ACC-NCR DEI Conference
Session Three

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Agenda

- Key Retention and Development Programs Based in Part on Race or Gender
  - Mentorship, Sponsorship, and Differentiated Development programs
  - Affinity groups
  - Current legal challenges
  - Potential impact of *Muldrow* decision
- Supplier Diversity and Investment Programs
  - Expansion following murder of George Floyd
  - Legal framework – Section 1981 claims
  - Current legal challenges
- Tying Executive Pay to Diversity Efforts/Results

Polling Questions 1 and 2

- Does your organization's DE&I program include mentorship, sponsorship or differentiated development programs targeting women or racial minorities?
- If so, have you modified those programs or eligibility criteria in any way following the *Harvard/UNC* decision?

Risk Associated With Employee Opportunities Based in Part on Race or Gender

- Mentorship programs
- Sponsorship programs
- Differentiated development programs
- Affinity groups

Those Seeking to Challenge the Opportunities . . .

- America First Legal Foundation
  - Press releases
  - Requests for issuance of EEOC Commissioner charges
  - Letters directed to boards of directors of Fortune 100 companies, including Hasbro, Mattel, Disney, Nike, IBM, American Airlines, United Airlines and Southwest Airlines, among others
- Edward Blum, President, Students for Fair Admissions
  - Challenged admissions policies at Harvard and University of North Carolina-Chapel Hill (*Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2023 WL 4239254 (U.S. June 29, 2023))
- National Center for Public Policy Research
  - Brought shareholder derivative action against Starbucks challenging its DEI initiatives (*Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz*, No. 2:22-CV-00267-SAB, 2023 WL 5945958 (E.D. Wash. Sept. 11, 2023))

Those Seeking to Challenge the Opportunities . . .

- State legislatures
  - At least 9 states have passed laws restricting DEI programs – Florida, Idaho, Kansas, North Carolina, North Dakota, South Dakota, Tennessee, Texas and Utah.
    - *See, e.g.,* Utah law HB 261 will prohibit certain DEI "policies, procedures, practices, programs, or initiatives" in government offices and in the Utah public education system.
    - The state laws mainly restrict DEI in public education or programs involving employees of public institutions or universities.
    - **But note** – Utah HB 111 would have been the first state law to reach **private employers** and extend DEI restrictions to workplace training programs, including unconscious bias training programs, in the private employment context. Introduced in January 2024, HB 111 passed the Utah of Representatives in February 2024 and later died in the Senate.
- State Attorneys General
  - On July 13, 2023, the attorneys general of 13 states signed a letter addressed to Fortune 100 CEOs warning them to end racial preferences in hiring. The letter targets the hiring practices of JPMorgan and Goldman Sachs, as well as Airbnb, Apple, Cisco, Facebook, Google, Intel, Lyft, Microsoft, Netflix, PayPal, Snapchat, TikTok, Uber and others.

Legal Theories and Anticipated Claims

- Title VII - 42 U.S.C. § 2000e-2(d)
  - Prohibits race, color, sex, or national origin discrimination "*in admission to, or employment in, any program established to provide apprenticeship or other training*"
- State anti-discrimination laws – largely track Title VII, but some expand the range of protected characteristics
  - California Fair Employment and Housing Act, Government Code § 12940 ("It is an unlawful employment practice, [f]or an employer, because of the race . . . color, national origin . . . sex, gender, gender identity, gender expression . . . [or] sexual orientation . . . of any person . . . to discriminate against the person in . . . terms, conditions, or privileges of employment.")
  - DC Human Rights Act, D.C. Code § 2-1402.11 ("It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color . . . sex . . . sexual orientation, gender identity or expression . . . to discriminate against any individual, with respect to his or hers . . . terms, conditions, or privileges of employment . . . or to limit, segregate, or classify his or hers employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his or hers status as an employee.")

Legal Theories and Anticipated Claims

- Shareholder derivative claims
  - *See Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz*, No. 2:22-CV-00267-SAB, 2023 WL 5945958 (E.D. Wash. Sept. 11, 2023): Conservative think tank brought derivative claim against officers and directors of Starbucks challenging, among other DEI initiatives, Starbucks' Leadership Accelerator Program that was open to certain minority employees to help them access the "leadership pipeline at Starbucks." In an order signed September 11, 2023, the court dismissed the complaint finding that "Plaintiff did not file this action to enforce the interests of Starbucks, but to advance its own political and public policy agendas."
- Officer and director breach of fiduciary duty claims
  - *See Simeone v. Walt Disney Co.*, No. 2022-1120-LWW (Del.Chancery 2022): Plaintiff shareholder sued under 8 Del.C. § 220 claiming that Disney breached its fiduciary duty to shareholders by expressing public opposition to Florida's "Don't Say Gay" bill. Disney prevailed on June 27 2023 – court found that Disney's opposition to the bill was a calculated management decision and that shareholders were motivated by political ideology, not shareholder concerns.

Mentorship and Sponsorship Programs

- Selection criteria
- Consideration of race, gender, ethnicity or other protected characteristic
- Prominent targets – Starbucks …
  - Mentorship program connecting BIPOC partners to senior leaders (senior VPs and BIPOC directors in corporate and retail roles)
  - Leadership Accelerator Program limited to BIPOC partners
  - Allegation – programs deprive White and Asian employees of employment opportunities
  - Diversity initiatives were alleged to violate Section 1981 of the 1866 Civil Rights Act, Title VII of the Civil Rights Act, and state anti-discrimination laws.

Affinity Groups and ERGs

- Open or restricted membership
- Employer funding or other support
- Prominent targets – Hasbro …
  - eOne and Black Young Professional Network Partnership (BYP)
  - Hasbro joined in 2022
  - BYP works to present "Black professionals with the best career opportunities"
- *Zack v. Integra LifeSciences Corp.*, No. A-1745-22, 2024 WL 1208530 (N.J. Super. Ct. App. Div. Mar. 21, 2024) (affirming summary judgment to defendant dismissing plaintiff's claim that her termination was racially discriminatory; plaintiff cited defendant's African American Affinity Group and its leadership's Juneteenth statement as evidence of bias against white employees)
  - Rejected white employee's claim that the existence of Integra's African American affinity group established that Integra discriminates against white employees
  - Found that the affinity group "demonstrates Integra values diversity and promotes an inclusive work environment"

Potential Impact of *Muldrow v. City of St. Louis Missouri*

In a unanimous decision issued on April 17, 2024, the Supreme Court ruled in *Muldrow v. City of St. Louis, Missouri,* No. 22-193, that an employee challenging a job transfer under Title VII must demonstrate:

- "Some harm respecting an identifiable term or condition of employment, …but that harm need not be significant," and
- That the "employer acted for discriminatory reasons – 'because of' sex or race or other protected trait." § 2000e-2(a)(1).

The Court overturned decades of lower court precedent applying a "significant harm" standard in Title VII cases.

- Factual backdrop – police officer claimed that her transfer from the St. Louis police department's intelligence division to a regular district was discriminatory on the basis of her gender. She was replaced by a male employee, and though she did not suffer any economic harm as a result of the transfer and she kept the same title, she alleged the position to which she was transferred was less prestigious and affected her work schedule, overtime pay structure, and work attire.
- The Eighth Circuit Court of Appeals affirmed summary judgment for the defendant, holding that Muldrow could not show that the transfer caused a "materially significant disadvantage." Like the district court, the Eighth Circuit emphasized that the transfer "'did not result in a diminution to her title, salary, or benefits.'" 30 F. 4th 680, 688-89 (2022).

Potential Impact of *Muldrow v. City of St. Louis Missouri*

- Citing the plain text of Title VII, the Court found that the statutory language prohibits discrimination against an individual "with respect to" the "terms [or] conditions" or "privileges of employment" because of the individual's race, sex or other protected characteristic. The Court found nothing in the language to establish "an elevated threshold of harm."
- The Court ruled that Muldrow need "show only some injury respecting her employment terms or conditions" and found that her transfer to a less prestigious role, in which she was less involved in high-visibility matters, primarily performed administrative work, lost her take home car, and had a less regular schedule satisfied her burden.
- Justice Kavanaugh's concurrence confirms that *Muldrow* will open the floodgates to challenges to sponsorship/mentorship and other programs that provide "networking" or opportunities to form "professional relationships" based in part on race.

Practical Tips

- Open membership of employer sponsored affinity groups to all employees irrespective of their race, gender or other attributes
- Selection criteria for sponsorship, mentorship and differentiated development programs
  - Programs should not be limited to minorities, whether racial, ethnic, gender or other
  - Selection should be not based solely on an employee's race or other minority status
  - To the extent that "diversity" is considered, define it broadly to include socio-economic, "first gen" and other non-race based characteristics

Practical Tips

- For differentiated development programs focused on an underrepresented group ….
- Be prepared to demonstrate the *Weber & Johnson* factors:
  - The program should be temporary in nature and necessary to eliminate a "manifest racial imbalance"
  - The need for the program should be re-evaluated periodically and terminated as soon as the racial/gender imbalance – relative to the local labor force – is eliminated
- Query whether *Weber & Johnson* survives *Muldrow* and the Supreme Court's hostility to race-based preferences as articulated in its *SSFA* decision?
  - *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 200 (1979): White employee brought action against employer and union challenging legality of plan for on-the-job training which mandated a one-for-one quota for minority workers admitted to the program. The Supreme Court held that: (1) Title VII's prohibitions against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans, and (2) an affirmative action plan that was collectively bargained by an employer and a union and that reserved for black employees 50 percent of the openings in an in-plant craft training program until the percentage of black craft workers in plant was commensurate with percentage of blacks in local labor force did not violate Title VII's prohibition against racial discrimination; purposes of the plan mirrored those of the statute, the plan did not unnecessarily trammel the interests of white employees, and **the plan was a temporary measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.**
  - *Johnson v. Transportation Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 616 (1987): Male employee who was passed over for promotion in favor of female employee brought Title VII suit against county transportation agency. The Supreme Court held that county agency did not violate Title VII by taking the female employee's gender into account and promoting her over male employee with higher test score, as the decision was made pursuant to affirmative action plan directing that sex or race be considered for purpose of remedying underrepresentation of women and minorities in traditionally segregated job categories, and did not unnecessarily trammel rights of male employees or create an absolute bar to their advancement.

Polling Question 3, 4, and 5

- Does your organization maintain a supplier diversity program?
- For those who have such programs, have you modified those programs or eligibility criteria in any way following the *Harvard/UNC* decision?
- For those who have such programs, do you target a specific percentage of contracts that should be awarded to diverse suppliers or a specific dollar value of contracts that should be awarded to diverse suppliers?

Supplier Diversity Programs

- Dramatic expansion following George Floyd murder
- Attributes of Supplier Diversity Programs
- Legal Framework – Section 1981 of the Civil Rights Act of 1866
  - Prohibits discrimination based on race in the "making, performance, modification, and termination" of contracts
  - Disparate treatment claims only
  - Prohibits racial discrimination against White persons as well – *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273 (1976)
  - Plaintiff must show "but for" causation – *Comcast Corp. v. National Association of African-American Owned Media, [cite]*
    - Plaintiff would have won a contract opportunity but-for his/her race
  - Non-employees can assert claims

Recent Claims Relating to Supplier Diversity Programs

- *Bolduc v. Amazon* (E.D. Tex. July 20, 2022)
  - Alleges Amazon's Diversity Grant Program violates Section 1981 by providing $10,000 bonus to Black, Latinx, Native American delivery service partners – not available to White and Asian delivery service partners
  - Case pending
- *Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz*, No. 2:22-CV-00267-SAB, 2023 WL 5945958 (E.D. Wash. Sept. 11, 2023)
  - Section 1981 claims target contracting with suppliers and media companies
  - Dismissed September 2023

Polling Question 6 and 7

- Does your organization tie executive pay in any way to progress on DE&I initiatives?
- If so, does your organization tie executive pay in any way to attainment of quantitative DE&I targets or goals?

Tying Executive Compensation to Diversity Efforts or Results

- America First Legal Foundation
  - Seeking EEOC Commissioner Charge against McDonald's based, in part, on public statements regarding incorporating "quantitative representation metrics for leadership" into the annual incentive compensation awards for its CEO and Executive Vice Presidents
- *National Center for Public Policy Research v. Howard Schultz, et al. [cite]*
  - Allegations based, in part, on Starbucks linking executive compensation to DE&I goals attainment – 7.5% of bonus tied to undisclosed DE&I goal
  - Starbucks discontinued program March 2024
- Contrast linking executive pay to "commitment" to diversity v. attainment of specific, numeric representation goals

Polling Question 8 and 9

- Does your organization invest in third parties that promote women-owned or minority-owned businesses (e.g., minority-owned banks or venture capital funds)?
- If so, have you modified those programs in any way following the *Harvard/UNC* decision?

Investment Programs

- Attributes of Investment Programs
  - Expand relationships with minority-owned banks
  - Invest in venture capital funds that target minority- or women-owned businesses
- Legal Framework
  - Equal Credit Opportunity Act of 1974 – prohibits discrimination in consumer and business/commercial loans – financial institutions
  - Section 1981 (race only, not gender)

Recent Claims Relating to Investment Programs

- *American Alliance for Equal Rights v. Fearless Fund Mgmt.,* (N.D.Ga.23-cv-03424 – August 2, 3023)
  - Alleges program that provides $20,000 grants to Black women small business owners violates Section 1981
  - District Court denies preliminary injunction – First Amendment defense
  - 11th Circuit (2-1) – overturns District Court and issues preliminary injunction preventing the Fund from enforcing the racial eligibility criterion
    - Finds the program "is substantially likely to violate" Section 1981
- Potential Shareholder Derivative Claims

Practical Tips

- Supplier Diversity Programs
  - "Expanding the Pie" Approach v. Percentage of Contracts/Dollars
    - Track metrics – programs typically based on existing imbalance
  - "Preferred Provider" Approach
    - Create/expand panel of potential suppliers
    - Assess each contracting opportunity separately
    - Establish business justification for selection of provider
  - Precise Language Describing Supplier Diversity Programs
    - Expand universe to include non-race-based categories – e.g., "small or diverse suppliers"

Practical Tips

- Executive Pay
  - Safest space is linking compensation to demonstrated commitment to the organization's DE&I principles
- Investment Programs
  - Investors "One Step Removed" – Funds in Cross-Hairs
  - Track metrics
    - Return on investment
    - Business judgment defense

Thank you.