On the basis of race

Supreme Court ruling may spur reverse discrimination lawsuits

by Katherine Hamilton

Logan Barry began working as a reporter for The Progress-Index newspaper in Petersburg in 2018, less than a year before a merger placed his paper under the ownership of Tysons-based media conglomerate Gannett. In August, he joined a federal class action lawsuit filed in the U.S. District Court for the Eastern District of Virginia alleging Gannett engaged in reverse racial discrimination.

The suit claims Gannett — the nation's largest publisher of newspapers, including its flagship, USA Today — hired a Black woman instead of Barry, who is white, for a role for which Barry feels he was more qualified. Barry's lawsuit alleges that the hiring of "a Black woman with less accolades and experience ... satisfied the racial quotas Gannett was seeking to achieve."

Now running his own media relations consulting firm in Richmond, Barry says, "Management informed me that I was amongst the highest performers in the newsroom and that they intended to tap me for what I understood to be a full-time leadership role."

In 2019, that leadership role was filled, and according to the complaint, Barry was never given the opportunity to formally apply for the role. He stopped working at the paper in 2020. (The woman whom he alleges was hired in his place could not be reached for comment for this story by press time.)

Barry is one of five named plaintiffs — all of whom are white — in the class action suit, which alleges Gannett's diversity, equity and inclusion (DEI) policy is "an intentional, companywide and systematic practice of discrimination against non-minority workers."

Although such suits have been filed in the past, they now appear to have more chance of succeeding, following the U.S. Supreme Court's ruling in June that rolled back race-based affirmative action policies at universities. The six conservative justices found such policies violate the 14th Amendment's Equal Protection Clause. The August suit against Gannett quotes from Chief Justice John Roberts' opinion: "Eliminating racial discrimination means eliminating all of it."

Although the ruling focuses on college admissions policies and not directly on workplace diversity, "the Supreme Court's [decision] has some overlapping themes with the lawsuit against Gannett," says Adam Sanderson, a Rochester, New York-based employment attorney representing the plaintiffs. Echoing Roberts, he adds, "The ruling has made clear that it is the court's view that eliminating racial discrimination means eliminating all of it."

As of Oct. 12, the lawsuit had not been served on Gannett, but it was expected to be served within 90 days of the complaint's Aug. 18 filing. After the company is served, it will have 21 business days to respond, according to the court.

"Gannett always seeks to recruit and retain the most qualified individuals for all roles within the company," Gannett's chief legal counsel, Polly Grunfeld Sack, said in a statement. "We will vigorously defend our practice of ensuring equal opportunities for all our valued employees against this meritless lawsuit."

The Supreme Court's decision bars higher education institutions from using race as a factor in admissions as a means of achieving diverse student bodies, with the exception of U.S. military academies. The practice was already illegal for businesses under laws such as Title VII of the Civil Rights Act of 1964 that prohibit any kind of employment discrimination.

Still, experts say the ruling may have an increased impact on companies, as nonprofit legal advocacy organizations like Students for Fair Admissions — which sued Harvard and the University of North Carolina — begin to pivot toward suing businesses over their DEI policies.

Photo by Caroline Martin

Logan Barry, a Richmond media relations consultant and former reporter for Petersburg's Progress-Index newspaper, is one of five plaintiffs in a federal class action lawsuit alleging that Tysons-based newspaper conglomerate Gannett has discriminated against "non-minority workers."

Rising litigation threat

In his concurring opinion on the ruling, Justice Neil Gorsuch wrote that Title VII, making it illegal for an employer to discriminate against someone because of race, color, religion, sex or national origin, should be interpreted the same as Title VI, which bars discrimination in any program or activity that receives federal funds and was a key policy used in the affirmative action decision.

This suggests the Supreme Court could be open to hearing further cases on the issue of discrimination, specifically in private employment settings, lawyers say.

"The case itself doesn't really say much to businesses," says Hank Chambers, a law professor at the University of Richmond who focuses on constitutional law and employment discrimination. "What it does suggest is that the court may well be willing to get back into the area and make some additional decisions or make some additional law in the area."

Building enough cases to create or alter specific laws on employers' DEI practices seems to be a primary goal for organizations that are suing companies for reverse discrimination, says Linda Goldman, a Los Angeles-based lawyer at Ogletree Deakins. "People are focusing and trying to expand a lot of these rules there and make law."

Barry says he hopes his lawsuit will result in Gannett ceasing its DEI policy, though he did not specify whether he wants to see a change in the law. "I seek respect for my professional skills and my hard work," he says. "I seek the same for all individuals." (Barry did not address whether his case is funded or assisted by any third-party organization.)

Some of the national backlash to DEI could be a partial response to recent corporate hiring patterns prioritizing diversity, especially following the 2020 Black Lives Matter protests. During 2021, 94% of more than 323,000 jobs added by 88 S&P 100 companies went to people of color, according to a study published by Bloomberg News in September.

Just as higher education institutions have been fielding lawsuits about their admissions policies, businesses may see an uptick in litigation similar to the class action suit brought against Gannett in Virginia.

Laura D'Agostino, a Centreville-based lawyer with Pacific Legal Foundation, a

nonprofit public interest legal organization that takes on libertarian and conservative issues around individual and economic freedom, is one of the attorneys looking to expand the law on diversity-related policies in both the public and private sectors. She's representing a white former Seattle city employee who is suing the city government for allegedly fostering a hostile work environment due to its DEI initiatives.

While the case was brought against a public entity, D'Agostino believes it speaks to growing litigation over racially hostile work environments, which, she says, she expects to be the next major debate in law.

"Even though the Supreme Court's ruling was specifically looking at things from the educational perspective, we believe that the principles articulated in there, particularly about the fact that people are to be viewed as individuals and that race cannot be this determinative factor, we think that this is slowly going to be impacting the private sector, as well," she says.

Edward Blum, a conservative legal strategist who founded Students for Fair Admissions in 2014, has pivoted to targeting the private sector, filing three lawsuits in August. Two of those suits were brought against law firms offering fellowships for minorities, and the third was filed against an Atlanta-based venture capital fund providing grants to Black women who own small businesses.

In late August, a former executive at Morgan Stanley sued the multinational bank and financial services company in the U.S. District Court of the Southern District of New York, alleging in the lawsuit that he, a white man, was terminated in May and replaced by a Black woman "with significantly less experience and qualifications for the position." According to the lawsuit, the action "was the result of the firm's attempt to comply with its diversity and inclusion objectives."

Rather than relying on Title VII, all four of these cases reference Section 1981 of the Civil Rights Act of 1866, a post-Civil War policy that's becoming a popular tool in reverse discrimination suits, according to Goldman.

"A lot of what we're seeing is organizations with an anti-DEI agenda, like the people who brought the [Students for Fair Admissions] case, bringing other claims under Section 1981 and seeking to expand that law," Goldman says. "We didn't see that before."

University of Richmond law professor Hank Chambers says the U.S. Supreme Court may be willing to make more decisions on discrimination in private employment.

Section 1981 is broader and has been more widely interpreted than Title VII, creating more of an opportunity to expand antidiscrimination laws to cover reverse discrimination claims.

Some reverse discrimination suits have been successful for plaintiffs, and those victories have come with significant dollar amounts; in June, a white Starbucks manager was awarded almost $28.3 million after alleging discrimination in her firing, and, in 2021, a Charlotte, North Carolina, jury awarded $10 million to an executive at Novant Health who claimed he was fired because he was white, although a U.S. magistrate judge reduced the amount to $4 million. While these high-dollar awards aren't extremely common, their value is reason enough to give businesses pause.

Scott Shepard, a fellow at the National Center for Public Policy Research, a conservative think tank, and a graduate of the University of Virginia School of Law, says he expects to see a lot of companies with more newly established diversity programs roll back their policies as more lawsuits crop up. His goal is to also deter firms with longer-held DEI initiatives, which Shepard says can be done by "roundly" suing those businesses.

The U.S. Supreme Court ruling "was just a ratification for businesses that all of the many programs that they've initiated, particularly in the years since the summer of 2020, will be found illegal and will cost companies ... a tremendous amount of money unless they start changing very quickly," Shepard says.

Sustaining DEI

After Minnesotan George Floyd was murdered by a Minneapolis police officer in May 2020, there was a roughly 55% uptick in corporate job openings for diversity, equity and inclusion roles, the Society for Human Resource Management reported in 2020.

More recently, though, that demand has dwindled significantly, according to Tiffany Jana, founder of Richmond-based TMI Consulting, which provides DEI advising services to businesses ranging from small startups to Fortune 500 firms.

Photo by Matthew R.O. Brown

"Over the past year or two, we've seen like 300 chief diversity officers disappear, equity-related titles are disappearing, people are being laid off left and right," Jana says. A Revelio Labs report showed the attrition rate for DEI roles was 33% at the end of 2022, compared with 21% for non-DEI roles.

"For the people who were looking for a reason to loosen their investment, for whatever reason, this ruling is giving them ... more justification for taking their investments out of their DEI programs," Jana notes. But businesses that are genuinely committed to DEI will be able to maintain their programs, as long as they ensure everything is strictly legal under existing laws, Jana adds.

"Even in the [Students for Fair Admissions] case, Chief Justice Roberts noted that diversity in general is a perfectly reasonable goal," says Chambers, the UR law professor. "It's really a question of how you get there."

When it comes to avoiding litigation, there are several pitfalls companies fall into, but the bottom line is ensuring all recruitment and inclusion efforts have a tangible effect on the business and are clearly defined as a value-add to the business model, Jana says.

It's important to stay away from explicit quotas or "too aggressive goals that start to look like a quota," Goldman says, such as aiming for a percentage of the workforce to be made up of a certain identity within a certain timeframe.

Giving executives incentives for hiring diverse employees is not illegal, as quotas are, but it puts companies at higher risk for litigation, says Goldman, who described DEI policy as a "risk continuum."

"This idea that DEI is risky is not a full picture. No DEI is also risky," she says. "You have employees filing suits on both sides."

When Shepard is researching companies that might be at risk of reverse discrimination suits, he keeps an eye out for three types of initiatives: policies incentivizing executives to hire or promote minorities, companies using only vendors owned by minorities, and training programs that divide people into groups.

Likewise, D'Agostino says she has taken a special interest in employee affinity groups, a concept from educational environments that has expanded into workplaces, which sometimes group individuals based on race, gender or other identity facets such as sexuality.

These are all issues that can be avoided with the right wording and human resources education, Goldman and Jana both say. Overarchingly, companies will likely be taking a closer look at their DEI policies.

Corporate reaction — whether to roll back policies, alter them to ensure legality or maintain the status quo — will depend on the quality of companies' commitment to diversity, Jana says. "If we're scared of every possibility of litigation, we will never get anything done." ■