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The Legal Pitfalls of Diversity Policies

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Diversity policies have become quite common in recent years. Although their content can vary greatly, such policies typically express the employer's desire to have a diverse work force. Some policies encourage mentoring of employees in historically disadvantaged groups, while others support "affinity groups," e.g., a group of employees of a particular ethnic background or gender.

Although diversity policies have become widespread, there is little legal authority directly addressing the issues such policies raise. Therefore, while the cases discussed below provide some guidance, the paucity of relevant authority makes it likely that there will be more litigation regarding such policies.

One potential issue is the attempt of an employee claiming "reverse discrimination" to use the employer's diversity policy to support his or her claim. The employee in that situation argues that the diversity policy calls for hiring or promoting employees in historically disadvantaged groups, such as females, and that by doing so, the policy calls for discriminating against the historically advantaged groups, such as males. To date, this argument has not fared well.

In *Jones v. Barnhanke*, 493 F. Supp.2d 18 (D.D.C. 2007), the court rejected an employee's attempt to cite a diversity policy as evidence of "reverse discrimination." In that case, the plaintiff was a man who claimed that the selection of a female employee over the plaintiff for a promotion was discriminatory. The plaintiff argued that the diversity policy encouraged, for example, the promotion of women and therefore discriminated against males. However, the court concluded that "... the mere existence of a diversity policy, without more, is insufficient to make out a prima facie case of reverse discrimination." The court further refused to consider a company witness' statement that it had a policy of promoting young women "only in the context of EEO goals and objectives that would cover the gender issue" as evidence of discrimination. The court stated that "an employer's statement that it is committed to diversity if expressed in terms of creating opportunities for employees of different races and both genders is not proof of discriminatory motive with respect to any specific hiring decision."

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The court in an earlier case reached a similar conclusion.

In *Bernstein v. St. Paul Companies*, 134 F. Supp.2d 730 (D. Md. 2001), the court concluded that the CEO's statement in a speech in which he outlined the diversity policy and said that "he did not want the company to consist exclusively of white men" did not constitute evidence to support the plaintiff's reverse discrimination claim. To show the CEO's nondiscriminatory intent, the court pointed to the CEO's subsequent statement, in the same speech, that he wanted to see, in

senior management, "the most talented people that are available ... irrespective of whether they are of a certain gender or of a certain race."

Although the employees have not succeeded to date in this argument, in each of these cases, the company was able to point to language showing the desire to make opportunities available to people of all backgrounds. A diversity policy focusing on a desire to provide opportunities to specific groups could be riskier.

A second area where courts have addressed diversity policies is where such policies clash with religious viewpoints.

In *Buonanno v. AT&T Broadband, LLC*, 313 F.Supp.2d 1069 (D. Colo. 2004), an employee who refused to sign a diversity policy was willing to agree to the portions of the policy addressing conduct, such as discrimination and harassment, but was unwilling to state that he "valued" differences among people. The employee stated that his religious beliefs were that some beliefs and conduct are sinful. The court held that the employee's right to "reasonable accommodation" of his religion, as required by Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. §2000e et seq., gave the employee the right to sign a modified version of the policy. Thus, where an employee claims a need for religious accommodation, the employer needs to make a case-by-case determination of how to respond.

Some employers permit or sponsor employee affinity groups, but are concerned that an affinity group based on religious orientation will lead to conflict with other employees. For example, a religious affinity group may seek to proselytize employees who are not members of the affinity group. In one case, the employer sought to avoid such conflict by generally permitting affinity groups, but specifically prohibiting affinity groups based on religious affinity.

In *Moranski v. General Motors*, 433 F.3d 537, 541 (7th Circuit 2005), an employee claimed that he was discriminated against because he was not allowed to form a religious affinity group at General Motors. GM sponsored affinity groups based on race, national origin, gender and sexual orientation, providing these groups with meeting space and other resources. GM's affinity group policy specifically did not allow any group that promotes or advocates any religious or political position. The 7th U.S. Circuit Court of Appeals upheld the dismissal of the employee's claim. The court found that because all religious positions, even those of religious indifference or opposition to religion, would not be allowed under the policy, there was no discrimination on the basis of religion.

From the cases decided to date, employers can note the importance of articulating such policies in a manner that does not support reverse discrimination claims. Employers further should consider the appropriate manner to address the interaction between their diversity policies and those who may oppose certain aspects of such a policy on a case-by-case basis. It seems likely that more litigation will provide further guidance regarding these issues.

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