

PBPA Podcast Transcript
Staying True to Your Nonprofit Mission:
Navigating Reverse Discrimination and Anti-DEI Challenges
(35:58 minutes)



Sireesha ([00:00](#)):

Since PBPA's last podcast episode regarding DEI (diversity, equity, and inclusion) initiatives, there have been numerous lawsuits against nonprofits, not only related to DEI employment initiatives, but also nonprofit grant making and programming. From the Supreme Court to the Circuit Court, right here in Atlanta, nonprofits are at the heart of many of these lawsuits. Today I'm speaking with Terri Stewart at Fisher Phillips and Abby Larimer with Mohawk Industries about the current state of the quickly developing legal landscape. Join us in this episode of the PBPA podcast as Terri and Abby share guidance to help your nonprofit navigate this landscape and considerations for your nonprofits' DEI initiatives or race-based program.

Sireesha ([01:03](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at pbpatl.org. Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([02:12](#)):

Terri Stewart is a regional managing partner at the Atlanta Office of Fisher Phillips. She represents employers in all areas of labor and employment law in state and federal courts. Terri volunteers with PBPA providing direct counsel to some of our clients, and recently led a panel for attorneys on diversity driven leadership. Abby Larimer is Assistant General Counsel with Mohawk Industries, where she focuses on employment and litigation. Abby has volunteered with PBPA on numerous occasions over the past five years, including advising clients on employment matters and in speaking engagements. I appreciate you both joining me today to talk about a topic that is so complex, important, and honestly, a bit nerve wracking for some of our nonprofits. Thanks for being here to guide us.

Abby ([03:09](#)):

Thank you for having us.

Terri ([03:11](#)):

Yes, very glad to be here.

Sireesha ([03:13](#)):

Abby, you joined me in, towards the end of 2021, right here at the PBPA Podcast to discuss DEI initiatives and how to keep them legal. Here we are a little more than two years later after a flurry of

anti-DEI and reverse discrimination lawsuits. Terri, can you provide some background on how this came to be?

Terri ([03:41](#)):

Um, absolutely. So the thing that really drew this to the forefront was a recent Supreme Court case that came through in June of last year, and it was Students For Fair Admissions, also known as SFFA, and in those lawsuits, a series of lawsuits, both Harvard and the University of North Carolina was, were challenged on their admission criteria and using race as part of that admission criteria. The Supreme Court found that that was in violation of the Equal Protection Clause and ultimately found that you could no longer do this as an exclusive part of the admission criteria. You were able to include, for instance, how race created your path to become who you are, but an actual check-the-box category was no longer allowed. There was three basic rational for that. The Supreme Court felt that it failed the strict scrutiny test because it went too far. It did no longer met the objectives that it was originally set out for. It encouraged stereotyping and that there was no expiration date. It was just something that was going to continue at infinium. But that was just the beginning. And since then, there's been a flurry of lawsuits that have really taken issue with this decision and brought it into the employment context which Abby will share a little bit more about, but also into other contexts of actually talking about grants and whether people can use race in other areas of their business. So we'll get into that a little bit more, but that's kind of how things have come to be. And as the last few months have unfolded, we're seeing kind of courts take different positions on this that will likely mean that we're gonna see something up at the Supreme Court over time again, on really taking the standard and see how, how far it will go and to what, what areas of the US law we'll take it.

Sireesha ([06:04](#)):

So, yeah. Abby, can you tell us a little bit about what has been going on in the employment context?

Abby ([06:10](#)):

Sure. Um, I think when we, when we last spoke, you know, there was a big rise in DEI initiatives in the workplace after, uh, the George Floyd incident. And now what we're seeing in response to that is this growing backlash to corporate diversity policies. Um, the opponents of these DEI initiatives they challenge them as violating employment discrimination laws. Uh, title VII, one of the main employment discrimination, well, the main employment discrimination law, you know, states that it is unlawful for an employer to discriminate against someone because of their race, color, religion, sex, or national origin. So technically that will extend even if the discrimination is against what we consider to be a traditionally advantaged group like white men. Um, and so this, this sort of concept is commonly referred to as reverse discrimination, uh, section 1981, which was a post civil war law that, uh, prohibits the use of, uh, race when, when entering into contracts factoring in race also recognizes this reverse discrimination.

Abby ([07:25](#)):

So you know, in the legal context, sort of what we, what we're seeing is that the use of this race-based criteria favoring one ethnic group or racial group over another can amount to discrimination, even, even if the intention is supposed to be good and supposed to be working towards the DEI initiative. And again, this, it's just that the, the arguments that the, these initiatives are illegal because they're factoring in race or gender and on its face, that that is something that is illegal. And so, you know, most companies, most organizations have strict EEO policies. And again you know, almost what's included in almost all of those is that there's gonna be, you know, an equal employment opportunity to all

employees and applicants you know, without regard to the basis of race or gender. So that's what the opponents of these DEI initiatives are really latching onto and saying that that's something that violates the law.

Abby ([08:24](#)):

Terri talked about the SFFA case and the EEOC actually felt compelled after that decision was, was announced to issue a statement saying that it's still lawful for employers even in the face of that decision to implement diversity, equity, inclusion and accessible accessibility programs. But, you know, the messaging that we're seeing is do this, but with caution. The challenges are coming from employees, from shareholders, from outside political adv or advocacy groups and other interested parties. There are some cases that say that efforts to promote diversity inclusion are permitted under Title VII because they go to promote the statutes underlying purpose. So this isn't just now a blanket, we can't factor this in at all, but it's just becoming extremely more nuanced than it ever was before. And, you know, generally what the cases so far have found is that there is a need to show discrimination beyond just, you know, something like a diversity policy. Like someone would have to show, you know, I didn't get this job because, you know, it just, it was, you know, entirely about race. But again as Terri said, I think we can expect this to continue. And we're seeing employers both back down you know, back away from the DEI initiatives and sort of slowly, you know, and quietly fold them under, but also some employers are, are kind of doubling down and saying, you know, we're gonna, we're gonna proceed. So it's just gonna be something to, to keep watching in the workplace.

Terri ([10:00](#)):

Yeah, we're seeing a lot of disagreement along various political lines that are creeping into the workplace. That's probably no surprise. But, you know, the, the commissioner as Abby mentioned said that, you know, uh, DEI programs are here to stay and absolutely fine. And another, uh, commissioner, which is not the lead, basically said that those companies that don't implement it correctly can basically proceed at their own risk. Um, you have Attorney Generals of 13 states sending letters to various CEOs of Fortune 100 companies kind of reminding them to beware on this issue and not to use race, as a basis of anything really under the, the label of diversity, equity, inclusion. Um, you have groups that are attacking individual DEI programs. Uh, for instance nascar, there's a group called America's, uh, first Legal and their Challenging NFL's team, uh, requirements to interview minority candidates for head coaching position. And that makes you think of the Mansfield rule. It makes you think of other initiatives and hiring and entertaining employees to create a diverse workforce.

Terri ([11:24](#)):

And how do we kind of thread this needle in in this new space where it was once DEI programs were kind of non-controversial and a must, and now they're under the spotlight. Um, you know, whether it will be actionable in and of itself as Abby mentioned, is kind of up in the air. You still have to show, you know, a negative action against an individual, but it does give the government a lot of leeway and potential pattern practice cases, or even in your standard discrimination case where they might use the DEI program, the fact that you have it or the fact that you don't, and what it's made of as like a factor in the circumstances prove setting forth or proving the discrimination case. So there is no exactly, uh, perfectly safe space, but it is even more important than ever to focus on your legitimate non-discriminatory reason. And to take a look at your policies and procedures on your DE and I, which we'll get to in just a moment.

Sireesha ([12:30](#)):

And so that is regarding the employment context, DEI and the employment context, which seems to have a, a little more of a framework coming from the EEOC and those lawsuits having started a little further back in time. But Terri, a lot of our nonprofits are very concerned now about how this wave of lawsuits might impact their programming. What has happened in the non-employment context since students, the Supreme Court case last summer?

Terri ([13:01](#)):

You know, it, it's kind of funny that it's become such an EEO, uh, in an employment context type of issue because of Students, uh, For Fair Admissions was not an employment case, and this is just a general standard of law for the US in general. It's the natural thing to potentially come first because behind admissions, you have government affirmative action requirements that would seemingly be a safe space. If you were a federal contractor, you had to have affirmative action policies and procedures. Um, so we're seeing it come up more often there, but there is some non-employment reaches with this particular section of law and how it's developing. And what we're largely seeing are things like funding being, which was often awarded to minority categories through the Small Business Association, and some of these federal contracting type programs, they are being challenged as unlawful because it is based solely on race or a protected category.

Terri ([14:15](#)):

So there is kind of a split in, in the various areas of our country. And I think that that's what's next. As I mentioned, this is probably gonna come up again to have the Supreme Court set limits on what, you know, how far does this go versus where does it stay. But the, the Sixth Circuit recently held that the minority category must demonstrate that his employer is "that unusual employer who discriminates against the majority". In another case, in the minority business development agency was offering grants to assist minority businesses, and it was held unconstitutional in the northern district of Texas. And these decisions will probably go along the party lines or the color of the state as it appears in presidential elections or congressional elections for a while, until the, uh, Supreme Court actually rules on it. Um, but it does call into question these minority focused programs, nonprofits, and all of these as to how to brand it, how to name it, and how to still complete your mission when we have to deal with these challenges. And you don't necessarily wanna be the next one to have to challenge it because it's, you know, the cost of this litigation is staggering. You know, there are things that you can likely do on the front end to perhaps not be the poster child for this area of the law, which we'll talk about as, as we kind of go through the rest of this podcast.

Sireesha ([15:50](#)):

This, what I'm hearing here is particularly concerning, considering that a lot of our nonprofits a lot of our listeners, a lot of our clients here at PBPA, part of their mission, kind of, almost the reason that some of them exists is to uplift certain communities. And so they focus on specific demographics, and this might have been their mission for decades. For example, their programming might be based on race, for example, providing housing for black veterans, or gender such as afterschool programming, STEM classes for girls, for example. So for nonprofits that have such programming, how can they continue to fulfill their mission while keeping an eye on these lawsuits? Let's start with you, Abby.

Abby ([16:42](#)):

Thanks. Um, and yeah, this sort of follows up on what, what Terri was saying, and that this is just becoming a much more delicate area than it ever was before. So, you know, something, but the first

example, you know, housing for black veterans, I mean, there you know, that would be, I, I think, you know, more of a funding issue, where we are starting to see more challenges. And there you know, the arguments have been, you know, for section 1981, that was a law that we mentioned before. It covers contracts. So there have been some challenges saying that a grant and when there are some, uh, conditions attached to the grant, that that can actually be considered a contract. So then if there's a factoring into race into that contract, that's something that can violate 1981, that Title VII, which covers federal funding. So, you know, organizations are starting to look a little bit more at how detailed their agreements are with specific deliverables or indemnity something, something like that. And it's better legally for that argument if the recipient doesn't receive anything in return for the donation for the grant. Now, however, that can be pretty inconsistent with the history of grant making, and that there are, you know, oftentimes, you don't just get a lot of money for nothing. That doesn't really happen in the US. to, you know, trying to sort of balance that you know, we want this money to be used for what we were intending it to versus, you know, making it appear to be a contract that's based on, on race.

Abby ([18:17](#)):

There are some defenses with free speech you know, there's been some case law that says, okay, where you give your money is free speech. But, and again, the challenges, and we also talked about, you know, the gender example here, but if we're saying, you know, okay, only girls, this is a program for girls or, you know, it could be a race based criteria as well. So some of the challenges there is an organization in, based out of Austin, Texas, and AAER, The organization was hidden Star. And again, this was something an organization trying to give to female and minority candidates. Um, they actually, uh, quickly resolved the lawsuit by clarifying on their website that even though, you know, this is their mission, but that the eligibility for the grant they were giving out that wasn't restricted. Comcast was another example of an organization that was sued after they were giving out grants and a again, the, they ended up opening the eligibility for all the grants after challenges when the grants have been intended for women and people of color.

Abby ([19:25](#)):

And of course, this can also be, you know, if you're having an internship program you know, hiring volunteers of a certain kind, what you may want to do for your a nonprofit is, you know, look at the language and evaluate: is this language specifically excluding someone of a certain race or gender? Other things that are, you know, uh, problematic here can be the public perception that could be associated with excluding races or genders and, and favoring others, which is just something unfortunately, this is a big, hot topic in the media now. So we're seeing a lot more of that. And then you know, the negative publicity that could make an organization a target for a legal challenge. You know, again, I think unfortunately that, you know, the nonprofits are just getting targeted a little bit more here than they ever were before by outside completely unrelated parties. Um, and generally, as Terri mentioned, nonprofits just don't have the resources to engage in huge legal battle, like even, you know, a company like Comcast. So, again, it's just, you know, I think that's something that's gonna be really difficult, evaluating the mission of the organization with, you know, how can you achieve this mission with also you know, not being discriminatory and avoiding getting into some sort of legal.

Sireesha ([20:39](#)):

And Abby as a follow up. And now speaking again about workforce or employees of an organization for nonprofits that have DEI initiatives, hiring goals or training within their workforce, what are potential risks of continuing such initiatives?

Abby ([20:59](#)):

Um, yeah, the biggest risk you know, is certainly getting involved in a lawsuit being sued for some sort of discrimination. Um, and we've already mentioned a number of times that nonprofits really do have limited resources. Um, and you don't want to spend all the resources that you should be spending on your, on your cause on a lawsuit. And in addition to just the financial burden of litigation, there's also the, the other effects, like if what could be in discovery. What sort of internal documents related to your nonprofit could, you know, come out in discovery: donors, decision making, you know, behind, a grant process. Concern about putting sensitive information into the public realm with a lawsuit. Um, what we've seen in some of the other challenges are, you know, they're suing and also seeking injunctions, so they're going to stop a grant from being given, you know, stop a hiring an intern or something like that, which can really just, you know, again, hold up the whole point of, of an organization. So, and beyond just the lawsuit, again, there is this, you know, idea of having a name dragged into the media, just something that you know, any sort of unwanted attention that can discourage donors or, you know, volunteers and just make what really is supposed to be a neutral organization into something, you know, political, that it was never intended.

Terri ([22:22](#)):

And, you know, quotas and specific numbers, you know, absent the affirmative action program approved by the federal government has always been illegal. And so you couldn't say, you know, I, you know, have a hundred people and I want 30 you know, people of this race, 30 of this and 30 of this. Um, you, you can't have specific numbers and quotas and never really could, what you have to really focus on is diversifying your workplace or otherwise, based on the intent to reflect the community around it. And if the two don't align then you might have to look for non-traditional sources for making an equitable reflective workplace. Recruit in different locations interview in a different technique, perhaps in a bilingual fashion. You know, with remote work now being an option for a lot of companies, you can look in different places that you didn't before and you may diversify your workforce that way, or train them in that way.

Terri ([23:41](#)):

Um, but you really have to start with the hiring and training goals. Um, but with everything that you're doing that is DE&I-related turn to the mission or the reason behind it, rather than the criteria if, you know, de and I is often it, it's focused on equality, you know, psychological security, uh, inclusion. Underlying concepts meant for everyone. And so you often have to, to change your focus on the underlying process and how are we gonna make that happen then exactly, how are we gonna get there with specific criteria listed. Um, which makes it difficult, but something that you can overcome.

Sireesha ([24:37](#)):

Yeah. But I think that's also a great point you make, 'cause it's kind of, especially for nonprofits that look at your mission, it's, it's already there probably what needs to guide you. It's in your mission Mm-Hmm. <affirmative> and use that as a starting point. Yes. And Terri, we have seen a recent focus in nonprofits seeking greater diversity within their board. Do you have any thoughts on what nonprofits should keep in mind if they are creating new DEI initiatives or revising existing DEI initiatives as they apply to their board?

Terri ([25:13](#)):

Sure. One initiative is seemingly accepted and well known now is diversifying the board itself, and making an intentional approach for your board to reflect your community. Um, and if a non diversified board, no matter what the board consists of, all the studies show a diversified board is more effective, they also tend to show that when the leaders of an organization adopt missions as their own. So it's not just something the lowest level employee participates in, but it's something that goes really from the top down. DEI is embraced by leadership all the way through to your lower level employees. I mean, we're seeing people leave companies and accept lower wages and lower benefits just to stand behind a company and work for a company that has a social mission that they can get behind. Whatever that is, whether it's, whether it's climate, whether it's race, whether it's homelessness, you name it.

Terri ([26:18](#)):

If it's a mission that the, that someone believes in and it has an identity, you're gonna attract better and more diverse employees and candidates anyway. So in some instances, you wanna embrace even more your underlying mission for your nonprofit, and I think the, the rest will, will follow. As far as the DE and I initiative initiatives that you should actually accept as, as you know, the specifics of what that should be, I think you should look at your program as a whole. You wanna reconsider any race-based goal as the only thing that is about you want. Um, a for example the business affiliation groups are open to everyone now. Um, and should be. It's something that should not be exclusive. It's something that should, you know, and, and perhaps leadership can, uh, who is not of that particular affinity group can still be a member of that and help push that mi that mission forward while diversifying the members of that group too. You know, retooling those and allowing them any and everyone to be a part of it. Even if it has a specific mission tied to gender, for example, or orientation or, or you name it.

Terri ([27:44](#)):

You, you want to be considerate about your actual written materials and what that looks like. We wanna remove any specific references to protected categories as the only thing, uh, that can be accepted. Um, there are other ways to say and do the same thing without basically being exclusionary. So those are, you know, some of those things. Um, mentoring programs are also a great thing to include, because they are, you know, uh, on a one-on-one basis, and they can be included. Uh, they, they can be directed to anybody, uh, in the organization. You know, you wanna make sure if your board and your leaders are involved and all of this, that everyone has been kind of trained on what good DE&I and I is. Um, and what it means to you as a company. So those are just kind of a, a few things to kind of focus on as you as these nonprofits. And everyone really takes a look at their DE&I and what they want it to be moving forward.

Sireesha ([28:52](#)):

Now, looking ahead, what trends do you anticipate to come in the legal landscape surrounding reverse discrimination and anti DEI lawsuits? How should nonprofits prepare? Let's hear from both of you, but Abby, can you start?

Abby ([29:10](#)):

Sure. You know, I think looking ahead as we've both mentioned I don't think either of us see this really slowing down or stopping anytime soon. I think it's going to be increasing. And I think, you know, we've, we've been talking about funding or selection for programs. I think that there could be extensions of getting to the point where almost anything where race is being considered that a nonprofit's doing, I mean, you have programming or anything could somehow become a target now as being discriminatory.

So I think it's, you know, important to stay up to date. Um, try as much as you can to sort of monitor, you know, what, what's going on with this. I, I agree very much with what Terri just said, focusing on, on language and what words are we using, looking at the mission of the organization versus your eligibility criteria, eligibility language, and using that, the appropriate language to identify, you know, the attended participants or clients. But, you know, making sure you're not being discriminatory when you're doing that. Um, consider an internal audit like Terri was just saying, you know, evaluate any policies or programs that could be at risk. Um, and particularly if you are an organization that really does focus on you know, providing services to a particular, uh, racial or, or ethnic group or gender. So but again, I think just, just continuing to monitor us because I don't think it's an issue that's going away anytime soon.

Terri ([30:40](#)):

And you know, it's probably going to happen in the employment context first. Um, it'll probably be a race, whether it happens in grant or employment first, but employment has always been the exact same. There's really no difference whatsoever in the employment context. You cannot use any protected category as the basis really for your decisions. And that stays true and that stays the same. Um, in the grant, uh, world, that's a little bit different because it can be tied to missions. So you know, I mean, we've both spoken about the language, as both of us as litigators in the room. If you do conduct audits, whether it be pay equity or DE&I or any type of audit, you may wanna consider hiring counsel so you can keep that privileged because if you pull a lot of data or write a lot about it to one another and what you should do and what you shouldn't do, those are discoverable documents unless it's actually privileged. And that's, that's unfortunate for companies that are trying to do the right thing and get to the bottom of what is the, the right thing in the future for them. But I think that's important to be mindful of that you don't want anything that you do to change or potentially correct your process to be held against you in the future based on, you know, written documentation as you work through this based on, you know, percentages or what your workforce is looking like. So that's another thing to consider.

Terri ([32:18](#)):

Keeping what you do open. And, and as Abby mentioned, the eligibility requirements very limited uh, to non-exclusive categories. Understanding that's gonna be a difficult thing for some organizations, but to the extent you can get to the same result in anything that you do with more inclusive language and less exclusive language or specific, uh, language, excluding certain protective categories, kind of the better off you'll be and just continue to stay alert over what's happening because this is developing rapidly and it'll probably be headed to the Supreme Court again soon. Um, our website, which is fisherphillips.com you know, anytime that there's a change, uh, a new case or, uh, a major change in this area, you know, we usually do a legal alert so you, that's free and accessible to all, so you can kind of keep up to date there, as things continue to change. And of course, we'd be happy to come back and talk again when things do change.

Sireesha ([33:35](#)):

And one final question I have, and this is just for clarification for our audience 'cause you used the term *protected class* in some of your responses, and can you just provide a reminder clarification on what is a *protected class*?

Terri ([33:51](#)):

In its most known form? Or, you know, as what Abby mentioned under Title VII things like race, color, national origin, gender the ADA protects your disability status, the age discrimination and employment is your age, those 40 and above. But those are the general protected categories we're referring to. But most of this new legislation, it's starting with race because, you know, as, as Abby mentioned, Section 1981 prohibits the use of race in the making of contracts. And that law has been around for a long time. Um, but you can imagine that, you know, gender orientation, age, those fall and are closely aligned and may will probably be the next things to be brought up as, as the basis for scrutiny.

Sireesha ([34:50](#)):

This is some great content and information to noodle over. This topic will continue to develop and change quickly, as you guys mentioned, but for where the law currently stands as of March, 2024. Terri and Abby, thank you so much for sharing your time and expertise with us today.

Abby ([35:13](#)):

Thank you.

Terri ([35:14](#)):

Thank you very much.

Sireesha ([35:17](#)):

We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.