

How have employers defended against challenges to their DEI programs by workers based on principles of standing?

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Since coming into office a little over four months ago, the Trump Administration has placed businesses on notice that it views certain actions intended to promote diversity, equity and inclusion (“DEI”) in the workplace as suspect and in violation of the anti-discrimination mandates of Title VII of the Civil Rights Act of 1964. Employment lawyers have been busy helping their clients steer clear of and to prepare to defend against the Administration’s enforcement efforts. At the same time, private plaintiffs have increased their own efforts to challenge DEI initiatives, which they allege illegally discriminate against majority groups. Courts have grappled with such cases since long before the Trump Administration and have developed a body of case law that provides helpful guidance to employers seeking to comply with the law, while at the same time seeking to achieve equal employment opportunities for all workers.

One important defense employers have against plaintiffs challenging DEI initiatives is to assert that the plaintiff lacks standing. In this article, we examine the law of standing and cases addressing how standing principles apply in cases challenging DEI initiatives by private employers. After analyzing some illustrative cases, we propose some measures employers may consider as they seek to comply with the law and defend against litigation by workers in majority groups.

Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 USC 2000e-2(a) & 2(d). The Supreme Court has long declared that Title VII’s protections apply to both majority and minority groups. *McDonald v. Santa Fe Trail Transp. Co.*, 427 US 273, 280 (1976). However, the Supreme Court has left the door open for affirmative action where the employer can point to a “conspicuous imbalance in traditionally segregated jobs.” See *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 US 616 (1987). According to opponents of DEI, the Supreme Court’s recent decision in *Students for Fair Admissions v. President and Fellows of Harvard*, 600 U.S. 181, 213, 143 S. Ct. 2141, 2166 (2023), narrowing the use of affirmative action in college admissions under Title VI, should apply with equal force to workplace DEI initiatives under Title VII. Opponents of DEI have been eager to litigate this position, as

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the number of anti-DEI lawsuits in 2024 was more than five times larger than the number in 2021. See <https://advancingdei.meltzercenter.org/cases/> In many of these cases, standing has been an important defense for employers.

To establish standing in federal court, a “plaintiff must demonstrate that an injury is ‘[(1)] concrete, particularized, and actual or imminent; [(2)] fairly traceable to the challenged action; and [(3)] redressable by a favorable ruling.’” *Bolduc v. Amazon.com Inc.*, Civil Action No. 4:22-CV-00615, 2024 U.S. Dist. LEXIS 75524, at *10 (E.D. Tex. Apr. 25, 2024) (quoting *Attala Cnty. v. Evans*, 37 F.4th 1038, 1042 (5th Cir. 2022)).

A key obstacle to standing in cases challenging DEI programs is the plaintiff’s ability to credibly allege both (1) that the plaintiff applied for some benefit, and (2) that the plaintiff was denied that benefit *because* of a protected characteristic such as age or gender.

Bolduc v. Amazon.com Inc. illustrates the first requirement. While a plaintiff may object to a benefit being open only to a particular group, if the plaintiff did not apply for that benefit, the plaintiff does not have standing to sue in federal court. In *Bolduc*, the plaintiff sued under § 1981 of the Civil Rights Act of 1866, which prohibits discrimination on the basis of race, color, and ethnicity in the making and enforcement of contracts. 2024 U.S. Dist. LEXIS 75524 at *6. The United States District Court of the Eastern District of Texas assessed the plaintiff’s standing to sue over an Amazon.com program whereby “eligible Black/African American, Hispanic/Latinx, and Native American/Indigenous DSP owners receive a monetary stipend of \$10,000 ... [while] DSPs owned by Whites or Asian Americans ... receive no such stipend.” *Id.* at 2. The plaintiff, who was white, claimed that this grant put her at a competitive disadvantage because she did not receive it. *Id.* at 8.

The District Court ruled that the plaintiff did not have standing because her injuries were speculative. The plaintiff had not applied to Amazon’s DSP program and thus had not suffered an actual or imminent injury, nor had she alleged that applying to the DSP program would have been futile. *Id.* at 11-13.

Similarly, the Court in *Correll v. Amazon.Com, Inc.* dismissed a challenge to an Amazon program intended to benefit minorities because the plaintiff had not alleged that he was ready and able to take advantage of that program. No. 3:21-cv-01833 BTM, 2022 U.S. Dist. LEXIS 183736, at *6 (S.D. Cal. Oct. 6, 2022). In *Correll*, the plaintiff challenged Amazon “policies in place to promote, encourage, and incentivize minority certified sellers.” *Id.* at 2. The Court, however, dismissed the Plaintiff’s suit on standing grounds, noting that that he did not plead that he was “able and ready” to sell on Amazon’s website, and thus had no injury in fact. *Id.*

When assessing legal risk, employers thus need to consider the number of applicants who actually applied for the benefit. If, for example, no non-African Americans applied for a program intended to benefit African American candidates, standing issues may render the overall potential liability to individual claimants relatively low.

The *Valencia Ag, LLC v. Reid* case is a good illustration of the second requirement—that

the plaintiff credibly allege that he or she was actually denied a benefit *because* of race, gender, or some other protected classification. In *Valencia*, the United States District Court for the Northern District of New York assessed the plaintiff's standing to sue over New York's Cannabis Law and regulations, which they claimed favored minority-owned and women-owned businesses. No. 5:24-CV-0116 (GTS/TWD), 2025 U.S. Dist. LEXIS 54706, at *1 (N.D.N.Y. Mar. 25, 2025). Like the plaintiff in *Bolduc*, the plaintiff in *Valencia Ag* argued that "social equity goals, including a goal that fifty-percent of licenses be given to SEE [Social and Economic Equity] applicants" put the plaintiff at a competitive disadvantage on the basis of race and sex. *Id.* 19. The plaintiff asserted that the Cannabis Law and regulations violated its rights under the Equal Protection Clause of the Fourteenth Amendment because they discriminate and grant preferential treatment to applicants on the basis of race and/or sex. *Id.* at *2.

The Court, however, held that "a mere aspirational goal to have a certain percentage of licenses given to SEE applicants (a group that is not definitionally limited to only minority- and woman-based businesses) does not plausibly suggest an injury-in-fact." *Id.* The Court noted that New York State's goal does not *require* that a certain percentage of licenses be given to SEE applicants. In other words, the plaintiff had not plausibly alleged that the aspirational goals caused the plaintiff to be denied a benefit. *Id.* at *19.

In contrast to *Bolduc* and *Valencia Ag, LLC*, *Garnet v. GMC* illustrates the type of case where the plaintiff has satisfied standing requirements by alleging that he or she did indeed apply for a benefit and that race, gender, or some other protected classification led the defendant to deny the plaintiff that benefit. 114 F. Supp. 2d 649, 656 (N.D. Ohio 2000). In *Garnet*, the benefit in question was an apprentice program open to the defendant's existing employees. *Id.* at 650. Applicants were given interview and exam scores, and minority and female candidates were each given 7 extra points towards their total scores.

The Court ruled that the plaintiff had alleged an injury in fact and thus standing to sue because "but for the addition of seven points to the scores of [other applicants] the Plaintiff would have been selected" *Id.* at 656. The Court ultimately dismissed the plaintiff's case on other grounds.^[1]

As the *Bolduc* and *Garnet* cases illustrate, programs with aspirational goals rather than quotas or point systems are going to be far more difficult to challenge given the plaintiff's inability to show that they were denied a benefit because of race, gender, or other protected classification.

State courts, like federal courts, have their own standing requirements, which usually require an employee to allege an injury in fact and that the plaintiff would actually receive a benefit from the relief requested. In Washington state, for example, a party has standing to sue if he or she demonstrates a present substantial interest in the subject of the lawsuit, not a mere expectancy or future contingent interest, and demonstrates that he or she will obtain a benefit from the relief requested. *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992). Put another way, to have standing, a party must have a distinct and personal interest in the outcome of the case.

Pac. Marine Ins. Co. v. Dep't of Revenue, 181 Wn. App. 730, 740, 329 P.3d 101 (2014); *Erection Co. v. Dep't of Lab. & Indus.*, 65 Wn. App. 461, 467, 828 P.2d 657 (1992). A party who did not apply for a particular program will have difficulty making such a showing.

These cases contain some lessons for employers assessing the risk of their DEI programs. First, programs with aspirational goals rather than quotas are less risky insofar as the plaintiff will have a difficult time showing that they were denied a benefit *because* of race, gender, or some other protected class. Second, employers should avoid programs that provide a clear numerical advantage to applicants (for jobs or for company programs) on the basis of race, gender or other protected class. Finally, employers will have defenses where no candidates outside of the preferred category apply. For example, if no white candidates apply to an internship designed to benefit minority candidates, there will be no individuals with a clear basis for standing to bring suit. Accordingly, employers will face less risk if they actively market such a program towards minority candidates, but accept applications from all otherwise qualified candidates and do not discriminate among applicants on the basis of race, gender, or other protected class.

[1] The Sixth Circuit Court of Appeals has held that plaintiffs alleging “reverse discrimination” must make a showing that “background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.” *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994). Following this precedent, the Court in *Garnet* held that there was no proof that the Defendant discriminated against white males in general, and thus the plaintiff had failed to make the required showing. Whether this additional element should be included in “reverse discrimination” cases is currently on appeal before the U.S. Supreme Court. *Ames v. Ohio Dep't of Youth Servs.*, 145 S. Ct. 118 (2024) (*cert granted*).

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