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DEI Under the Microscope: What Employers Should Know About Recent Developments

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There have been recent developments in the continually evolving legal landscape for employers utilizing diversity, equity and inclusion (DEI) programs and policies. Below is a brief overview of those recent developments and how they may impact your company or organization.

1. *Ames v. Ohio Department of Youth Services* eases the standard to prove 'reverse discrimination'

In a unanimous decision on June 5, 2025, the US Supreme Court rejected the heightened burden test faced by plaintiffs in demonstrating "reverse discrimination" under Title VII of the Civil Rights Act (Title VII). In *Ames* (No. 23-1039), the Supreme Court rejected application of the "background circumstances" test, whereby members of a "majority group" must meet a heightened burden of proof in discrimination cases "to support the suspicion that the defendant is that unusual employer who discriminates against the majority." The background circumstances test had been adopted by five circuit courts – including the Sixth, Seventh, Eighth, 10th and DC circuits. The case involved a heterosexual woman who claimed her employer, the Ohio Department of Youth Services, discriminated against her in violation of Title VII by denying her a management promotion and demoting her because of her sexual orientation. The agency filled the management position with a lesbian woman and filled her program administrator position with a gay man.

The Supreme Court concluded that the US Court of Appeals for the Sixth Circuit had applied the wrong standard to the plaintiff's discrimination claims, clarifying that the "background circumstances" rule cannot be squared with the text of Title VII or long-standing precedents interpreting Title VII. The Supreme Court concluded that Title VII establishes the "same protections for every 'individual'—without regard to that individual's membership in a minority or majority group—Congress left no room for courts to impose special requirements on majority-group plaintiffs alone." The Supreme Court also held that case law interpreting Title VII supports the finding that the standard for proving disparate treatment under Title VII "does not vary based on whether or not the plaintiff is a member of a majority group" – and the background circumstances test flouts the basic principle that the requirements for establishing discrimination were meant to be flexible. The Supreme Court therefore vacated the Sixth Circuit's ruling and remanded the case for application of the proper standard.

In a nod to the current climate scrutinizing many corporate DEI programs, Justice Clarence Thomas authored a concurring opinion (which Justice Neil Gorsuch joined), in which he noted that the background circumstances rule is "nonsensical" for the additional reason that it requires courts to assume that only an "unusual employer" would discriminate against those it perceives to be in the majority. Justice Thomas wrote, "a number of this Nation's largest and most prestigious employers have overtly discriminated against those they deem members of so-called majority groups. American employers have long been 'obsessed' with 'diversity, equity, and inclusion' initiatives and affirmative action plans … Initiatives of this kind have often led to overt discrimination against those perceived to be in the majority."

2. EEOC agrees with *Ames* and issues guidance with DOJ on DEI-related discrimination

The *Ames* decision is consistent with the long-standing position of the US Equal Employment Opportunity Commission (EEOC) that civil rights protections – including Title VII – apply equally to all individuals. Indeed, the day after the *Ames* decision, EEOC Acting Chair Andrea Lucas issued a statement commending the Supreme Court's decision to "resoundingly dispel[]" the background circumstances test by "making clear that discrimination on the basis of a protected characteristic is unlawful 'discrimination,' no matter the identity of who

engaged in the discrimination or which workers were harmed or benefited." Lucas acknowledged that the EEOC has agreed with the Supreme Court's conclusion since the 1970s and stated that the agency "is committed to dismantling identity politics that have plagued our employment civil rights laws, by dispelling the notion that only the 'right sort of' plaintiff is protected by Title VII." Lucas noted that the decision confirms that employers will not be shielded from "any race or sex discrimination that may arise from those employers' DEI initiatives."

The decision also is consistent with March 2025 guidance from the EEOC and DOJ on DEI-related discrimination. According to the EEOC's press release, the two new technical assistance documents were aimed to help "educate the public about how well-established civil rights rules apply to employment policies, programs, and practices," including DEI programs. These documents are an important reminder that Title VII prohibits discrimination when an employment action is "motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic."

The first document, issued jointly by the DOJ and EEOC and titled, "What To Do If You Experience Discrimination Related to DEI at Work," outlines what DEI-related discrimination can "look like" and the procedure for filing charges of discrimination with the EEOC if an individual believes they experienced DEI-related discrimination. In this document, the DOJ and EEOC acknowledge that while DEI "is a broad term that is not defined" in Title VII, DEI policies and programs may be unlawful if employment actions are motivated, even in part, by a protected characteristic. The agencies then detail some examples of prohibited conduct, such as when an employer uses quotas or otherwise "balances" a workforce by "race, sex, or other protected traits."

The second document, issued solely by the EEOC and titled, "What You Should Know About DEI-Related Discrimination at Work," is a longer, FAQ-style document. Some notable points from this document include the following:

- Title VII protects all workers equally, not simply those who are part of a "minority group."
- Title VII's prohibition against discrimination applies to a wide variety of aspects of employment – including compensation, fringe benefits, job duties or work assignments, access to or exclusion from training, internships, access to mentoring, sponsorship or workplace networking, and limiting access to employee resource groups (ERGs) or other affinity groups.
- Referring to the agency's amicus brief in the *Ames* case, "there is no such thing as 'reverse' discrimination; there is only discrimination." As confirmed by *Ames*, the agency (and moving forward, all courts) does not require a higher showing of proof for "reverse" discrimination claims.
- Title VII provides that demonstrating a "business necessity" for an employment practice cannot be used as a defense against a claim of intentional discrimination. Examples of business necessity can include client or customer preference.
- With respect to hostile work environment claims, the document notes, "an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context."

3. DOJ launches Civil Rights Fraud Initiative targeting illegal DEI

On May 19, the DOJ announced the development of the Civil Rights Fraud Initiative, which will use the False Claims Act (FCA) to investigate and pursue claims against federal funding recipients that knowingly violate federal civil rights laws. In a memo announcing the initiative, Attorney General Pamela Bondi warned that "[i]nstitutions that take federal money only to allow anti-Semitism and promote divisive DEI policies are putting their access to federal funds at risk." As described by the DOJ, the FCA is the DOJ's "primary weapon against government fraud, waste, and abuse." Successful FCA claims can result in treble damages and significant penalties, with whistleblowers receiving a portion of monetary recoveries. The DOJ states that the FCA is "implicated when a federal contractor or recipient of federal funds knowingly violates civil rights laws – including but not limited to Title IV, Title VI, and Title IX of the Civil Rights Act of 1964 and falsely certifies compliance with such laws." The initiative will be co-led by the DOJ's Civil Rights Division and Civil Fraud Section, with assistance from 93 US attorney's offices nationwide.

The initiative builds on Executive Order (EO) 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," which, as described in a January 2025 Cooley alert, requires federal government contractors to certify that they do not "operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws." The EO also directs federal agencies to include in every contract or grant award a "term

requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all Federal anti-discrimination laws is material to the government's payment decisions for purposes of" the FCA. See this related Cooley alert, addressing new NIH antidiscrimination certification.

In a memo issued by Deputy Attorney General Todd Blanche about the initiative, the DOJ noted some examples of when federal funding recipients or contractors may run afoul of the FCA, such as when a university that accepts federal funds "encourages antisemitism," "allows men to intrude into women's bathrooms," or, in the case of DEI programs, where organizations "certify compliance with civil rights laws while knowingly engaging in racist preferences, mandates, policies, programs, and activities, including through … DEI programs that assign benefits or burdens on race, ethnicity, or national origin." The memo further warns that despite federal antidiscrimination law, "many corporations and schools continue to adhere to racist policies and preferences – albeit camouflaged with cosmetic changes that disguise their discriminatory nature."

In addition to government enforcement, the DOJ also encourages private parties to file lawsuits and litigate FCA claims. The FCA permits such suits through qui tam actions, which allow whistleblowers to share in any monetary recovery by the government.

4. Next steps

The ongoing scrutiny of DEI programs highlights the need for employers to continue to carefully assess DEI programs and ensure that their policies and programs align with federal and local antidiscrimination law. Employers receiving federal funds, in particular, should conduct a comprehensive review of DEI-related programs to assess any potential FCA risk. Employers are reminded that all employees should be treated without regard to any protected characteristic, regardless of whether an employee is a member of a "majority group." And, while the DOJ and EEOC guidance does not have the force of law, employers are reminded that these sources provide a blueprint into how the EEOC will enforce Title VII with respect to DEI initiatives, particularly in light of Lucas's announcement that her enforcement priorities will include "rooting out unlawful DEI-motivated race and sex discrimination." Thus, employers should keep these guidance documents in mind when reviewing DEI initiatives and programs to ensure compliance with all applicable federal and state law.

Please contact a member of Cooley's DEI strategic counseling and litigation practice if you have questions concerning how these developments affect your organization.

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