



Pfizer has dropped race-based eligibility requirements for a fellowship program designed for college students of Black, Latino and Native American descent, even though a judge dismissed a lawsuit against the program. MARK LENNINGAN/AP FILE

# COMPANIES QUIETLY ALTER THEIR DIVERSITY PROGRAMS

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NEW YORK — Sophia Danner-Okotie has ambitious plans for her Nigerian-inspired clothing line but a sense of dread has punctured her optimism as she watches a legal battle being waged against a small venture capital firm that has provided funding instrumental to her boutique brand's growth.

The case against the Fearless Fund alleges that one of its grant programs discriminates against non-Black women and asks the courts to imagine a similar program designed only for white applicants. It is among a growing list of lawsuits against corporate diversity and inclusion programs that are making their way through the courts this year.

Most have been filed by conservative activists encouraged by the Supreme Court's June ruling ending affirmative action in college admissions and are now seeking to set a similar precedent in the working world.

The battle has been a roller coaster of setbacks and victories for both sides, but some companies are already retooling their diversity programs in the face of legal challenges, and the growing expectation that the conservative-dominated Supreme Court will eventually take up the issue.

One conservative activist, Christopher Rufo, claimed another victory this month with the resignation of Harvard's first Black woman president, Claudine Gay, after allegations of plagiarism and a furor over her congressional testimony about antisemitism.

Rufo, who has cast Gay's appointment to the job as the culmination of diversity and inclusion efforts that have sidelined conservative voices in higher education, vowed on the social media platform X, formerly known as Twitter, not to "stop until we have abolished DEI ideology from every institution in America."

Dozens of prominent companies have already been targeted, as well as a wide array of diversity initiatives, including fellowships, hiring goals, anti-bias training and contract programs for minority- or women-owned businesses.

Some challenges have focused on policies adopted after the 2020 protests over George Floyd's killing by police as companies pledged more efforts to redress racial inequalities in the workplace. But others have targeted decades-old diversity programs that anti-affirmative action advocates have long tried to dismantle.

Diversity and inclusion experts say the legal backlash is already having a chilling effect over corporate efforts to address workplace inequality at a time when investment and interest in such initiatives have slowed following the post-Floyd surge.

Job openings for diversity officers and similar positions have declined in recent months. The combined share of venture capital funding for businesses owned by Black and Latina women has dipped back to less than 1% after briefly surpassing that threshold — at 1.05% — in 2021 following a jump in 2020, according to the nonprofit advocacy group digitalundivided.

The case against the Fearless Fund, which provides early-stage funding to businesses led by women of color, exemplifies the unpredictable legal landscape.

In late September, a federal judge in



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Atlanta refused to block a Fearless Fund grant contest for Black women business owners, saying they are donations protected by the First Amendment and the lawsuit was likely to fail. But days later, a three-judge federal appeals panel suspended the contest, calling it "racially exclusionary" and saying the suit was likely to succeed.

"Am I going to be able to apply to grants like these? Are they even going to exist?" said Danner-Okotie, who received \$10,000 from a separate Fearless Fund grant. "With this last ruling, it seems like no."

Danner-Okotie first saw the potential for scaling her clothing brand when the COVID-19 pandemic shut down the boutiques and fairs that carried her designs. Searching for ways to increase her online sales, she landed a contract with subscriber-based retailer Stitch Fix and used a government pandemic relief loan to fulfill the order. But when she tried to build on that success, she ran into roadblocks as banks declined her loan applications, deeming her business model risky since her clothes are handmade by Nigerian tailors.

The Fearless Fund, Danner-Okotie said, grasped her mission of designing clothes for American women looking to celebrate their African heritage. The grant was a game changer, allowing her to contract a factory in India to make uniquely designed fabrics for her team of tailors in Nigeria.

But now, future funding from the program is in jeopardy. The lawsuit against the Fearless Fund is being brought by the American Alliance for Equal Rights, a nonprofit founded by anti-affirmative action activist Edward Blum, the man behind the college admissions cases the Supreme Court ruled on in June. The outcome of the case could be a bellwether for similar diversity programs.

Oral arguments in the case are scheduled for Jan. 31.

## Adjusting diversity programs

Faced with a messy legal landscape, companies are being cautious. Most major companies have stuck by diversity initiatives that many ramped up in the face of pressure from some shareholders, employees and customers. Starbucks and Disney are among companies that have so far prevailed in court against challenges to their inclu-

sion policies.

But some have made changes to diversity programs to try to protect them from legal scrutiny.

Among those are two prominent law firms that had faced lawsuits by Blum's group. The firms, Morrison Foerster and Perkins Coie, opened their diversity fellowship programs to all applicants of all races in October, changes the companies said were in the works before Blum's lawsuits, which he subsequently dropped.

In February, pharmaceutical giant Pfizer dropped race-based eligibility requirements for a fellowship program designed for college students of Black, Latino and Native American descent, even though a judge had dismissed a lawsuit against the program two months earlier.

Despite the change, the conservative nonprofit suing Pfizer, Do No Harm, is appealing the lawsuit's dismissal, arguing the fellowship's goals remain the same.

In May, Comcast said business owners of all backgrounds would be eligible to apply for a grant program originally intended for women and people of color when it launched in 2020. The telecommunications company settled a lawsuit last year over the program brought by the conservative Wisconsin Institute for Law & Liberty on behalf of the white owner of a commercial cleaning business.

The Wisconsin Institute filed another lawsuit in October, this one on behalf of two construction firms. The lawsuit seeks to dismantle the U.S. Department of Transportation's Disadvantaged Business Enterprise program, which dates back to the Reagan administration and requires that 10% of funds authorized for highway and transit federal assistance programs be expended with small businesses owned by women, minorities or other socially and economically disadvantaged people.

Dan Lennington, an attorney with the Wisconsin Institute, said he considers Comcast's changes "progress," but the anti-affirmative action movement is looking for a broader victory that could change case law on workplace diversity programs, and the lawsuit against the DOT has that potential.

The Supreme Court's ruling on affirmative action "opened up a whole new world," Lennington said. "This decision just really injected new life into the whole debate."

## A 'gray area' on hiring

Many of the lawsuits challenging diversity programs, including the cases against Pfizer and the Fearless Fund, are relying on a section of the Civil Rights Act of 1966, which prohibits racial discrimination in contract agreements. The law was originally intended to protect formerly enslaved people, but conservative activists are citing it to challenge programs designed to benefit racial minorities.

Their lawsuits generally target programs that have clear race-based eligibility components. A more difficult challenge is proving that companies are making hiring decisions based on race, said David Glasgow, executive director of the Meltzer Center for Diversity, Inclusion, and Belonging at New York University's School of Law.

Taking race into account for hiring or promotions is illegal under Title VII of the 1964 Civil Rights Act. A debate has emerged about whether companies are crossing the line by announcing goals for increasing Black and other minority representation. Companies say such efforts are not quotas but aspirational goals they will try to achieve through policies like widening candidate pools and rooting out bias in hiring processes.

Glasgow called it a "gray area" that could depend on a court's interpretation of corporate policies. He said it could be hard to prove discrimination just because a company "announced in a really broad way that it would be nice to have more people of color in management," but plaintiffs could try to argue that diversity, equity and inclusion policies are pressuring hiring managers to make race-based decisions.

Conservative activists are trying to make just that case, seizing on corporate documents that share data on efforts to increase the ranks of Black, Hispanic and other underrepresented groups in their workforce, however modest that progress might be.

America First Legal, a group run by former Trump adviser Stephen Miller, sent a letter in November to the federal Equal Employment Opportunity Commission seeking an investigation into Macy's efforts to strengthen its DEI policies, arguing they amount to discriminatory hiring practices.

In 2019, Macy's announced a goal of 30% ethnic diversity among its leadership at the director level and above by 2025, in part to better serve its customer base, which is about 50% non-white. The retailer launched a leadership training program for selected managers of color, and last year required that candidates for director roles include ethnically diverse applicants. It also has incorporated its DEI goals into annual performance reviews for directors and company-wide incentive calculation.

America First Legal cited those initiatives to argue that Macy's "has set explicit racial and other quotas for hiring." The group has sent dozens of similar letters to the EEOC targeting companies from IBM to American Airlines.

Macy's declined to comment on the letter. But in a previous interview with The Associated Press, outgoing Macy's CEO Jeff Gennette said the company is sticking with its DEI policies while closely watching legal developments.

"Our enthusiasm and our commitment to all the prongs that we had with DEI, and our strategy, remains. We might express it differently based on court rulings and in the future," Gennette said, without providing details.