msk

new considerations for employers committed to dei initiatives

Louise Truong & Ricky Tai
MSK Client Alert

August 7, 2024

The current state of Diversity, Equity, and Inclusion (DEI) initiatives is at a critical juncture. Recent court decisions and policy changes have presented significant challenges to ongoing DEI efforts across industries and sectors. How to implement DEI initiatives moving forward in this new landscape will require a thoughtful approach.

In recent years, there has been an uptick in litigation against companies seeking to diversify or promote diversity in their workforce through various initiatives and affirmative action programs. For example,

- In 2022, a reverse racial discrimination lawsuit was brought by a Caucasian male who claimed that he was terminated purportedly due to a company-wide initiative to place certain percentages of women and people of color in leadership positions within the company. *Walton v. Medtronic USA, Inc.*, No. 0:22-CV-00050 (D. Minn. 2022). Particularly, the plaintiff alleged that Medtronic's "goal of having women in 40% of its leadership positions and people of color in 20% of its leadership positions by the year 2020 was the reason for his termination." This case is currently still pending with a jury trial set to move forward on August 19, 2024.

- In 2023, a class action lawsuit was filed in the Northern District of Ohio by America First Legal, a special interest group, against Progressive Insurance, who sponsored a small business grant program that focused on Black trucking entrepreneurs. *Roberts et. al., v. Progressive Preferred Insurance Company, et. al.*, No. 1:23-cv-01597 (E. Oh. 2023). America First also sued Hello Alice, a fintech company who administered the grant. America First's client, a Caucasian male, argued that the grant, which was given to 10 "Black-owned small businesses to use towards the purchase of a commercial vehicle," was discriminatory because he was ineligible for the grant. Notably, this case was dismissed on standing grounds and the merits were not addressed. The court held that since the plaintiff did not actually

attorneys

Wei Kit (Ricky) Tai

Louise Truong

practice areas

Diversity, Equity and Inclusion Advisory

employment litigation & counseling

labor & employment

apply for the grant, there was no cognizable injury alleged and he lacked standing as a result. While the outcome was ultimately favorable, the battle against DEI initiatives and programs continues and proves to be costly, as Hello Alice laid off 69% of its workforce in the wake of the lawsuit and lost major funding.[1] America First has filed an appeal and this case is currently pending.

- In 2024, an action was brought under Title VII and 42 U.S.C. § 1981 by a Caucasian, heterosexual, and female law school student, against the law firm, King & Spalding, for a paid summer associate diversity program that required applicants to have ethnically or culturally diverse backgrounds, or were a member of the LGBT+ community. *Spitalnick v. King & Spalding, LLP*, No. 1:24-cv-01367-JKB (D. Md. 2024). The plaintiff claimed that she was deterred from applying to the program and discriminated against due to her white race and for being heterosexual. This case is currently pending in the District of Maryland.

There are costly consequences when DEI initiatives and programs are deemed to be in non-compliance with anti-discriminatory statutes.

On March 12, 2024, the Fourth Circuit in *Duvall v. Novant Health, Inc.* affirmed a jury's decision in finding liability against Novant Health where the plaintiff, a Caucasian male employee, claimed reverse discrimination when the company's diversity initiatives purportedly went too far, and he was abruptly terminated due to the company's attempt to diversify its work force. Punitive damages were assessed by the jury in the amount of $10 million, but the award was reversed on appeal. The jury verdict of nearly $4 million in lost wages, benefits, and interest, however, was affirmed.

The plaintiff was a marketing executive who, when terminated, was only informed that the company "was going in a different direction." At trial, the jury heard evidence about the context surrounding his termination, which occurred as the company was fully engaged in developing and rolling out its diversity and inclusion initiative. There was evidence the company sought to achieve this goal by, among other things, benchmarking its then-current D&I levels and developing and employing D&I metrics to close any diversity gaps. The company also adopted a long-term financial incentive plan that tied executive bonuses to incentivize more diverse hires. The jury ultimately concluded that the explanations given for the plaintiff's termination were pretextual, and that a motivating factor in the termination was the fact that the plaintiff was a white male.

The *Duvall* case reveals how a company's DEI efforts may be perceived as being unlawful when challenged in litigation, if an employer fails to properly develop and implement its DEI programs and initiatives. Specifically, companies must be mindful about how to set up and reach DEI goals without creating unintended consequences of disparate treatment or impact based on any protected category, such as tying DEI metrics to compensation structures and employment decisions. As the Fourth Circuit cautioned, "[t]o be clear, employers may, if they so choose, utilize D&I-type programs. What they cannot do is take adverse employment actions against employees based on their race or gender to implement such a program."

Anti-DEI advocates will likely rely on the Supreme Court's recent decision, *Muldrow v. City of St Louis,* to combat DEI initiatives and programs, by arguing they cause "some" harm to non-diverse individuals.

On April 16, 2024, the Supreme Court issued its ruling in *Muldrow v. City of St. Louis,* which anti-DEI advocates may potentially add to their arsenal to combat against DEI-initiatives and programs that many employers have been implementing in recent years.

Under both federal and state law, employers are prohibited from discriminating against an applicant or employee based on a protected trait, such as race, gender, disability, and age. For there to be discrimination, there generally must be some type of "adverse action," i.e. termination, suspension, reduction in pay, or demotion. In the past, courts throughout the country have held that for an employee to prove they suffered an adverse action, they must show a "material change," or "significant harm" to the terms of their employment.[2] Yet, the Supreme Court in *Muldrow* held that, for discrimination lawsuits under Title VII, employees challenging a change in their employment terms or conditions need to only show that there was "some" harm to the their employment.

In *Muldrow,* a Sergeant in the St. Louis Police Department (the "Department"), brought a Title VII action against the Department, alleging that was transferred to another job within the Department because she was a woman. Even though the terms and conditions of her employment, responsibilities, pay, and rank remained the same, the plaintiff claimed that she still had a viable discrimination claim because, among other reasons, she was transferred to a less prestigious position, had fewer opportunities to work on important investigations, and her work scheduled changed. The Supreme Court agreed with the plaintiff, holding a heightened level of harm or significant harm is not required to prove discrimination based on a protected category. All an employee has to show is that there was "some 'disadvantageous' change in an employment term or condition."

Although *Muldrow* dealt with a transfer decision in the employment context and a more traditional discrimination claim, anti-DEI advocates may try to weaponize the *Muldrow* decision to argue that non-diverse individuals suffered "some" harm, by not qualifying or otherwise being eligible for benefits provided through company DEI initiatives and programs, such as mentorship/leadership programs, internships, or retreats that are limited to women, minorities, or LGBT+ individuals.

DEI initiatives must be carefully crafted to ensure they do not adversely affect non-diverse individuals.

Each company should review its DEI initiatives and programs to ensure not only that they are helping the company achieve and advance its internal DEI commitments, but also that they can withstand potential legal challenges.

MSK remains committed to helping employers navigate the balance of adhering to their company values and culture with the constantly evolving DEI landscape and is available to assist companies with implementing, reviewing, and revising their DEI programs and initiatives.

---

[1] *See* https://www.inc.com/sarah-lynch/court-dismisses-anti-dei-lawsuit-hello-alice.html.

[2] For example, under California, New York, and Florida Law, an adverse employment action requires that there be a *material* change in the terms and conditions of the employees' employment. *See Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1051-55 (2005); *Malais v. L.A. City Fire Dep't*, 150 Cal. App. 4th 350, 357-58 (2007); *Golston-*

Green v. City of New York, 184 A.D.3d 24, 29, 123 N.Y.S.3d 656, 660 (2020); *McCaw Cellular Commc'ns of Fla., Inc. v. Kwiatek*, 763 So. 2d 1063, 1066 (Fla. Dist. Ct. App. 1999).