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# DEI, Private Employers, Affirmative Action: Where Things Stand One Year After SCOTUS Ruling Striking Down Race Based Admissions Policies in Higher Education

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# PRESENTERS



**Caroline Vickrey**  
*Shareholder*  
JOHNSON & BELL, LTD.  
Chicago, IL  
vickreyc@jbltd.com  
(312) 984-0287



**Amy Yarbro**  
*Partner*  
MORRISON MAHONEY LLP  
Boston, MA  
ayarbro@morrisonmahoney.com  
(617) 439-7500

# INTRODUCTION



# *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. 181*

Question presented: Whether the admissions systems at Harvard and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment

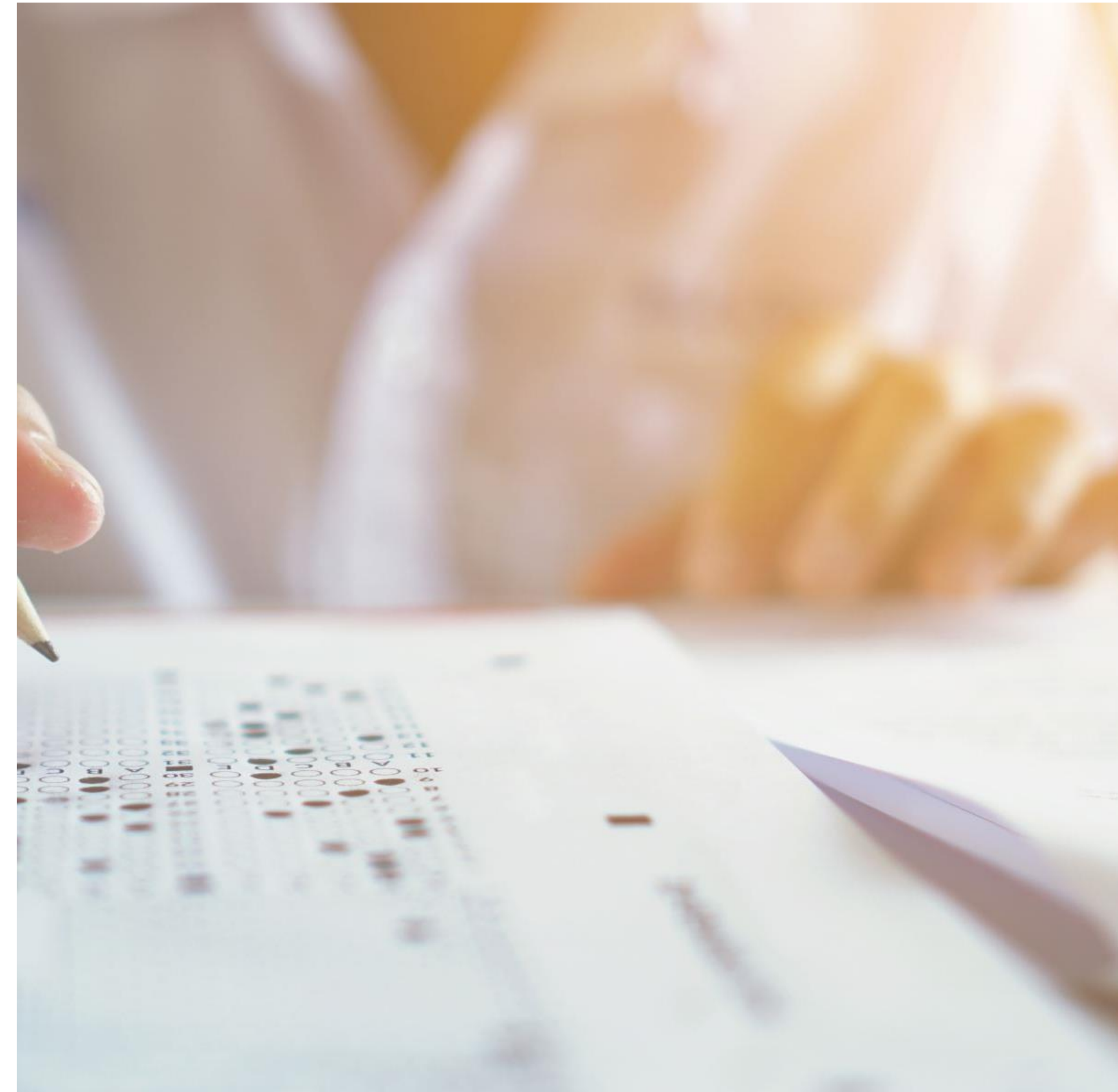
# Harvard Admissions Process Overview

- Academic
- Extracurricular
- School Support
- Personal
- Overall (Race is considered)
  
- “Lop List” = Legacy Status, Recruited Athlete Status, Financial Aid Eligibility, Race
  
- “Race is a Determinative Tip”



# UNC Admissions Process

- Numerical ratings
- “Plus” assigned for race
- “School group review” in which race is considered



# History of Race Based Admissions Programs

*Plessy v. Ferguson*=separate but equal

*Brown v. Board of Ed.*=separate is not equal

*Regents of Univ. of Cal. v. Bakke*=Set aside admission process- Six different opinions – School's freedom not unlimited

# Strict Scrutiny

## *Grutter v. Bollinger*

- Use of race must be to further compelling government interests

## *Fisher v. Univ. of Texas*

- Use of race must be “narrowly tailored”



# “Compelling government interest”

- Obtaining educational benefits from racially diverse student body=sufficient as a compelling interest under *Bakke*

BUT

- Must never use race as a stereotype or negative
- At some point they **MUST END**

# Twin Commands

Race as a  
Negative

- Harvard's program resulted in fewer admissions of Asian-Americans

Race based  
admissions  
require  
stereotyping

- Offensive and demeaning assumption that students of a particular race, because of their race, think alike

# Questions Raised by the Majority re: Stereotypes

- Were South Asian or East Asian students equally represented?
- Who is Hispanic?
- How are applicants from Jordan, Iraq, Iran and Egypt categorized in Harvard's groups of Asian, Hawaiian or Pacific Islander, Hispanic, White, African American and Native American?

# No Logical End Point

- Achieving meaningful diversity is just a metric to see if a proportional goal has been achieved
- It is impossible to determine when students are achieving the benefits of diversity



# Summary

Harvard's and UNC's race-based admissions programs were unconstitutional because they:

1. Lacked sufficiently focused and measurable objectives warranting the use of race
2. Unavoidably employed race in a negative manner
3. Involved racial stereotyping
4. Lacked meaningful end points

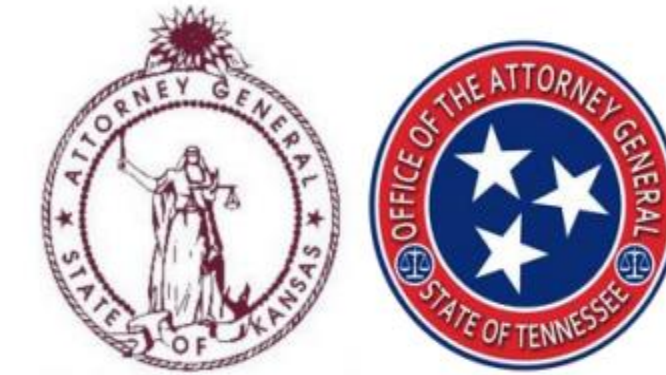


# LITIGATION AND CLAIMS AGAINST EMPLOYERS POST SFFA



# Politics / Litigation

- 13 State Attorneys General Letter to Fortune 100 Companies After SFFA Ruling
  - “These principles apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting.”
  - “Social mobility is essential for the long-term viability of a democracy, and our leading institutions should continue to provide opportunities for underprivileged Americans. Race, though, is a poor proxy for what is fundamentally a class distinction.”
- Special Interest Groups Funding Litigation
  - Initiating challenges in light of the appointment of conservative Supreme Court justices



July 13, 2023

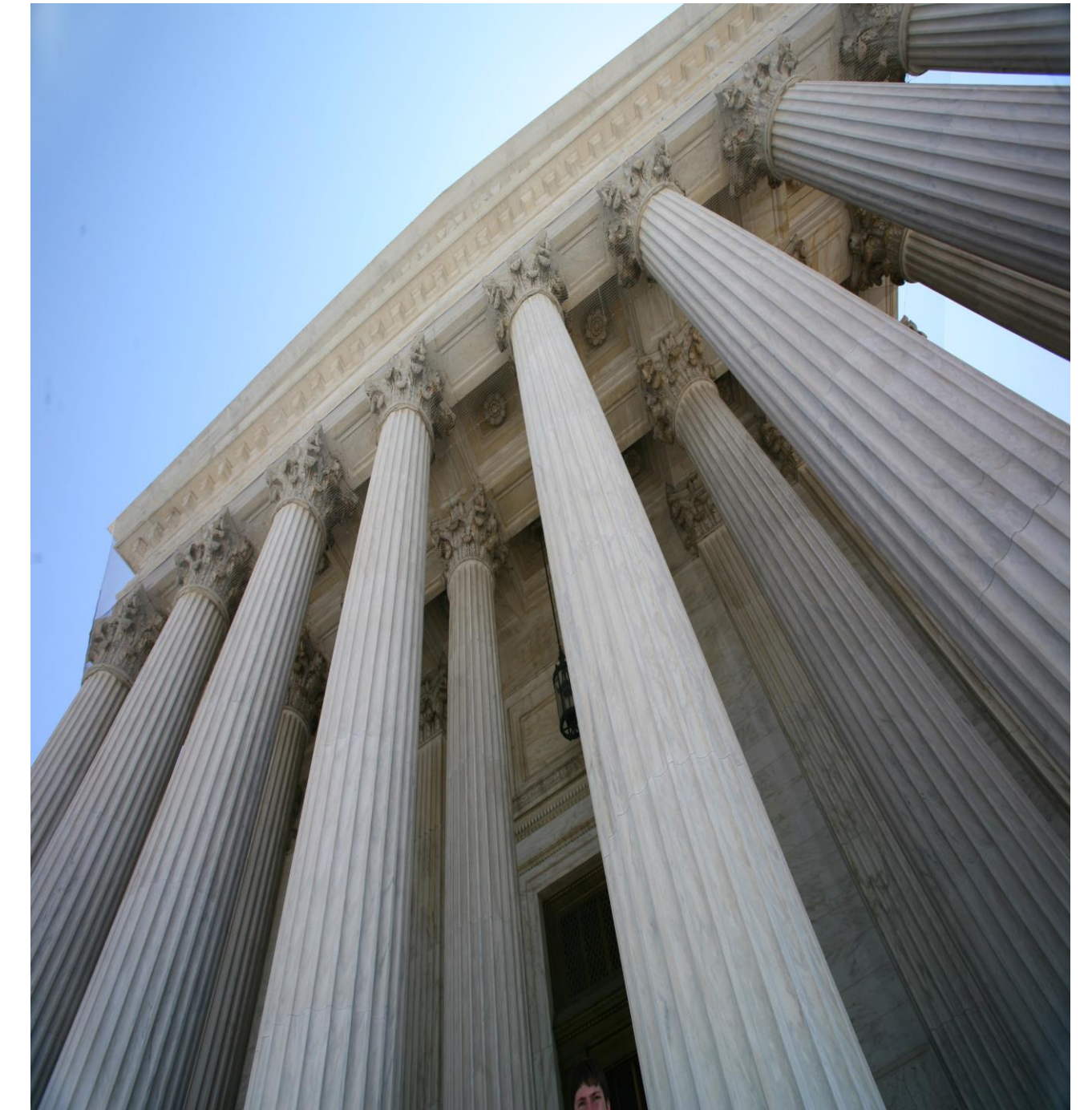
Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of “diversity, equity, and inclusion” or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

*Kansas, Tennessee, Alabama, Arkansas, Indiana, Nebraska, Iowa, South Carolina, Kentucky, West Virginia, Mississippi, Missouri, Montana*

# DEI Litigation: Causes of Action

- 42 U.S.C. § 1981 (Civil Rights Act of 1866)
  - All persons shall have the same right to make and enforce contracts and to the full and equal benefit of all laws as is enjoyed by white citizens
- Title VI (Civil Rights Act of 1964)
  - Applies to federally supported programs
  - Prohibits discrimination on grounds of race, color, or national origin
- Title VII (Civil Rights Act of 1964)
  - It is unlawful to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual or to limit, segregate, or classify employees or applicants for employment because of such individual's race, color, religion, sex, or national origin
  - Includes disparate impact claims
- Fourteenth Amendment Equal Protection Clause
  - Applies to government actors





# DEI Litigation: Hiring

- Am. Alliance for Equal Rights v. Morrison & Foerster LLP, No. 1:23-cv-23189 (U.S.D.C. – S.D. Fla. August 22, 2023)
  - Summer associate program requirement that candidates be of a historically underrepresented group, including African American/Black, Latino, Native American/Native Alaskan, LGBTQ+ community. 42 U.S.C. § 1981
- Am. Alliance for Equal Rights v. Perkins Cole LLP, No. 3:23-cv-01877 (U.S.D.C.-N.D. Tex. August 22, 2023)
  - Summer associate program requirement that candidates be students of color, students who identify as LGBTQ+, and students with disabilities. 42 U.S.C. § 1981
- National Center for Public Policy Research v. Schultz, No. 2:22-cv-00267-SAB (U.S.D.C. – E.D. Wash. Sept. 11, 2023)
  - Shareholder’s challenge against Starbucks’ diversity policies describing them as “woke” dismissed.
    - “This Complaint has no business being before this Court and resembles nothing more than a political platform.”



# DEI Litigation: Training

## Hostile Work Environment / Retaliation

- White city employee claimed that segregated DEI training subjected him to hostile work environment.
- Training included references to “white privilege” and “white supremacy”, and statements made by director-level employees that “all white people are racist.”
- Employee claimed that when he reported his concerns to his supervisor, she asked him to step down from his position because he was denying a person of color an opportunity for promotion. Another supervisor chest-bumped him, got in his face, and told him that he had white privilege and racist motives.
- Employee claimed he was constructively discharged when City stopped allowing him to work from home because of staffing shortages; he believed employees of color were given priority to telework.
- Employee’s allegations of hostile work environment and retaliation were sufficient to survive motion to dismiss.

Diemert v. City of Seattle, 689 F. Supp. 3d 956 (W.D. Wash., Aug. 28, 2023)

*Employee represented by Pacific Legal Foundation*

# DEI Litigation: Training

- **Pennsylvania State University writing professor alleged racial discrimination and hostile work environment, in violation of Title VI and Title VII, claiming that:**
  - he was instructed to incorporate race into grading
  - the Director of the DEI program sent an email to all employees “calling on white people” to “feel terrible” about their “own internalized white supremacy” and to “hold other white people accountable”
  - training included a video entitled “White Teachers are a Problem” and “White Language Supremacy” and a message that “accused white faculty of unwittingly reproducing racist discourses and practices in our classrooms”
  - that when he asked for examples of racist discourse, facilitators reported him for bullying and harassment, and he was issued a performance expectations notice for causing significant disruption at the meeting
- Employee told supervisor that the “antiracist dogma” made him feel harassed, and he filed a report with the Penn. Human Relations Commission and Penn State’s Affirmative Action Office. Employer told employee to continue to attend trainings “until you get it” and the training does not constitute discrimination toward him.
- Employee’s hostile work environment claim survived motion to dismiss. Other claims for violation of the First Amendment, Section 1981, and Title VI failed.



De Piero v. Penn. State Univ., 2024 WL 128209 (E.D. Penn. Jan. 11, 2024)



# DEI Litigation: Training

## Refusal to take unconscious bias training is grounds for termination

- Employee refused to participate in mandatory unconscious bias training and was terminated.
- Employee claimed that he was retaliated against for refusing to take the training and for complaining about a supervisor's email referring to unconscious bias.
- Court affirmed summary judgment on grounds that employee had no objectively reasonable belief that the action he opposed violated the law because he never viewed the training materials.

Vavra v. Honeywell Internat'l, Inc., 106 F. 4th 702 (7th Cir., July 10, 2024)

# DEI Litigation: Training

## “Severe and Pervasive” / Standing Issues

- Employee for Colorado Dept. of Corrections claimed that mandatory Equity, Diversity, and Inclusion training subjected him to hostile work environment under Title VII and violated the Equal Protection Clause.
- Training defined terms like “white fragility,” “white exceptionalism,” and described “BIPOC” as a term used to “acknowledge that Indigenous and Black people have been most impacted by whiteness . . . shapes the experiences of and relationship to white supremacy for all people of color.” while “race” is a “social construct that artificially groups people by skin tone . . . to justify social and economic oppression of people of color by white people.”
- Employee failed to establish that training program was severe and pervasive for purpose of hostile work environment claim.
- Employee did not have standing to pursue Equal Protection Claim because he no longer worked for the department.
- Young v. Colorado Dept. of Corrections, 94 F. 4th 1242 (10th Cir. Mar. 11, 2024)  
*Employee represented by Mountain States Legal Foundation*

# EEO Form / Race Data / Termination

- Termination Request Form which included EEO Analysis data, including race of white male meteorologist, demographics of his colleagues, and identification of potential comparator employees who had engaged in similar conduct did not support employee's claim that he was terminated because of race because there was no evidence that decisionmaker relied on racial data in form.
  - Purpose of data was to ensure that the station was not treating one person in that situation in that comparable group differently than others
- Fact that employee was replaced by a Hispanic woman may have been enough to establish first prong of prima facie case for burden shifting analysis. However, employee's claim that termination for sexual harassment was pre-text was belied by his own admission to engaging in sexual harassment conduct.
- Dissent: EEO form required managers to disclose their employees' race including employees not accused of wrongdoing so that decisionmaker could consider group racial balance in deciding whether to approve termination request. Such balancing results in white employee's race being a "negative factor" as contemplated by SFFA.
  - EEOC requires race data to be kept separate from employees' personnel records. 29 C.F.R. §1602.13

Ossman v. Meredith Corp., 82 F. 4th 1007 (11th Cir. Sept. 8, 2023)

F1  
Contact No. 08017

**EQUAL EMPLOYMENT OPPORTUNITY**  
**Employer Information Report**

Company Name: \_\_\_\_\_ Contact Person: \_\_\_\_\_  
 Address: \_\_\_\_\_ Telephone #: \_\_\_\_\_  
 City: \_\_\_\_\_ Fax #: \_\_\_\_\_  
 State: \_\_\_\_\_ Zip: \_\_\_\_\_ Fed. Tax ID #: \_\_\_\_\_

**Company Owner\* Information:**

Category: \_\_\_\_\_ Native Origin: \_\_\_\_\_  
 1  White American Europe, North America, or the Mid-East  
 2  African American Any Black racial group in Africa  
 3  Native American Indian North America, and maintain cultural identification through tribal affiliation or community recognition, not including Eskimos or Aleuts.  
 4  Hispanic American Mexico, Puerto Rico, Cuba, Central or South America, or other Spanish origin, culture, or descent, regardless of race.  
 5  Asian/Pacific American Far East, Southeast Asia, the Indian Subcontinent, Pacific Islands  
 6  Hispanic Jew  
 7  Female  
 8  Disabled

\* Owner is defined as: one who owns and controls at least 51% of the business, and is involved with the daily operations and management of the business.

**Company Employee Information:**  
 Report the number of all employees - permanent, part-time, apprentices

Occupational Category	White		African American		Nat. Amer. Indian		Hispanic American		Asian/Pacific American		Disabled		Totals	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Officials & Managers														
Professionals														
Technicians														
Sales Workers														
Office & Clerical														
Craftsman (Skilled)														
Operators (Skilled)														
Laborers (Unskilled)														
Service Workers														
<b>Totals</b>														
Includes Trainees?														
Part-time only?														
On-the-job Trainees? (Subcontractors)														

\* Report only employees enrolled in formal on-the-job training programs. This information shall also be included in the counts for the appropriate category above.

Equal Employment Opportunity Officer (Print Name): \_\_\_\_\_  
 Equal Employment Opportunity Officer (Signature): \_\_\_\_\_

F114, Form EEO-1  
Revised 4/99

# DEI Litigation: Termination

**A North Carolina jury found that a white male executive employee was terminated because of his race and sex in violation of Title VII and awarded \$10,000,000 in punitive damages.**

- Employer implemented a Diversity & Inclusion plan to embed diversity and inclusion in executive and senior leadership teams within 3 to 5 years such that the workforce reflected the community.
- Employer promoted a black woman and a white woman to take over employee's duties. Evidence was presented that other white males had been terminated and replaced by a racial minority.
- Employer told employee that the company was going in a different direction at the time of termination.
- Mixed motive standard requires direct or circumstantial evidence demonstrating that a protected characteristic was a motivating factor in the defendant's challenged employment practice.
- Court affirmed liability issue but vacated punitive damages award on grounds that employee had not met high standard under Title VII by showing that employer engaged in intentional discrimination *and* that the discriminatory practice was done with malice or reckless indifference to the federally protected right of the individual.

Duvall v. Novant Health, Inc., 95 F. 4th 778 (4th Cir., Mar. 12, 2024)

# SFFA Destined to Overturn Precedent

Long-standing precedent requiring a “majority” plaintiff to show that his employer “is that unusual employer who discriminates against the majority” has been undermined by SFFA.

Smyer v. Kroger Ltd. Partnership, 2024 WL 1007116 (6th Cir. Mar. 8, 2024) (Boggs, J., Readler, J., Concurring) (stating that “unusual employer” requirement in the 6<sup>th</sup> Circuit and other jurisdictions should be overruled)





# EEOC GUIDANCE



# EEOC Position on SFFA – Charlotte Burrows

- Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on colleges and universities to provide a diverse pipeline of talent for recruitment and hiring. Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers". 6/29/23 Charlotte Burrows

## No effect on Employer Efforts

The decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. 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.

# Future?



# DEI CONSIDERATIONS FOR EMPLOYERS



# What Does SFFA Mean for Private Employers?

Hiring / Recruiting

DEI Training Programs

Creating a “Diverse” Workforce

Mentorship Programs

Affinity Groups

# Creating a Diverse Workforce

- What is “diversity”?
  - Education
    - First generation college graduate
  - Life Experiences
    - May include consideration of how race has impacted an applicant’s life
  - Languages spoken
  - Geographic background
  - What makes the individual unique
- Inclusion
  - Cultural programs
    - Food, book clubs, events, awareness initiatives

## Hiring / Advancement

- Race is not an eligibility requirement
- May consider individual's background and experiences
- Avoid numeric goals based on race, i.e., quotas
- Treat all applicants equally
- Review job descriptions
- Expand recruitment across a broad range of schools

## Training

- Ensure all employees receive the same training
- Avoid divisive language and generalizations
- Unconscious bias training applicable to all employees
- Mentorship programs
- Affinity groups – open membership to all employees



# Employee Termination

- Document disciplinary actions / performance issues
  - Accurate assessments
  - Note specific matters of concern
- Provide reason for termination in writing
- EEO race data for employees maintained separate from employee personnel records
- Racial makeup of workforce or department cannot be a factor in determining whether to terminate an employee



# Pop-Up Question

- **What state is Caroline from?**
  - A. Illinois
  - B. Massachusetts
  - C. Rhode Island
  - D. New York



**THANK YOU! If you have any questions, please contact one of the presenters**



**Caroline Vickrey**  
*Shareholder*  
JOHNSON & BELL, LTD.  
Chicago, IL  
vickreyc@jbltd.com  
(312) 984-0287



**Amy Yarbro**  
*Partner*  
MORRISON MAHONEY LLP  
Boston, MA  
ayarbro@morrisonmahoney.com  
(617) 439-7500

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