

The Rise of Anti-DEI Litigation and Legislation and its Impact on Employment Law

**Legal Network for
Gender Equity Webinar**

**25 April 2024
3:00-4:30 pm**



Today's Agenda

Part I

Introductions

Part II

Affirmative Action and Race Consciousness

Part III

Attacks on DEI in the Workplace & Beyond

Part IV

Framing Common Patterns of Workplace Bias

Part V

Q&A and Announcements



Jin Hee Lee (she/her) is the Director of Strategic Initiatives at the NAACP Legal Defense & Educational Fund, Inc. (LDF). In this role, she leads the Department of Strategic Initiatives, which houses specific projects and campaigns that integrate litigation, policy, organizing, communications, research, and public education to provide impactful, community-centered advocacy for Black communities. Ms. Lee also led LDF’s representation of a multi-racial coalition of 25 Harvard student and alumni organizations, which served as amici curiae in both the trial and appellate levels in the affirmative action case, *Students for Fair Admissions v. Harvard*. As counsel for the student and alumni organizations, Ms. Lee presented oral argument to the First Circuit Court of Appeals in the Harvard case. 980 F.3d 157 (1st. Cir. 2020).

Ms. Lee is a 1995 graduate of Georgetown University’s School of Foreign Service, magna cum laude, and the recipient of a Fulbright Fellowship. She graduated from Columbia Law School in 2000 and served as law clerk to Judge Martha Vázquez in the United States District Court for the District of New Mexico. In 2016, Ms. Lee was recognized by Columbia Law School as the Distinguished Public Interest Graduate of the Year.



Sunu P. Chandy (she/her) is a civil rights attorney and Senior Advisor with Democracy Forward. At Democracy Forward, she is working to help lead the fight against the many attacks on racial justice and DEI more broadly alongside many partner organizations. Sunu is also the author of the award-winning collection of poetry, *My Dear Comrades*. Until August 2023, Sunu served as the Legal Director of the National Women’s Law Center. There, she oversaw litigation, including as counsel on several Supreme Court amicus briefs. Sunu also guided the Center’s LGBTQ+ policy work including by providing Congressional testimony.

Previously, Sunu was the Deputy Director for the Civil Rights Division with the U.S. Department of Health and Human Services (HHS), and the General Counsel for the DC Office of Human Rights (OHR). Before that, Sunu was a federal litigator with the Equal Employment Opportunity Commission (EEOC) for 15 years where she also led outreach including as part of the White House Initiative on Asian Americans and Pacific Islanders (WHIAPPI) Regional Working Group. Sunu began her legal career as a law firm associate representing unions and individual workers in New York City at Gladstein, Reif and Megginniss, LLP. Sunu earned her B.A. in Peace and Global Studies/Women’s Studies from Earlham College, her law degree from Northeastern Law School and her MFA in Poetry from Queens College, CUNY. Sunu is cited as a legal expert on a range of civil rights issues including by NPR, The New York Times and The Washington Post. Sunu also serves on the board of directors for the Transgender Law Center.



Emma Leibowitz (she/her) is a Legal Fellow, co-sponsored by Harvard Law School, at Democracy Forward. Emma graduated cum laude from Harvard Law School in 2023. While at Harvard, Emma served as a Solicited Content Editor for the Civil Rights-Civil Liberties Law Review and was a member of the school's chapter of People's Parity Project. She worked as a student-attorney in the Veterans Law and Disability Benefits Clinic and as an extern in the office of Associate Attorney General at the Department of Justice. She also was a Teaching Fellow for Constitutional Law. During her summers, she worked on immigration direct services and in the Voting Section of the Civil Rights Division of the Department of Justice. Center.



Subhashini Bollini (she/her) is a Partner at Correia & Puth, PLLC, in Washington, DC. She has represented employees across the U.S. in employment discrimination and retaliation claims under local, state and federal statutes. She has represented employees in claims of discrimination based on age, race, sex, disability, and whistleblower reprisal against employers of varying sizes, from small businesses to local, state, and federal agencies, to Fortune 500 corporations. Since 2011, Ms. Bollini has served as a board member of the Metropolitan Washington Employment Lawyers Association (MWELA), a voluntary bar association of hundreds of attorneys who represent employees in workplace disputes. She served as President of MWELA from 2019 – 2021. Ms. Bollini is also an active member of the National Employment Lawyers Association (NELA), the national bar association dedicated to the representation of employees and advancement of employee rights.

Ms. Bollini was selected by her peers for recognition in Employment Law in Super Lawyers magazine since 2013. In 2019 and 2020, Ms. Bollini was recognized by Best Lawyers in D.C. for her work in Civil Rights and in 2022 was selected as Lawyer of the Year for Civil Rights, Washington, D.C. Since 2019, she has been listed as one of Lawdragon's 500 Leading Civil Rights and Plaintiff Employment Lawyers. Along with NYTimes columnist Maureen Dowd, CBS Evening News Anchor Norah O'Donnell, and Olympic Gold Medalist Benita Fitzgerald Moseley, Ms. Bollini is one of 50 women professionals who were profiled by Julia Brandus (with help from her dad, Paul Brandus) in her 2023 book *Girl to Boss! Advice for Girls from 50 of America's Most Successful Women* (net proceeds of purchases benefit Inova Children's Hospital).

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AFFIRMATIVE ACTION AND THE BATTLE FOR RACE CONSCIOUSNESS

Jin Hee Lee
Director of Strategic Initiatives
LEGAL DEFENSE FUND



SFFA v. Harvard/UNC



20-1199

IN THE
Supreme Court of the United States

STUDENTS FOR FAIR ADMISSIONS, INC.,
Petitioner,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Respondent.

*On Writ of Certiorari to the
United States Court of Appeals for the First Circuit*

**BRIEF OF AMICI CURIAE 25 HARVARD
STUDENT AND ALUMNI ORGANIZATIONS IN
SUPPORT OF RESPONDENT PRESIDENT
AND FELLOWS OF HARVARD COLLEGE**

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July 25, 2022

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**FOUR MYTHS
ABOUT THE
SFFA DECISION**

MYTH NO. 1

Racial diversity is
frowned upon by the
Supreme Court.

EDUCATIONAL BENEFITS OF DIVERSITY

Harvard

- (1) “training future leaders in the public and private sectors”;**
- (2) preparing graduates to “adapt to an increasingly pluralistic society”;**
- (3) “better educating its students through diversity”; and**
- (4) “producing new knowledge stemming from diverse outlooks.”**

UNC

- “(1) promoting the robust exchange of ideas;**
- (2) broadening and refining understanding;**
- (3) fostering innovation and problem-solving;**
- (4) preparing engaged and productive citizens and leaders; [and]**
- (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”**

“Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny.”

**– Chief Justice Roberts
*SFFA v. Harvard/UNC***

MYTH NO. 2

**It is illegal to know a
person's race when making
decisions.**

SFFA's Complaint

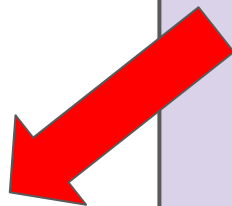
WHEREFORE, Plaintiff, Students for Fair Admissions, Inc., prays for the following relief as to all counts:

(a) A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, from the Court that Harvard's admissions policies and procedures violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*;

(b) A declaratory judgment, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, from the Court that any use of race or ethnicity in the educational setting violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*;

(c) A permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions;

(d) A permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission;



“[N]othing in this opinion should be construed as prohibiting universities from **considering an applicant’s discussion of how race affected his or her life**, be it through discrimination, inspiration, or otherwise.”

- Chief Justice Roberts
SFFA v. Harvard/UNC

MYTH NO. 3

It is illegal to foster diversity through race-neutral means.

Coalition for TJ v. Fairfax County School Board

(Black students 2%; Latino students 3%)

Race Neutral Changes:

- Eliminate admissions test
- Eliminate \$100 application fee
- Allocation of seats to every eligible middle school
- Consideration of SES, disability, language access

Admissions Results:

- Economically disadvantaged students increased from 0/62% to 25% (Asian Americans are largest racial group)
- Latino applicants increased 42% (enrollment now 6%)
- Black applicants increased 70% (enrollment now 4%)

“[G]overnments and universities still ‘can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve the classification of race.’”

- Justice Kavanaugh (concurrency)
SFFA v. Harvard/UNC

“Race neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.”

- Justice Thomas (concurrency)
SFFA v. Harvard/UNC

MYTH NO. 4

The *SFFA* decision changed the law pertaining to “diversity, equity, and inclusion” in the workplace.

Affirmative Action

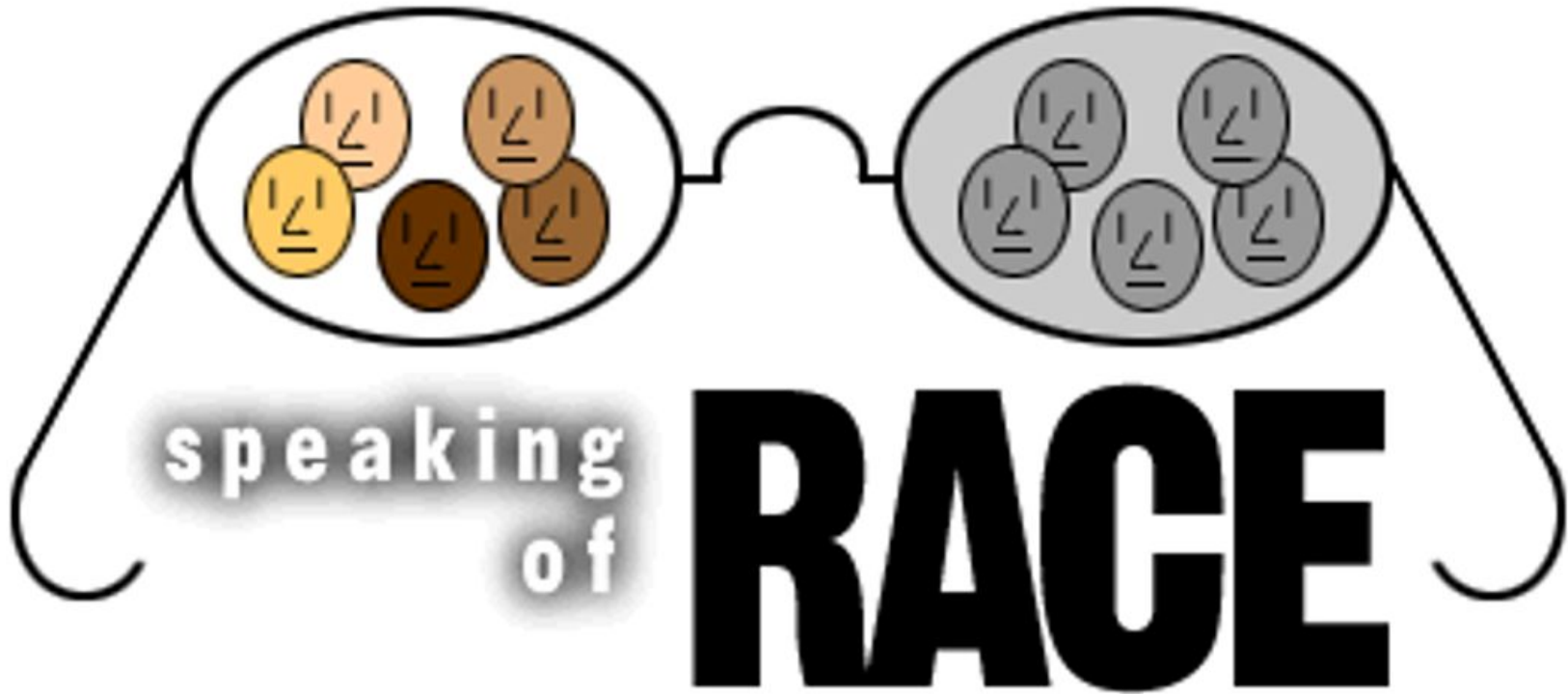
Higher Education:

- Title VI/EP
- Educational benefits of diversity (prior to *SFFA*)

Employment:

- Title VII/Section 1983
- Adverse impact, correct prior discrimination, historically limited labor pool

RACIAL COLORBLINDNESS



“With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces ‘colorblindness for all’ by legal fiat. But deeming race irrelevant in law does not make it so in life.”

- Justice Jackson (dissenting)

SFFA v. Harvard/UNC

ANTI-DEI ATTACKS IN PRIVATE SECTOR

BUSINESS

SBA program upended in wake of Supreme Court affirmative action ruling

A judge struck down a provision of a federal program meant to help minority-owned businesses, a ruling that could imperil other programs that benefit underrepresented groups



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Retail & Consumer

Starbucks executives, directors are sued over diversity policies

Salesforce's Diversity Program Accused of Bias Against White Men

Aug. 22, 2023, 1:33 PM EDT; Updated: Aug. 22, 2023, 10:43 PM EDT

Perkins Coie, Morrison Foerster Sued Over DEI Programs

ANTI-DEI ATTACKS IN HIGHER EDUCATION

University of Texas at Austin students say cultural programs are struggling to stay afloat in wake of anti-DEI law



By [Nicquel Terry Ellis](#), CNN

6 minute read · Published 6:05 AM EDT, Thu March 28, 2024



VIDEO

Alabama governor signs bill prohibiting DEI programs at schools, state agencies

This is the latest in a Republican-backed movement against diversity programs.

By [Kiara Alfonseca](#)

March 21, 2024, 8:26 AM

NBC NEWS TRUMP TRIAL POLITICS U.S. NEWS WORLD BUSINESS SPORTS HEALTH NBC NEWS TIPLINE WATCH LIVE

LATINO

DeSantis' anti-DEI law is sparking 'confusion, anxiety and fear' among Florida faculty

The law applies to public colleges and universities in the state, a third of which are designated Hispanic-serving institutions, where most Latino students earn their degrees.



RACIAL EQUITY
IS A MORAL &
LEGAL
IMPERATIVE



THANK YOU!

<https://www.naacpldf.org/equal-protection-initiative>



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Democracy Forward: Fighting Attacks on DEI in the Workplace & Beyond

**Emma Leibowitz, Legal Fellow
Sunu P. Chandy, Senior Advisor**

**DEMOCRACY
FORWARD** 

The logo for Democracy Forward, consisting of the words 'DEMOCRACY' and 'FORWARD' stacked vertically in a bold, dark blue, sans-serif font. To the right of the word 'FORWARD' is a graphic element consisting of two overlapping triangles: a teal one on top and a dark blue one on the bottom, pointing to the right.

Anti-DEI Attacks

Litigation

VERIFIED COMPLAINT

Plaintiffs allege their complaint against Defendants as follows:

INTRODUCTION

1. The largest, and perhaps oldest affirmative action program in U.S. history is called the “disadvantaged business enterprise” (DBE) program. Under this program, the federal government finances the American transportation system, including highway construction, with a series of race and gender preferences they call “goals.” But in effect, these “goals” amount to discriminatory barriers, preventing many construction companies from competing for contracts on an equal footing with firms owned by women and certain racial minorities. Because the DBE program violates the Constitution’s “promise of equal treatment,” it must be permanently dismantled. *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 228 (2023) (citation omitted).



They Didn't Plan to Be at the Center of a Civil Rights Battle. Then the Fearless Fund Was Sued

Image and text reprinted with permission from The Daily Beast. For more information, visit <https://www.fearlessfund.com/news/2024/02/28/fearless-fund-sued>.

State Legislation

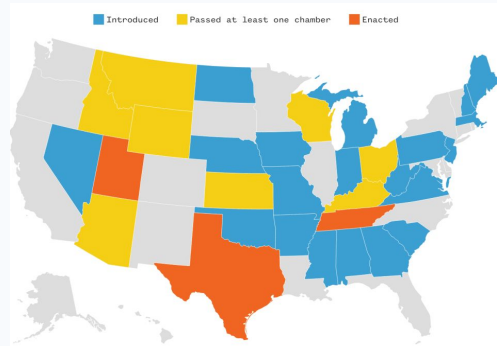


Image via NBC. Char Adams & Nigel Chivaya, *Map: See which states have introduced or passed anti-DEI bills*, NBC News (Mar. 2, 2024) <https://www.nbcnews.com/data-graphics/anti-dei-bills-states-republican-lawmakers-mmszom-140756>.

Letters



America First Legal Blasts the NFL’s Illegal and Racist “Rooney Rule,” Files Federal Civil Rights Complaint

February 6, 2024



WASHINGTON, D.C. – Today, America First Legal (AFL) filed a federal civil rights complaint against the National Football League (NFL) for

Anti-DEI Litigation

Contexts	
Private Contracts & Grants	Public Contracts & Grants
Private Boards	Public Boards
Private Hiring	Public Universities
Private Workplace Policies	Public Workplace Policies
K-12 Education	Continuing Education, Licensure, Certification
Book Bans	
LGBTQ+ Protections	

Legal Claims	
Equal Protection	Due Process
First Amendment	Title VII
Title VI	ACA § 1557
42 U.S.C. § 1981	State Civil Rights Laws
Administrative Procedure Act	State Constitutional Provisions

Employment Sector

Workplace DEI Programs and Policies

- What can you do?
 - Job Postings
 - Data Collection
 - Broad statements
- Resources: NY Bar Report, LDF Report
- Legal Challenges
 - *Diemert v. Harrell*
- Academic Hiring
 - *Haltigan v. Drake*

Anti-Discrimination Training

- Anti-Discrimination
- EEO laws
- Implicit bias
- Often court-approved
- An affirmative defense

- EEOC Amicus Brief in *Vavra v. Honeywell*

Race-Specific Programs

- Voluntary race-specific programs permitted
- Somewhat atypical
- Minority Fellowships::
 - Law firm cases
 - *Do No Harm v. National Association of EMTs*
- EEOC Amicus Brief in *Roberts v. Progressive*

Challenges to Board Composition

- **American Alliance for Equal Rights v. Ivey**, 2:24-cv-00104 (M.D. Ala.): Real Estate Appraisers Board
 - “[N]o less than two of the nine board members shall be of a minority race.”
 - “[O]verall membership of the board shall be inclusive and reflect the racial, gender, geographic, urban/rural, and economic diversity of the state.”
 - State answered complaint.
- **Alliance for Fair Board Recruitment v. SEC**, 21-60626 (5th Cir.): Nasdaq Board Diversity
 - Plaintiff sought review of SEC’s approval of Nasdaq’s Board Diversity Disclosure Rule, requiring Nasdaq-listed companies to annually report aggregated statistical information about the Board’s self-identified gender and racial characteristics, and also requires companies to appoint at least two diverse directors or explain why they have not done so.
- **AFBR v. Weber**, 23-15900 (9th Cir.), 21-cv-01951 (E.D.Cal.): Public Corps. in CA
 - Public corporations headquartered in California must have a minimum number of directors from “underrepresented” identities.
 - District Court found unconstitutional.
 - Case stayed pending resolution of *Meland v. Weber*.
- **DNH v. Edwards**, 5:24-cv-00016 (W.D. La.): Board of Medical Examiners
 - At least every other member appointed” by the governor to four specific seats on the Board of Medical Examiners be “a minority appointee.”
 - State answered complaint.

Challenges to Board Composition cont.

- **DNH v. Gianforte**, 6:24-cv-00024 (D. Mont.): Board of Medical Examiners
 - Governor "shall take positive action to attain gender balance and proportional representation of minorities resident in Montana to the greatest extent possible."
 - State answer due May 3, 2024.
- **DNH v. Lee**, 3:23-cv-01175 (M.D. Tenn.): Board of Podiatry
 - Governor to "strive to ensure" that boards, commissions, and other executive branch entities include at least one person who is "a member of a racial minority."
 - Motion to dismiss fully briefed.
- **Hurley v. Gast**, 4:22-cv-00176 (S.D. Iowa): Judicial Nominating Commission
 - Elected commissioners must be "of different genders" (i.e. understood to require the election of one woman and one man for district).
 - District Court found unconstitutional.
- **Meland v. Weber**, 22-15149 (9th Cir.), 2:19-cv-02288 (E.D. Cal.): Public Corps. in CA
 - Public corporations headquartered in California must have a minimum number of "female" directors.
 - District Court upheld law under intermediate scrutiny standard.
 - Case stayed on appeal pending resolution of state court challenge.
- **Miall v. City of Asheville**, 23-cv-00259 (W.D.N.C.): City Human Rights Commission
 - "The consideration of appointment of members shall provide equal access and opportunity to serve upon the Commission to all historically disadvantaged groups, including but not limited to . . ."
 - Motion to dismiss fully briefed.

Anti-DEI Actors

Academic Hiring

Jonathan Mitchell
Former
Solicitor
General of
Texas



Public Boards



Grants & Contracting



MOUNTAIN STATES LEGAL
FOUNDATION



Private Hiring

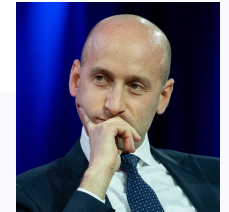


Ed Blum
American Alliance
for Equal Rights &
Students for Fair
Admissions

Corporate DEI Programs & Workplace Policies



AMERICA
FIRST
LEGAL



Where does that leave us?

Reassured

- DEI programs are legal and necessary
- Majority on solid legal ground
- Title VII precedents
- Positive case outcomes

Alarmed

- Pace and intensity
- Broad contexts
- Overcorrection
- Federal programs undermined (*Nuizard v. Minority Business Development Agency*)
- Misinformation
- Thorny arguments re First Amendment (*303 Creative v. Elenis*)
- State Legislation

Hopeful

- Broad support for DEI and ESG efforts
- Resolved cases with helpful hiring criteria
- Federal government support
- Good for business including retention of employees

Resources:

- [EEOC Amicus Brief](#) in *Vavra v. Honeywell*, 23-2823 (7th Cir.)
- [EEOC Amicus Brief](#) in *Roberts et al. v. Progressive et al.*, 1:23-cv-01597 (E.D. Ohio)
- New York State Bar Association, [Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity](#) (Sept. 2023)
- LDF, [The Economic Imperative to Ensure Equal Opportunity: Guidance for Employers, Businesses, and Funders](#)
- LDF, [Affirmative Action in Higher Education: The Racial Justice Landscape after the SFFA cases](#)
- Gibson Dunn - [Diversity, Equity, and Inclusion \(DEI\) Resource Center](#)
- Democracy Forward's [Amicus Brief](#) in *Alliance for Fair Board Recruitment v. SEC* (5th Cir.)
- Democracy Forward's Sunu P. Chandy & Skye Perryman, [Workplace DEI Programs Have a Path Forward in Face of Backlash](#), Bloomberg Law (Mar. 7, 2024)

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Framing Common Patterns of Workplace Bias to Prove Race and Sex Discrimination Claims

Subhashini Bollini, Partner, Correia & Puth, PLLC

Connecting the Dots

- How might workplace DEI programs relate to employee discrimination claims?
- What types of employment decisions may be affected by bias in the absence of effective DEI programs?
- How can commonly identified patterns of bias help frame viable discrimination claims under Title VII and similar statutes?
- What information may be relevant in discovery?

What should an effective workplace DEI program achieve when it comes to equity?

“Equity in the workplace requires treating all employees fairly and justly—regardless of their backgrounds—and ensuring equal opportunities for growth, development, and success.

Since people often hire or promote individuals who [share similar characteristics as themselves](#), proactively combatting influences—such as [unconscious bias](#)—can lead to workplace equity in the form of:

- Equal opportunities
- Fair compensation
- Balanced training and educational opportunities

“What you have to do around equity is tell people there are a lot of biases we’ve built up since we were kids that have been reinforced repeatedly,” King says in [Leadership, Ethics, and Corporate Accountability](#). “And you need more awareness around them if you want to do well in a forward-thinking company.”

DEI: What Is It and How to Champion It in the Workplace, <https://online.hbs.edu/blog/post/what-is-dei>

How might such a DEI program relate to employment discrimination?

- An *effective* DEI program should be focused in identifying and mitigating bias in employment decisions. <https://biasinterrupters.org/>
- An *effective* DEI program can include measures that help managers and other employees identify and mitigate personal biases
- Such a program can also mitigate biases in processes that affect employees' career opportunities and *the terms, conditions, and privileges of employment*.
 - Hiring/Promotions
 - Assignment of work
 - Performance evaluations
 - Compensation

***Muldrow v. City of City of St. Louis, Missouri*, 601 U.S. _____ (2024)**

To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment.

What the transferee does not have to show, according to the relevant text, is that the harm incurred was “significant.” 30 F. 4th, at 688. Or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar. See *supra*, at 4, and 4-5, n. 1. “Discriminate against” means treat worse, here based on sex. See, e.g., *Bostock*, 590 U. S., at 657-658, 681, 140 S. Ct. 1731, 207 L. Ed. 2d 218.

[Muldrow v. City of St. Louis, No. 22-193, 2024 U.S. LEXIS 1816, at *13-14 \(Apr. 17, 2024\)](#)

Some quick thoughts on discovery

- Consider a “Rules of the Road” approach
 - **Rules of the Road: A Plaintiff Lawyer’s Guide to Proving Liability**, Rick Friedman & Patrick Malone Paperback: 352 pages; 2nd edition (2010); ISBN: 9781951962111, Publisher: Trial Guides, LLC
 - <https://www.trialguides.com/products/rules-of-the-road-trade>
- Focus on processes where appropriate for the claims

The Workplace Experiences Survey (WES) Data

*ARTICLE: Beyond Implicit Bias: Litigating Race and Gender Employment
Discrimination Using Data from the Workplace Experiences Survey.*

72 Hastings L.J. 337(2020)

Types of Biases Identified in the Workplace Experiences Survey

1. Prove-it-Again Bias

- Women and Black employees have to provide more evidence of competence in order to be seen as equally competent

2. Tightrope Bias

- Behaviors that signal competence, mastery, and leadership, such as assertiveness, self-promotion, displays of anger, are accepted more from white men than from women and people of color. Employees in these groups walk a tightrope of being perceived negatively for the same behaviors that are accepted from others.

3. Maternal Wall Bias

- Negative assumptions about a mother's priorities (children first), commitment to work, and competence; similar bias against fathers who take parental leave.

4. Tug-of-War Bias

- Bias against a group fuels conflict within the group; members of a group struggle with whether to align or distance themselves from others, and whether others within the group are competing for scarce resources.

5. Racial Stereotyping

See Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey, 72 HASTINGS L.J. at 353-400.

PARTICIPANT POLLS 1,2 & 3

You do not have to participate in this poll, but if you do, please be aware that your responses are tallied anonymously.

1. Do you identify as a woman or a person of color? (Y/N)
2. If you answered “Yes” to question 1, during your career, have you experienced any of the five types of biases identified through the WES? (poll can list the five and include radio buttons for responses (same for next question))
3. For all participants, have you represented an employee who has experienced any of the five types of biases identified through the WES?

Fact pattern # 1:

- Employee is a scientist at research institution, woman, married with a child.
- Male supervisor refuses to recommend her for a tenured position after taking the following actions:
 - After she has her child, questioning her commitment to a career in research
 - Describing her to his male colleagues in assessments of her professional development as being “rough around the edges,” “overly ambitious,” and “having a strong personality”
 - Downplaying the value of her research, which is focused on women’s health, and denying her funding based on his assessment
 - Setting as a bar for his tenure recommendation her getting her work published in a prestigious scientific journal, then adding a new requirement after she got her work published in a prestigious scientific journal.
 - Alleging she committed a serious infraction that warrants termination and subjecting her to an investigation. Although she was cleared her of wrongdoing, he then characterized her to other decisionmakers as being “sloppy” and non-compliant with research protocols.

How can the five patterns show that a decision was made “because of” sex, race, or both?

“Much of social science is what every cab driver in New York City already knew.” - Mort Halperin

[ARTICLE: *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey* +, 72 Hastings L.J. 337, 426](#)

Indeed, we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.

[*Price Waterhouse v. Hopkins*, 490 U.S. 228, 256, 109 S. Ct. 1775, 1793 \(1989\)](#)

**“Tightrope Bias”/gender stereotyping results in
a poor appraisal and eventual layoff**

Margolis v. Tektronix, Inc., 44 F. App’x 138 (9th Cir. 2002)

“Tightrope Bias”/gender stereotyping results in a poor appraisal and eventual layoff

While her supervisor’s comments might not have been as blatant as the sex stereotypes in *Price Waterhouse*, the subjective nature of the skills matrix--prepared specifically for the workforce reduction--left ample room for such stereotypes to affect Margolis’ scores, especially in areas such as “leadership” and “teamwork” where aggressiveness by a female might be impermissibly penalized.

[Margolis v. Tektronix, Inc., 44 F. App'x 138, 141 \(9th Cir. 2002\)](#)

Maternal wall bias leads to denial of tenure

Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004)

Maternal wall bias leads to denial of tenure

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 1982, 155 L. Ed. 2d 953 (2003).

Fact pattern # 2

- Black male employee holds an MBA and Ph.D., serves in a non-supervisory position just below management level.
- White female manager displays discriminatory biases in evaluating employee's performance and affording him opportunities for career advancement by doing the following:
 - Assigning employee tasks such as preparing presentations, setting up projectors and meeting rooms, while denying him the opportunity to speak on the subject matter of his expertise
 - Excluding employee from meetings and informal networking opportunities
 - Denying employee training that would help him qualify for promotions
 - Discrediting employee's accomplishments in performance appraisals, even where they were widely acknowledged successes
 - Calling employee "self-centered" and "not a team player" for making a statement in an article profiling his team's achievements
 - Requiring employee to provide daily reports describing what work he had completed
 - Monitoring employee's whereabouts during the workday

**Prove-it-Again Bias / Race-based stereotyping leads to
a low appraisal and eventual layoff**

Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999)

Prove-it-Again Bias / Race-based stereotyping leads to a low appraisal and eventual layoff

The concept of “stereotyping” includes not only simple beliefs such as “women are not aggressive” but also a host of more subtle cognitive phenomena which can skew perceptions and judgments. *Price Waterhouse* highlighted one such phenomenon: the tendency of “unique” employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process. *See* 490 U.S. at 235-36; *see also Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir. 1991) (discussing possible relevance of plaintiff’s status as the sole employee within a protected class).

[Thomas v. Eastman Kodak Co.](#), 183 F.3d 38, 61 (1st Cir. 1999)

Prove-it-Again Bias / Race-based stereotyping leads to a low appraisal and eventual layoff

Prove-it-Again Bias/Racial Stereotyping leads to denial of a raise

Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765(E.D. Wis. 2010)

Prove-it-Again Bias/Racial Stereotyping leads to denial of a raise

•...[S]cholars have long recognized that black males are subject to distinct stereotypes. For example, some white Americans believe that black males are less intelligent than other groups, including black females. Pamela J. Smith, *Part II -- Romantic Paternalism The Ties That Bind: Hierarchies of Economic Oppression That Reveal Judicial Disaffinity for Black Women & Men*, 3J Gender, Race & Justice 181, 254 (1999-2000); *see also* Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Bases Engender a Case of Race Plus Sex Discrimination*, 36 Washburn L.J. 23, 41 (1996) (stating that because America "remains a segregated society . . . stereotypical biases dominate selection and promotional processes to the exclusion of African-American males who are veiled with images of incompetency"). As a result, black males are sometimes monitored more closely than members of other groups. *Id.* at 31.

[Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 770-71 \(E.D. Wis. 2010\)](#)

Prove-it-Again Bias/Racial Stereotyping leads to denial of a raise

Today's Agenda

Part I

Introductions

Part II

Affirmative Action and Race Consciousness

Part III

Attacks on DEI in the Workplace & Beyond

Part IV

Framing Common Patterns of Workplace Bias

 **Part V**

Q&A and Announcements

Questions?



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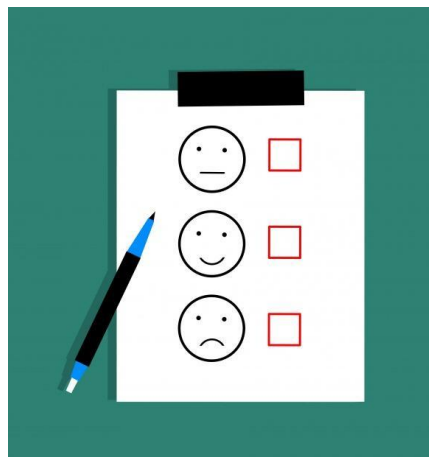
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