Is DEI Still Standing? Moving Forward with Diversity

Barbara E. Hoey

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It’s been over a year since the Supreme Court's June 2023 ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (SFFA), prompting employers nationwide to brace for potential legal challenges to their Diversity, Equity, and Inclusion (DEI) programs.

These concerns were validated when lawsuits and threats were lodged against a wide range of employers in 2023. Plaintiffs targeted law firms, universities, non-profits, and prominent companies, arguing that their DEI initiatives were now illegal under *SFFA*. We’ve been monitoring these legal challenges closely; you can find more details here and here.

Watching as these challenges played out, many legal advisors urged clients to tread carefully when developing and implementing diversity initiatives. While striving for a diverse workforce and dismantling systemic barriers is an admirable goal, the risk of litigation and adverse publicity loomed large in today’s socio-political landscape.

As time went on, these cases began to settle, leading to a lull in litigation by early 2024. This raised an important question: is the wave of DEI challenges over? As we look ahead to 2025, many employers are left uncertain about their next steps. In our practice, we frequently receive inquiries about whether the challenges to DEI programs have subsided and whether we can revert to pre-*SFFA* practices.

Unfortunately, the answer is no. Although the frequency of legal challenges has decreased, they are still occurring. Recent settlements continue to influence DEI programs, as evidenced by the Fearless Fund’s settlement on September 11, 2024. This Atlanta-based venture capital firm, which supports women of color entrepreneurs, resolved a lawsuit that challenged its grant program.

Given this context, employers must remain vigilant, ensuring all initiatives comply with legal standards.

Emerging Trends in DEI Challenges

In the wake of the *SFFA* decision, we observed organized, well-funded activist groups launching attacks on DEI programs, both in public discourse and through litigation. Some of these efforts, like the one against the Fearless Fund, have achieved notable success.

As a further example, Lowe's recently scaled back its DEI commitments after facing scrutiny from conservative activists. Similarly, Williams-Sonoma was sued by America First Legal for allegedly engaging in unlawful discrimination through its DEI hiring practices.

Just this week, King & Spaulding, a national law firm, sought to dismiss a discrimination claim from a

white applicant who argued she was discouraged from applying to its diversity summer program due to her race. The firm contends that the applicant lacked standing, as she never actually applied.

Alongside organized challenges, there have also been individual lawsuits alleging “reverse discrimination” tied to DEI initiatives. The Meltzer Center for Diversity, Inclusion, and Belonging tracks these cases, revealing 24 workplace discrimination suits to date. Although somewhat numerous, their overall impact has been less severe than anticipated, and outcomes have varied.

In the *Bradley v. Gannett* case, for example, a class of employees challenged a company policy aimed at achieving racial and gender parity. Critically—in reviewing the company’s motion to dismiss—the District Court was quick to point out that it was not actually clear if such an explicit policy actually existed that could be interpreted to establish a formal or informal “caste system” that placed employees and applicants in a supposed preference hierarchy based on a mix of factors including race, color, ethnicity, and national origin.

The company moved to dismiss and strike the class allegations, arguing that there was no “policy” in effect at all. The Court agreed—noting that no evidence of such a policy could be uncovered that:

1. defined specific racial hiring, promotion, or retention quotas for any specific position or the workforce overall;
2. referred to any “caste” system designating a “hierarchical preference” for certain groups over others; or
3. provided specific plans for how its diversity goals are to be achieved.

Indeed, as opposed to a concrete policy put in place, it appeared as though the employer’s initiatives were aspirational in nature. The Court also noted that the plaintiffs’ pleadings failed to properly identify a policy at all, and sometimes referred to a “2020 Inclusion Report” as the policy at issue, while concurrently describing the operative “policy” as an entirely different system in effect.

After reviewing each individual plaintiff’s claims, the Court concluded that each employee would be seeking relief based on different theories of recovery. Indeed, these individuals were largely located in different positions within separate divisions and subsidiary groups throughout the country that involved dissimilar decisionmakers. Ultimately, the Court opted to dismiss the plaintiffs’ claims of discrimination for failure to state a claim without prejudice and ordered the class allegations stricken.

This skepticism toward DEI challenges appears to be a growing trend in some federal courts. For instance, the Seventh Circuit recently upheld summary judgment in *Vavra v. Honeywell*, where the plaintiff claimed he was discriminated against for refusing to engage in a training session addressing unconscious bias. The court found he could not reasonably believe the training was discriminatory since he had not watched the training materials and failed to show a retaliatory motive linking his complaints to his termination.

While these cases illustrate a trend toward skepticism in court, they do not signify a fundamental shift in legal principles. The most significant change in law came with the Second Circuit’s *Do No Harm* decision earlier this year. The outcomes of *Vavra* and *Bradley* support the idea that courts may be growing more discerning regarding DEI-related claims, but they do not indicate a clear trend.

The Fearless Fund settlement exemplifies how DEI challenges can yield some success for its opponents. But, at the same time, a DEI program can survive. After facing legal action in 2023, the

Fund opted to settle rather than risk setting a harmful precedent, allowing it to refocus on its mission to support under-resourced entrepreneurs.

Moving Forward with DEI

The positive takeaway is that organizations like the Fearless Fund can return to their mission, and similarly, employers should feel empowered to pursue diversity initiatives. However, they must ensure that specific grants, offers, or benefits are not exclusively reserved for particular groups. Anyone selected for a position or grant should be the best candidate, with all groups given equal opportunity to participate.

Despite the challenges, DEI programs remain in use, and the goals of diversity and inclusion remain a focal point for many organizations. If you are considering launching or updating a diversity initiative, consult with employment counsel to ensure compliance with legal standards.