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EXPERT OPINION

Section 1981: The Swiss Army Knife for Anti-DEI Litigation

There have been a number of recent executive orders, guidance, and other warnings issued by the President regarding DEI, both the Department of Justice and the EEOC, as well as ominous enforcement threats by cabinet-level heads. The problem: these are not legally binding unless they accurately reflect existing case law, statutes, and/or court decisions, and companies are being advised as such by their law firms.

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Employment Law

By Steve Kardell

There have been a number of recent executive orders, guidance, and other warnings issued by the President regarding DEI, both the Department of Justice and the EEOC, as well as ominous enforcement threats by cabinet-level heads. The problem: these are not legally binding unless they accurately reflect existing case law, statutes, and/or court decisions, and companies are being advised as such by their law firms.

This creates strong corporate pushback and resistance (e.g., Disney and Costco), as well as superficial window-dressing (e.g., JP Morgan and Citigroup) and backsliding (e.g., Amazon, Target and Tractor Supply).

There are a number of publications that track these examples in real time. See [Ron Winkler, *19 US Companies Committed to DEI \(and 19 Who Dropped Their DEI Policies\)*](#), *alot Finance*, Mar. 4, 2025.

Ironically, Section 1981 (a Civil War-era statute) is extremely effective in the fight against DEI policies. Also, here no new law or legislation is needed, and existing case law, statutes and/or court decisions can be utilized.

The first cause of action is *CBOCS v. Humphries*, the “Cracker Barrel opposition clause,” a 1988 Supreme Court case that recognized the right of observers (such as current employees) to complain about discriminatory acts, with the assurance of statutory protection under Section 1981.

These opposition rights arguably empower current employees to identify not only a corporation that refuses to alter its DEI stance and insists on maintaining its current DEI practices (e.g., Disney and Costco) but also allows employees to “out” the corporate “window-dresser” and its fellow traveler, the corporate “backslider.” See hypothetical example of “Cracker Barrel” whistleblower, below.

The second is the cease and desist/injunction cause of action, a practice first recognized by the *Students for Fair Admissions Inc. v. President and Fellows of Harvard College* case, a recent application of which is the *American Alliance for Equal Rights v. Fearless Fund* (AAER), decided in June 2024, whereby the 11th Circuit ruled in favor of the AAER, finding that the Fearless Fund’s program likely violated Section 1981 by awarding grants specifically to Black women entrepreneurs, finding that this race-based grant program was discriminatory because it excluded applicants based on race.

The third is the reverse discrimination cause of action, first recognized by the Supreme Court’s 1976 *McDonald v. Santa Fe Trail Transportation* case and subsequently gaining popularity as a way to litigate reverse discrimination allegations of unfair treatment of members of a dominant or majority group (often white males).

Serendipitously, most observers also predict that the Supreme Court will soon strengthen reverse discrimination claims in *Ames v. Ohio*

Department of Youth Services, with the repudiation of the “background circumstances” rule, an evidentiary hurdle that has resulted in the dismissal of many reverse discrimination cases in certain jurisdictions. Double serendipity: in a reverse discrimination case decided a few days ago (wherein a terminated white, male IBM manager alleged that his termination was related to “diversity targets) the federal district judge held that even though they were in a jurisdiction that had to follow the restrictive *Ames* rule, the evidence of DEI discrimination was so strong that even application of the *Ames* “background circumstances” rule would not support IBM’s motion to dismiss. *See Dill v. IBM; 1:24-cv-852 (WDMI, motion to dismiss denied on 3-26-2025)*.

The reverse discrimination, anti-DEI lawsuits keep on coming. *See Meier v. Google; 1:25-cv-2539 (SDNY, filed 3-27-2025)*.

The new EEOC test for reasonable belief of a DEI violation:

Any employee “outing” what they believe is an illegal company practice is protected from retaliation “so long as the employee provides a fact-specific basis for their belief that the employer’s DEI-related policy, program, or training violates the law.” The DEI-related policy, program, or training need not actually violate the law to invoke Title VII’s anti-retaliation provision. The employee need only have a good faith, reasonable belief that the employer’s DEI policy is unlawful to be protected.

Hypothetical Company:

XYZ Corp. is another multinational mass media and entertainment conglomerate, also under FCC regulations, similar to Disney.

Hypothetical Supplier Diversity Program:

XYZ Corp. has a Supplier Diversity Program that focuses on promoting a diverse supplier base to enhance its supply chain. The XYZ Corp. Supplier Diversity Program only works with businesses that are at least 51% owned by women, minorities, LGBTQIA+ individuals, veterans, or people with disabilities.

Hypothetical Whistleblower at XYZ Corp.:

Reflecting how these diversity programs are heavily staffed, our whistleblower is one of 10 assistant managers who report to the “Director of the XYZ Corp. Supplier Diversity Program.”

A hypothetical whistleblower concludes that the program, as defined, is an illegal DEI program.

What happens next:

Anytime there is a potential compliance violation, companies usually initiate an internal investigation.

An in-house lawyer sits down with the assistant manager whistleblower:

“You claim that our Supplier Diversity Program is discriminatory.”

“The program has been vetted by our team of lawyers, who have the benefit of multiple years of contracting experience, including working with federal contracting requirements for affirmative action.”

“What’s your basis for reasonable belief of a Section 1981 violation, which only prohibits race discrimination in contracting?”

Assistant Manager Whistleblower:

“Federal contracting is a thing of the past. That federal oversight agency (OFCCP) no longer exists.”

“Secondly, the recent EEOC guidance indicates that as far as an anti-DEI claim is concerned, all that’s required is a fact-specific basis for my belief that there is a DEI violation.”

“The DEI violation need not actually violate the law to invoke Title VII’s anti-retaliation protection.”

“All I need is a good faith, reasonable belief that our existing DEI policy violates EEOC guidelines.”

In-house Lawyer (only applies to Title VII):

“You obviously know those are nonbinding, for 'information purposes only' and only apply to Title VII.”

Assistant Manager Whistleblower:

“My understanding is that the EEOC guidance is a joint one with the DOJ, which enforces Section 1981 complaints.”

“Also, the joint guidance is designed to educate and inform the average person about the laws.”

“Also, our federal oversight agency is the FCC, which has advised Disney that a program like this is likely illegal.”

“Not only has President Donald Trump described a program like ours as illegal DEI, so have 19 State Attorney Generals, in criticizing a similar Costco program.”

“This should be enough to qualify as a 'reasonable belief.'”

Conclusion

Of the Section 1981 litigation tools that can be utilized to isolate and eradicate suspect DEI practices, the Cracker Barrel-reasonable belief test is arguably the most effective since it provides non-retaliation protection for current employees who internally report and complain about suspect DEI practices.

Steve Kardell has been an employment law litigator, senior partner and practice group leader in Big Law, Midsized Law and presently Small Law as the principle of his own firm, all following his clerkship with one of the most colorful federal judges in history, Chief Judge Judge Joe J. Fisher of the Eastern District of Texas. He has seen every trend and development in employment law under the sun but has never seen anything like the plethora of reverse discrimination cases, coupled with the fervor

associated with anti-DEI litigation, which now comprises a big part of his litigation practice. He can be reached at skardell@kardellawgroup.com.

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