The IDC Monograph

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Diversity, Equity, and Inclusion: Past, Present, and Future

Introduction

Diversity, equity, and inclusion efforts across America have garnered the attention of American courts, politicians, government leaders, organizations, and businesses. Presently, there exists an ongoing debate between proponents and critics of such efforts, with the former contending that DEI programs create a fair environment for people of different backgrounds, and the latter averring that these programs violate anti-discrimination laws. This article focuses on the history and purposes of DEI and affirmative action initiatives, and seeks to shed light on current impediments to their continued existence based upon legal developments at state and federal levels.

Historical Background of DEI and Affirmative Action Programs

Slavery and segregation resulted in various discriminatory systems that impacted the welfare of black Americans. This included substantial differences in the unemployment rates of black and white Americans and wide disparities in median family income.[1] The civil rights movement emerged following World War II to combat such inequality. The movement culminated in the enactment of the Civil Rights Act of 1964 which was the "**most sweeping civil rights legislation since [the] Reconstruction" era** and is "the nation's benchmark civil rights legislation."[2] However, efforts were made even before then to prohibit discrimination in employment. These included efforts to provide black Americans with an opportunity to participate in the war-related employment boom of World War II.[3]

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Federal Fair Employment Efforts Before the Civil Rights Movement

The first federal fair employment practices bill was introduced to Congress on March 13, 1941, by former Representative Vito Marcantonio (NY). Representative Marcantonio introduced another fair employment practices bill to Congress the following year. Both of his bills died in committee. There were many similar bills that followed and failed.[4]

On June 25, 1941, on the eve of World War II, President Franklin D. Roosevelt signed Executive Order No. 8802, "the first presidential action ever taken to prevent employment discrimination by private employers holding government contracts."[5] The executive order prohibited government contractors in defense industries from engaging in employment discrimination based on race, creed, color or national origin "primarily to ensure that there [were] no strikes or demonstrations disrupting the manufacture of military supplies" for the war.[6]

On July 26, 1948, President Harry S. Truman signed two executive orders towards eradicating discrimination in federal government. The first was Executive Order No. 9980 which required that "[a]ll personnel actions taken by Federal appointing officers . . . be based solely on merit and fitness" and without "discrimination because of race, color, religion, or national origin."[7] The second was Executive Order No. 9981 which called for the desegregation of the Armed Forces.[8]

Brown v. Board of Education

In 1954, in the consolidated cases of *Brown v. Board of Education of Topeka*, the United States Supreme Court held that racial segregation in public schools was unconstitutional.[9] After further briefing and argument, the Supreme Court issued a second opinion in the case the following year, in which it remanded the consolidated cases to the district courts to issue decrees for desegregation "with all deliberate speed."[10]

There was great resistance to desegregation, and it proceeded very slowly.[11] By the end of the 1950s, fewer than 10 percent of black children in the South were attending integrated schools.[12]

The Civil Rights Movement and the Enactment of the Civil Rights Act of 1964

Brown encouraged calls for additional desegregation that shaped the civil rights movement. Notably, on December 1, 1955, in Montgomery, Alabama, Rosa Parks refused to give up her seat to a white man on a bus and was arrested.[13] "[W]ord of her arrest ignited outrage and support" and inspired the Montgomery Bus Boycott by the Montgomery Improvement Association, led by Baptist minister Dr. Martin Luther King Jr.[14] Additionally, on September 4, 1957, nine black students, known as the Little Rock Nine, went to Central High School to begin desegregated classes as mandated by *Brown*. They were met by the Arkansas National Guard and a mob and violence later ensued. President Dwight D. Eisenhower had federal troops escort the Little Rock Nine to their classes.[15]

Around that time, the Civil Rights Act of 1957 was enacted to prevent intimidation, threats, and coercion that black Americans often faced, particularly in the South, when voting.[16] The statute also established a Commission on Civil Rights for the executive branch to study equal protection.[17] The reports of that commission further publicized the plight of minorities.[18]

Civil rights demonstrations and protests continued. The Congress of Racial Equality organized Freedom Rides, in May 1961, to defy segregation in interstate transportation. A riot, in 1962, broke out over the desegregation of the University of Mississippi for which President Kennedy mobilized the National Guard. In the spring of 1963, Dr. King

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and Reverend Fred Shuttlesworth launched a campaign of mass protests in Birmingham, Alabama that resulted in the jailing of Dr. King during which he wrote the famous "Letter from Birmingham Jail." There were attacks on black youths marching in the streets of Birmingham City, in May of 1963. The desegregation of the University of Alabama was met with resistance as well for which President Kennedy mobilized the National Guard.[19]

President Kennedy further assisted the civil rights movement by proposing a comprehensive civil rights bill.[20] On June 11, 1963, President Kennedy asked Americans through a televised speech, to end racism: "One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free."[21] On June 19, 1963, President Kennedy addressed Congress with a proposed bill.[22] He pleaded that Congress enact legislation to address the "racial strife" that was resulting in "hate and violence, endangering domestic tranquility, retarding [the] Nation's economic and social progress and weakening the respect with which the rest of the world [regarded America]."[23]

A couple of months later, Dr. King delivered his famous "I Have a Dream" speech. On August 28, 1963, the March on Washington for Jobs and Freedom took place with "an interracial and interfaith crowd of more than 250,000 Americans" demonstrating in Washington D.C.[24] It was, at this demonstration, that Dr. King delivered his speech from the steps of the Lincoln Memorial.

Almost two months later, on November 22, 1963, President Kennedy was assassinated.[25] Thereafter, President Lyndon Johnson pressed hard for passage of the President Kennedy's proposed civil rights bill. He urged Congress that it was the time "to write the next chapter [on equal rights] in the books of law."[26] On July 2, 1964, the Civil Rights Act of 1964 was enacted, but not without substantial resistance.[27] There were 500 amendments and 534 hours of debate before the Act passed.[28]

Early Legal Development of DEI

Equal Treatment and Equal Opportunity Under Title VII

Title VII of the Civil Rights Act of 1964 ("Title VII") made it unlawful for private employers to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin."[29] Discrimination was not defined in the statute, and no reference was made to intent in this statutory language. Nonetheless, the prohibition on discrimination was interpreted by courts as prohibiting only intentional discrimination, because adverse employment decisions are only prohibited by the statute if made "because of" a protected characteristic. This interpretation reflects the most traditional theory of employment discrimination: disparate treatment which merely calls for equal treatment.[30] When enacting Title VII, Congress likely only contemplated such intentional discrimination.[31]

Title VII also made it unlawful for private employers "to limit, segregate, or classify [their] employees in any way which would deprive or tend to deprive [them] of employment opportunities or otherwise adversely affect [their employment status], because of [an] individual's race, color, religion, sex, or national origin."[32] Even though this statutory provision contains the same "because of" language relied upon by the disparate treatment theory to require a showing of intentional discrimination, this statutory provision has been relied upon for the development of the "less traditional and much more controversial" disparate impact theory of employment discrimination which does not require a showing of intent.[33] Instead, the theory focuses on the impact of employment practices—even those that are facially-neutral—to determine whether they disproportionately disadvantage members of a protected group. In this way, the disparate impact theory calls for equal opportunity.[34] There has been substantial debate about whether the theory is

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consistent with the language of Title VII and the intent of Congress; however, there was legislative recognition of a need for equal employment opportunities.[35]

Title VII included exceptions for bona fide seniority or merit systems and professionally developed ability tests. Differences based on bona fide seniority or merit systems are permissible if they are not the result of "an intention to discriminate because of race, color, religion, sex, or national origin."[36] Professionally developed ability tests are permissible if they are not "designed, intended or used to discriminate because of race, color, religion, sex, or national origin."[37] However, the disparate impact theory, limited employers' use of tests and other employment criteria as discussed further below. The theory applied to not only objective tests, but also subjective criteria used to make employment decisions.[38]

Affirmative Action in Private Employment

In 1979 in United Steelworkers of America v. Weber, the United States Supreme Court considered whether affirmative action plans are illegal under Title VII. The affirmative action program in that case was developed to provide black individuals with equal employment opportunities at the employer's plant that hired as craftworkers only persons who had had prior craft experience. "Be- cause blacks had long been excluded from craft unions, few were able to present such credentials."[39] The employer, therefore, "established a training program to train its production workers to fill craft openings. Selection of craft trainees was made on the basis of seniority, with the proviso that at least 50% of the new trainees were to be black until the percentage of black skilled craftworkers" at the plant "approximated the percentage of blacks in the local labor force."[40] The Supreme Court held that the affirmative action program was not unlawful under Title VII.[41]

In reaching its holding, the Supreme Court analyzed the legislative intent of Title VII. It observed that the purpose of the law was to open employment opportunities for black Americans.[42] The Supreme Court believed that Congress could not have "intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[43]

The decision did not legalize all affirmative action. The Supreme Court merely held that the affirmative action program in that case was permissible as the purpose of the program was to break down old patterns of racial segregation and hierarchy like Title VII. The Supreme Court also noted that the program was a temporary measure that did not violate the interests of white employees. The Supreme Court refused to draw a "line of demarcation between permissible and impermissible affirmative action plans."[44]

The United States Supreme Court further developed the framework for assessing the validity of affirmative action under Title VII in Johnson v. Transportation Agency. The Supreme Court explained that the analysis should start with the burden on the plaintiff to establish a prima facie case of discrimination. Once the plaintiff establishes that a protected characteristic was taken into account in the employment decision, the burden then shifts to the employer to articulate a nondiscriminatory rationale for its decision. "The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid."[45] The employer may present evidence in support of its plan, but the burden ultimately rests on the plaintiff to prove the plan's invalidity.[46]

To determine whether an affirmative action plan is invalid, the Supreme Court instructed courts to "first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in Weber."[47] In particular, courts are to consider if the plan was "justified by the existence of a 'manifest imbalance' that reflected underrepresentation . . . in 'traditionally segregated job categories'" as to ensure that the plan is consistent with Title

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VII's purpose.[48] Second, courts must determine whether the effect of the plan on the aggrieved parties is comparable to the effect of the plan in Weber.[49] This includes consideration of whether the plan unnecessarily trammels on the rights of the aggrieved parties or creates an absolute bar to the aggrieved parties' advancement.[50] Courts may also examine whether the plan is temporary to attain a balanced work force as opposed to a more permanent goal to maintain balance.[51]

In Connecticut v. Teal, the United States Supreme Court considered whether an affirmative action program could rescue the employer from a finding of disparate impact discrimination.[52] The Supreme Court answered in the negative, explaining that Title VII cannot be overcome except by a showing that a test was related to a job as further explained below.[53] "The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."[54] Therefore, the benefit afforded to a group as a whole through an affirmative action program cannot justify discrimination that an individual employee may have suffered.[55]

Disparate Impact Theory Jurisprudence

The disparate impact theory can be traced back to the United States Supreme Court's 1971 opinion in Griggs v. Duke Power Co.[56] That case involved a class action by thirteen black employees who worked for the defendant's plant that was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. The plaintiffs were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other departments, in which only white individuals were employed. Although black employees were not explicitly limited to the Labor Department following the enactment of the Civil Rights Act of 1964, the defendant maintained a policy that required a high school education to transfer from the Labor Department to any other department. Additionally, following the enactment of the Civil Rights Act of 1964, the defendant required that employees register satisfactory scores on two professionally prepared aptitude tests to qualify for placement in any department other than the Labor Department and to qualify for transfer to Operations, Maintenance, and Laboratory and Test Departments. Neither test was directed or intended to measure an employee's ability to perform the applicable job.[57] The defendant's requirements had a disproportionate effect on black employees who had "long received inferior education in segregated schools."[58]

The Supreme Court held that the defendant's requirements were unlawful under Title VII. Its holding was predicated on the following: (a) neither requirement was shown to be significantly related to successful job performance, (b) both requirements operated to disqualify black employees at a substantially higher rate than white employees, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.[59]

In reaching that holding, the Supreme Court found that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation," unless "related to job performance" and, therefore, justified by "business necessity."[60] The Supreme Court observed that Congress's objective in enacting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[61] Therefore, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[62]

In 1975, the United States Supreme Court clarified the "appropriate standard of proof for job relatedness" in Albemarle Paper Co. v. Moody.[63] If the plaintiff makes out a prima facie case of disparate impact discrimination by showing that a given employment practice has a significantly discriminatory pattern, then the burden shifts to the employer to prove that the practice has a manifest relationship to the employment in question. Once the employer meets

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its burden of proving job relatedness, the complainant is granted the opportunity to show that other practices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest.[64]

In 1989, the United States Supreme Court expounded upon the disparate impact standard of proof in Wards Cove Packing Co. v. Atonio. The Supreme Court explained, in order to establish the prima facie case of disparate impact discrimination, the plaintiff must identify a specific or particular employment practice that caused the alleged disparate impact. A showing of a racial imbalance alone, would not meet the plaintiff's burden of proof.[65]

The Civil Rights Act of 1991 was enacted, in part, "to codify the concepts of 'business necessity' and 'job related'" from Griggs and Wards Cove Packing Co. and "to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits" under Title VII.[66] The statute amended Title VII to include a provision stating that "[a]n unlawful employment practice based on disparate impact is established … only if": (a) the complainant "demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;" or (b) the complainant makes the demonstration discussed in the aforementioned cases "with respect to an alternative employment practice and the respondent refuses to adopt [the] alternative employment practice."[67]

Hostile Work Environment

In 1986, in Meritor Savings Bank, FSB v. Vinson, the United States Supreme Court found that Title VII's prohibition on disparate treatment "is not limited to 'economic' or 'tangible' discrimination," but rather extends to "'the entire spectrum of disparate treatment.'"[68] The Supreme Court, therefore, went on to recognize discrimination that arises from harassing conduct that "'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"[69] Such discrimination may be asserted as a claim alleging a hostile or abusive work environment.[70]

For such harassment to be actionable, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[71] More specifically, it must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—" and subjectively hostile or abusive as to actually alter the conditions of the victim's employment.[72] Courts should consider all circumstances in making that assessment. "These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[73]

Employers can be held vicariously liable for hostile or abusive work environments created by supervisors but have limited liability for such harassment by co-workers. Employers are "only liable for a hostile work environment created by a co-worker if the employer was negligent in discovering or remedying the harassment."[74] The plaintiff must then show, for the employer's negligence, that the employer knew or should have known about the harassment.[75]

Equal Rights Under 42 U.S.C. § 1981

The Civil Rights Act of 1991 also resulted in the enactment of 42 U.S.C. § 1981. That statute provides all individuals within the United States with an equal right "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white

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citizens."[76] Equal rights under the statute extend not only to public but private employment as well.[77] "Most of the core substantive standards that apply to claims of discriminatory conduct in violation of Title VII, are also applicable to claims of discrimination in employment in violation of § 1981."[78] This includes the standard for proving hostile work environment claims.[79]

However, there are several notable differences between the two statutes. First, claims asserted under 42 U.S.C. § 1981 need not comply with Title VII's shorter time limits.[80] Second, Title VII claims cannot be asserted against individuals while claims pursuant to 42 U.S.C. § 1981 can. Third, for a claim under 42 U.S.C. § 1981 against a municipality or an individual sued in his official capacity, the plaintiff is required to show that the challenged acts were performed pursuant to a municipal policy or custom for which the plaintiff need not identify an express rule or regulation. Rather, it is sufficient for the plaintiff to show that a discriminatory practice of municipal officials was so "'persistent or widespread'" as to constitute "'a custom or usage with the force of law,'" or that a discriminatory practice of subordinate employees was "'so manifest as to imply the constructive acquiescence of senior policy-making officials.'" [81] A policy, custom, or practice may also be inferred where training was so inadequate that it displayed a deliberate indifference to the constitutional rights of those within its jurisdiction. Thus, proof for claims under 42 U.S.C. § 1981 may vary from that of Title VII. Fourth, a plaintiff must show that discrimination was intentional for claims under 42 U.S.C. § 1981, although that is not always required under Title VII.[82]

Impact of Recent Events Upon DEI

Recent racial, economic, and political challenges have also impacted DEI initiatives across the country. The U.S. has long struggled with issues of race, dating back to slavery, the civil rights movement in the 1950s and 1960s, and racial justice protests.[83] More recently, for example, the murder of an African American man named George Floyd in Minneapolis, Minnesota, on May 25, 2020, by a law enforcement officer sparked racial protests with demands for change.[84] This event resulted in the rapid hiring of chief diversity officers and other similar roles, and DEI related job postings increased by ninety-two percent from July 2020 to July 2021.[85]

The surge in DEI-related recruitment came under attack by legal activists who averred that DEI programs are tantamount to racial discrimination.[86] Thus, as quickly as DEI efforts in the workplace soared due to racial challenges, such efforts stalled due to economic hurdles. Particularly with the rise and fall of COVID-19 cases, companies throughout the U.S. encountered an uncertain economy, resulting in mass layoffs.[87] Notably, many of these terminated workers were only hired to implement DEI strategies, and since July 2023, DEI job postings have declined by thirty-eight percent.[88]

DEI efforts have come under harsh criticism because they are considered expensive, performative, and even a source of division.[89] In agreement with the latter critique, the U.S. Supreme Court recently rejected the use of race-conscious admissions in higher education.[90] On June 29, 2023, the Court struck affirmative action programs at Harvard University and the University of North Carolina (UNC) that were used to raise the number of underrepresented minority students.[91] According to the Court, these programs violate the Constitution's promise of equal protection by considering an applicant's race.[92]

In the majority opinion, the conservative justices agreed with a group called Students for Fair Admissions in the appeal of lower court rulings that upheld DEI efforts implemented to nourish a diverse student population.[93] Harvard and UNC representatives indicated "they used race as only one factor in a host of individualized evaluations for admission without quotas" and anticipate "a significant drop in enrollment of students from under-represented groups" with the elimination of this consideration.[94] Chief Justice John Roberts explained in pertinent part that applicants 'must be treated based on . . . experiences as individual[s] not on the basis of race.'[95] In failing to do so, '[m]any universities . . . concluded,

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wrongly, that the touchstone of an individual's identity is not challenges bested, skills built or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.'[96]

Many institutions of higher education, corporations and even the U.S. military have supported affirmative action and DEI strategies not simply to remedy racial inequity, but to create a talent pool consisting of a range of perspectives in the workplace and the armed forces.[97] Liberal Justice Ketanji Brown Jackson, the first Black woman appointed to the Court, dissented from the majority opinion writing that the Court "pulls the ripcord and announces colorblindness for all by legal fiat. But deeming race irrelevant in law does not make it so in life."[98] Liberal Justice Sonia Sotomayor, the first Hispanic jurist, similarly expressed that the ruling "subverts the constitutional guarantee of equal protection and further entrenches racial inequality."[99] Justice Sotomayor added, '[t]oday, this court stands in the way and rolls back decades of precedent and momentous progress.'[100] President Joe Biden, in addition, strongly disagreed with the ruling and opined that the commitment to fostering diversity should not be abandoned.[101]

Some predict corporate DEI policies will experience a similar result as the affirmative action programs at Harvard and the UNC.[102] As it currently stands, however, the decision appears to apply only to affirmative action in higher education, not to an employer's pursuit to foster diversity in the workplace.[103] Charlotte Burrows, chair of the Equal Employment Opportunity Commission, stated, "It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[104]

By contrast, Justice Neil Gorsuch's concurring opinion provides 'the court's rule . . . now applies with equal force to employers.'[105] To this end, Stephen Miller, the former adviser to President Donald Trump has asked the Equal Employment Opportunity Commission to investigate hiring practices aimed at increasing minority representation at numerous companies, including Kellogg's, Hershey, and Alaska Airlines.[106] Moreover, in recent years, eliminating DEI programs has been an integral theme of conservative political messaging.[107] Following the Court's ruling, Miller stated , "This ruling means we can strike hard legally in our courts now and win major victories. Now is the time to wage lawfare against the DEI colossus[108]".

Alvin Tillery, a political science professor at Northwestern University, who also operates a consulting firm that pushes DEI-related initiatives with companies, such as Google, agrees conservative groups will now use the Supreme Court's ruling to focus their efforts on race-conscious programs in the workplace.[109] Tillery warns "businesses will have to be prepared for that."[110] Despite these various challenges, diversity advocates continue to encourage entities to view these various setbacks and developments as opportunities to reset.[111] Janet Stovall, the global head of diversity for the NeuroLeadership Institute, a consulting firm focused on culture and leadership, advises companies committed to DEI endeavors to "[f]ocus on the rationale" and "[m]ake the business case for bringing on a diversity of backgrounds and experiences."[112]

Because DEI programs fall under Title VII of the Civil Rights Act, companies can maintain their programs by reframing their language and creating processes to ensure their structures do not violate Title VII's prohibition against discrimination.[113] Finally, in an effort to combat the decline of DEI programs, more than eighty major corporations and businesses, including Apple, General Electric, Google, and Johnson & Johnson, have filed three briefs with the Supreme Court arguing these policies help increase workforce diversity, improve company performance, and serve racially diverse customer bases.[114] In sum, the fate of DEI efforts is yet to be seen as the fight for the survival of such programs continues.

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Potential Benefits to DEI Initiatives

The most salient purpose of DEI initiatives is to promote diversity among employees within the workplace. Over and above this primary benefit, the internet and social media are replete with commentators discussing the additional perceived benefits from DEI Initiatives.[115] These range from more ambiguous benefits such as encouraging "excellence," to more concrete benefits such as increased employee retention and achieving financial goals.[116]

Over and above these informal publications, researchers have concluded that diversity in the workplace leads to demonstrable and measurable outcomes. For example, one study employed computational mathematical models to demonstrate why diverse groups of problem solvers would be expected to outperform more homogenous groups of high-ability problem solvers.[117] Other studies have employed survey methodology within organizations and have concluded that diversity within the workplace leads to increased levels of trust and openness, job satisfaction, and knowledge sharing.[118]

Another study from the Journal of the National Medical Association provides evidence that diversity improves performance and outcomes in the health care setting.[119] That study employed a meta-analysis of medical and business research articles since 1999, relating diversity to a financial or quality outcome.[120] Only studies involving the healthcare industry, or a related skill such as innovation, communication and risk assessment were included.[121] The results of the studies demonstrated a positive association between diversity, quality, and financial performance.[122] Results also showed that patients generally fared better when care was provided by more diverse teams.[123]

A recent research paper by the Enterprise Strategy Group investigated correlations in the business sector between DEI and business outcomes.[124] This paper reports that 86% of survey respondents report their organization's DEI strategies deliver a positive or very positive investment return.[125] The paper reports that businesses categorized as leading DEI organizations reported they were 2.6 times more likely to have beaten revenue expectations by greater than 10%.[126]

Some commentators have also observed that more evidence-based studies of the DEI's implementation are needed.[127] In *Moving diversity, equity, and inclusion from opinion to evidence*, authors from within the medical research field observe that over the past decade, such institutions have earmarked more resources to DEI efforts.[128] They note that this movement has been the result of national standards set by accreditation bodies, research funding agencies (e.g., NIH) and other social pressures.[129] However, they argue that how organizations measure DEI to often focuses upon actual diversity, and ignores the effects of equity and inclusion.[130] They suggest more scientific approaches to better quantify the equity and inclusion effects of DEI programs.[131]

Potential Pitfalls to DEI Initiatives

The implementation of DEI within the workspace is not without potential risks. One such risk is demonstrated by an opinion from the United States District Court for the Northern District of Georgia.[132] In *DiBenedetto v. AT&T*, plaintiff was a 58-year old white man who was terminated by AT&T in 2020, in connection with a reduction in force.[133] Significantly, plaintiff alleged that throughout his career, and leading up to his position of assistant vice president within the tax department, he had consistently received positive feedback and performance evaluations.[134] Plaintiff alleged that his wrongful termination arose from AT&T's corporate wide "Diversity & Inclusion Plan," adopted two years prior to his termination.[135] According to the district court's opinion, "[t]he [Diversity & Inclusion Plan]'s stated goal was to increase and foster workplace diversity throughout the company . . . To that end, AT&T provided detailed workforce demographic information to its senior leaders—such as VP Johnson, SVP Stephens, and CFO Stephens—who, in turn,

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implemented the DIP through hiring and retention policies that altered the racial, ethnic, and gender composition of the company's workforce, especially in the leadership ranks like those occupied by Plaintiff."[136]

According to plaintiff, in 2020, AT&T terminated several positions across their finance department.[137] Plaintiff was told that the decision was not performance related, but rather "numbers related."[138] Within the tax department, a dozen employees were terminated.[139] Of those, nine were male, all were white, and all were over 50 years old.[140] Plaintiff also alleged that more senior individuals had commented to him during one meeting that "in these roles, you know, you've got to be able to adapt and move, and I'm not saying you can't, but a 58-year-old white guy, I don't know if that's going to happen."[141]

AT&T filed a motion to dismiss, arguing two basic points.[142] First, that plaintiff's claims must fail because allegations of multiple bases of discrimination (i.e., race, age and gender) undercut the requirement that plaintiff's Section 1981 claims require "but for" causation.[143] Second, AT&T argued that plaintiff failed to plead sufficient facts to support the Title VII claims.

The court disagreed with AT&T on both counts. As to the claims brought under Section 1981 and the ADEA, the court noted that under the liberal pleadings standards of the Federal Rules of Civil Procedure Section 8(d), plaintiff may assert multiple, inconsistent claims.[144]

As for the Title VII claims, the *DiBenedetto* district court observed that:

> Title VII makes it unlawful for employers to discharge or otherwise discriminate against an employee because of his race or sex. 42 U.S.C. § 2000e—2(a)(1). A plaintiff raising a discrimination claim under Title VII may be entitled to relief if he shows that an illegal bias was "a motivating factor" for an adverse employment action, even if other factors also motivated the employer's decision. Notably, to show intentional discrimination under Title VII, a plaintiff need not prove that his employer "harbored some special 'animus' or 'malice' towards [his] protected group." In other words, ill will, enmity, or hostility "are not prerequisites of intentional discrimination"—instead, it is enough for the plaintiff to show that an adverse employment decision was consciously and deliberately motivated by a protected characteristic. Although a plaintiff need not plead a prima facie case of discrimination at the outset, the prima facie elements can nevertheless aid a reviewing court in organizing the allegations and identifying any material omissions at the pleading stage. With that said, a plaintiff can make out a prima facie case of disparate treatment by showing that he: (1) is a member of a protected class; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was treated less favorably than a similarly situated individual outside his protected class.[145]

Having set out the applicable legal standard, the *DiBenedetto* court concluded that under these facts, plaintiff complaint was adequate to withstand a motion to dismiss: "[t]he upshot of Plaintiff's allegations is that AT&T implemented a company-wide employment policy that programmatically favored non-white persons and women for hiring and retention based solely or at least principally on internal company demographics."[146]

DiBenedetto provides an example of the types of claims an employer may face if implementing a DEI program in a way that illegally discriminates against non-diverse employees. However, implementation of DEI programs may lead to claims in other scenarios as well. The recent U.S. Supreme Court opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[147] demonstrates problems that academic institutions may face when incorporating DEI initiatives into their admissions process.

In *Students for Fair Admissions*, the Court observed that Harvard College's application process explicitly considered race in its admissions criteria.[148] According to Harvard's director of admissions, race was considered in furtherance of

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the goal to make sure Harvard does not have a dramatic drop off in minority admissions from one year to the next.[149] Similarly, the University of North Carolina implements a highly-selective admissions process.[150] Like Harvard, the University of North Carolina's admissions process incorporates an applicant's race as a factor.[151]

The Students for Fair Admissions ("SFFA") is a nonprofit organization founded in 2014 whose purpose is to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law."[152] In November of 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated Title VI of the Civil rights Act of 1964 and The Equal Protection Clause of the Fourteenth Amendment.[153] Both lawsuits proceeded to bench trials in separate federal district courts, and in both cases the district courts upheld the universities' use of race-based criteria.[154] The U.S. Supreme Court granted certiorari in both cases.[155]

In its analysis, the Court began with the fundamental premise that "[e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application.' For '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'"[156] From there, the Court observed that all exceptions to the equal protection clause must survive a strict scrutiny analysis.[157] Under that standard, the Court evaluates whether the racial classification is used to "further compelling governmental interests," and if so, whether the government's use of race is "narrowly-tailored" —meaning "necessary"— to achieve that interest.[158]

The *Students for Fair Admissions* majority noted that under the Court's precedent, only two compelling interests were allowed to justify race-based government action.[159] One was to remediate specific, identified instances of past discrimination that violated the Constitution or a statute.[160] The second was avoiding imminent and serious risks to human safety in prisons.[161]

Proceeding from these legal principles, the Court concluded that both the Harvard and University of North Carolina admissions programs violated the equal Protection Clause.[162] In reaching that conclusion, they noted the interests put forth by Harvard to justify their approach:

> Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.[163]

The Court noted that these were commendable goals, but that they were not sufficiently coherent for purposes of a strict scrutiny analysis.[164] First, it is unclear how courts would measure any of these goals.[165] Second, if a court could measure the goals could be measured, how would a court know when those goals have been reached?[166] The Court concluded that the programs also failed to articulate a meaningful connection between the means they employ and the goals they pursue.[167] The Court observed it was far from evident how pursuing racial quotas furthers the educational benefits that the universities claim to serve.[168]

The *Students for Fair Admissions* opinion will likely not resolve that controversy. The Court's majority cautioned against future attempts to subvert the rule through the use of application essays or other means.[169] The Court cautioned

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that a benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination, not simply the student's race, ethnicity or gender.[170]

Conclusion

Undoubtedly, DEI and affirmative action efforts dating back to as early as 1941 have combated discriminatory practices and racial imbalances in this country. While originally intended to remedy past injustices, the fate of these processes remains unclear and uncertain given the opposing viewpoints, laws, and court decisions that question the constitutionality of these structures. As a result, employers, institutions, and organizations must remain abreast of these developments and seek legal counsel as they pursue and promote diversity in the workplace.

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