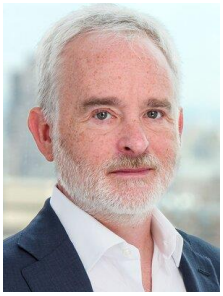
How DEI Programs Are Being Challenged In Court And Beyond

By **Lara Flath, David Schwartz and Amy Van Gelder** (April 11, 2024)

Lara Flath



David Schwartz

Amy Van Gelder

The U.S. Supreme Court's June 2023 **decision** in Students for Fair Admissions Inc. v. President and Fellows of Harvard College, which declared the consideration of race in university admissions unconstitutional, has had a significant impact on diversity, equity and inclusion initiatives.[1]

In the wake of that decision, litigants have begun to challenge some DEI training programs, alleging that they constitute racial discrimination and compelled speech, and/or cultivate a hostile work environment.

Additionally, state legislators on both sides of the aisle have passed bills and introduced others to either pare back or promote DEI.

Here, we look at a recent set of challenges to DEI training initiatives that are emerging through both litigation and legislation.

Court Challenges to DEI-Related Trainings

Over the last several years, many organizations have implemented or increased programming related to systemic racism, white supremacy and implicit bias.

Individual plaintiffs have now initiated lawsuits challenging these types of trainings, alleging that they constitute compelled speech, racial discrimination and — by singling out participants based on protected characteristics — cultivate a hostile work environment.

Courts have allowed some of these claims to survive the pleadings stage, although none appear to have yet been decided on the merits.

In one such suit, De Piero v. Pennsylvania State University in the U.S. District Court for the Eastern District of Pennsylvania, a white male professor sued his employer, Penn State, alleging, among other race-based claims, a hostile work environment.

The plaintiff alleged that he had to sit through trainings that singled out white faculty, including a "'presentation and dialogue about critical race theory and antiracism' that attacked 'race neutrality, equal opportunity, colorblindness and merit.'"

The court allowed his hostile work environment claim to proceed, highlighting his allegations relating to required trainings.

Those included that "he was obligated to attend conferences or trainings that discussed racial issues in essentialist and deterministic terms — ascribing negative traits to white people or white teachers without exception and as flowing inevitably from their race."

Similar cases have been filed elsewhere in the country. In Diemert v. City of Seattle in

the U.S. District Court for the Western District of Washington, a white male former employee of the city of Seattle alleged that certain diversity initiatives, which allegedly included mandatory diversity training involving critical race theory, created a hostile work environment and constituted racial discrimination.

The district court, citing the Supreme Court's Students for Fair Admissions decision, **denied** the city's motion to dismiss last year.

With respect to the plaintiff's equal protection claim, the court held that because the city encouraged "employees to attend different training based on their race, [it] must establish these affinity group distinctions are narrowly tailored to achieve the asserted compelling state interest."

In another Western District of Washington case, Weitzman v. Fred Hutchinson Cancer Center, a Jewish former employee of a medical center recently **sued** in January, alleging that the medical center terminated her for, among other things, failing to adhere to "race-conscious principles of Diversity, Equity, and Inclusion." There are no rulings yet in that case.

It remains to be seen how courts will handle lawsuits like these on the merits and whether plaintiffs ultimately will prevail. Regardless, pushback on DEI initiatives and programming persists, including through the expansion of challenges beyond hiring or eligibility criteria.

And while decisions on these types of claims are limited, courts appear willing to consider critically the extent to which DEI trainings may improperly distinguish among participants based on race or otherwise promote a hostile work environment.

As the Eastern District of Pennsylvania in the Penn State case cautioned: "When employers talk about race — any race — with a constant drumbeat of essentialist, deterministic, and negative language, they risk liability under federal law."

State Legislation Relating to DEI Initiatives

In addition to private court challenges to DEI trainings, several states have introduced or passed DEI-related legislation. This includes laws that prohibit or restrict identity-based preferences for hiring and admissions, diversity statements, mandatory DEI training, and DEI offices and staff. Nine of these bills have become law.

Most recently, on March 20, the governor of Alabama signed S.B. 129 into law, a sweeping measure that prohibits state agencies and schools from sponsoring DEI programs or requiring their employees or students to participate in them.

Meanwhile, Utah's governor signed into law H.B. 261, which prohibits public institutions from requiring DEI training or asking job applicants questions about initiatives that promote differential treatment based on personal identity characteristics. It also bans policies or programs with "diversity, equity, and inclusion" in their names.

Notably — and importantly, for private employers — while H.B. 261 passed quickly, a bill covering employers in the private sector, H.B. 111, did not fare as well.

The measure, which would have prohibited such employers from mandating DEI trainings, passed the Utah House but was voted down in the Utah Senate in February.

Florida, North Carolina, North Dakota, Tennessee and Texas have also enacted anti-DEI bills. For example, Texas adopted S.B. 17, which bans DEI offices and faculty and staff diversity trainings at public institutions. Tennessee signed into law H.B. 158, which prohibits certain public institutions from mandating implicit bias training.

At the same time, other states have moved to require DEI initiatives.

Washington's S.B. 5462 would require school districts to adopt curricula that tell the perspectives of LGBTQ Washingtonians. And in California, S.B. 54 requires venture capital companies to report the diversity of the founding members of businesses in which they invest.

In Sum

Debates over the appropriate place for DEI initiatives in public and private institutions do not appear to be waning. As they continue, organizations should keep abreast of shifting state and local regulations and carefully consider whether employees may perceive any mandatory DEI programs as creating a hostile environment.

So long as organizations comply with applicable laws, however, they need not shy away from educating their employees about diverse viewpoints, promoting equal opportunity among employees and making efforts to stamp out racial bias.

Clarification: This article has been updated to clarify the basis for the hostile work environment claim in De Piero.

Lara A. Flath is a partner at Skadden Arps Slate Meagher & Flom LLP.

David E. Schwartz is a partner and global head of the labor and employment law group at the firm.

Amy Van Gelder is a partner at the firm.

Skadden associate Emily B. Kaplan contributed to this article.

Disclosure: Flath and Van Gelder represented the University of North Carolina at Chapel Hill in Students for Fair Admissions v. Harvard.

[1] The cases are Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina (together, SFFA).