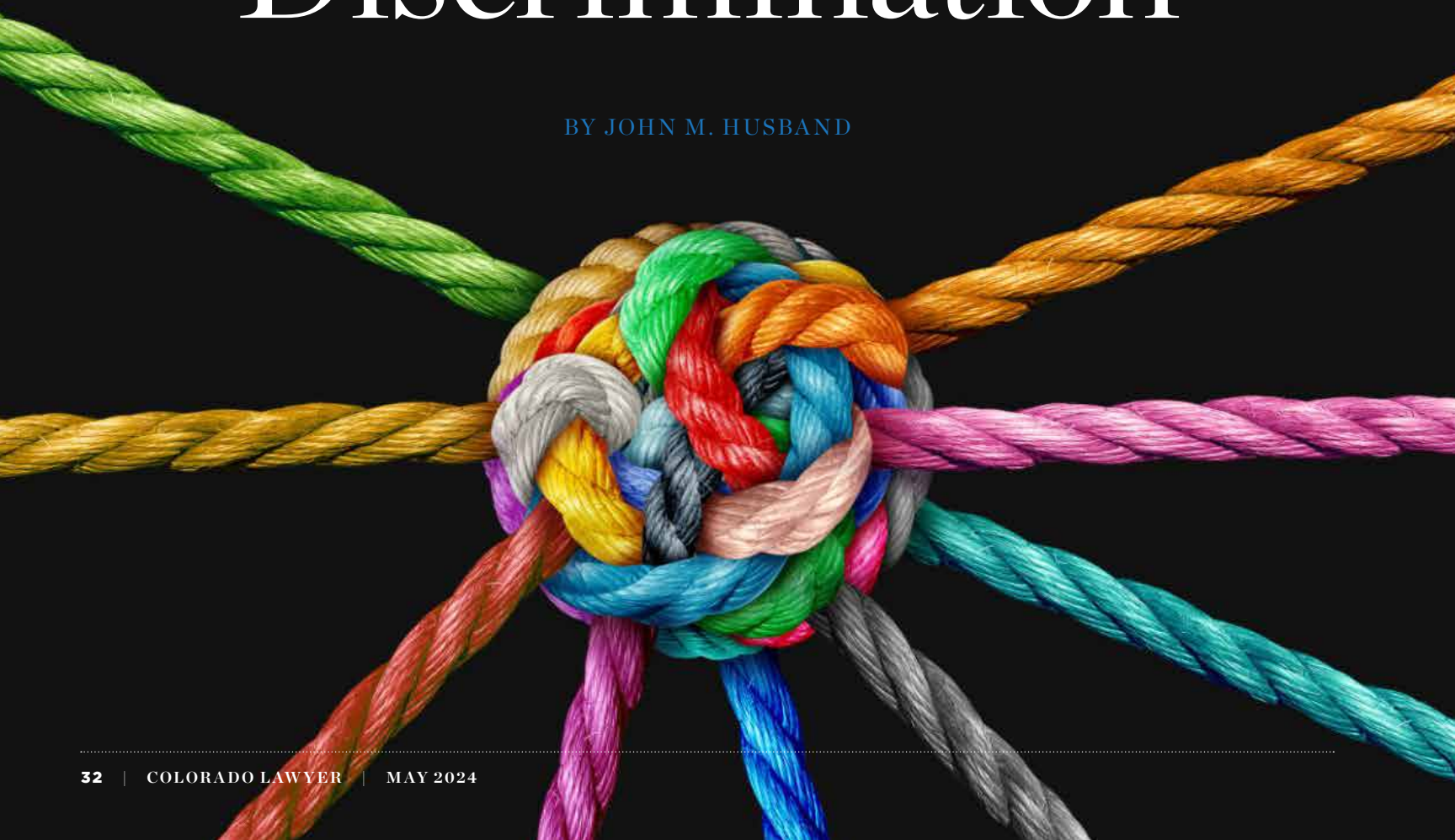
Diversity, Equity, and Inclusion, and Reverse Discrimination

BY JOHN M. HUSBAND



This article discusses how a recent US Supreme Court decision dealing with racial discrimination combined with a split in the US courts of appeals on standards of proof in reverse discrimination cases could send DEI challenges to the US Supreme Court.

Diversity, equity, and inclusion (DEI) is a frequent topic in the news.[1] Many employers, companies, and law firms have developed and endorsed DEI plans and policies designed to recruit, retain, and increase leadership opportunities for historically underrepresented groups. At the same time, these programs have come under scrutiny from both legislative and court challenges claiming that DEI initiatives discriminate on the very factors they seek to avoid by favoring certain groups over others. Adding to the debate, the US Supreme Court has also weighed in on these complex issues with a recent significant decision dealing with racial discrimination. This article briefly reviews that decision but primarily focuses on a circuit court split regarding the criteria for reverse discrimination cases and discusses how challenges to DEI programs could end up before the US Supreme Court.

US Supreme Court Holds That All Racial Discrimination Is Unlawful

The US Supreme Court in *Students for Fair Admissions v. President and Fellows of Harvard College* (SFFA) ruled against race-conscious admissions policies at Harvard College and the University of North Carolina.[2] The Court found that the policies employed by those institutions violated the Equal Protection Clause of the Fourteenth Amendment because they (1) lacked focused and measurable objectives, (2) used race as a stereotype or negative factor, and (3) had no end point.[3] The Court noted that the policies employed by those institutions provided a benefit to some applicants at the expense of others and did not promote the goals of ensuring campus diversity.[4] Harvard's admission process, for example, led to fewer white and Asian students being admitted.[5] The Court reinforced the principle that all racial discrimination is unlawful, no matter the intention. The Court held that eliminating racial discrimination means eliminating all of it, including when using admissions decisions as a way to achieve racial balance.[6] Although the 6-to-3 ruling was specific to higher education, its application has significant implications for employers, both public and private. Employment actions dealing with hiring, promotion, terms and conditions of employment, and initiatives designed to improve DEI practices will likely be challenged based on the reasoning used in this decision.

Attorneys General Have Differing Views

Soon after the SFFA decision, the Republican attorneys general of 13 states sent a letter to Fortune 100 chief executive officers directing them to avoid using racial preferences in employment and contracting decisions. The letter warned: "If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat *all* employees, *all* applicants and *all* contractors equally, without regard for race."[7] A response filed by the Democratic attorneys general from 21 states takes exception to the abandonment of racial equity policies and programs and supports DEI initiatives, noting that "corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination. In fact, businesses should double-down on diversity-focused programs because there is still much more work to be done."[8]

Title VII Prohibits Discrimination

Employment affirmative action programs and workplace DEI initiatives are governed by both federal and state employment discrimination laws, including Title VII of the Civil Rights Act of 1964.[9] Considering and favoring any individual on the basis of race, sex, or national origin in employment decisions is generally illegal under discrimination laws.[10]

Although it did not directly address discrimination in the context of Title VII, the SFFA decision lays the foundation for future challenges to the rationale supporting workplace diversity programs. Challenges to these programs are likely to take the form of so-called reverse discrimination cases, with plaintiffs alleging that DEI programs favor certain groups over others on the basis of race, national origin, or sex. Title VII prohibits all forms of discrimination and has successfully been used as a basis for claims of discrimination against white applicants and employees.[11] For example, Starbucks recently lost $25.6 million in damages to a white manager in a reverse discrimination case.[12]

Circuit Courts Are Split on Reverse Discrimination Standard

In a Title VII case, a plaintiff must establish a prima facie case of discrimination and must demonstrate that (1) they belong to a protected class, (2) they were qualified for the job, (3) they were rejected despite being qualified, and (4) similarly situated individuals outside their protected class were treated more favorably.[13] Several courts impose an additional requirement when a plaintiff pursues a reverse discrimination case. These courts require the plaintiff to show background circumstances to support the suspicion that the defendant is that "unusual employer" that discriminates against the majority. It is this additional requirement that will be the focus of reverse discrimination litigation going forward.

The US circuit courts of appeals are conflicted on the required evidence needed in a reverse

discrimination case. The Tenth Circuit Court of Appeals[14] is joined by the Sixth,[15] Seventh,[16] Eighth,[17] and DC Circuits[18] in applying the additional "background circumstances" element to an employee's bias claim under Title VII when that employee is not a member of a minority. The Third[19] and the Eleventh Circuits[20] have expressly rejected the "background circumstances" rule. The First,[21] Second,[22] Fourth,[23] Fifth,[24] and Ninth[25] Circuit courts simply do not apply the "background circumstances" rule.

The Tenth Circuit, in *Notari v. Denver Water Department*, noted that

> it is appropriate to "adjust[] the prima facie case to reflect" the reverse discrimination context of a lawsuit because "the presumptions in Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of an historically favored group."[26]

The employee in *Notari* was a male who was denied a promotion in favor of a less qualified female. The court went on to say that in any reverse discrimination case, an employee must establish the requisite "background circumstances" to meet their prima facie burden to show that these background circumstances support an inference that the defendant is one of those unusual employers that discriminates against the majority.[27]

The Sixth Circuit, in December 2023, determined a case that included a concurring opinion critical of the rule.[28] The employer in that case defeated an appeal in which a female employee, Ames, alleged discrimination based on sexual orientation. Ames alleged she was denied a promotion and demoted because she was heterosexual and that her sexual orientation caused her to lose her job. She was demoted and replaced by a gay man and denied a promotion that was instead given to a gay woman. The court found that Ames had established key elements of a prima facie case for sexual orientation discrimination under Title VII, but the claim failed because Ames did not show background circumstances suggesting that her employer is the unusual employer who discriminates against the majority.[29] The court said Ames needed to come forth with either (1) evidence that a member of the relevant minority group made the challenged job decision or (2) statistical proof of a pattern of bias against members of the relevant majority group.[30] The court stated Ames made neither showing.

"The court went on to say that in any reverse discrimination case, an employee must establish the requisite 'background circumstances' to meet their prima facie burden to show that these background circumstances support an inference that the defendant is one of those unusual employers that discriminates against the majority."

Judge Kethledge issued a concurring opinion to express his disagreement with the "additional background circumstances" requirement, suggesting that it should be eliminated.[31] He noted that Title VII prohibits discrimination for any employee based on sex or other protected categories.[32] In his view, having different evidentiary burdens imposed on different workers based on their different demographic groups is discrimination in and of itself against an employee and prohibited by Title VII:

> The "background circumstances" rule is not a gloss upon the 1964 Act, but a deep scratch across its surface. The statute expressly extends its protection to "any individual"; but our interpretation treats some "individuals" worse than others—in other words, it discriminates—on the very grounds that the statute forbids.[33]

Judge Kethledge concluded:

> Respectfully, our court and others have lost their bearings in adopting this rule. If the statute had prescribed this rule expressly, we would subject it to strict scrutiny (at least in cases where plaintiffs are treated less favorably because of their race). And nearly every circuit has addressed this issue one way or another. Perhaps the Supreme Court will soon do so as well.[34]

Conclusion

The US Supreme Court's decision in SFFA could pave the way for increased reverse discrimination challenges to DEI programs and lead to major implications on an issue with significant social, political, and employment philosophies. Do decisions intended to promote equity discriminate against members of certain categories? Are differing standards of proof legal? Given the split in the circuit courts of appeal, there will be conflicting decisions until these issues are resolved by the US Supreme Court. CL

John M. Husband is a partner in Holland & Hart, LLP's labor and employment practice group in Denver. He is a fellow of the College of Labor and Employment Lawyers and has a nationally recognized labor and employment practice—jhusband@hollandhart.com.

Coordinating Editor: John M. Husband, jhusband@hollandhart.com

NOTES

1. Smith and Weber, "How the Push for Diversity at Colleges and Companies Came Under Siege," *Wall St. J.* (Jan. 4, 2024) https://www.wsj.com/business/how-the-push-for-diversity-at-colleges-and-companies-came-under-siege-036d4065. *See* Hoff, "EEOC's Lucas Calls Mark Cuban 'Dead Wrong' In DEI Push," Law360 (Jan. 29, 2024), https://www.law360.com/articles/1791366/eeoc-s-lucas-calls-mark-cuban-dead-wrong-in-dei-push; Muyskens, "Michigan Justice Attacks State Court's 'Divisive' DEI Plan," Law360 (Jan. 18, 2024), https://www.law360.com/pulse/articles/1787536.

2. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181 (2003) (SFFA).

3. *Id.* at 2166.

4. *Id.* at 2168–69.

5. *Id.*

6. *Id.* at 2161–62, 2172.

7. Kobach et al., Letter from attorneys general of Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Nebraska, South Carolina, Tennessee, and West Virginia to Fortune 100 CEOs 6 (July 13, 2023), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf.

8. Ford et al., Letter from attorneys general of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington to Fortune 100 CEOs 1 (July 19, 2023), https://illinoisattorneygeneral.gov/News-Room/Current-News/Fortune%20100%20Letter%20-%20FINAL.pdf (citing US EEOC, "Best Practices for Employers and Human Resources/EEO Professionals," https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resourceseeo-professionals).

9. Civil Rights Act of 1964 § 7, 42 USC §§ 2000e et seq.

10. *See* 42 USC § 2000e-2(a). *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

11. *See, e.g., Phillips v. Starbucks Corp.*, 624 F.Supp. 3d 530 (D.N.J. 2022).

12. *Id.* (race was the determinative factor in the termination decision).

13. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

14. *Notari v. Denver Water Dep't*, 971 F.2d 585, 588–89 (10th Cir. 1992).

15. *Ames v. Ohio Dep't of Youth Servs.*, 87 F.4th 822 (6th Cir. 2023).

16. *Mills v. Health Care Serv. Corp.*, 171 F.3d 450 (7th Cir. 1999).

17. *Hammer v. Ashcroft*, 383 F.3d 722, 724 (8th Cir. 2004).

18. *Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1017–18 (D.C.Cir. 1981).

19. *Iadimarco v. Runyon*, 190 F.3d 151, 157–62 (3d Cir. 1999).

20. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011).

21. *Williams v. Raytheon Co.*, 220 F.3d 16, 18–19 (1st Cir. 2000).

22. *Aulicino v. NYC Dep't of Homeless Servs.*, 580 F.3d 73, 80–81 & n.5 (2d Cir. 2009).

23. *Lightner v. City of Wilmington*, 545 F.3d 260, 264–65 (4th Cir. 2008).

24. *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000).

25. *Hawn v. Exec. Jet Mgmt.*, 615 F.3d 1151, 1156 (9th Cir. 2010).

26. *Notari*, 971 F.2d at 589 (citing *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986)).

27. *Id.*

28. *Ames*, 87 F.4th 822.

29. *Id.* at 825 (citing *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020)).

30. *Id.*

31. *Id.* at 827 (J. Kethledge, concurring).

32. *Id.*

33. *Id.*

34. *Id.* at 828.