

"Supreme Court's Ruling in 'Students for Fair Admissions' and Its Impact on DEI Initiatives in the Workplace," by attorneys Katharine Fogarty and Gabrielle Talavaccia, published in *The Legal Intelligencer*, 11-8-2024

In the wake of the landmark decision, employers across the country have been dealing with an uptick of litigation targeting workplace diversity, equity, and inclusion (DEI) policies and programs.

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*Following the U.S. Supreme Court's ruling in *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), eliminating the consideration of an applicant's race for admission, universities across the country have been grappling with how to proceed with diversity efforts to ensure an equal opportunity for students of all backgrounds to have access to a fulfilling educational experience. However, it has now been more than one year since the court's ruling, and it is apparent that the decision has had a ripple effect, extending beyond college campuses and impacting the private-sector workplace.*

*In the wake of the landmark decision, employers across the country have been dealing with an uptick of litigation targeting workplace diversity, equity, and inclusion (DEI) policies and programs. Following the court's logic in *Students for Fair Admissions*, litigants argue that employers are essentially implementing their own affirmative action policies under the guise of DEI in order to impermissibly use race or ethnicity as a factor in hiring or other employment decisions. In fact, just weeks after the court's decision, attorneys general from 13 states, including Indiana and South Carolina, signed a letter addressed to Fortune 100 CEOs cautioning employers that companies that continue to use race-based preferences in employment decisions and hiring practices "will be held accountable—sooner rather than later—for their decision to continue treating people differently because of the color of their skin."*

*Missouri Attorney General Andrew Bailey delivered on this warning to employers, and, on June 20, 2024, sued IBM, alleging its "diversity modifier" required the use of race and gender quotas in its hiring in violation of the Missouri Human Rights Act, in *Missouri v. IBM*, in the St. Louis County Circuit Court. Similarly, anti-DEI civil cases have been filed all over the country, from New York to Texas. Cases include *S Herrera v. New York City Department of Education*, filed Jan. 23, 2024, in the Southern District of New York, denying a defendant's motion for summary judgment where the plaintiffs alleged they were demoted because of the defendant's discriminatory policies and sidelined in favor of less qualified "candidates of color;" in *Netzel v. American Express*, where a class action complaint alleging the defendant implemented policies to hire and maintain a percentage of Black employees to be comparable to that of the United States population, filed Aug. 3, 2023, in the U.S. District Court of Arizona; in *Bradley v. Gannett*, filed Aug. 20, 2024 in the Eastern District of Virginia, where it was alleged a defendant's policy to achieve "racial and gender parity with the diversity of our nation, throughout our workforce" resulted in unlawful, race-based hiring; in *Vavra v. Honeywell International*, filed in the Northern District of Illinois (2023), where it was alleged an employer unlawfully terminated the plaintiff's employment because he stated his opposition to taking implicit bias training based on his conclusion that it was inherently racist; and in *Kascsak v. Michael Davis Velasco, Expedia*, a case filed March 22, 2024 in the Western District of Texas, where a defendant's motion for summary judgment was denied in part where the plaintiff, a white man, alleged a verbal offer for an executive position was retracted and filled by a Black woman, and was told the company wished to find a more diverse candidate to fill the role.*

In addition to litigation, since 2023, more than 100 anti-DEI bills have been either introduced or passed across 30 states. ("Map: See Which States Have Introduced or Passed Anti-DEI Bills," NBC News, March 2, 2024. For example, Idaho and Indiana have both passed laws prohibiting the use of DEI statements in employment and admissions decisions at public institutions. (Senate Bill 1274, Leg., Reg. Sess. (Idaho 2024); Senate Bill 202, Leg., Reg. Sess. (Ind. 2024)).

In response to the increased scrutiny from courts and lawmakers, some companies have already started scaling back their DEI programs. In June, Tractor Supply Co. announced that it would be eliminating DEI roles and retiring all current DEI roles, while other companies such as Lowe's, Harley-Davidson and Ford have all also moved away from their previous DEI messaging and programs. ("Ford joins list of companies walking back DEI policies," CNBC, Aug28, 2024. Other companies have remained steadfast in their support

of DEI, criticizing those that have backed away as having never truly been committed to such DEI initiatives.

Although employers may be concerned by the increase in backlash against DEI, research countering such concerns showcases benefits enjoyed by organizations that are committed to fostering a diverse workplace. An article published in the Harvard Business Review, "Why Diverse Teams Are Smarter," states that diversity in the workplace often leads to better financial performance and increased innovation for companies. The article goes on to explain that companies with employees from a wide range of backgrounds and experiences often leads to a variety of perspectives and ideas, leading to more creativity and the avoidance of "groupthink" when approaching issues.

With these benefits in mind, there are multiple ways employers can foster a diverse workplace while still ensuring the lawful implementation of diversity initiatives. One strategy that companies can choose to implement is broadening their recruitment practices. By confirming employees are being selected from an inclusive and diverse pool of candidates, employers can cultivate a workforce that reflects a variety of backgrounds and life experiences without making employment decisions based upon an individual's race, ethnicity or other impermissible characteristics. Another approach employers can take is to promote an inclusive workplace culture, and, in doing so, attract a diverse population of workers. This objective can be reached by introducing or strengthening equal employment policies, establishing mentorship groups, offering education and training programs, and advancing the overarching objective of fostering an environment in which employees feel safe to communicate with management about any issues or concerns.

While recognizing that the current legal landscape for DEI policies is challenging, it is important for employers to be reminded of the value of a diverse workforce and understand that they can implement numerous strategies to navigate these obstacles in furtherance of a commitment to diversity and inclusion in the workplace.

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