

The Swinging Pendulum

Trends in Reverse Discrimination Lawsuits and Legal Challenges to DEI Programs

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Agenda

- When “What I Have Done?” turns into “What Have You Done?!?!”
- The Risks:
 - Reverse discrimination claims/lawsuits
 - Internal or External Stakeholder led initiatives
 - Anti-woke legislation, government restrictions or other actions
- What to do and how...and what not to do.

- From an Organization: Foundation Against Intolerance and Racism (FAIR).
- Says they support measures and provide opportunities to underrepresented groups.
- Mentions one of your programs or statements made by someone at your company.
- Cites several cases on reverse discrimination.
- Says what you are doing is reverse discrimination and wants you to respond in ten days.
- Promises to bring a class action lawsuit if you don't.

Going from “What I have done” to “What have you done??!!” – You get this letter

What are we seeing?



The reverse discrimination claim or lawsuit.



Stakeholder-led initiatives.



Anti-woke legislation.



Government action and possible boycotts.

Reverse Discrimination Claims/Lawsuits



Trends

General increase in reverse discrimination claims.

Outcomes vary quite a bit.

Heavy focus on the facts – make sure your files are complete!

It often boils down to a pretext analysis.

Unpredictable especially if it gets to a jury.

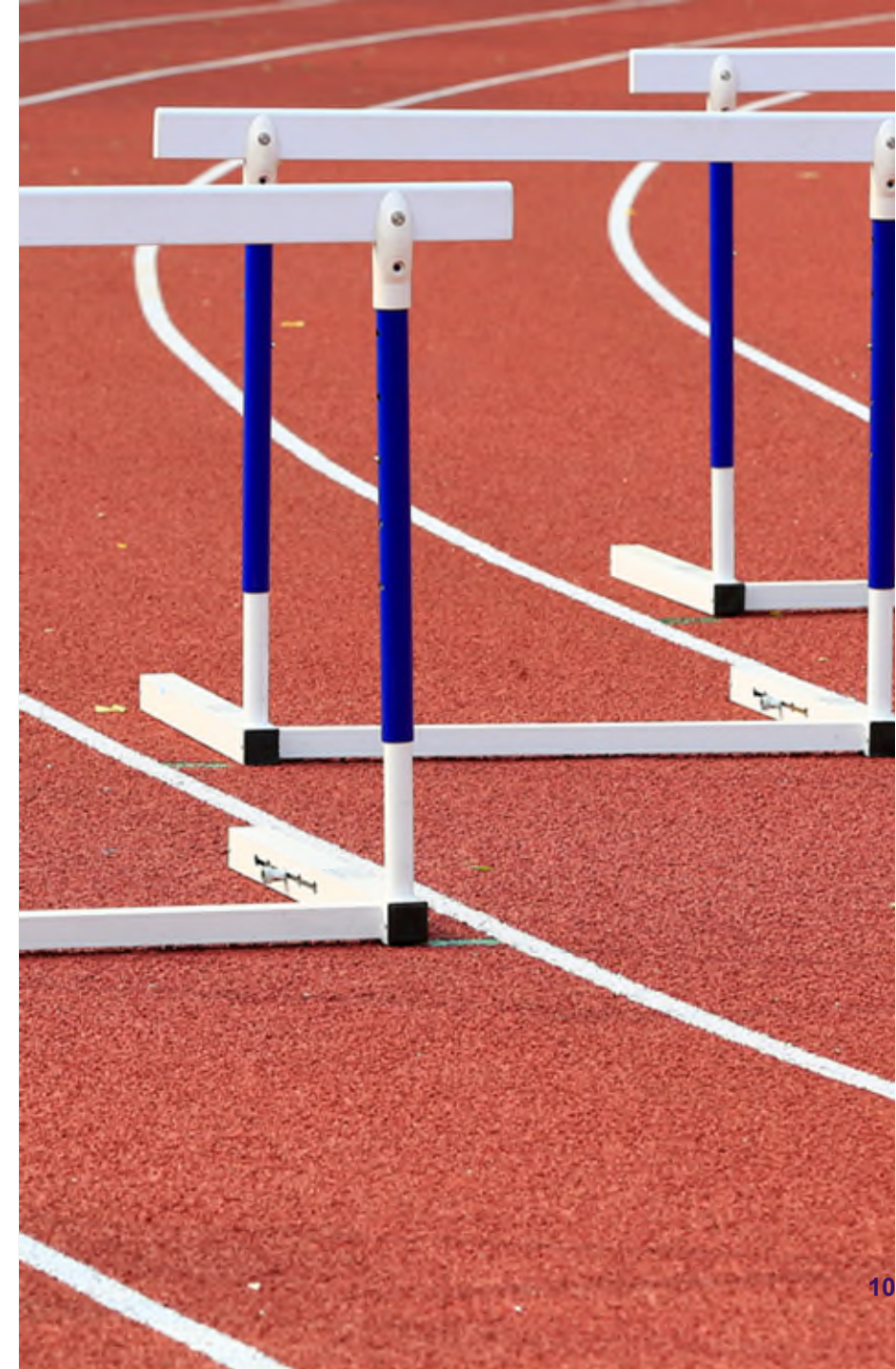


DEI and Reverse Discrimination

- Supreme Court Foundation
 - In *McDonald v. Santa Fe Trail Transportation Company*, the Supreme Court concluded Title VII is “not limited to discrimination against members of any particular race” but “prohibits racial discrimination against [White people].”
 - Since the Supreme Court’s ruling in *McDonald* provided no guidance on how to interpret the racial minority element, the circuit courts have split on how to assess reverse discrimination claims.

The Extra Hurdle

- The Extra Hurdle Circuits:
 - Sixth (Zambetti), Seventh (Phelan), Eighth (Hammer), Tenth (Notari), and D.C. Circuit (Harding) Circuits require an extra hurdle.
 - White plaintiff alleging reverse discrimination would have to show “background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority.” *Parker v. Baltimore & O.R. Co.* (D.C. Cir. 1981).
- The Circuits Where They Are All The Same:
 - Third (Ladimarco), Fifth (Byers), and Eleventh (Bass) Circuits have addressed reverse discrimination claims as if they were traditional discrimination claims and analyzed them exactly as it would any racial discrimination claim. *Bass v. Bd of Cnty. Comm’rs* (11th Cir. 2001).
- The Ones That Aren’t Sure:
 - First, Second, Fourth, and Ninth Circuits have not directly weighed in on the issue, and district courts within the circuits have adopted competing positions.





Reverse Discrimination: Seventh Circuit (That's Us)

- *Groves v. South Bend* (2022) – Employer wins.
 - Groves (White) applied for district-wide athletic administration position. Gavin (Black) was hired instead of him.
 - Both met basic requirements (a Bachelors Degree).
 - Other qualifications comparable and Gavin interviewed better.
 - Gavin had a criminal conviction in his background that School District did not know about. No inconsistencies on how policies are applied.



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Reverse Discrimination: Seventh Circuit (That's Us)

Dunlevy v. Landgfelder et al. (2022) – Employee wins.

- Dunlevy (White) fired for inaccurate reporting meter reads. Black coworker was not fired, even though late, left early took breaks for hours, omitted disclosing a burglary conviction.
- Supervisors said both should be fired. Mayor is decisionmaker and fired Dunlevy only.
- Being concerned about minority hiring not enough for the first hurdle.
- Are they similarly situated? Court said yes because both infractions are similarly serious given their job.

Reverse Discrimination: Seventh Circuit (That's Us)

- *Runkel v. City of Springfield et al.* (2022) – Employee wins.
 - Runkel (White female) asked to be hired for purchasing agent position. Mayor selected Wilkin (Black female) who reported to Runkel. Plaintiff was offered a raise instead.
 - Runkel says this is discriminatory and threatens an EEOC charge. A “disturbance” ensued. Runkel’s raise is rescinded.
 - Why employee wins:
 - Offered evidence Mayor chose Wilkins because he wanted to appoint a Black person as a PO for political/policy reasons. What was this evidence?
 - Previous PO was Black and was only Black PO. Mayor offered the position to another Black person before offering it to Wilkin.
 - There was evidence that Wilkin was better educated, had more seniority, and had displayed more professionalism on the job than Runkel.
 - But, Mayor said he did not compare Wilkin to Runkel. Wilkin’s resume not mailed to Mayor until after he made the decision to promote her. Why is that important? Pretext.

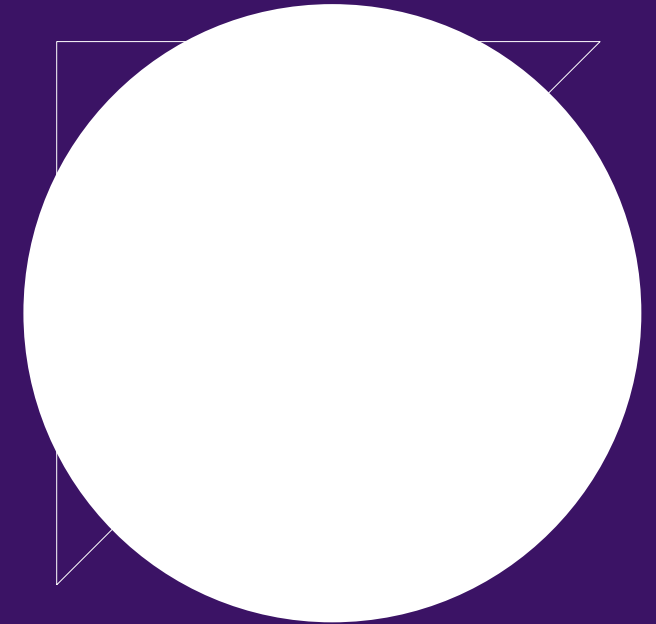
Reverse Discrimination: Seventh Circuit (that's us)

- *Loizon v. Evans* (2022) – Employer wins.
 - Loizon (White male) worked as a Deputy Chief of Cook County Adult Probation Dept. Sues Chief Judge of the Circuit Court of Cook County and Office of the Chief Judge.
 - Why employer wins: Court focuses on pretext.
 - “Where...an employer offers several reasons for an adverse employment action, ‘the employee has the burden of demonstrating that each proffered nondiscriminatory reason is pretextual.’”(citing Wilson)
 - “The record provides ample evidence to support each of these reasons for termination.”
- *Ethridge v. Hudson Grp. Retail, LLC*. (2022) – Employer wins.
 - Etheridge (White male) worked as a delivery driver at O’Hare. Fired less than a year after he was hired for attendance issues for being absent over dozen times.
 - Etheridge thinks it was discriminatory based on race and sex. Etheridge disproved each allegation with his own testimony.
 - Cited evidence that he was the only non-Black driver which was not true; that the individual who terminated him was Black when only 1 out of 4 individuals who made decision was Black.
 - Why employer wins: Focuses is on pretext.
 - Ethridge termination was in line with Employer’s policies, far from pretextual. Under policy it only took four no call, no shows, and Ethridge was absent 12 times.

Internal or External Stakeholder-led Claims and Initiatives

DEI and Reverse Discrimination: External Stakeholders

- Shareholder Proposals – National Center for Public Policy Research (NCPPR).
 - Demanding that DEI initiatives and proposals be put to a vote.
 - Demanding studies are conducted as to impact of DEI initiatives such as diversity training.
 - Demanding that employer put and end to “radical and divisive ‘racial justice initiatives.’” Claim over 3200 people have signed as of September.
- Shareholders sending requests to the EEOC to open civil rights investigations.
- Shareholders Sending DEI Policy Retraction Demands – America Civil Rights Program (ACPR).
 - Letters asking for retraction of DEI initiatives and threatening litigation for non-retraction.
 - Seven retraction letters sent to Dropbox, JP Morgan, Starbucks, McDonalds, Novartis, Lowe’s, and Coca-Cola.
 - They sue if it does not work. *NCPPR v. Starbucks*. The American Civil Rights Project is suing Starbucks officers and directors on behalf of NCPPR alleging defendants violated their fiduciary duties in adopting the DEI policies, which allegedly illegally discriminate based on race by incentivizing officers to establish a more diverse workforce and supply chain.





Class Action Exposure Stemming from DEI Programs

- Evidence of a system or pattern of disparate treatment based on protected categories.
 - Often based on data and employer statements/commitments.
 - *Luqman v. City and County of San Francisco* (2020): A race class action brought on behalf of 5000 Black current and former employees.
 - Office of Racial Equity, the City admitted to “serious disparities between demographic groups, particularly along racial lines. Most notably, in comparison to those of other races, our Black employees have lower-paying jobs, are less likely to be promoted, and are disciplined and fired more frequently.”
 - *Curley v. Google LLC* (2022): A former employee at Google sued claiming it systematically discriminated against Black, female workers by placing them in lower-level jobs, underpaying them and denying them opportunities to advance. The lawsuit is based mostly on numbers in Google’s 2021 diversity report.
- State and federal government and the Biden Administration have increased data collection efforts while also placing greater emphasis on discriminatory systemic practices.

DEI and Class Action Reverse Discrimination: Internal Stakeholders

- *Lowery v. Texas A&M* (2022)
 - A professor sued under Title VII alleging the faculty fellowship program aimed at increasing diversity discriminates against white and Asian men, stating “These discriminatory, illegal, and anti-meritocratic practices have been egged on by woke ideologues who populate the so-called diversity, equity, and inclusion offices at public and private universities.”
- *Netzel v. American Express* (2022)
 - Former employee Brian Netzel sued under Title VII on behalf of himself and of other similarly situated White employees alleging that “Amex implemented anti-racism policies throughout its corporate structure that “gave preferential treatment to individuals for being Black and unambiguously signaled to White employees that their race was an impediment to getting ahead in the company.” Potentially 1000s of employees.

Reverse Discrimination: The *Duvall* Matter

Duvall v. Novant Health, Inc. (2021). A former top executive in a North Carolina-based health care system who alleged he lost his job due to his company's efforts to diversify its top leadership and because he is a white male received a \$10M verdict. Some facts:

- Replaced by two women, one White and one Black.
- Several other white executives terminated were replaced by minorities and females. A decrease of 5.6 % in white executives with corresponding increase in minority and female executives.
- DEI efforts:
 - (1) expressly asking managers to use “a diversity lens” in decisions
 - (2) incentive plan rewards executives who improved DEI performance – 50% of the incentive was related to achieving under-represented minority targets (but no numeric targets or quotas)
 - (3) CEO “bragged” about increased diversity on the executive team.
- Evidence Duvall was a strong performer. In writing and external communications.

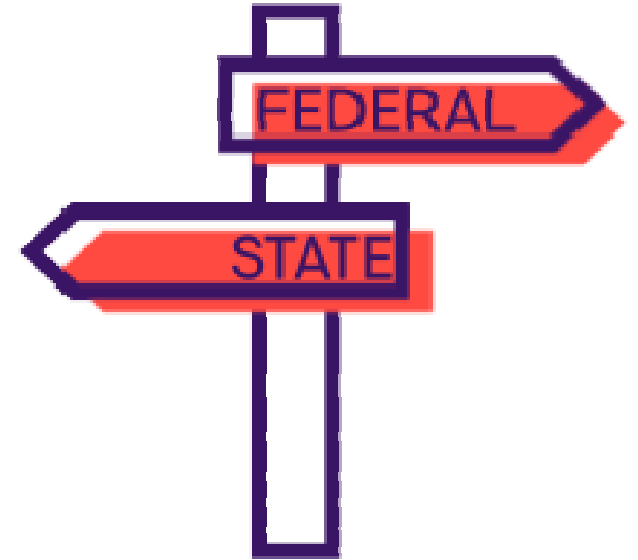
Reverse Discrimination: The *Duvall* Matter

- Some takeaways (and more on this later):
 - A reverse discrimination case is same or very similar to a regular discrimination case because (1) totality of circumstances counts – the more facts on one side of the balance, the more likely for that side to outweigh the other one; and (2) unpredictable especially if it gets to a jury.
 - What's always bad: numbers, statements, shifting reasons or complicated explanations.
 - A DEI initiative might be sufficient evidence to support “the suspicion that the defendant is that unusual employer who discriminates against the majority.”

Anti-woke Legislation, Government Restrictions and Other Actions

Anti-Woke Legislation

- Proposed in the legislatures of at least 17 states.
- Mostly focused on what is taught in schools and on public bodies, but some deal with what can be taught as mandatory training to employees such as Florida's Stop WOKE Act.
 - Forbids training that says individuals are privileged or oppressed due to their race or gender or training that might make staff feel "guilt" or "anguish" because of past actions by members of the same race.
- The Trump administration questioned diversity policies. In September 2020, a memo from the White House OMB terminated federal agencies' diversity training that included critical race theory or referred to White privilege. Biden revoked that order.



A close-up, artistic photograph of several US dollar bills, showing the intricate patterns and colors of the currency. The bills are slightly out of focus, creating a sense of depth. The text "GOVERNMENT RESTRICTIONS AND OTHER ACTIONS" is overlaid on the right side of the image.

Government Restrictions and Other Actions

- States restrict using certain employers because of their stance on certain issues. About 30 measures in 2022.
- Mostly targeting ESG issues such as climate stance/energy use, abortion or gun control but could begin to affect DEI initiatives.
- Driven by industry lobbying groups.
- Significant effect on the employer's bottom line
 - One financial sector employer in Texas went from underwriting 2.3 billion worth of municipal bonds a year to 210 million as of July 2022.
 - Another went from 3.7 billion for previous year to none so far this year.
- Remember this pressure can come from the other side, too.



What Now?

- What this section is not about.
 - Giving you bright lines. Remember we must look at the totality of circumstances and realize this is an unpredictable area.
 - Giving you one size fits all solutions.
 - Mostly not about giving you absolute “no-no's”
 - Maybe some. Remember what’s always bad like bad numbers, bad statements, shifting or complicated explanations
- What this is section is about.
 - What questions to ask yourself about who you are, where are you and who you want to be.
 - What level of risk are you comfortable with?
 - Making sure when you weigh risks and benefits of your DEI initiatives you have all the items on both sides of the scale.



What Do You Do?

- Know Thyself.
 - Know your jurisdiction for laws and climate.
 - Know your workforce.
 - Diversity diagnostic and/or climate surveys.
- Have a Plan.
 - Not ad hoc or reacting to discreet events.
 - What you want to do.
 - How you are going to communicate it – what are you going to say. Be mindful of language-use diversity goals or aspirational goals and not terms requiring or suggesting targets or quotas.
 - METRO: **M**onitor, **E**ducate and train, **T**rack, **R**eport and **O**ngoing adjustments
- Remember the Three C's.
 - Consistency in action, enforcement and communication.
 - Credibility.
 - Continual Education and Training. Unconscious bias for everyone and leadership training for leaders .



Do's and Don'ts

- Don't go at it alone. Business, DEI, HR, communications/marketing and legal all have a role in how you respond to events or accomplish DEI aspirations.
 - Remember privilege and METRO (**M**onitor, **E**ducate and train, **T**rack, **R**eport and **O**ngoing adjustments).
- Avoid Targets or Quotas.
 - Possible exceptions (few).
- Be honest with your risk tolerance and “Blossom Where You are Planted.”
- Remember the full picture

Thank you.

