DEI Task Force Update

August 15, 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 July 23, 2024, America First Legal (AFL), the organization founded and run by former Trump policy advisor Stephen Miller, announced that it had filed a federal civil rights complaint with the EEOC against CrowdStrike. AFL alleges that "prohibited characteristics" are motivating CrowdStrike's employment decisions under the guise of DEI, in violation of Title VII. The complaint points to CrowdStrike's nine employee resource groups, including Women of CrowdStrike and Communidad. AFL contends that the lack of a resource group for "Men of CrowdStrike" or white employees is discriminatory. AFL also highlights CrowdStrike's public proxy statement, which includes a "Board Diversity Matrix" that tracks the sex, gender identity, race, and ethnicity of its current directors. AFL sent a

corresponding letter to CrowdStrike's board of directors demanding that the company end its allegedly discriminatory workplace practices.

On July 29, 2024, Auburn University announced it will dissolve its Office of Inclusion and Diversity by August 15, 2024. Established in 2016 at the recommendation of students and staff, the office aimed to enhance the recruitment and retention of underrepresented groups and oversee educational and cultural programs. Auburn now joins four other Alabama state colleges in closing their diversity offices after Governor Kay Ivey signed a law banning DEI programs and the teaching of certain "divisive concepts" on March 19, 2024. One day later, on July 30, 2024, the University of Missouri also announced it will dissolve its Division for Inclusion, Diversity and Equity (IDE) by August 15, 2024.

On July 30, 2024, the court granted Starbucks' motion to dismiss in *Langan v. Starbucks Corporation*, No. 3:23-cv-05056 (D.N.J. July 30, 2024). Langan, a white female former employee, filed a complaint against Starbucks claiming that she was wrongfully accused of racism and terminated after she rejected Starbucks' attempt to deliver "Black Lives Matter" T-shirts to her store. The plaintiff brought claims for discrimination under Title VII, Section 1981, the New Jersey Law Against Discrimination (NJLAD), the Americans with Disabilities Act, and the Age Discrimination in Employment Act, as well as retaliation in violation of Title VII and the NJLAD and various torts. On December 8, 2023, Starbucks moved to dismiss the plaintiff's NJLAD claims on the basis that they were barred by the statute of limitations. Starbucks also moved to dismiss the plaintiff's tort claims and Section 1981 discrimination claim for failure to state a claim. In the ruling last week, the court granted Starbucks' motion to dismiss in its entirety, agreeing that the NJLAD claims were untimely and that the plaintiff had failed to state her tort or Section 1981 claims. As to her Section 1981 claim, the court held that the plaintiff had not alleged that her termination was based on anything other than her "egregious" discriminatory comments and her violation of the company's anti-harassment policy. The court granted the plaintiff leave to amend, and the plaintiff filed an amended complaint on August 11.

On July 29, 2024, the Equal Protection Project (EPP) filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) against the Mitchell Hamline School of Law (Hamline Law) in St. Paul, Minnesota. EPP alleges that Hamline Law's hosting of the Minnesota Association of Black Lawyers (MABL) Law School Pathways mentorship program constitutes racial discrimination in violation of Title VI of the Civil Rights Act, as the program is exclusively available to Black students. The program selects ten to twenty juniors, seniors, and alumni from Minnesota universities and colleges each year as "MABL Pathways Scholars." These scholars receive pre-law school programming, LSAT preparation, and academic mentoring in order "to empower Black students in Minnesota to succeed in law school and the legal profession." In response to EPP's complaint, Hamline Law said that it only hosts the program and does not administer it.

On July 29, 2024, Judge Trina Thompson in the Northern District of California denied a motion to dismiss a proposed securities class action against Wells Fargo in *SEB Investment Management AB v. Wells Fargo & Co.*, No. 22-cv-03811-TLT (N.D. Cal. July 29, 2024). The lawsuit alleged that Wells Fargo engaged in sham practices related to interviewing diverse candidates, including interviewing candidates for positions that had already been filled. To support their allegations that Wells Fargo violated Section 10(b) of the Securities Act and Rule 10b-5, the plaintiffs identified eleven allegedly false or misleading statements related to Wells Fargo's hiring program dating back to 2020. Wells Fargo argued that the plaintiffs had not adequately pled scienter, but the court held that plaintiffs had sufficiently alleged that Wells Fargo knowingly made false statements about its hiring practices sufficient to raise a strong inference of scienter. The court therefore denied Wells Fargo's motion to dismiss.

On July 31, 2024, a three-judge panel of the Eleventh Circuit overturned the district court's dismissal of a complaint of race discrimination against a City Commission and its Chairman in *McCarthy v. City of Cordele*, No. 23-11036 (11th Cir. July 31, 2024). The plaintiff sued the City Commission of Cordele, Georgia, and the newly-elected Chairman of the Commission, alleging that he was fired from his position as City Manager because he was white, in violation of Section 1981, Section 1983, Title VII, and the Equal Protection Clause of the Fourteenth Amendment. The district court granted the defendants' motion to dismiss, holding that the plaintiff's allegations did not support an inference of a racially discriminatory motive because the plaintiff did not adequately allege that the Commissioners who voted to fire him acted with a discriminatory intent, even though they were acting at the urging of the non-voting Chairman. The Eleventh Circuit found that the district court erred in separating the

official actions of the Chairman from those of the Commission but that it correctly dismissed the claims against the Chairman in his individual capacity. The court therefore reversed the district court in part and remanded for further proceedings.

Media Coverage and Commentary:

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

- Wall Street Journal, "The Activist Pushing Companies to Ditch Their Diversity Policies" (August 3): The Wall Street Journal's Joseph Pisani and Chip Cutter profile conservative activist Robby Starbuck, who has leveraged his 500,000 followers on X to rally opposition against DEI initiatives at various companies. Pisani and Cutter report that Starbuck's criticism has led companies such as Tractor Supply and John Deere to scale back their DEI efforts, and that his newest target is Harley-Davidson, with additional companies also in his sights. In his campaign against Harley-Davidson, Starbuck criticized the company for its support of LGBTQ+ causes and its "total commitment to DEI policies." According to Starbuck, "Everybody should just go to work, do their job, go home. You want to be an activist in your personal time? That's your business."

- Forbes, "Amid DEI Backlash, Support From Workers Drops Slightly – But Remains Strong" (August 5): Forbes' Jena McGregor reports on a recent shift in support for DEI initiatives amid growing political scrutiny. McGregor highlights a survey conducted by Seramount, a DEI consulting firm, which queried 3,000 employees about their perspectives on DEI efforts. McGregor says the survey reveals that while overall support for DEI remains robust, with 76% of respondents expressing a personal commitment to advancing DEI in their workplaces, this figure has decreased from 83% in 2021. Additionally, McGregor reports that Black employees' views of their managers' inclusion

efforts have improved, with 70% describing their managers as inclusive in 2024, up from 65% in 2021. In contrast, the percentage of white employees who view their managers as inclusive fell from 74% in 2021 to 68% this year.

- Wall Street Journal, "The Fight Against DEI Programs Shifts to Medical Care" (August 14): The Wall Street Journal's Theo Francis and Melanie Evans report on a civil rights complaint filed against the Cleveland Clinic by Wisconsin Institute for Law and Liberty (WILL). The complaint alleges that the Cleveland Clinic discriminates on the basis of race by operating a program to prevent and treat strokes and other conditions in Black and Latino patients. WILL filed the complaint on behalf of Do No Harm, a "membership group for medical professionals and others opposing diversity, equity and inclusion initiatives." Francis and Evans note that "[t]he allegation pushes the fight against race-based programs into untested legal territory, arguing that healthcare providers can't use racial and ethnic demographics to target treatment, preventive care or patient education." According to Gibson Dunn partner and co-head of the firm's Labor and Employment practice group Jason Schwartz, telling medical institutions that they cannot help minority populations address significant medical risks could prove to be a tough sell. Schwartz says "[t]he rule is not that you have to help everyone or no one, whether it's a charitable endeavor or a public health priority. That would shut down an awful lot of good works."

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:

- ***Do No Harm v. American Association of University Women***, No. 1:24-cv-01782 (D.D.C. 2024): On June 20, 2024, Do No Harm filed a complaint against the American Association of University Women (AAUW), alleging that the organization is violating Section 1981 by providing "Focus Group Professions Fellowships" to only "women from ethnic minority groups historically underrepresented in certain fields within the United States: Black or African American, Hispanic or Latino/a, American Indian or Alaskan Native, Asian, and Native Hawaiian or Other Pacific Islander." Do No Harm is seeking a temporary restraining order and preliminary injunction prohibiting AAUW from closing the application window for the fellowships, and a permanent injunction prohibiting AAUW from considering race when selecting grant recipients.

- **Latest update:** On August 2, 2024, AAUW filed its opposition to the plaintiff's motion for a TRO and preliminary injunction, arguing that Do No Harm lacks standing, that the fellowship program is protected by the First Amendment, and that the program is a valid affirmative action program.

- ***Do No Harm v. Gianforte***, No. 6:24-cv-00024-BMM-KLD (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 already-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. Gianforte also argued that the plaintiff's pre-enforcement challenge was not ripe because his administration does not interpret the statute as a quota. 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. On June 7, Gianforte moved to dismiss the amended complaint, arguing again that the pseudonymous members lacked standing and that the case still was not ripe because the statute imposed only reporting requirements regarding diversity, so it posed no threat to the new members. On June 28, Do No Harm opposed the motion, asserting that the case is ripe and the members have standing because they will be disadvantaged in applications for upcoming openings, given the existing composition of the Board and the statute's requirement to take "positive action" to achieve gender and racial balance.

    - **Latest update:** On July 26, 2024, Governor Gianforte filed a reply in support of his motion to dismiss, reiterating his standing and ripeness arguments.

2. Employment discrimination and related claims:

- ***Wood v. Red Hat, Inc.***, No. 2:24-cv-237-REP (D. Idaho 2024): On May 8, 2024, a white male former employee sued Red Hat, Inc., a subsidiary of IBM. In his complaint, the plaintiff alleges that his role was terminated "as a direct result of Red Hat's DEI policies and efforts to diversify the workforce" and claims that, of the group of employees who were terminated at the same time, "21 of the total 22 individuals were white, and 21 were male." The plaintiff alleges that he was retaliated against for opposing his employer's stated goals of increasing diversity, which included setting hiring quotas of 30% female employees globally and 30% employees of color in the United States by 2028. The

plaintiff brought claims under Title VII, Section 1981, and the Family and Medical Leave Act.

  - **Latest update:** On July 29, 2024, the defendant filed a motion to compel arbitration and stay proceedings, arguing that the parties had a valid arbitration agreement that covers the dispute.

- ***Beneker v. CBS Studios, Inc., et al.***, No. 2:24-cv-01659 (C.D. Cal. 2024): On February 29, 2024, a heterosexual, white male writer represented by AFL, sued CBS, alleging that its de facto hiring policy discriminated against him on the bases of sex, race, and sexual orientation. In his complaint, the plaintiff alleges 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 writers, female writers, and a lesbian writer. The plaintiff is requesting 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 and requiring CBS to offer him a full-time job as a producer, and damages. CBS filed a motion to dismiss on June 24, 2024, arguing that the First Amendment protects its hiring choices and that two out of three of the plaintiff's Section 1981 claims were untimely. The plaintiff opposed on July 15, 2024, arguing that the First Amendment does not protect hiring decisions, even if CBS is engaged in a creative enterprise.

  - **Latest update:** On July 29, 2024, CBS filed a reply in support of its motion to dismiss, reiterating its First Amendment and Section 1981 arguments.

- ***Peters v. Federal Reserve Bank of Cleveland***, No. 1:24-cv-01314 (N.D. Ohio 2024): On July 31, 2024, a plaintiff filed a lawsuit under Title VII alleging that the Federal Reserve Bank of Cleveland had denied him a series of promotions and instead promoted candidates from minority backgrounds, even though he was more qualified than those candidates. The plaintiff is seeking a permanent injunction preventing the bank from continuing to implement its allegedly discriminatory policies and ordering the bank to promote the plaintiff and pay him monetary damages.

  - **Latest update:** The docket does not reflect that the defendant has been served.

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

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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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