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DEI Task Force Update (February 14, 2024)

Diversity | February 14, 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 January 31, 2024, the American Alliance for Equal Rights (AAER) submitted a comment on the Department of Commerce's proposed Business Diversity Principles (BDPs) calling for the BDPs to be scrapped. AAER took issue with four aspects of the BDPs (as it viewed them): (1) the awarding of networking opportunities, resource groups, and other benefits to "underserved communities," including people of color; (2) the recommendation of strategies for increasing diversity in senior leadership; (3) the use of "demographic data" to assess diversity goals; and (4) the alleged lack of certain non-discrimination safeguards, such as a prohibition on quotas. AAER wrote that these principles violate the law and spirit of Section 1981, Title VII, and the *SFFA* decision in a way that "will likely increase, rather than diminish, discrimination in the workplace." In a press conference on February 7, Edward Blum, the leader of AAER, said that any business that implements the BDPs "will find itself in violation of federal law—and in federal court." On February 2, 2024, the Supreme Court denied Students for Fair Admissions' (SFFA) application for an emergency injunction pending appeal in *Students for Fair Admissions Inc. v. U.S. Military Academy West Point*, No. 7:23-cv-08262 (S.D.N.Y. 2023). SFFA sought to enjoin West Point from considering applicants' race during the upcoming admissions cycle. On September 19, 2023, SFFA filed its initial challenge to the constitutionality of West Point's race conscious admissions, arguing the academy should be subject to the same constitutional analysis as other schools, despite the Supreme Court's statement in *SFFA v. Harvard* that the Court's opinion did not address race-based admissions programs at the nation's military academies "in light of the potentially distinct interests that military academies may present." Following the district court's denial of SFFA's preliminary injunction on January 3, 2024, SFFA requested an emergency injunction from the Second Circuit and then the Supreme Court. In its denial, the Supreme Court reasoned that the record before the Court is "underdeveloped." The Second Circuit, which also denied the requested injunction, concluded simply that "an injunction pending appeal is not warranted." The case will now return to the Second Circuit for review of the district court's denial of SFFA's preliminary injunction. On February 5, 2024, American Alliance for Equal Rights (AAER) filed a complaint and motion for a preliminary injunction against Hidden Star, a nonprofit organization that provides grants of $2,750 to "minority and low-income entrepreneurs" through its Galaxy of Stars grant program. The program also connects recipients to Hidden Star's expertise and resources, including an online community. AAER claims that the program constitutes race discrimination in violation of Section 1981 because it allegedly limits eligibility for the grants to people who are a confirmable ethnic minority or female. AAER's claims against Hidden Star echo those in its suit against Fearless Fund. Hidden Star has not yet responded to the complaint. On February 6, 2024, America First Legal (AFL) sent a letter to the EEOC accusing the National Football League (NFL) of race and sex discrimination in violation of Title VII through its implementation of the Rooney Rule. The Rooney Rule, adopted by the NFL in

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2003, initially required teams with head coach vacancies to interview at least one "diverse" candidate before making a new hire. Over the years, the Rooney Rule has been amended to include more specific requirements for minority candidates in other positions, with the goal of increasing diversity not only among head coaches, but also among general managers and executive positions. AFL's complaint argues the NFL and its member teams "limit, segregate, or classify their employees or applicants for employment in ways that deprive at least some individuals of interview and employment opportunities specifically because of race, color, or sex." On the same day the lawsuit was filed, AFL also sent a letter to the NFL Commissioner, demanding that appropriate measures be taken to address the alleged "assault on Constitutional equality." On February 7, Senators Ted Cruz (R–Texas) and John Kennedy (R–Louisiana) sent a letter to Chief Judge Diane S. Sykes of the Court of Appeals for the Seventh Circuit arguing that the courtroom policies of three active judges in the Southern District of Illinois are unethical and unconstitutional in light of *SFFA*. As discussed in our February 2, 2024 DEI Task Force Update, in 2020, Chief Judge Nancy J. Rosenstengel, Judge Staci M. Yandle, and Judge David W. Dugan issued standing orders announcing new procedures aimed at encouraging "newer, female, and minority attorneys" to participate in courtroom proceedings, and AFL filed a formal judicial complaint challenging those orders on January 25, 2024. Citing AFL's complaint for support, Senators Cruz and Kennedy argue that the standing orders "discriminate on their face" and "suggest ongoing judicial race and sex discrimination." The Senators' letter asks the Chief Judge to respond to a series of questions regarding the number of oral arguments granted on the basis of sex, race, or experience rather than the merits of a case; a description of measures in place to screen discriminatory standing orders, empower individuals to raise concerns about discrimination, and initiate trainings in the wake of *SFFA*; and an explanation of the circumstances under which it would be "even theoretically inappropriate for a female or minority attorney to argue a motion."

Media Coverage and Commentary:

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

- Law360, "Fla. Justices Tell State Bar To Eliminate Diversity Funding" (January 18): Law360's Jack Karp reports on the Florida Supreme Court's directive ordering the Florida Bar to stop funding diversity and inclusion initiatives. Karp says that the Bar intends to apply funds previously allocated to its Diversity and Inclusion Committee to a new Membership Outreach Committee, which will focus on increasing participation in the Florida Bar more generally. Karp notes that the court's directive is consistent with an administrative order it issued in 2023 in which the court dissolved its own Standing Committee on Fairness and Diversity and eliminated a requirement that new judges attend a mandatory "fairness and diversity" training.
- Law360, "3 Takeaways After EEOC Members Tackle DEI On Social Media" (February 2): Law360's Vin Gurrieri reports that EEOC Commissioners are once again posting their views about DEI initiatives on X. The latest series of posts started when Commissioner Andrea Lucas told Mark Cuban he was "dead wrong" by suggesting that race and gender can be "part of the equation" in hiring decisions. EEOC Vice Chair Jocelyn Samuels responded in her own post that DEI was good for business and lawful, explaining that "reducing barriers to equal opportunity is not the same as unfairly putting a thumb on the scale." Gurrieri explains that these social media posts "may mask [a] broader consensus" about legal requirements among the commissioners, and that "[a]ny daylight in the commissioners' viewpoints lies more in exactly how DEI programs are crafted rather than disputes about the law." Gurrieri also recommends that employers avoid relying on social media posts over available formal EEOC resources. He notes that some experts believe the Supreme Court may offer further insight on DEI "sooner rather than later," highlighting related questioning by the Justices in the recent *Muldrow v. City of St. Louis* argument.
- Wall Street Journal, "Corporate America Tweaks Diversity Initiatives Amid

Pushback" (February 5): The Wall Street Journal's Richard Vanderford examines the changing landscape among corporate America's diversity initiatives. The article catalogs some of the diversity programs that many companies implemented following the death of George Floyd, some of which, according to Johnny Taylor Jr., the head of the Society for Human Resource Management, "were questionable." Vanderford explains how a recent flurry of lawsuits and increased scrutiny of these programs, particularly those with quota-like targets, has forced corporations to pivot, restructuring their programs to accomplish the same goals without attracting attention from plaintiffs' lawyers. While diversity initiatives are sure to exist into the foreseeable future, Vanderford notes that many advisers suggest focusing on inclusion to shield companies from unwanted attention.

- Wall Street Journal, "The Case Against Bill Ackman and Elon Musk's Anti-DEI Stance" (February 7): The Wall Street Journal's Tali Arbel comments on a letter sent by a coalition of minority business owners to Fortune 500 CEOs. The letter, published on February 7, 2024, calls upon Fortune 500 CEOS to support DEI efforts despite opposition from a "vocal minority of ideologically motivated voices." Arbel notes that the letter responds to billionaires Elon Musk and Bill Ackman's recent criticism of DEI, as well as litigation efforts challenging pro-DEI corporate initiatives, saying that the opposition to DEI is "out of step with most business leaders." The letter also provides evidence that pro-DEI efforts are both popular with the public and profitable. Cosigners of the letter include presidents and CEOs of organizations that advance the interests of racial minorities, women, veterans, and LGBT individuals.

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:**

- ***Bradley, et al. v. Gannett Co. Inc.***, 1:23-cv-01100-RDA-WEF (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 November 24, Gannett moved to dismiss, arguing that the plaintiffs failed to plead specific facts connecting the allegedly discriminatory policy with plaintiffs' own differential treatment on the basis of race. Gannett also moved to strike the plaintiffs' class action allegations.
    - **Latest update:** On January 22, 2024, the plaintiffs filed their opposition to Gannett's motion to dismiss, arguing that hiring demographics can only legally reflect the hiring pool—rather than the overall community—and specifying alleged instances of differential treatment. The plaintiffs also opposed Gannett's motion to strike the class allegations, claiming that the proposed class is ascertainable and challenges to the class definition are premature. On January 29, 2024, Gannett filed its reply, arguing that without any factual allegations of harm, the plaintiffs' complaint is properly construed as a facial challenge of Gannett's policy, which is not a legally viable claim under Section 1981. Gannett also contended that the plaintiffs could not show that the policy was the but-for cause of any adverse employment actions. Finally, Gannett argued that the purported class of plaintiffs is insufficiently ascertainable to support a class action. On February 8, 2024, the plaintiffs moved for class certification and a preliminary injunction against Gannett's policy, claiming that each passing day denies the proposed class the opportunity of equal employment, causing them irreparable harm. The court set a hearing for March 13, 2024.

- ***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 January 25, 2024, the plaintiff filed his oppositions to the defendants' motions to dismiss. The plaintiff argued that he was qualified for the program but excluded due to the defendants' discriminatory conspiracy. He also argued that the defendants misconstrued his allegations as a failure-to-hire employment claim, rather than a claim of interference with his right to freely contract under Section 1981. He maintained that his complaint should survive regardless of whether the defendants interfered with his employment or right to contract, because under either theory, the defendants' actions violated Section 1981.

- ***Mid-America Milling Company v. U.S. Dep't of Transportation***, No. 3:23-cv-00072-GFVT (E.D. Ky. 2023): Two plaintiff construction companies sued the Department of Transportation, asking the court to enjoin the DOT's Disadvantaged Business Enterprise Program (DBE), 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. On December 15, 2023, the plaintiffs filed a motion for a preliminary injunction, requesting that the court prohibit the defendants from implementing or enforcing the DBE program's race and gender requirements and its goals of minority participation. On January 16, 2024, the DOT filed its motion to dismiss the complaint.
  - **Latest update:** On January 26, 2024, the DOT filed its opposition to the plaintiffs' motion for a preliminary injunction. The DOT first argued that the plaintiffs did not have a likelihood of success on the merits because they lack standing, but that even if they had standing, the DOT's program would survive strict scrutiny. The DOT also argued that the plaintiffs are not at risk of irreparable harm because they have not identified current contracts that have race- or gender-based subcontracting goals under the program. Finally, the DOT argued that the balance of the equities weighed in favor of the government, which has an interest in remedying past and ongoing discrimination in the transportation industry.

2. Employment discrimination under Title VII and other statutory law:

- ***Hoffman v. Bd. Of Regents of the Univ. of Wis. Sys.***, No. 23-cv-00853-SLC (W.D. Wis. 2023): On December 14, 2023, a white University of Wisconsin-Eau Claire employee sued the UW system, alleging that she was forced to resign from her role as interim director of the university's Office of Multicultural Student Services due to her "race and color." The employee claims that she was subjected to a hostile work environment on the basis of her race and that she experienced "constructive demotions" in violation of Title VII.
  - **Latest update:** Defendants' response to the complaint is due on February 26, 2024.

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

- **Valencia AG, LLC v. New York State Off. of Cannabis Mgmt. et al.**, No. 5:24-cv-00116-GTS-TWD (N.D.N.Y. 2024): On January 24, 2024, Valencia AG, a cannabis company owned by white men, sued the New York State Office of Cannabis Management for discrimination, alleging that New York's Cannabis Law

and implementing regulations favored minority-owned and women-owned businesses. The regulations include goals to promote "social & economic equity" ("SEE") applicants, which the company claims violates the Equal Protection Clause and Section 1983.

- **Latest update:** On February 7, 2024, the plaintiff filed a motion for a temporary restraining order and preliminary injunction, seeking to prohibit the defendants from implementing the regulations, charging SEE applicants reduced fees, or preferentially granting SEE applicants' applications. The plaintiff argued it has a strong likelihood of success on the merits because race- and sex-based discrimination is presumptively invalid. The plaintiff asserted that it will suffer irreparable harm because earlier entrants to the market receive benefits like customer loyalty. The plaintiff also argued the balance of equities weighs in its favor because resolving a constitutional violation serves the interests of justice and dismantling the program now rather than after trial prevents a "chaotic mess." Defendants' response to the complaint is due on February 21, 2024.

4. Board of Director or stockholder actions:

- ***Craig v. Target Corp.***, No. 2:23-cv-00599-JLB-KCD (M.D. Fl. 2023): America First Legal sued Target and certain Target officers on behalf of a stockholder, claiming the board falsely represented that it monitored social and political risk, when it allegedly focused only on risks associated with not achieving ESG and DEI goals. The plaintiffs claimed that this focus depressed Target's stock price, alleging violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934.
  - **Latest update:** On January 26, 2024, Target and its officers filed a motion to dismiss and a request to transfer venue to the District of Minnesota. In their motion to dismiss, the defendants emphasized that Target repeatedly warned investors of risks associated with its DEI and ESG initiatives, and that the plaintiffs have conceded that they were warned. The defendants also argued that the plaintiffs failed to plead sufficient facts showing that Target's alleged misstatements were materially false or misleading, made with scienter, or caused plaintiffs to suffer losses. Finally, the defendants stressed that "disagreeing with Target's business judgment does not give rise to an actionable claim under the securities laws." In support of their motion to transfer to the District of Minnesota, where Target is headquartered, the defendants explained that transfer of venue serves justice and judicial economy because Minnesota is where the underlying decisions and events occurred and is home to the majority of key figures. Plaintiffs' response to both motions is due March 1, 2024.

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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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