Schwartz acknowledges that conservative activists "have been highly organized and very effective so far in their litigation." But Schwartz cautions corporate clients "not to overreact" to that success, saying that these groups "filed their early cases in jurisdictions where they thought they would be more successful," and predicts that the law will "develop in different ways" as these cases are brought "in courts throughout the country." While at least 50 lawsuits relating to DEI programs have been filed since the Supreme Court's *SFFA* decision, Schwartz anticipates that anti-DEI litigation will continue to "heat up before it cools off," as claims filed under Title VII make their way out of the EEOC administrative process and into federal court.

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:

- ***SGCI Holdings III LLC v. FCC,*** No. 1:24-cv-01204 (D.D.C. 2024): On April 24, 2024, hedge fund manager Soo Kim brought a lawsuit against the Federal Communications Commission and media entities over what he alleges is a racially discriminatory conspiracy to block his fund's $8.6 billion purchase of media company Tegna. The lawsuit

alleges that the FCC stalled Kim's efforts to purchase Tegna because a competing media executive, who is Black, wanted to purchase Tegna.

  - **Latest update:** On September 9, 2024, the defendants filed motions to dismiss. In its motion to dismiss, the FCC asserted sovereign immunity and argued that the plaintiff had failed to state a claim and lacked standing. The media company defendants argued that the court lacked subject matter jurisdiction and that the plaintiff's claims were barred by the First Amendment. On September 24, 2024, Dish Network (one of the defendants) filed a motion for Rule 11 sanctions, arguing that the factual allegations against it were unsupported and frivolous. The plaintiff opposed the next day.

- ***Mid-America Milling Company v. U.S. Department of Transportation***, No. 3:23-cv-00072-GFVT (E.D. Ky. 2023): On October 26, 2023, two plaintiff construction companies sued the Department of Transportation, asking the court to enjoin the DOT's Disadvantaged Business Enterprise Program, an affirmative action program that awards contracts to minority-owned and women-owned small businesses in DOT-funded construction projects, with the statutory aim of granting 10% of certain DOT-funded contracts to these businesses nationally. The plaintiffs alleged that the program constitutes unconstitutional race discrimination in violation of the Fifth Amendment.

  - **Latest update:** On September 23, 2024, the court granted the plaintiffs' motion for a preliminary injunction, holding that the DOT's race and gender classifications violate the Equal Protection Clause. The court also held that the plaintiffs have standing based on their allegations that they are "able and ready" to bid on a government contract in the near future. The court denied the defendants' motion to dismiss pending the resolution of any interlocutory appeal of the injunction order.

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

- ***Young Americans for Freedom v. United States Department of Education***, No. 3:24-cv-00163 (D.N.D. 2024): On August 27, 2024, the University of North Dakota Chapter of Young Americans for Freedom (YAF) sued the U.S. Department of Education (DOE) over its McNair Post-Baccalaureate Achievement Program, a research and graduate studies grant program that supports incoming graduate students who are either low-income first-generation college students or "member[s] of a group that is underrepresented in graduate education." YAF alleges that the McNair program violates the Equal Protection Clause by restricting admission based on race. YAF requests, among other things, a preliminary injunction enjoining the DOE from enforcing all race-based qualifications for the McNair program.

  - **Latest update:** On September 23, 2024, the DOE responded to the plaintiffs' motion for a preliminary injunction. DOE argued that the plaintiffs are not likely to succeed on the merits because they lack standing and do not face a threat of irreparable harm because they are ineligible to apply for the program. On September 30, 2024, the plaintiffs replied, arguing that they have standing

because they are harmed by the DOE's use of race in administering the achievement program.

3. Employment discrimination and related claims:

- ***Harker v. Meta Platforms, Inc. et al.***, No. 23-cv-07865-LTS (S.D.N.Y. 2023): A lighting technician who worked on a set where a Meta commercial was produced sued Meta and a film producers association, alleging that their diversity initiative Double the Line ("DTL") violated Title VII, Sections 1981 and 1985, and New York law. The plaintiff also claimed that he was retaliated against after raising questions about the qualifications of a coworker hired under DTL. On December 19, 2023, the defendants filed their motions to dismiss the plaintiff's first amended complaint.
    - **Latest update:** On August 29, 2024, the court granted the defendants' motion to dismiss for lack of subject matter jurisdiction and closed the case. The court held that the plaintiff lacked standing because he had not actually filed an application to participate in the DTL program, and that arguing that an application is futile is insufficient to establish standing, relying on the Second Circuit's recent decision in *Do No Harm v. Pfizer*, 96 F.4th 106 (2d Cir. 2024). On September 24, 2024, the plaintiffs filed a notice of appeal.
- ***Johnson v. Watkin et al.***, No. 1:23-cv-00848-ADA-CDB (E.D. Cal. 2023): On June 1, 2023, a community college professor in California sued to challenge new "Diversity, Equity and Inclusion Competencies and Criteria Recommendations" enacted by the California Community Colleges Chancellor's Office, claiming the regulations violated the First and Fourteenth Amendments. The plaintiff alleged that the adoption of the new competency standards, which require professors to be evaluated in part on their success in integrating DEI-related concepts in the classroom, will require him to espouse DEI principles with which he disagrees, or be punished. The plaintiff moved to enjoin the policy.
    - **Latest update:** On September 23, 2024, the court granted the defendants' motion to dismiss for lack of standing. The court held that the plaintiff had not provided enough details regarding his intent to engage in a constitutionally protected course of conduct that would be abridged by the regulations. The same day, the plaintiff filed a notice of appeal.
- ***Bradley, et al. v. Gannett Co. Inc.***, 1:23-cv-01100 (E.D.Va. 2023): On August 18, 2023, white plaintiffs sued Gannett over its alleged "Reverse Race Discrimination Policy," claiming Gannett's expressed commitment to having its staff demographics reflect the communities it covers violates Section 1981. On August 21, 2024, the court granted Gannett's motion to dismiss, holding that Gannett's diversity policy alone did not establish disparate treatment, since it did not define any specific goals or quotas. The court also held that each of the named plaintiffs had failed to state a claim for individual relief pursuant to Section 1981, and dismissed the class allegations because the class was not ascertainable and lacked commonality.

- **Latest update:** On September 19, 2024, the plaintiffs filed a second amended complaint, adding specific allegations of adverse employment actions that Gannett had purportedly taken pursuant to its policy.

- ***Spitalnick v. King &smp; Spalding, LLP***, No. 24-cv-01367-JKB (D. Md. 2024): On May 9, 2024, Sarah Spitalnick, a white, heterosexual female filed a lawsuit against King & Spalding, alleging that when she was a first-year law student at University of Baltimore School of Law, she was deterred from applying to King & Spalding's Leadership Counsel Legal Diversity internship program. Spitalnick alleges that she was qualified for the program but was deterred because the advertisement for the program stated that candidates "must have an ethnically or culturally diverse background or be a member of the LGBT community." Spitalnick sued King & Spalding under Title VII and Section 1981 for race and sex discrimination.

    - **Latest update:** On September 19, 2024, King & Spalding moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The law firm argued that Spitalnick lacked standing because she failed to apply to the program and that she failed to allege sufficient facts to state a claim under Section 1981 and Title VII.

- ***Hogarty v. Cherry Creek School District***, No. 1:24-cv-02650-RMR (D. Colo. 2024): On September 25, 2024, America First Legal filed a complaint on behalf of a former employee of Cherry Creek School District, alleging that the District terminated his employment after he expressed disagreement with concepts in a DEI training program. The complaint asserts claims under Section 1983 based on alleged violations of the First Amendment.

    - **Latest update:** The District's response to the complaint is due on November 6, 2024.

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.

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