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Changes in Discrimination Interpretation and Enforcement

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Recent agency and court developments, including cases on workplace training programs and liability for customer harassment, are shifting the current landscape of employment discrimination. The Trump Administration's stance against disparate impact liability enforcement means the EEOC will not pursue this theory and eventually plaintiffs may only bring suit under the disparate treatment theory.

Although included in the text of Title VII, the Supreme Court seems ready to hear a constitutional challenge to disparate impact liability on the basis that the theory conflicts with the Equal Protection Clause. District courts have also signaled a willingness to reexamine and limit certain areas of discrimination law.

Title VII Liability Standards

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. Courts initially required proof of intentional discrimination on the basis of a protected class (disparate treatment liability) to make out a Title VII claim. The Supreme Court of the United States first recognized disparate impact as an alternative theory of liability in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Congress later codified disparate impact liability in Section 703(k) of Title VII through the Civil Rights Act of 1991. An employee bringing a discrimination claim under the disparate impact theory must show that an employment practice has a disproportionately adverse effect on a protected class of individuals.

Discriminatory intent of the employer is not required, and an otherwise facially neutral employment practice can be deemed discriminatory if it is not justified by business necessity.

Trump Administration Policy

The Trump Administration has undertaken policy directives aimed at limiting employer liability for discrimination claims arising under federal civil rights laws, such as Title VII. On April 23, 2025, President Trump signed an Executive Order (titled "Restoring Equality of Opportunity and Meritocracy"), which states that "[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible" because it hinders an employer's ability to use bona fide job-oriented evaluations when recruiting. Exec. Order No. 14, 281, 90 Fed. Reg. 17537, (Apr. 23, 2025).

The Executive Order further provides that, because disparate impact claims do not require discriminatory intent by the employer, employers are forced to

make hiring decisions not on the basis of merit or skill, but rather to avoid hiring decisions that could lead to disparate outcomes. In furtherance of this policy, the Administration directed federal agencies to deprioritize enforcement of any statutes or regulations that could result in disparate impact liability, including Title VII.

The Restoring Equality of Opportunity and Meritocracy Executive Order instructed federal agencies to divest focus from disparate-impact discrimination claims as part of the Administration's efforts to "creat[e] opportunity, encourage[e] achievement, and sustain[ ] the American Dream." The Administration's position is that "[d]isparate-impact liability imperils the effectiveness of civil rights laws by mandating, rather than proscribing, discrimination" and "threatens the commitment to merit and equality of opportunity that forms the foundation of the American Dream."

EEOC to Cease Enforcement of Disparate Impact Claims

According to an internal agency memorandum obtained by Bloomberg Law, the EEOC planned to administratively close all pending charges based solely on disparate impact by the end of September. For existing claims, EEOC staff must issue "right to sue" letters by Oct. 31, giving charging parties 90 days to pursue those claims privately in federal court.

The memo reportedly states that agency staff will continue to pursue cases involving both disparate impact and disparate treatment theories of liability. However, such cases will proceed only on the disparate treatment theory. It appears that the EEOC will no longer investigate new charges of discrimination based solely on a disparate impact theory.

Although the EEOC will be retreating from its enforcement of disparate impact cases, disparate impact discrimination is still prohibited by the text of Title VII. Additionally, several state non-discrimination laws recognize disparate impact liability.

However, the Supreme Court of the United States may be ready to consider challenges to the constitutionality of the disparate impact theory. In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court addressed whether an employer violated Title VII when it intentionally disregarded the results of a facially neutral promotion exam.

The employer argued that it did so to avoid disparate impact liability because the examination's results would have caused the disproportionate promotion of white candidates compared to minority candidates. The Court held that an employer can only take intentionally discriminatory action if the employer has a "strong basis in evidence" that failing to do so would subject it to disparate impact liability.

Justice Scalia's concurrence in *Ricci* invited constitutional challenge to Title VII's disparate-impact provision based on its supposed conflict with the Equal Protection Clause. Scalia explained that the disparate-impact theory necessarily requires an employer to discriminate against a non-minority class when it abandons a facially neutral practice to avoid disparate impact liability. As Scalia notes, the disparate-impact provision requires employers to "place a racial thumb on the scales," which may violate the Equal Protection Clause. Given the Court's current composition, it may be willing to adopt Scalia's view that disparate impact theory is constitutionally at odds with the Equal Protection Clause.

Employer Liability for Diversity Programs

A growing number employees have brought challenges to diversity programs, claiming that these programs are discriminatory and create a racially hostile work environment. On September 25, 2025, the Second Circuit found in *Chislett v. New York City Department of Education*, No. 24-972-CV, 2025 WL 2725669 (2d Cir. Sept. 25, 2025), that mandatory implicit bias training programs may give rise to race-based hostile workplace environment claims under Section 1983 when the training includes "a constant drumbeat of essentialist, deterministic, and negative language" with respect to a particular race.

In *Chislett*, the plaintiff brought a Section 1983 claim based on race discrimination under several theories, including that mandatory implicit bias training and subsequent workplace interactions (including negative generalizations about white employees) created a hostile work environment. The Second Circuit vacated the district court's grant of summary judgment on the hostile work environment claim, finding that a rational juror could determine that the employee was subject to a hostile work environment and that the employee's supervisors knew about the harassment and did not act to stop it.

Importantly, the Second Circuit made clear that it was not suggesting that “the conduct of implicit bias trainings is per se racist,” but rather that the way the trainings are conducted and an agency’s reaction to alleged harassment in and outside of such trainings can give rise to liability.

As in *Chislett*, courts are also reevaluating the legal standard for an employee to establish a claim of racial discrimination based on a hostile work environment under Title VII. On June 5,2025, the Supreme Court unanimously held in *Ames v. Ohio Department of Youth Services*, 605 U.S. 303 (2025), that the standard for establishing a discrimination claim is the same for all workers, regardless of whether they are a member of a minority or majority group.

Plaintiffs have since cited *Ames* to challenge the legality of anti-bias trainings, presenting the question of whether and when diversity programs and anti-bias trainings may form the basis of a hostile work environment claim. In *Chislett*, the Second Circuit did not determine whether the facts rose to the level of a hostile work environment, only that they could, and that the plaintiff had “raised genuine disputes of material fact” that precluded summary judgment.

Cases currently pending before the Ninth and Third Circuits will likely address the question of what constitutes “severe or pervasive” harassment in the context of workplace diversity programs. In *Diemert v. City of Seattle*, Docket No. 25-1188 (9th Cir. Feb. 25, 2025), the court is considering the standard applied to a hostile work environment claim brought by a member of a majority group based on conduct during anti-bias trainings. *Zack De Piero v. Pennsylvania State University, et al.*, Docket No. 25-01952 (3d Cir. May 16, 2025) raises similar questions in the Third Circuit.

Employer Liability for Third-Party Misconduct

The Sixth Circuit has also revisited the standard used for determining an employer’s liability for a third party’s misconduct. In *Bivens v. Zep, Inc.*, 147 F.4th 635, 643 (6th Cir. 2025), the plaintiff, an employee, reported to her employer, the defendant, that she had been harassed by a customer. In response, the customer was reassigned to another sales team to prevent further contact, and the plaintiff’s employment was later terminated. The plaintiff brought claims for hostile work environment, retaliation and race discrimination under Title VII and Michigan law.

Federal courts and the EEOC have long held that the standard for employer liability in cases involving harassment of an employee by a non-employee is negligence—whether the employer knew or should have known about the misconduct and did not take appropriate corrective action. The Sixth Circuit broke from that framework in *Bivens* when it held that negligence is an improper standard.

Rather, the court adopted a new standard that only imputes liability to an employer for a non-agent’s conduct where the employer “intend[ed] for the relevant unlawful consequence... to occur.” The court explained that an employee can meet this standard by providing evidence that the employer either “desired to cause” the misconduct (in *Bivens*, the harassment) or was “substantially certain that it would result from its actions.”

Bivens marks a departure from the long-standing negligence standard applied by the EEOC and all circuits that have addressed the issue (including the First, Second, Eighth, Ninth, Tenth and Eleventh Circuits), other than the Seventh Circuit, and embraces a more employer-protective framework for liability.

Looking Ahead

Developments in federal courts and the Trump Administration’s directives to federal agencies signal a shift toward more employer-friendly frameworks for liability under federal anti-harassment and discrimination laws.

Still, the disparate impact theory remains codified in Title VII and widely recognized among federal courts for now. In any event, employers should review training programs and be mindful of the evolving nature of this area given the current political climate and the make up of the Supreme Court.

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