Are Employers' Diversity Efforts Risking "Reverse Discrimination" Lawsuits?

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1. Discrimination Lawsuits Brought by White Employees

We have recently seen a number of headlines regarding "anti-white racism" and there have been a variety of civil rights lawsuits filed by white employees, reporters, and farmers claiming race discrimination. Just recently, Amy Cooper the so-called "Karen of Central Park" sued her former employer alleging that she was wrongfully terminated because of her race (white) and gender. Ms. Cooper was the subject of a viral video taken by an African American birdwatcher in which she is seen reporting to the police that the birdwatcher was threatening her and her dog, and emphasizing his race. Following the release of the video, her employer fired her and publicly condemned her behavior as racist. In Chicago, a newspaper and its white journalist filed suit against Mayor Lori Lightfoot after she indicated that she would only take interviews with reporters of color. A federal appellate court struck down a portion of the American Rescue Plan Act that authorized loan forgiveness for minority farmers only. These issues follow other employment race discrimination lawsuits from white employees such as the recent high-profile cases against YouTube, Google, and Starbucks, where white employees claimed unfavorable treatment. And these claims come at a time when many employers, with good intentions, are seeking to create a diverse work environment.

While seeking to create a diverse work environment and ensure equal opportunity, employers must keep in mind that all employees are protected by federal and state civil rights laws, regardless of race, including white employees. Any workplace decision that favors one group of employees based on protected status over another can lead to liability.

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A recent lawsuit in Tennessee provides a cautionary example for employers. After the municipal utility employee in that case was fired for refusing to accept a demotion, he filed suit alleging race (white) discrimination and, as a governmental employee, First Amendment retaliation. His demotion, subsequent termination, and First Amendment claim related to off-duty comments he made at a televised rally and on social media about preserving his "white heritage." The employer, however, had previously only given a three-day suspension to an African American employee after he advocated killing Asian-Americans because of their race as well as making xenophobic and homophobic statements on social media. Because of the different treatment of the minority and non-minority employees, after a bench trial, the court found that the employer discriminated against the white employee based on his race and in retaliation for his protected speech. The court awarded him his job back plus nearly $200,000 in damages. *Goza v. Memphis Light, Gas & Water Div.*, 398 F. Supp. 3d 303 (W. D. Tenn. 2019), *appeal dismissed,* No. 19-5804, 2020 WL 8212940 (6th Cir. Sept. 23, 2020)

2. Affirmative Action and Quotas

While the above case highlights risks of taking disparate adverse employment actions against non-minority employees compared to other protected groups, there is also legal liability for unfairly hiring or promoting workers based on those protected characteristics, such as race; Yet many companies have publicly announced policies to utilize race-based metrics in hiring and promotion decisions. For instance, Adidas AG, Boeing Co., and Alphabet Inc.'s Google promised to increase their hiring of people of color by certain percentages. This April, United Airlines tweeted "Our flight deck should reflect the diverse group of people on board our planes every day. That's why we plan for 50% of the 5,000 pilots we train the next decade to be women or people of color." Meanwhile, under the Trump administration, the U.S. Labor Department began an investigation of Microsoft Corp. and Wells Fargo & Co. regarding their programs to increase Black leadership.

Companies should be aware that race or gender-based hiring remains unlawful as do hiring or promotion quotas. The only exception to this rule might be where a business has a permissible voluntary affirmative action plan. While voluntary affirmative action plans can be lawful in limited circumstances, they are not without risks and can create massive compliance issues and require careful consideration with a company's labor and employment counsel before implementation. Absent such a plan, the state of the law, as summarized by Chief Justice Roberts is that "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007). That does not mean that employers cannot take certain steps to increase diverse applicant pools, but should do so in consultation with counsel to be sure such steps are legally permissible.

3. Diversity Training Risks

Diversity and equal employment training has long been a staple feature of corporate training. The goal of such training is to educate the workforce on company EEO policies and legal requirements, as well as foster teamwork and camaraderie. We highly recommend training by an attorney focused on legal compliance, which Butzel's employment attorneys also regularly conduct. Yet recently, many

businesses and public employers have opted for non-attorney, private "Diversity, Equity, and Inclusion" (DEI) consultants to conduct DEI training and some have come under fire after presentation materials which suggested race was being impermissibly considered were leaked.. For example, Coca-Cola made headlines for allegedly providing DEI training to its employees instructing them to "be less white." Coca-Cola later disclaimed knowledge of the specifics of the training and insisted it was part of a larger, non-mandatory package of training materials it allowed employees to access. Disney also issued a public statement noting that leaked DEI training materials were not reflective of company policy. Disney's training modules contained suggestions to reject "equality," and, instead, strive for "equity," with a focus on "the equality of outcome." The training went on to suggest "to build a leadership team with people of color at the helm . . ." and purportedly provided a "white privilege" checklist for white employees to complete. The Disney training is similar to many current third-party DEI presentations that focus on the idea that to achieve fairness in the workplace and society, women and persons of color should be treated more favorably in order to create "equity" and right past discriminatory wrongs or "systemic racism."

This concept of "equity" and "systemic racism" has become highly politicized and caught up in ongoing debates about "Critical Race Theory" (CRT). For businesses trying to navigate this potentially contentious issue, it is important to be aware that, regardless of good intentions, it remains unlawful to make employment decisions based on race—including decisions that favor minorities—without a legally compliant affirmative action plan. Further, companies should understand the specifics of the training and whether it comports with company policy, fits the workplace, and does not indicate that race may be impermissibly considered.

As an example of potential risks, two white, Jewish, University of Stanford professors recently filed administrative charges claiming that the University's DEI training created an unlawful hostile work environment. The professors alleged that they were pressured into racially segregated "whiteness accountability affinity groups" as part of the DEI program and that the training "maligned and marginalized Jews, by castigating them as powerful and privileged perpetrators who contribute to systemic racism."

4. Best Practices to Balance Legitimate Diversity Efforts Against Legal Risk.

- **Be careful of policies or public messages that could be construed as making employment decisions based on legally impermissible factors such as race or gender.** Often a company's PR department issues diversity statements that are not vetted by Human Resources or a legal team and can inadvertently create liability. Public promises of race-based hiring quotas, for instance, could lead to liability.
- **Be cautious of your vocabulary.** The word "equity" has become synonymous with the concept that some protected classes of employees must be favored over other protected classes of employees to achieve true fairness. Many businesses, however, conflate this term with "equality" and are inadvertently using it even though it may be in conflict with their internal policies. Thus, while the political and academic debate will continue regarding "equity," businesses are legally prohibited from using protected characteristics in employment decisions and company messaging should be

consistent with the law.

- **Review DEI training before it is provided to employees.** Training provided by third-parties may be imputed to the Company as reflective of company policy. As the examples of Coca-Cola and Disney illustrate, companies should be aware of what training they are buying and ask for any changes to the materials that conflict with company policy or the law.
- **Avoid q*uotas and impermissible hiring/promotion practices.*** Businesses still cannot make decisions based on a protected trait. Even with the best of intentions, express preferences or quotas for certain groups can lead to potential liability.
- ***Affirmative Action.*** In very limited circumstances, private employers may voluntarily adopt affirmative action plans. Because of the legal complexities and risks, businesses should discuss such plans with their Labor & Employment counsel. Federal contractors, notably, are already under certain affirmative action requirements and counsel should be consulted to ensure compliance.
- ***Diversity audits, self-assessments, affinity groups, and EEO data***. Tools such as diversity audits and self-assessments have become common and are a frequent component of DEI training. Companies, however, should confer with counsel before undertaking these efforts to ensure compliance and attorney-client privilege where necessary. Audits and self-assessments can create unintended liability and should be done carefully—as was demonstrated by the case of Disney's alleged "white privilege checklist." Further, companies seeking to measure the success of diversity efforts may create EEO data that provides the very statistical evidence needed to prove "reverse discrimination" allegations. Likewise, racially segregated "affinity groups" risk potential claims such as those brought by the Stanford professors.
- **Be cautious of "townhalls" or forced discussions on highly politized topics.** In the wake of the George Floyd killing, LinkedIn held a virtual town hall to discuss racial justice. While the presentations were well-meaning, LinkedIn allowed anonymous chatting on Bluejeans during the forum that led to virtual chat-war relating to race and political issues.

There are sound business reasons for employers to be inclusive and to have an environment that is welcoming to all, and which ensures equal employment opportunity to all regardless of race or protected status. But employers must remain cognizant of their legal obligations not to consider race as a factor in employment decisions, and must be sure that the steps they may take, even with the best of intentions, to ensure inclusion stay within the confines of what is legal. This is best done in consultation with labor and employment counsel.

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