

Words matter — Can your DEI policies be evidence of (reverse) discrimination claims?

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DEI (Diversity, Equity and Inclusion) initiatives increased in popularity in workplaces. However, as DEI initiatives became more popular, the same initiatives garnered more scrutiny. As a result, there has been an increase in (reverse) discrimination claims being filed using DEI initiatives and messaging as supporting evidence of the discrimination claims.

Importantly, anti-discrimination laws protect all individuals and, thus, poorly created, implemented initiatives coupled with a lack of training can create significant liability for employers. Additionally, we are seeing larger verdicts, as demonstrated by the recent \$25.6 million awarded to a white regional manager who alleged she was wrongfully terminated following the arrest of two Black men at a Philadelphia Starbucks in 2018.

She claimed Starbucks was working to “punish White employees ... in an effort to convince the community that it had properly responded to the incident.” Employers need to be prepared for these types of complaints and ensure their “good intentions” are not used against them.

(Reverse) discrimination

Reverse discrimination refers to discrimination against members of a historically dominant or majority group, in favor of a minority or historically disfavored group. However, Title VII of the Civil Rights Act of 1964, and its amendments, protects *all* employees from discrimination on the basis of their race, color, religion, sex, or national origin regardless of whether they were historically in the majority or minority.

For example, white or male employees enjoy the same protections under the law as minority or female employees. As a result, the risk and potential liability associated with a discrimination complaint does not vary based on the individual’s status in a particular category.

A rise in discrimination complaints?

In March 2023, the Equal Employment Opportunity Commission (EEOC) published its Annual Performance Report (<https://bit.ly/3JAC3vO>) that provides an overview of charges filed, and the EEOC’s enforcement measures from fiscal year 2022, among other things. Additionally, there were important measures employers should know.

First, there was a 20% increase in discrimination charges from the prior year. This is not entirely surprising as traditionally there are spikes in complaints during tight fiscal climates and when layoffs are occurring. The increase in complaints is also a result of more employees interacting as they return to the office. The sharp increase should signal to employers the increased perception of discrimination occurring in the workplace and a return to higher averages of complaints, which previously averaged around 83,000 per year since 1997.

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Second, 91 merit lawsuits were initiated by the EEOC wherein they accused employees of engaging in unlawful discrimination, 13 of which were suits alleging systemic discrimination involving multiple victims. This does not include lawsuits indicated to enforce subpoenas or seeking injunctive relief. Indeed, we expect to see this number continue to rise as the commission has a Democratic majority.

Another notable takeaway is the commissioners themselves initiated 29 investigations, known as a commissioner charge, a rarely used tool. By way of comparison, only six commissioner charges were signed in each of the prior two fiscal years.

These charges are considered to be “targeted” investigations that are not spurred by an individual complaint.

While the report is quite lengthy, what is apparent is there is at least a perception of increased discrimination in the workplace and very active commissioners initiating targeted investigations on areas of focus by the administration.

Discrimination cases involving DEI policies

While DEI has only made headlines the last couple years, DEI initiatives (in one form or another) have been around for decades.

Courts lag behind evolution in policies and practices and take years to issue case law on the emerging issues. Below are a few federal cases that have come out recently that address employers' DEI initiatives, policies, and methodologies.

Johnston v. School District of Philadelphia, Pennsylvania (2006)

Four former employees sued the school district for race discrimination and retaliation. One of the plaintiffs was told, "[t]here's too many white male managers in this office." During a reorganization of the office, the four white male plaintiffs were terminated.

The jury found they were all discriminated against and three were retaliated against. Plaintiffs were awarded more than \$2.6 million in damages.

Tolle v. American Drug Stores, Inc., Kansas (2006)

Randy Tolle sued his employer for sex and age discrimination. As evidence he cited several items including the employer's use of a "diversity scorecard," a goal to have more females and minorities by 2023, comments stating the workforce should mirror our customer base (which was 85% women), several terminations of men in manager positions while no female terminations during the same 10-year period, several comments about needing more women, among others.

As a result, the court ruled there was beyond sufficient evidence for a jury to find for plaintiff and denied defendant's motion for summary judgment on Tolle's sex discrimination claim. Summary judgment was granted on the age discrimination claim.

Goza v. Memphis Light, Gas & Water Division, Tennessee (2019)

A white utility employee sued the municipality for race discrimination and violation of his right of free speech. Previously, the employee made a televised comment at a rally and on social media about preserving "white heritage." After the municipality became aware of the comments, Michael Goza was demoted and later fired.

Regarding Goza's race discrimination claims, the court found the employer's actions were driven, at least in part, by Goza's race. The court also recognized that a similarly situated black employee only received a three-day suspension after advocating killing Asian-Americans, which demonstrated an insupportable disparity. As a result, the court awarded backpay, fringe benefits, compensatory damages, attorney fees, and court costs.

Duvall v. Novant Health Inc., North Carolina (2022)

David Duvall was a health care executive at Novant Health Inc. After he was terminated, he brought claims of race and sex discrimination. Similar to other companies, Novant rolled out several DEI initiatives including a goal to increase female representation in senior leadership and associated timelines.

Duvall presented evidence of comments by the company such as wanting to remake the workforce to reflect community

demographics and statistical evidence of the company's shifting demographics. Duvall also demonstrated there was a pattern of terminating white males and replacing them with women. The jury determined that both race and sex were motivating factors in Duvall's termination and awarded over \$10 million in damages.

Lutz v. Liquidity Services, Inc., Maryland (2022)

Michael Lutz, a white male, sued Liquidity Services alleging race, gender, and age discrimination. Lutz claimed the CEO said, "I want you to retire. I have a diversity problem. I need to improve the diversity profile of the company." Lutz was later terminated and replaced with a minority female. The court allowed the case to proceed to a jury stating that the facts presented a question for the jury and noted there was sufficient evidence to find for Lutz.

Runkel v. City of Springfield, Illinois (2022)

Diane Runkel, a white female, alleged race discrimination and retaliation. After Runkel's manager retired, she applied for his position. The mayor instead initially offered the job to a Black man, and when he declined, later promoted a different Black male who had reported to Runkel and had significantly less experience.

Communications to employees, training managers and employees, as well as being thoughtful in your DEI programs and initiatives are imperative to ensuring a successful DEI program and limiting exposure to liability.

The district court originally granted the City's motion for summary judgment, but that was later overturned by the Seventh Circuit. In its order of reversal and remand, the Seventh Circuit noted several items that appeared to be more than sufficient to demonstrate discrimination existed.

Specifically, it noted during an interview, the mayor, who was up for re-election, touted the promotion of the Black employee and as example of how his administration was "moving toward reflecting the city's demographics." Additionally, it observed there was evidence that the Black employee selected did not originally apply for the position and only submitted a resume *after* the Black employee was offered the position, which demonstrated that the mayor did not review the employee's qualifications in making a determination.

Effect of DEI programs

The importance of implementing meaningful and lawful DEI programs has not subsided and holds tremendous value to employers. Employers should work with counsel to ensure they are preparing compliant DEI programs and understand potential risks associated with DEI policies, practices, or selection methodologies.

Employers should consider taking the following steps with their DEI programs and initiatives:

- Be thoughtful about the creation of your programs — Why are you creating them? How are you setting goals and objectives? How are you measuring success?
- Be thoughtful about your implementation strategy — How are you notifying employees? What ‘messaging’ are you using to communicate ‘goals’ and ‘objectives’ to employees?
- Provide training — Make sure you are training *all* managers before rolling out messaging and then provide training to all employees.

- Follow up with (anonymous) engagement surveys — Ask in the survey about participants’ knowledge of/experience with the DEI programs or initiatives.

As the cases discussed above make clear, communications to employees, training managers and employees, as well as being thoughtful in your DEI programs and initiatives are imperative to ensuring a successful DEI program and limiting exposure to liability. Taking these steps will help employers create *positive* evidence of their intent and help ensure the DEI programs are not misused and create liability for companies.

About the authors



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