Increased Liability Risk from Backing Away from DEI Initiatives

National institute for Workers' Rights

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I. Background & Overview

In recent months, after legal and public attacks from those opposed to equal opportunity and inclusion at work, some companies have scaled back efforts designed to break down barriers to opportunity and inclusion. Most recently, Tractor Supply, Harley-Davidson, Lowe's, Ford Motor Co., Brown-Forman Corp, Caterpillar, and Molson Coors have announced that they are no longer participating in the Human Rights Campaign Foundation's Corporate Equality Index, the national benchmarking tool on corporate policies and practices pertinent to LGBTQ+ employees, amongst other inclusion-related changes.[1] As other companies have considered backing away from diversity, equity, and inclusion efforts, some have wondered whether such retreats by companies could also be used against them in litigation. After all, many DEI initiatives are proactive efforts by employers to overcome discrimination that occurred under traditional employer practices. We looked into this question and found that such steps can be used against companies in discrimination claims in a few ways.

First, an employer's decision to distance itself from DEI initiatives may be used as circumstantial evidence of discriminatory animus or that a particular employment action was "because of" race, gender, religion, or national origin. Additionally, anti-DEI sentiment expressed by a senior executive, someone in the employee's chain of command, or the decisionmaker involved in an employment action is relevant evidence, as it is comparable to statements indicating bias or stereotyping. Finally, both these kinds of evidence can be used to support a claim that the company should be held responsible for creating a hostile work environment that violates Title VII of the Civil Rights Act.

In what follows, we flesh out and provide examples on how this evidence can be used in both hostile work environment and disparate treatment claims. We also consider the likely objection that some of this evidence is protected by attorney-client privilege.

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1. Christopher Doering, *Molson Coors latest company to revise DEI policy*, INDUST. DRIVE, 1 (Sept. 5, 2024); Jeff Green, *Caterpillar Joins Ford, Lowe's in Diversity Rethink as Backlash Grows*, BLOOMBERG, 2 (Sept. 19, 2024); Nathaniel Meyersohn, *Harley-Davidson is dropping diversity initiatives after right-wing anti-DEI campaign*, CNN, 1 (Aug. 19, 2024); Ryan Golden, *'New dynamics at play': Jack Daniel's maker ends DEI initiatives*, INDUST. DRIVE, 1 (Aug. 28, 2024), Tractor Supply Co., *Tractor Supply Company Statement* (June 27, 2024).

II. Hostile Work Environment Claims

Backing Away Can be Used as Evidence of Unreasonable Care in Hostile Work Environment Claims:

- Where a supervisor is the harasser, employers may avoid liability in part by demonstrating that they exercised reasonable care to prevent and promptly correct any harassing behaviors.[2] Retreating from DEI programs could indicate a failure to maintain preventive measures, as harassment policies must be "both reasonably designed and reasonably effectual" in preventing harassment.[3] When assessing whether the employer is "reasonably effectual" in preventing harassment, courts can consider a range of evidence about the climate of the workplace and the steps that employers have taken to foster inclusion and prevent harassment.[4]
    - An employee can use their employer's **lack of participation in national benchmarking or climate surveys** as evidence of a lack of reasonable care in fostering an inclusive work environment. For example, one can imagine a gay employee subject to harassment pointing to a company dropping out of the Human Rights Campaign Foundation's Corporate Equality Index, which encourages companies to include those with LGBTQ+ identities in a nondiscrimination policy, use LGBTQ+ inclusion practices, and conduct trainings on sexual orientation.
- Where co-workers are the harassers, the plaintiff must show that the employer *knew or should have known* that the harassment was taking place and failed to take remedial action. If the employer can be faulted for an employee not speaking up, then the plaintiff can meet this burden. A reduction of DEI efforts can help demonstrate a lack of reasonable care in fostering an inclusive work environment that does not tolerate harassment.
    - **Scaling back affinity or employee resource groups can increase risk for companies.** Such groups can be places where "the sharing of discrimination or separation from others within the workplace" can lead to employees feeling comfortable coming forward to speak up about harassment.[5] The groups also frequently serve to increase awareness of organizational policies

2. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 765 (1998).
3. *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999); *Lagunovich v. Findlay City Sch. Sys.*, 181 F. Supp. 2d 753, 769; *Stricker v. Cessford Constr. Co.*, 179 F. Supp. 2d 987, 1007.
4. See, e.g., *Williams v. Spartan Communications*, No. 99-1566, 2000 U.S. App. LEXIS 5776 (4th Cir. March 30, 2000) (holding the magistrate judge "entirely ignored substantial relevant evidence..that could lead the factfinder to conclude that Spartan's anti-harassment policy was not an effective preventive program" including a lack of harassment training for a supervisor, management's tolerance of sexually explicit jokes, and the close relationship among senior managers); *Robinson v. City and County of Denver*, 30 P.3d 677, 683 (Co. App. 2000) (evidence of disparate treatment within the department which did not directly affect the plaintiff was relevant "to show the racial climate of the workplace")
5. Megan M. Lambertz-Berndt, *Communicating Identity in the Workplace and Affinity Group Spaces*, 4 STUD. IN MEDIA AND COMMC'N 110, 112 (2016) (discussing the importance of affinity groups in creating a space for empathy for individuals' experiences related to their identities in the workplace).

and procedures. Indeed, employee resource groups originated as opportunities for people of underrepresented backgrounds to share challenges at the workplace.[6] A plaintiff may be able to point to a scaled-back employee resource group as a "but-for" reason they did not know how to raise a complaint, or did not feel comfortable coming forward.

III. Disparate Treatment Claims

Anti-DEI Sentiments Can be Used as Evidence of Intent:

- Statements made by the immediate decisionmaker that question DEI initiatives, support the elimination of DEI positions, or claim that DEI policies harmed the company can serve as evidence of discriminatory intent.
- Remarks made by supervisors, CEOs, presidents, or high-level executives can be used to argue that their views may influence lower-level managers, who may aspire to align with these leaders. Additionally, such individuals may be perceived as the employer's proxy or alter ego.[7]

Backing Away Can Also be Used as Evidence of Causation:

- Implementing DEI programs signals a company's commitment to supporting underrepresented employees. **Conversely, reducing or eliminating DEI initiatives suggests a lack of interest in fostering a diverse workforce and can reflect discriminatory animus.** Plaintiffs can argue that abandoning a DEI program was motivated by a protected trait such as race or gender, and a jury could conclude that the decision to end a program made a difference in causing a plaintiff not to be hired or promoted, for example.
- Internal discussions about diversity in recruitment, hiring, and promotions often highlight known challenges faced by women and minorities. **Evidence of these discussions can demonstrate that the employer knowingly allowed and therefore caused discriminatory outcomes by abandoning efforts to address these barriers.**
    - For example, a Black employee passed over for promotion can bring forward evidence their employer downsized their dedicated DEI task force that ensured equitable advancement opportunities as evidence of discriminatory animus or causation, especially given the important role these task forces play in fostering accountability and equity. Research shows that diversity task forces increase the representation of women and racial minorities in

6. Judi C. Casey, *Employee Resource Groups: A Strategic Business Resource for Today's Workplace*, BOS. COLL. CTR. FOR WORK & FAM., 1 (2021).
7. *O'Brien v. Middle E. Forum*, 57 F.4th 110, 121 (3d Cir. 2023); Lewis Brisbois' Labor & Employment Team, *Third Circuit Narrows Ellerth-Faragher Affirmative Defense in Hostile Work Environment Case*s, GRINDSTONE, 2 (Jan. 18, 2023).

management.[8] Making a conscious choice to reduce such efforts can be used as evidence that the failure to promote was "because of" race.

- The termination or scaling back of DEI initiatives within a company is analogous to company-wide policies or patterns that reflect discriminatory practices. Implementing DEI programs signals a company's commitment to supporting underrepresented employees and to correcting patterns of discrimination. Indeed, research has found that two out of three employees have seen positive results at work from new policies to ensure equality in salary, hiring practices, and promotion to leadership positions.[9] But reducing or eliminating DEI initiatives may give rise to an inference that the company is resistant to a more diverse workforce, and, after abandonment, the workplace may revert back to a pattern of discrimination.

Privilege will Likely Not Protect Many DEI-Related Documents:

- Legal advice is often only one component of business decisions about DEI programs, and business decisions are generally not protected.[10]
- Courts have allowed plaintiffs in discrimination cases to obtain discovery of documents related to hiring guidelines, evaluations of promotion barriers for women, and the accuracy of public statements about employment policies.
- Courts have also permitted discovery of statistical data concerning an employer's general policy and practice concerning minority employment.

IV. Conclusion

Though some companies have backed away from diversity, equity, and inclusion initiatives in the face of attacks, dropping such initiatives can be used as evidence in discrimination litigation brought by those who would be helped by such initiatives, leading to increased liability risk for those companies.

8. Frank Dobbin & Alexandra Kalev, *The Civil Rights Revolution at Work: What Went Wrong*, 47 ANN. REV. OF SOCIO. 281, 290 (2021) (diversity task forces lead to growth of at least 12% for white, Black, Hispanic and Asian American women in management).
9. The Associated Press & NORC Center for Public Affairs Research, *How Does the Focus on Sexual Misconduct and Diversity Affect the Workplace*, 5 (October 2019).
10. See Fed. R. Civ. P. 26(b)(3) advisory committee's note to 1970 amendment ("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.")