DEI Task Force Update

December 13, 2023

Gibson Dunn has formed a Workplace DEI Task Force, bringing to bear the Firm's experience in employment, appellate and Constitutional law, DEI programs, securities and corporate governance, and government contracts 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 December 6, 2023, Fearless Fund (represented by Gibson Dunn) filed its merits brief in ***Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC***, No. 23-13138 (11th Cir. 2023). The brief is available here. Fearless Fund is a Black women-owned venture capital firm with a "Fearless Strivers" charitable grant program that provides $20,000 grants to Black female entrepreneurs as part of its mission to raise awareness about inequities in access to capital. AAER sued Fearless Fund in August 2023, claiming the program violates Section 1981 and seeking a preliminary injunction preventing Fearless Fund from awarding the grants. The district court denied the plaintiff's motion for a preliminary injunction, but on September 30, 2023, the Eleventh Circuit temporarily enjoined the program pending appeal. AAER filed its merits brief on November 6, 2023. Its reply brief is due on January 3, 2024. Oral argument is scheduled for January 31, 2024.

On December 6, 2023, the U.S. Supreme Court heard oral arguments in *Muldrow v. City of St. Louis*, a case that presents potentially sweeping implications for workplace discrimination claims. The question before the Court is whether Title VII prohibits discrimination in transfer decisions if the transfer did not create a significant disadvantage for the employee, such as diminished earnings, benefits, or future career prospects. The plaintiff argued that all job-transfer decisions based on a protected characteristic violate Title VII regardless of whether an employee suffers any additional harm, an argument to which a number of Justices appeared sympathetic. The defendant argued that an employee must experience a materially adverse employment action—beyond the transfer decision itself—for the action to be cognizable under Title VII. Depending on its scope, a finding by the Court that the lateral transfer in this case was an actionable change in the "terms, conditions and privileges of employment" could significantly expand the range of employment actions subject to Title VII. An expanded definition of "terms, conditions and privileges of employment" could raise questions, for example, about whether workplace DEI programs that do not constitute tangible employment actions like promotions could nevertheless be actionable under Title VII if they provide differential treatment based on race or gender.

On November 28, 2023, America First Legal ("AFL"), on behalf of Target shareholders, filed an amended complaint in its lawsuit against Target Corporation and certain of its officers. Plaintiffs allege that the Target board depressed Target's stock price by falsely representing that it was monitoring social and political risks to the company, when it was, in fact, only focused on risks associated with not achieving ESG and DEI goals. The original complaint alleged violations of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934. The amended complaint adds a claim under Section 20(a) of the Exchange Act based on the company's 2023 Pride Month collection. The amended complaint also adds four new plaintiffs. Responsive pleadings are due on January 26, 2024.

On December 4, 2023, the Sixth Circuit issued a decision in *Ames v. Ohio Department of Youth Services*, No. 23-3341 (6th Cir. Dec. 4, 2023), calling attention to a circuit split relating to a plaintiff's burden of proof in Title VII "reverse-discrimination" cases. In affirming the district court's decision granting summary judgment for the Department, the court relied on Sixth Circuit precedent that requires plaintiffs in reverse-discrimination cases to make an additional showing that "background circumstances . . . support the suspicion that the defendant is that unusual employer who discriminates against the majority." In a concurring opinion, Judge Raymond M. Kethledge took issue with the background circumstances rule, noting that the rule goes against the express language of Title VII because it imposes different burdens on different plaintiffs based on their membership in different demographic groups. The Sixth, Seventh, Eighth, Tenth, and D.C. Circuits have adopted the background circumstances rule, while the Third and Eleventh Circuits have expressly rejected it. Judge Kethledge predicted that the Supreme Court will resolve the circuit split and review the validity of the background circumstances rule.

With the 2024 proxy season approaching for many publicly traded companies, special interest investors with viewpoints that span the political spectrum continue to use the shareholder proposal process set forth in Securities and Exchange Commission (SEC) Rule 14a-8 to advance their particular pro- or anti-DEI agendas. As we reported on here, shareholder proposals focused on nondiscrimination and diversity issues were the fourth most popular proposals submitted during the 2023 proxy season. These proposals largely focused on requesting racial equity or civil rights audits, reports on DEI efforts, and analyses of gender and racial pay equity. Companies also received shareholder proposals from ESG skeptics like the National Legal and

Policy Center and the National Center for Public Policy Research. These proposals asked that companies roll back plans to undertake a racial equity audit, conduct a cost/benefit analysis of DEI programs and conduct a "return to merit" audit where the supporting statements focused on concerns about potential discrimination against "non-diverse" employees or discrimination based on religious and political views. DEI-related shareholder proposals submitted for 2024 annual meetings to date are similar, including shareholder proposals requesting reports on corporate DEI programs and on any risks associated with potential discrimination against conservative viewpoints or ideologies.

Media Coverage and Commentary:

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

- The Washington Post, "Conservatives are suing law firms over diversity efforts. It's working." (December 9): The Post's Julian Mark and Taylor Telford summarize the efforts of Edward Blum's conservative advocacy group American Alliance for Equal Rights, which has sued or sent threat letters to at least seven law firms challenging their diversity recruitment programs. At least three of these firms changed their diversity fellowship eligibility criteria. Blum noted that "it is likely that other corporate entities with similar racially discriminatory policies will be sued in the coming weeks." Professor Kenji Yoshino was quoted extensively and offered alternative paths to achieving DEI goals in this new legal landscape.

- Bloomberg Law, "Blum Says He's Done Suing Law Firms as Winston Yields on DEI." (December 6, 2023): Bloomberg Law's Tatyana Monnay reports that AAER has no further plans to sue law firms, however, Edward Blum noted that his team still "combs websites of hundreds of firms looking for any evidence of programs he views as illegal."

- Law360, "Commerce Dept. Wants Feedback on Draft DEI Principles" (November 27): Law360's Sarah Jarvis reports on a recent request by the U.S. Department of Commerce for comments on a proposed set of DEIA principles that set out best practices for DEI in the private sector. According to the Department's Federal Register notice, the Initiative is intended to be the first step in a long-term effort to "convene private sector business diversity leaders, amplify existing efforts, and inspire additional, voluntary business diversity efforts." The draft principles are focused on executive leadership, organizational strategy, workforce development, human resources, business opportunities, and community investment. Comments are due January 5, 2024.

- Bloomberg Law, "Nasdaq's Board Diversity Court Win Draws New Conservative Appeal" (November 28): Bloomberg Law's Andrew Ramonas reports that the National Center for Public Policy Research ("NCPPR") has filed a petition for en banc review of the Fifth Circuit's October decision in *Alliance for Fair Board Recruitment v. SEC*, upholding Nasdaq's Board Diversity Rules. The Alliance for Fair Board Recruitment, the other petitioner in the case, previously filed a petition for rehearing in October. Among other things, NCPPR contends that the rules exceed the scope of the Exchange Act. Gibson Dunn represents Nasdaq as an intervenor in the case.

- Law360 California Pulse, "Diversity In Management Linked To Higher Long-Term Growth" (November 30): Law360's Aaron West summarizes a new study by corporate social responsibility and workplace equity nonprofit As You Sow, which found that, in certain industries, companies with more racial diversity in management are more likely to demonstrate increases in average long-term financial growth, income after tax, and other financial metrics. According to the report, these positive correlations were evident in the "communication services, consumer discretionary, consumer staples, financials, health care, and information technology sectors." West notes that the study also identified that the most statistically significant positive financial gains occurred among companies with the largest market capitalization.

- Law360, "4th Circ. Reluctant To Reverse White Exec's Race Bias Verdict" (December 7): Law360's Hayley Fowler reports on the oral argument before a panel of the Fourth Circuit in *Duvall v. Novant Health Inc.*, a case in which a white executive was awarded nearly $4.6 million after a jury trial on his claim that he was fired as a result of a North Carolina hospital's diversity initiative, in violation of Title VII. Oral argument on Novant Health's appeal included an extended discussion of the efforts white collar workers must make to find new employment, in order to mitigate damages. According to Fowler, the panel "seemed dubious" overall of undoing the jury verdict in favor of the plaintiff.

Current Litigation:

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

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

- ***Am. Alliance for Equal Rights v. Winston & Strawn LLP***, No. 4:23-cv-04113 (S.D. Tex. 2023): AAER sued law firm Winston & Strawn, challenging its 1L diversity fellowship program as racially discriminatory in violation of Section 1981.
    - **Latest update**: On December 6, 2023, AAER dismissed the case after Winston & Strawn changed its fellowship program eligibility language to be race-neutral.
- ***Phillips v. Starbucks Corp.***, No. 19-cv-19432 (D.N.J. 2019): On October 28, 2019, a white former Starbucks regional director sued the company for firing her based on her race, allegedly to protect its image after the company suffered bad press when two Black men were arrested in a store for which the plaintiff oversaw operations. The plaintiff alleged discrimination and retaliation in violation of Title VII, Section 1981, and New Jersey state law. On June 12, 2023, a New Jersey federal jury awarded $25.6 million in compensatory and punitive damages to the plaintiff. On July 13, 2023, Starbucks filed a number of post-trial motions, including a motion to vacate and a motion for judgment as a matter of law.
    - **Latest update**: The court heard oral argument on the post-trial motions on November 30, 2023.
- ***Correll v. Amazon.com, Inc.***, No. 3:21-cv-1833 (S.D. Cal. 2022): On October 28, 2021, a white male businessman sued Amazon, alleging that by having a feature within its website that allows consumers to identify products sold by non-white, non-male sellers, the company violated Section 1981 and separately California Civil Code §§ 51 and 51.5, which prohibit racial discrimination by businesses.

- **Latest update**: On November 28, 2023, the parties filed a joint motion to dismiss, stipulating to the plaintiff's dismissal of the action against Amazon with prejudice. The court granted the motion on November 30, 2023.

- ***Bradley, et al. v. Gannett Co. Inc.***, 1:23-cv-01100 (E.D.V.A. 2023): On August 18, 2023, white plaintiffs sued Gannett over its alleged "Reverse Race Discrimination Policy," in response to Gannett's expressed commitment to having its staff demographics reflect the communities it covers, alleging violations of Section 1981.

    - **Latest update**: On November 24, Gannett moved to dismiss, arguing that the plaintiffs failed to state Section 1981 claims because they did not plead specific facts connecting the allegedly discriminatory policy with their own differential treatment on the basis of race. Gannett also argued that many of the actions that the plaintiffs challenged, including performance evaluations and reassignments, did not rise to actionable adverse employment actions. A hearing on the motion to dismiss has been scheduled for January 10, 2024.

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

- ***Alliance for Fair Board Recruitment v. SEC***, No. 21-60626 (5th Cir. 2021): On October 18, 2023, a unanimous Fifth Circuit panel rejected challenges to Nasdaq's Board Diversity Rules and the SEC's approval of those rules. Petitioners Alliance for Fair Board Recruitment and National Center for Public Policy Research sought review of the SEC's approval of Nasdaq's Board Diversity Rules, which require companies that have contracted to list their shares on Nasdaq's exchange to (1) disclose aggregated information about their board members' voluntarily self-identified diversity characteristics (including race, gender, and sexual orientation), and (2) provide an explanation if fewer than two board members are diverse. The SEC approved the rules after determining that they were consistent with the Exchange Act. Petitioners challenged the rules on constitutional and statutory grounds. Gibson Dunn represents Nasdaq, which intervened to defend its rules.

    - **Latest update**: On October 25, 2023, AFBR petitioned for a rehearing en banc. On November 27, 2023, NCPPR also petitioned for rehearing en banc, and the court ordered the SEC and Nasdaq to respond to the petitions. On November 28, Republican Attorneys General from Utah and 18 other states filed an amicus brief in support of the petitions. Responses to these petitions are due December 18, 2023.

- ***Johnson v. Watkin***, 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 November 29, 2023, both plaintiff and defendant filed objections to the magistrate judge's recommendation and proposed order granting a preliminary injunction to prevent the college from disciplining or investigating the plaintiff based on his political speech. The plaintiff argued that the court should enjoin the new DEI rules in their entirety. The defendants argued that the proposed injunction is overbroad and forecloses all DEI policies (including those not yet written), and is factually inaccurate as to how disciplinary procedures work. The defendants further argued that the plaintiff lacks standing and that the rules are constitutionally permissible standards for job-related conduct rather than restrictions of the plaintiff's personal views.

3. Educational Institutions and Admissions (Fifth Amendment, Fourteenth Amendment, Title VI, Title IX):

- ***Students for Fair Admissions, Inc. v. University of Texas at Austin***, 1:20-cv-00763-RP (W.D. Tex. 2020): On July 20, 2020, SFFA sued the University of Texas, alleging that UT Austin's methods of considering race in undergraduate admissions violated the Equal Protection Clause of the Fourteenth Amendment, Sections 1981, Title VII, the Texas Constitution, and Texas state law.

    - **Latest update**: On October 27, 2023, the defendants moved to dismiss the action as moot, claiming UT Austin made its admissions process race-neutral following the Supreme Court's decision in *SFFA v. Harvard*. On November 27, SFFA opposed dismissal, arguing the case is still live because UT Austin has allegedly failed to implement safeguards to ensure its admissions officers comply with the new policy and because SFFA is still seeking an injunction to prohibit UT from reinstituting its prior policy. The defendants' reply is due on January 11, 2024.

- ***Students for Fair Admissions v. United States Naval Academy***, No. 1:23-cv-02699-ABA (D. Md. 2023): On October 5, 2023, SFFA sued the U.S. Naval Academy, arguing that consideration of race in its admissions process violates the Fifth Amendment.

    - **Latest update**: On November 27, 2023, the court set a hearing on the plaintiffs' motion for a preliminary injunction for December 14, 2023. On December 1, 2023, the Naval Academy and other federal defendants filed their response to the preliminary injunction motion, arguing that SFFA did not demonstrate that it had standing because it submitted only anonymous declarations on behalf of its members, and that it did not demonstrate irreparable harm because there had been a substantial delay in bringing the action. On the merits, the Academy argued that the military has a compelling national security interest in a diverse officer corps, and that its admissions process was narrowly tailored.

- ***Students for Fair Admissions v. U.S. Military Academy at West Point***, No. 7:23-cv-08262 (S.D.N.Y. 2023): On September 19, 2023, SFFA sued West Point, arguing that affirmative action in its admissions process, including alleged racial "benchmarks" of "desired percentages" of minority representation, violates the Fifth Amendment of the U.S. Constitution by taking applicants' race into account.

- **Latest update**: On November 22, 2023, West Point and other federal officials filed their opposition to the motion for a preliminary injunction. They argued that SFFA has not demonstrated it has standing because it has not pled facts to show its members, who are described anonymously in the complaint, have a stake in the controversy. They also argued that SFFA did not demonstrate irreparable harm, in part because its members have not actually applied for admission to West Point. On the merits, West Point argued that its admissions process is constitutional because the military has a compelling national security interest in a diverse officer corps distinct from academic interests in student diversity, and its admissions process is narrowly tailored.

The following Gibson Dunn attorneys assisted in preparing this client update: Jason Schwartz, Mylan Denerstein, Elizabeth Ising, Blaine Evanson, Molly Senger, Zakiyyah Salim-Williams, Matt Gregory, Zoë Klein, Mollie Reiss, Teddy Rube*, Alana Bevan, and Marquan Robertson*.

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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