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DEI Task Force Update

May 8, 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 April 24, 2024, the Wisconsin Institute for Law & Liberty (WILL), a conservative non-profit organization, sent a letter to the American Bar Association (ABA) concerning its Judicial Clerkship Program and Judicial Intern Opportunity Program, claiming that these programs unlawfully use race as a criterion for selecting participants. The ABA's Judicial Clerkship Program consists primarily of a conference that "introduces law students from diverse backgrounds . . . to judges and law clerks" and "informs and educates the students as to life-long benefits of a judicial clerkship." Participating law schools identify "four to six law students who are from underrepresented communities of color" to send to the conference. The ABA's Judicial Internship Opportunity Program offers opportunities for students who are members of traditionally underrepresented racial and ethnic groups in the legal profession to work with a judge over the summer. Applicants for this program must indicate how they qualify and may check boxes specifying their race, gender, socioeconomic status, sexual orientation, gender orientation, or disability status. WILL alleges that the criteria for both of these programs constitute unlawful racial quotas. In its letter, WILL cautioned the ABA that it will pursue legal action unless the ABA

announces by April 30, 2024 that these programs will no longer consider race as an eligibility factor. As of May 7, 2024, WILL has not reported any subsequent legal action.

On April 25, 2024, the Office for Civil Rights (OCR) for the U.S. Department of Education opened an investigation into Western Kentucky University's Athletics Minority Fellowship program, which offers four $2,000 undergraduate scholarships to students who are "underrepresented ethnic minorit[ies]" interested in athletic administration careers. The investigation responds to a complaint filed on September 16, 2023 by the Equal Protection Project (EPP) alleging that the program discriminates on the bases of race and national origin because white students are not eligible. The website for the program is no longer active, but EPP states that it "doesn't matter [if the program is no longer operating] because the discriminatory bell cannot be unrung." EPP further demands that the university create "a remedial plan to compensate students shut out of this scholarship." EPP's complaint also challenges the university's Distinguished Minority Fellowship program, which provides $15,000 to graduate students who are "African American, American Indian/Alaskan Native, Native Hawaiian/Pacific Islander, two or more races or Hispanic/Latino." OCR has indicated that there is already an ongoing investigation into that program.

On April 25, 2024, America First Legal (AFL), the conservative 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 Shake Shack, Inc., alleging race and sex discrimination in violation of Title VII. AFL claims that Shake Shack discriminates on the basis of race and sex by unlawfully considering the protected characteristics of applicants and employees when making employment decisions. In support of these allegations, AFL cites the company's May 2023 Proxy Statement, in which Shake Shack outlined its "5-Year Diversity Targets" that concentrate on women and people of color. Specifically, Shake Shack set a goal for 50% of its leadership roles to be occupied by people of color by the end of 2025, and also mandated that at least two underrepresented minorities, women, or people of color be interviewed when hiring for leadership positions. AFL highlights Shake Shack's June 2023 update on its DEI goals, as well, where the company cited a 33% increase in the representation of women and an 18% increase in people of color in leadership positions since establishing its 2025 diversity goals. AFL also sent a cease and desist letter to Shake Shack's CEO and Board of Directors demanding that the company end its allegedly discriminatory employment practices.

As state lawmakers wrap up a busy legislative session, several states have passed bills seeking to promote DEI. On April 17, 2024, Virginia's legislature enacted House Bill 1404, which establishes the Small SWaM (Small, Women-owned and Minority) Business Procurement Enhancement Program. The program fosters "initiatives to enhance the development of small businesses, microbusinesses, women-owned businesses, [and] minority-owned businesses" by supporting procurement opportunities for SWaM businesses participating in state-funded projects. On March 25, 2024, Washington's legislature enacted House Bill 1377, which requires continuing education providers to align their content with the

state cultural competency and DEI standards. And Maryland's legislature has enacted two bills: Senate Bill 205, which requires at least one member of the Board of Regents of the University System of Maryland to be a graduate of a historically Black college or university in the state; and House Bill 1212, which establishes a DEI director for the State Retirement and Pension System.

Media Coverage and Commentary:

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

- New York Times, "What to Know About State Laws That Limit or Ban D.E.I. Efforts at Colleges" (April 21): The *Times*' Anna Betts reports on recent efforts by Republican state lawmakers to roll back college diversity, equity, and inclusion initiatives. Betts explains that proponents of on-campus DEI policies and programs cite their importance in reversing decades of exclusion, but critics argue that DEI programs leave out other groups and perpetuate "reverse racism." Betts reports that, according to The Chronicle of Higher Education, state lawmakers critical of DEI initiatives have introduced 84 bills targeting publicly funded diversity programs and admissions practices since 2023. Twelve have been enacted into law and 13 are awaiting governors' signatures. In certain states, including Florida and Texas, these laws have eliminated all DEI-related positions and programs at public universities. But in other states, Betts says, schools are "work[ing] around these laws" by "reintroducing their D.E.I. offices under different names, and rewriting requirements to eliminate words like 'diversity' and 'equity.'"

- Forbes, "EEOC And Investors Support Hello Alice's Grants For Black Entrepreneurs" (April 24): Geri Stengel, president of diverse entrepreneurship consultancy firm Ventureneer, writes about the legal and financial supporters of Hello Alice, a fintech platform providing funding and AI-driven financial tools to small business owners. Some of Hello Alice's grants are tailored to historically underserved and underfunded groups, including the Black, Latino, Native American, LGBTQ+, rural, urban, and veteran communities. Like Fearless Fund, a venture capital fund providing financing to

businesses led by women of color, Hello Alice is currently fighting a lawsuit alleging that these grantmaking policies violate Section 1981, which prohibits consideration of race in contracting. Stengel notes that the EEOC has filed an amicus brief in support of Hello Alice, arguing that *SFFA* does not prohibit voluntary affirmative action programs in private investment. And although the lawsuit initially cost Hello Alice some investors and grant sponsors, Stengel writes that the organization recently closed its Series C funding round, allowing it to expand its financing offerings for small businesses.

- Daily Labor Report, "NYC Settles White Executives' Demotion Suit Over Diversity Push" (April 25): Three former New York City Department of Education executives have settled their race-discrimination suit against the city, writes Bloomberg's Ufonobong Umanah. In the suit, *Herrera v. New York Department of Education*, the white female plaintiffs alleged that they were demoted and replaced with less-qualified Black employees. Previously, Judge Mary Kay Vyskocil of the United States District Court for the Southern District of New York had granted summary judgment to the city on the plaintiffs' sex discrimination claims, but denied judgment on their race discrimination claims, based in part upon former Mayor Bill de Blasio's testimony "that it was 'a policy' of his administration to consider race in staffing decisions because he wanted the racial composition of his administration to mirror the racial diversity of the City." The parties settled for an undisclosed amount.

- Washington Post, "Can this firm invest in only Black women? This case will decide." (April 29): The Post's Julian Mark reports on Fearless Fund's ongoing work as the venture capital firm awaits the Eleventh Circuit's decision in *American Alliance for Equal Rights v. Fearless Fund Management, LLC.* Mark notes that AAER's lawsuit is seen by some as "an inflection point" for civil rights and racial equity. Mark reports that the lawsuit is taking a toll on Fearless Fund itself—founder Arian Simone said the firm hasn't had a closing since AAER filed its complaint in August 2023, although its portfolio remains "extremely healthy." Simone told Mark that the exceptionality of Fearless Fund's success in an industry dominated by white men only underscores the importance of its mission. "I would love a world that was equitable, where everybody received their fair portion," Simone

said. “If we lived in that world, I’d be fine—I can stop the Fearless Fund. But we don’t live in that world.” (Gibson Dunn represents the Fearless Fund in the litigation.)

- Daily Labor Report, “DeSantis Takes Aim Again at Workplace DEI Despite Court Loss” (May 2): Bloomberg’s Chris Marr reports on Florida Governor Ron DeSantis’s May 2 comments about workplace diversity training. During a press conference, Governor DeSantis said that mandatory training sessions on inherent racial and gender bias can create a hostile work environment under existing state law. The governor also indicated that he plans to address the issue with administrative action. These statements come two months after the Eleventh Circuit affirmed a district court’s order preliminarily enjoining operation of Florida’s “Stop W.O.K.E. Act” in *Honeyfund.com, Inc. v. DeSantis*, — F.4th —, 2024 WL 909379 (11th Cir. Mar. 4, 2024), holding that the law “exceeds the bounds of the First Amendment” by “target[ing] speech based on its content” and thus “penaliz[ing] certain viewpoints.” But, as Marr reports, the governor maintains “that current Florida civil rights laws prohibit[] some of this racist training that is being done and imposed under the rubric of D, E, and I.”

- Law360, “EEOC ‘Up For A Fight’ As High Court Title VII Test Takes Shape” (May 2): Law360’s Anne Cullen reports on a recent amicus brief filed by the EEOC in which the Commission argues that courts should apply the Supreme Court’s holding in *Muldrow v. St. Louis*—that employees alleging discrimination under Title VII need not show they faced significant harm to state a viable claim—to suits under the Americans with Disabilities Act (ADA). The case in which the EEOC filed its brief, *Scheer v. Sisters of Charity of Leavenworth Health System, Inc.* (No. 24-1055, 10th Cir.), is an appeal of the district court’s grant of summary judgment to the employer. In *Scheer*, the plaintiff was required to attend mandatory mental health treatment after expressing suicidal ideation but was later terminated after she refused treatment and would not sign a release of liability. The court held that the plaintiff had not shown that mandatory treatment constituted an adverse employment action under the ADA. Now, the Commission is taking the position that *Muldrow* abrogated the prior adverse-employment-action test in ***all*** workplace disputes, not just those under Title VII, and that the new, lower standard

would make counseling referrals actionable. Cullen reports that this position "proved divisive internally," with two of the five Commissioners voting not to file the brief in *Scheer*. Jason Schwartz, Gibson Dunn partner and co-chair of the firm's Labor & Employment group, told Cullen that the Commission's brief is an "overreading" of *Muldrow*: "It's like they took the Play-Doh or Silly Putty and tried to stretch it as far as possible. It's a super broad reading of *Muldrow*, broader than the Supreme Court intended, and certainly a reading that is going to encourage much more litigation."

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:

- ***Crystal Bolduc v. Amazon.com Inc.*, No. 4:22-cv-615-ALM (E.D. Tex. Jul. 20, 2022):** On July 20, 2022, AFL filed a putative federal class action lawsuit on behalf of a white plaintiff who sought to become an Amazon delivery service provider (DSP), alleging race discrimination in violation of Section 1981 in Amazon's supplier-diversity initiatives, including a program extending $10,000 grants to Amazon delivery service providers allegedly based in part on race.
    - **Latest update:** On April 25, 2024, the court partially granted Amazon's motion to dismiss and dismissed the case without prejudice. The court found that Bolduc lacked Article III standing to sue because she never applied to Amazon's DSP program and thus has suffered no actual or imminent injury. Although Bolduc argued that she was deterred from applying because of the allegedly discriminatory grant, the court explained that a plaintiff must submit to a policy before bringing an action to challenge it. The court concluded that "Bolduc falls outside the class of individuals potentially suffering a direct and personal injury: DSP owners who have been denied any contractual benefit due to their race." Because the issue of standing was sufficient to dismiss the case, the court did not consider whether Bolduc had failed to state a claim under Section 1981 as Amazon argued in its motion to dismiss. On April 26, 2024, Bolduc filed a notice of appeal.
- ***Poer v. Jefferson Cty. Comm'n* , No. 22-11401 (11th Cir. May 1, 2024):** In August 2019, Angela Poer filed suit in the Northern District of Alabama alleging that the Jefferson County Commission discriminated against her based on her race in violation of Title VII and Sections 1981 and 1983 by refusing to grant her transfer request and firing her. Poer argued that her boss, a Black woman, created a hostile work environment and denied her transfer request because of her animus against white people. The district court granted the Commission's motion for summary judgment, finding that no direct evidence supported Poer's racial discrimination claims and any circumstantial evidence was

insufficient to create a reasonable inference that her termination was racially motivated. Poer appealed.

    - **Latest update:** On May 1, 2024, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the Commission. The court found that the Commission offered several legitimate, non-discriminatory explanations for terminating Poer, including multiple performance issues caused by her repeated absences and mishandling of money. The court rejected Poer's argument that her boss's alleged racially discriminatory remarks alone were sufficient to preclude summary judgment, finding that Poer failed to tie any discriminatory comments to the decisionmakers who actually fired her.

- ***Valencia AG, LLC v. New York State Off. of Cannabis Mgmt. et al.*, No. 5:24-cv-116-GTS (N.D.N.Y. Jan. 24, 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 plaintiff claims violate the Fourteenth Amendment's Equal Protection Clause and Section 1983. On March 13, 2024, the plaintiff's new counsel, Pacific Legal Foundation, filed an amended complaint, naming only two New York state officials as defendants in their official capacity. The plaintiff sought a permanent injunction against the regulations and a declaration that the use of race and sex in the New York Cannabis Law violates the Fourteenth Amendment.

    - **Latest update:** On April 24, 2024, the defendants moved to dismiss the amended complaint, arguing that the plaintiff lacks standing because no injury or imminent harm warrants such broad relief. The defendants explained that the plaintiff's "position in the queue [for a New York microbusiness cannabis license] is too low to be considered even if no minority- or women-owned SEE applicants had even applied." The defendants also argued that the plaintiff failed to state a plausible claim under the Equal Protection Clause. The plaintiff's response is due May 15, 2024.

2. Employment discrimination and related claims:

- ***Cooper v. The Office of the Commissioner of Baseball et al.*, No. 1:24-cv-03118 (S.D.N.Y Apr. 24, 2024):** On April 24, 2024, a former minor league baseball umpire sued Major League Baseball, alleging that he was fired after he accused a female umpire of harassing him and using homophobic slurs. The complaint alleges that MLB implemented an "illegal diversity quota requiring that women be promoted regardless of merit," which the plaintiff claims emboldened the female umpire to make statements to him and other male umpires that, "I'm a woman and can get away with anything," and that "MLB has to hire females, they won't get rid of me unless I quit."

    - **Latest update:** The docket does not reflect that MLB 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 Robertson, Janice Jiang, Elizabeth Penava, Skylar Drefcinski, Mary Lindsay Krebs, David Offit, Lauren Meyer, Kameron Mitchell, Maura Carey, and Jayee Malwankar.

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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