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EXECUTIVE SERIES: LABOR & EMPLOYMENT



The Battle over DEI

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Agenda

- Students for Fair Admissions
- Early Challenges to DEI
- Recent Challenges to DEI
- Best Practices

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Early Challenges to DEI

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***Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003).**

- Black employees challenged Balanced Work Force Initiative
 - Goal that “all racial and gender groups were proportionally represented at all levels of the company.”
- Court determined that to remedy disproportionate racial representation, company “set specific racial goals for each job and grade level.” Evaluated supervisors on whether they met the goals.
- Existence of program “is sufficient to constitute direct evidence of a form or practice of discrimination.”

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***White v. Oakland Cnty. Cmty. Coll.*, Case No. 19-10465, 2020 WL 5908319 (E.D. Mich. Oct. 6, 2020).**

- Plaintiff, a white female, alleged discrimination when an African American female hired over her.
- Plaintiff cited report published by College concerning the “promotion of racial diversity.”
- Court found no evidence that College considered race in hiring, no statistical evidence of consideration of race, and no evidence that promotion of racial diversity was evidence of bias in hiring.
- Court granted dismissal of claim.

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Students for Fair Admission

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Students for Fair Admissions, Inc. v. Harvard & UNC, 600 U.S. 181 (2023).

- Harvard's & UNC's admissions practices did not survive strict scrutiny:
 - Diversity is a compelling, but elusive government interest (not measurable)
 - Use race as a negative – assumes all students of a certain race think/act alike
 - No logical endpoint
- Race cannot be a criteria for admissions decisions, even if part of a holistic review of a student. But the discussion of race in materials, such as in essays, can be a factor for admissions.

Case was not about employment practices . . .

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EEOC Weighed In

[The decision] does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. **It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.**

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OFCCP Weighed In

The Supreme Court's decision [] applies only to higher education admissions programs and does not address the employment context. **There continue to be lawful and appropriate ways to foster equitable and inclusive work environments and recruit qualified workers of all backgrounds. OFCCP's affirmative action requirements enable employers to reduce the risk of discrimination in their workforces and recruit and retain diverse talent.**

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Recent Challenges

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The Resurgence of the § 1981 Claim

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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The Resurgence of the § 1981 Claim (con't)

- Four-year statute of limitations
- Covers non-employees
- No need to exhaust administrative remedies
- Applies to all employers
- Individual liability for supervisors
- No cap on punitive damages
- Immediate injunctive relief

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Challenging Training

- Metzler Center for Diversity, Inclusion, and Belonging at New York University School of Law
 - *Arsenault v. HP Inc.* (D. Conn. filed May 29, 2024). White, male plaintiff alleges that he was subject to a “shaming session” after expressing his negative opinions on DEI, which led to retaliation, termination of his employment, and refusal to rehire him. Alleged violation of § 1981 and Title VII.

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Young v. Colo. Dep't of Corrections, 94 F.4th 1242 (10th Cir. 2024).

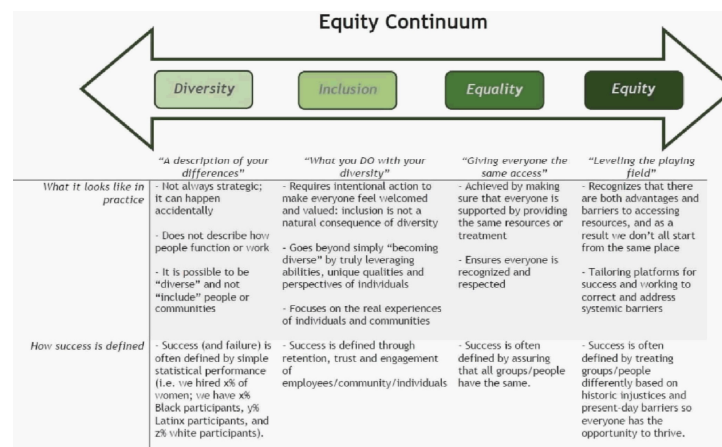
- Plaintiff alleged that DEI training materials “were based upon a glossary of terms stating that all whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that ‘whiteness’ and ‘white supremacy’ affect all ‘people of color within a U.S. context.’”

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Young v. Colo. Dep't of Corr. (con't)



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Young v. Colo. Dep't of Corr. (con't).



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Young v. Colo. Dep't of Corr. (con't).

- Court stated that “the racial subject matter and ideological messaging in the training is troubling on many levels.”
- However, single instance of training did not rise to the level of being severe or pervasive, the court granted summary judgment for defendant.

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***Diemert v. City of Seattle*, 689 F. Supp. 3d 956 (W.D. Wash. 2023).**

- Plaintiff alleged that he experienced a disparate and hostile treatment during his employment until he resigned.
- Plaintiff alleged a course of conduct over time – 2015-2021.

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***Diemert v. City of Seattle* (con't).**

Challenging Comments

- “What could a straight White male possibly offer our department?”
- “[It is] impossible to be racist toward ‘white people.’”
- He was told he should step down and that he used his white privilege to retain the position and that he was denying a person of color an opportunity for a promotion.
- Coworker told him he was privileged, racist, and called his words “violence” and an invasion of her “safe space.”
- Supervisor told him he had white privilege and racist motives.

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Diemert v. City of Seattle (con't).

- Court found that Plaintiff alleged enough facts to state a plausible claim for disparate treatment.
- City filed for summary judgment. Oral argument scheduled for Thursday, October 31 at 9:00 a.m.

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Bresser v. Chicago Bears, 24-cv-02034 (N.D. Ill.).

- Bresser sued the Bears alleging he was denied a position for a “legal diversity fellow” because he is a white man.
- Job posting: Applicant should be a person of color and/or female law student
- Bears: chose to pursue “other applicants whose experience and qualifications more closely match our needs.”

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Bresser v. Chicago Bears (con't)

Qualifications

- Meet current class standing of 1L or above at one of the following participating law schools:
 - Chicago-Kent College of Law
 - DePaul University – College of Law
 - Northwestern Pritzker School of Law
 - School of Law | Loyola University Chicago
 - University of Illinois College of Law
 - UIC Law School
 - University of Chicago Law School
- Person of color and/or female law student
- Have a minimum cumulative GPA of 3.0 on a 4.0 scale (1Ls with pending grades shall supplement their application when final grades are posted)
- Demonstrated ability to maintain confidentiality
- Excellent research and writing skills
- Proficient in Microsoft Office (Word (including legal formatting), Excel, PowerPoint), and Adobe Acrobat
- Demonstrated ability to effectively manage and prioritize multiple projects (ranging from the routine to the complex), deadlines and initiatives with minimal supervision

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Bresser v. Chicago Bears (con't)

- Case settled for an undisclosed amount on August 27, 2024.

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Best Practices

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Avoid the Pitfalls

- Quotas
- Using diversity as a “tie-breaker”
- Narrow definitions of diversity
- Group-specific programs
- Tying compensation to diversity goals

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Critically Examine Current DEI

- What are the employer's goals?
- Are the employer's goals lawful?
- Are the employer's initiatives legally defensible?
- Are the company's statements regarding DEI creating risk?

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