

DEI TRAINING AND TITLE VII

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ABSTRACT

Title VII protects workers from employment discrimination on the basis of race, color, sex, national origin, and religion. Executive Order 11246 (EO 11246), signed by President Lyndon B. Johnson, required that federal contractors specify affirmative action goals. And numerous employers, including private businesses and universities, voluntarily established DEI initiatives. Sixty years of case law have upheld these workplace protections and diversity initiatives. But diversity initiatives of any kind are now under attack, as the Trump Administration has upended courts' interpretation of discrimination, rescinded EO 11246, and threatened cancellation of or actually canceled the federal contracts of businesses and universities that even mention DEI initiatives.

In *Young v. Colorado Department of Corrections*, the plaintiff alleged that the department's DEI employee training subjected him to a racially hostile work environment in violation of Title VII. In upholding the district court's decision to dismiss Young's case, the Tenth Circuit held that the DEI training did not subject Young to harassment that was sufficiently "severe or pervasive" to establish a racially hostile work environment as required under Title VII, nor did Young establish that he suffered harassing treatment from coworkers that met this standard. However, the court left open the possibility that DEI training that used race-based rhetoric could meet the standard for harassment under Title VII, saying that "[i]f not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging." Further, the Tenth Circuit postulated that DEI training "could promote racial discrimination and stereotypes within the workplace" and "encourage racial preferences in hiring, firing, and promotion decisions."

Although Title VII does not explicitly identify a hostile work environment as an unlawful workplace condition, Supreme Court decisions in the 1980s interpreted sexual harassment as a form of sex discrimination, and courts have followed this interpretation to include harassment based on membership in other protected classes. Notably, the threshold for unlawful harassment requires that the behavior be sufficiently severe or

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pervasive so that it alters the terms or conditions of the plaintiff's employment. But unlike claims of pay or hiring discrimination, in which statistical evidence or comparators will often be available, claims of harassment allow for a continuum of behaviors and produce ambiguity as to whether the behavior at issue satisfies the severe or pervasive standard. Whether an unlawful harassment claim reaches this legal standard is particularly unclear when the behavior at issue is DEI training, which to date no court has found to be inherently discriminatory. Adding further to the ambiguity is the Supreme Court's holding in *Muldrow v. City of St. Louis* that lowered the bar for employment actions to be actionably adverse, potentially lowering the threshold of severity at which DEI training could be actionably adverse workplace harassment.

Courts to date, including the Tenth Circuit, have not found DEI training to be discriminatory. Although the Tenth Circuit went further than other courts in suggesting that DEI training could itself promote employment discrimination, it only speculated—without providing support for—this possibility. By examining the legal environment governing workplace harassment and social science research on the reach and impact of DEI training on employment outcomes, this Article concludes that, for now, it is unlikely that DEI training will be found to be unlawful employment discrimination.

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INTRODUCTION

There is vast evidence that people hold unconscious biases.¹ Out of concern that individuals' biases interfered with organizations' ability to comply with the law or with the efficiency of their operations, or perhaps out of equity concerns, organizations provide "diversity training"² to address and counter biases in the workplace. Organizations have offered diversity training for at least the past sixty years.³ The term "DEI" that has come into common use⁴ lacks a precise definition but has been interpreted as referring to virtually anything that includes a component related to diversity, equity, and inclusion.⁵ Under this expansive understanding of DEI, almost any anti-bias training would be considered to have a diversity component because these trainings are designed to help people overcome unconscious biases and to teach dissimilar others how to work together effectively.

Although unconscious bias training is common in large corporations,⁶ recent lawsuits have alleged that "DEI training" is inherently discriminatory or is itself a cause of unlawful workplace harassment.⁷ To

1. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 8 (2011) (describing a widely circulated article that explains twenty biases as demonstrations of the role of heuristics in judgment). The terms "unconscious bias" and "implicit bias" are used interchangeably to denote biases and attitudes which people are unaware that they hold. See Annika L. Jones, Comment, *Implicit Bias as Social-Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221, 1222 n.1 (2017). See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987), for an early exploration of the role of racism attributable to unconscious bias.

2. See Alex Lindsey, Eden King, Michelle Hebl, & Noah Levine, *The Impact of Method, Motivation, and Empathy on Diversity Training Effectiveness*, 30 J. BUS. PSYCH. 605, 606 (2014) ("Diversity training can be defined as any program designed to facilitate positive intergroup interaction, reduce prejudice and discrimination, and generally teach dissimilar others how to work together effectively.").

3. Julie Kratz, *The Little Known History of DEI and Why It's Critical to Its Survival*, FORBES (Dec. 29, 2024, at 8:00 ET), <https://www.forbes.com/sites/juliekratz/2024/12/29/history-of-dei-why-it-matters-for-the-future> ("While there is no formal consensus, most DEI supporters cite the U.S. Civil Rights Act of 1964 as a catalyst for the modern DEI industry.").

4. See Nicquel Terry Ellis, *What Is DEI, and Why Is It Dividing America?*, CNN (Jan. 23, 2025, at 2:15 ET), <https://www.cnn.com/2025/01/22/us/dei-diversity-equity-inclusion-explained>.

5. As posted on the EEOC website, Diversity, Equity and Inclusion (DEI) is a broad term that is not defined in Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employment discrimination based on protected characteristics such as race and sex. Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic. *What You Should Know About DEI-Related Discrimination at Work*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work> (last visited Oct. 19, 2025).

6. A 2023 Pew Research Center survey found that 52% of workers say they had trainings or meetings on DEI at work. RACHEL MINKIN, DIVERSITY, EQUITY AND INCLUSION IN THE WORKPLACE, PEW RSCH. CTR. 4 (2023); see also Joann S. Lublin, *Bringing Hidden Biases into the Light*, WALL ST. J. (Jan. 9, 2014, 8:20 ET), <https://www.wsj.com/articles/bringing-hidden-biases-into-the-light-1389311814> ("As many as 20% of large U.S. employers with diversity programs now provide unconscious-bias training . . .").

7. Lawsuits alleging that DEI training is unlawfully discriminatory that have reached court decisions since 2020 include *Young v. Colo. Dep't of Corr.*, 94 F.4th 1242, 1255 (10th Cir. 2024); *Vavra v. Honeywell Int'l, Inc.*, 106 F.4th 702, 704–05 (7th Cir. 2024); *Diemert v. City of Seattle*, 689 F. Supp. 3d 956, 960 (W.D. Wash. 2023); *De Piero v. Pa. State Univ.*, 711 F. Supp. 3d 410,

date, these lawsuits have been unsuccessful in establishing that DEI training is inherently discriminatory or in demonstrating a causal connection from DEI training to unlawful harassment. However, in *Young v. Colorado Department of Corrections*,⁸ the court left open the possibility that DEI training that uses race-based rhetoric could meet the standard for harassment under Title VII, saying that “[i]f not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging.”⁹ The court further expressed the concern that the messaging itself could “encourage racial preferences in hiring, firing, and promotion decisions.”¹⁰

Employment practices that are illegal under Title VII—and specifically harassment on the basis of race—remain illegal independently of any workplace training.¹¹ The question examined here is whether and when DEI training is itself discriminatory in the absence of identifiable acts of discriminatory treatment caused by the training. Despite the concerns expressed in *Young*, this Article concludes that DEI training is neither inherently discriminatory under Title VII nor likely to lead to discriminatory employment decisions in violation of Title VII.

This Article proceeds as follows. Part I describes how anti-discrimination law under Title VII and workplace diversity goals that were mandated by the now-revoked Executive Order 11246 (EO 11246) interacted to support anti-bias training efforts by numerous organizations. Part II discusses the goals of anti-bias training, which include protection against liability for harassment as well as business objectives. This Part also shows that despite the large investments organizations make into diversity training, there is little evidence that this training is effective in meeting the expressed goals. Part III discusses whether and under what conditions DEI training itself could be unlawful harassment and discusses legal cases alleging that DEI training itself is a discriminatory violation of Title VII. This Part also discusses court decisions that have uniformly held that DEI training is not inherently discriminatory. Part IV addresses the liability standards that may be offered in support of claims that DEI training is unlawful workplace harassment and concludes that it is unlikely that training on its own would meet a liability standard. In particular, Part IV discusses the Tenth Circuit’s decision in *Young* that opened the door to the possibility of DEI training reaching the legal standard for unlawful workplace harassment under Title VII. Although the Tenth Circuit expressed concern that DEI training could promote race-based discrimination in hiring, firing, and promotion, this Part concludes that the limited evidence of the efficacy of DEI training in

416–17 (E.D. Pa. 2024); and *Chislett v. N.Y.C. Dep’t of Educ.*, 723 F. Supp. 3d 285, 294 (S.D.N.Y. 2024).

8. 94 F.4th 1242 (10th Cir. 2024).

9. *Id.* at 1251.

10. *Id.*

11. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> (last visited Oct. 19, 2025).

increasing workplace diversity makes it similarly unlikely to lead to racial discrimination in employment decisions.

I. ANTI-DISCRIMINATION LAW AND DIVERSITY GOALS

A. Civil Rights Act of 1964 and Workplace Harassment

Title VII of the Civil Rights Act of 1964 prohibits employers, labor unions, and employment agencies from discriminating against employees or applicants “with respect to compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”¹² Workplace harassment is neither defined nor specifically covered under Title VII.¹³ The legal basis for Title VII protection against workplace harassment originates from judicial and Equal Employment Opportunity Commission (EEOC) interpretations of sexual harassment as a form of sex discrimination.¹⁴ In 1980, the EEOC issued “Guidelines on Discrimination Because of Sex,”¹⁵ which designated sexual harassment as a violation of Title VII. In *Meritor Savings Bank v. Vinson*,¹⁶ the Supreme Court held that plaintiffs could establish a Title VII violation by conduct that discriminated on the basis of sex, created a hostile or abusive environment, and was severe or pervasive such that it interfered unreasonably with the ability of an employee in a protected class to do their job by altering the “terms, conditions, or privileges of employment.”¹⁷

Further Supreme Court decisions have provided employers with a possible defense against liability.¹⁸ Unlike non-harassment claims of employment discrimination, in which parties may directly report discrimination to the EEOC,¹⁹ victims of harassment or hostile work environment discrimination must generally make an internal complaint to allow the employer to correct the discriminatory behavior before the victim

12. 42 U.S.C.S. § 2000e-2 n.136 (LexisNexis 2025).

13. See *id.* (failing to include workplace harassment as a term in statutory language); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (explaining that “Title VII does not prohibit all verbal or physical harassment in the workplace”).

14. See, e.g., MARGARET A. CROUCH, THINKING ABOUT SEXUAL HARASSMENT 37–38 (2001) (providing an overview of the evolution of the interpretation of sexual harassment as a form of sex discrimination); DIRECTIONS IN SEXUAL HARASSMENT LAW 8–9 (Catharine A. MacKinnon & Reva B Siegel eds., 2004).

15. See *Policy Guidance on Current Issues of Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment> (last visited Oct. 19, 2025) (describing the Guidelines from 1980).

16. 477 U.S. 57 (1986).

17. *Id.* at 64, 67.

18. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (“The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (utilizing the same possible defense).

19. With the exception of the Equal Pay Act, claims of employment discrimination brought under federal law require that the injured party first files a charge with the EEOC or corresponding state agency before filing a lawsuit in federal court. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-lawsuit> (last visited Oct. 22, 2025).

reports to the EEOC.²⁰ The employer may avoid liability by showing that it exercised reasonable care to prevent harassment (such as having an antiharassment policy and a procedure to report harassment and to take corrective measures) and that the employee failed to take advantage of the employer's complaint procedure.²¹

The Supreme Court emphasized that not all unpleasant work conduct will reach the standard for illegal harassment.²² To meet the legal threshold, the harassment must create an environment that is both objectively hostile or abusive in the eyes of a reasonable person, and that the victim subjectively perceives as hostile or abusive.²³ The Supreme Court identified frequency of harassment, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance as legally significant indicators of workplace harassment.²⁴ The Supreme Court further elaborated that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"²⁵

Title VII's doctrine has expanded through a series of Supreme Court decisions that clarified that unlawful harassment did not have to be of a sexual nature or motivated by sexual desire.²⁶ At this time, all classes protected under Title VII are also protected from workplace harassment.²⁷

B. Affirmative Action in Employment

In 1965, President Lyndon B. Johnson issued EO 11246 to prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin by federal contractors and subcontractors.²⁸ This directive

20. See *Faragher*, 524 U.S. at 807–08 ("And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.").

21. This liability regime was established in two cases. *Id.*; *Burlington Indus., Inc.*, 524 U.S. at 765.

22. See *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

23. *Id.* at 23.

24. *Id.*

25. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (quoting *Faragher*, 524 U.S. at 788).

26. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (same-sex harassment constitutes illegal harassment under Title VII); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 664 (2020) ("[I]t's irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.").

27. See *Harassment*, *supra* note 11.

28. Executive orders mandating affirmative action to address racial injustice in hiring were issued in the 1960s by both Democratic and Republic presidents. Specifically, executive orders mandating affirmative action were issued by Presidents John F. Kennedy, Lyndon B. Johnson, and Richard Nixon. See, e.g., Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (John F. Kennedy); Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (Lyndon B. Johnson); Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969) (Richard Nixon).

expanded the enforcement role of the Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor (DOL).²⁹ EO 11246 obligated federal contractors and subcontractors to specify hiring goals for underrepresented workers and to take “affirmative action” to correct past discriminatory practices by efforts such as outreach and recruitment plans.³⁰ It also gave the OFCCP the authority to audit contractors’ hiring, pay, and other employment data for compliance with anti-discrimination law and affirmative action programs and to investigate and bring suits against contractors not in compliance.³¹

With Executive Order 14173 (EO 14173), President Trump revoked EO 11246 and required the DOL and OFCCP to cease promoting “diversity” as well as to cease all investigative and enforcement activity.³²

Revoking EO 11246 has upended sixty years of required workplace affirmative action practices and has left employers in an uncertain legal position. In *Students for Fair Admissions v. Harvard*,³³ the Supreme Court held that any direct consideration of race in higher education admissions is an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.³⁴ But this decision did not touch on the legality of consideration of race in employment. Nonetheless, most observers and commentators have predicted that any consideration of race in employment decisions is on its way to becoming an unlawful employment practice.³⁵

II. ANTI-BIAS TRAINING

The presence of workplace anti-harassment training may serve as a legal defense against liability for workplace harassment claims under Title VII.³⁶ But it is equally important to recognize that the primary goal

29. Adam K. Edgerton, *The History and Status of the Office of Federal Contract Compliance Programs (OFCCP)*, CONG. RSCH. SERV. (Mar. 12, 2025), <https://www.congress.gov/crs-product/IF12941>.

30. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

31. See *id.* (mandating that contractors’ hiring, pay, and other employment data must be included in contracts).

32. Of the executive orders mandating affirmative action listed above, only EO 11246 was revoked by EO 14173. Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025).

33. 600 U.S. 181 (2023).

34. *Id.* at 230.

35. This possibility has been widely addressed. See, e.g., Francesca L. Odell, Jennifer Kennedy Park, & Charity E. Lee, *How Boards Should Be Thinking about the Supreme Court’s SFFA Affirmative Action Decision*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 14, 2024), <https://corpgov.law.harvard.edu/2024/02/14/how-boards-should-be-thinking-about-the-supreme-courts-sffa-affirmative-action-decision/> (“While these decisions, known collectively as *SFFA*, do not apply to a corporation’s employment decisions, language in the Court’s opinion has led many to speculate as to how the precedent could potentially be expanded to this context.”); Michael J. Yelnosky, *Racial Preferences in Employment After Students for Fair Admissions v. Harvard*, 112 GEO. L.J. ONLINE 74, 74 (2023) (“Employers will likely lose the fight for the right to use racial preferences to pursue operational goals.”).

36. It has long been accepted that training may serve to reduce exposure to liability, as expressed in *Hartman v. Pena*: “Programs like the CDW [cultural diversity workshop], which spawned the facts here, are not uncommon. Due to the rash of discrimination lawsuits over the last decade, many entrepreneurial opportunists have promised employers that they could reduce exposure to liability via ‘sensitivity’ training.” 914 F. Supp. 225, 227 (N.D. Ill. 1995).

of Title VII is avoidance of harm.³⁷ To reduce harm, it is common for employers to provide training to attempt to prevent sexual and other forms of workplace harassment.³⁸ Training has been found effective in preventing and addressing harassment.³⁹ But even if training is ineffective (as discussed below), in accordance with Title VII's primary goal of avoidance of harm, courts have found that trainings on implicit bias are not necessarily a discriminatory practice under Title VII.⁴⁰ Courts have also approved anti-discrimination and unconscious bias trainings as remedial injunctive measures and in consent decrees.⁴¹

This Part explores the pervasiveness of anti-bias training in the workplace and how employers use training to meet business objectives. This Part then surveys the business of training itself, and the methods and techniques trainers utilize during workplace trainings. Finally, this Part examines the efficacy of anti-bias training, asking whether trainings meet Title VII's harm reduction goals.

A. The Business Case for Anti-Bias Training and Workplace Diversity

The business case for anti-bias training includes two objectives.⁴² One objective is to avoid legal liability.⁴³ For example, training on sexual harassment is designed to educate employees on what constitutes illegal workplace harassment. Recommended training would include descriptions of sexually harassing behaviors and information on resources for reporting.⁴⁴ Employers expect that providing training will reduce the

37. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (“[T]he primary objective [of Title VII] was a prophylactic one: ‘It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.’”) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)).

38. Megan Cole, *71 Percent of Organizations Offer Sexual Harassment Prevention Training*, ASS'N FOR TALENT DEV. (Nov. 12, 2017), <https://www.td.org/insights/71-percent-of-organizations-offer-sexual-harassment-prevention-training>.

39. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 46 (2016).

40. See, e.g., *De Piero v. Pa. State Univ.*, 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024) (“To be clear, discussing in an educational environment the influence of racism on our society does not necessarily violate federal law.”); *Young v. Colo. Dep’t of Corr.*, No. 22-cv-00145, 2023 WL 1437894, at *7–8 (D. Colo. Feb. 1, 2023), *aff’d*, 94 F.4th 1242 (10th Cir. 2024) (“Mr. Young posits in the Amended Complaint that the CDOC’s training ‘created a racially hostile environment for Mr. Young’ But this conclusory allegation is unaccompanied by sufficient supporting factual allegations.”).

41. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Neither Party at 16–18, *Vavra v. Honeywell Int’l, Inc.*, 106 F.4th 702 (7th Cir. 2024) (No. 23-2823) (explaining that multiple courts have approved trainings as remedial injunctive measures or in consent decrees).

42. See Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1473 (2017) (describing the connection between the legal and business cases for diversity and providing experimental evidence that “inclusion efforts grounded in antidiscrimination law, or the legal case, are the most likely to curb widely held biases and promote equitable behavior”).

43. See cases cited *supra* note 18.

44. FELDBLUM & LIPNIC, *supra* note 39, at 50–54; see also *Promising Practices for Preventing Harassment*, EQUAL EMP. OPPORTUNITY COMM’N (Nov. 21, 2017), <https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment> (providing recommendations for leaders on comprehensive and effective harassment policy, effective and accessible harassment complaint systems, and effective harassment training).

prevalence of workplace sexual harassment and provide employers with a defense against liability.⁴⁵

A second objective is to provide training that will enhance organizational operations by increasing the diversity of the workforce.⁴⁶ There are well-documented adverse consequences associated with workers holding biases.⁴⁷ The business case for diversity is that firms that have a diverse workforce are more profitable.⁴⁸

These objectives for training are not mutually exclusive. For example, in addition to the risk of legal liability, it is widely documented that workplace sexual harassment is costly to businesses.⁴⁹ There is extensive evidence that workers who are sexually harassed have lower job satisfaction, higher absenteeism,⁵⁰ and are more likely to quit their jobs, all of which is costly to firms.⁵¹ Empirical evidence consistently shows that the majority of harassers are men and the majority of targets are women, and that sexual harassment is more frequent in male-dominated hierarchical structures.⁵² Unconscious bias that stereotypes women into traditional

45. See *Promising Practices for Preventing Harassment*, *supra* note 44.

46. See, e.g., Francesca Gino & Katherine Coffman, *Unconscious Bias Training That Works*, HARV. BUS. REV. (October 2021), <https://hbr.org/2021/09/unconscious-bias-training-that-works> (“[L]eaders are striving to make their companies more diverse, equitable, and inclusive. Unconscious bias training has played a major role in their efforts.”).

47. See, e.g., Devah Pager, *Are Firms That Discriminate More Likely to Go Out of Business?*, 3 SOCIO. SCI. 849, 852 (2016) (“The likelihood of going out of business for an employer who discriminated thus appears more than twice that of its nondiscriminating counterpart.”); CROSBY BURNS, CTR. FOR AM. PROGRESS, *THE COSTLY BUSINESS OF DISCRIMINATION 1* (2012) (“There’s a price to be paid for workplace discrimination—\$64 billion. That amount represents the annual estimated cost of losing and replacing more than 2 million American workers who leave their jobs each year due to unfairness and discrimination.”).

48. See Jamillah Bowman Williams, *Beyond the Business Case: Moving from Transactional to Transformational Inclusion*, 46 SEATTLE U.L. REV. 299, 301 (2023).

49. FELDBLUM & LIPNIC, *supra* note 39, at 17–20.

50. There is a vast literature documenting the costs to targets of sexual harassment. See, e.g., Chelsea R. Willness, Piers Steel, & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERS. PSYCH. 127, 127 (2007) (finding that workplace sexual harassment is “associated with negative outcomes such as decreased job satisfaction, lower organizational commitment, withdrawing from work, ill physical and mental health, and even symptoms of post-traumatic stress disorder”); Heather McLaughlin, Christopher Uggen, & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC’Y 333, 333 (2017) (“We find that sexual harassment increases financial stress, largely by precipitating job change, and can significantly alter women’s career attainment.”); Olle Folke & Johanna Rickne, *Sexual Harassment and Gender Inequality in the Labor Market*, 137 Q. J. ECON. 2163, 2208 (2022) (estimating that 10% of the gender wage gap can be attributed to sexual harassment).

51. For example, a 2019 study for the Australian workforce estimated the economic costs of sexual harassment to be \$3.5 billion annually. DELOITTE ACCESS ECON., *THE ECONOMIC COSTS OF SEXUAL HARASSMENT IN THE WORKPLACE 5* (2019).

52. See U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN FEDERAL WORKPLACES: UNDERSTANDING AND ADDRESSING THE PROBLEM* iii (2022), https://www.mspb.gov/studies/studies/Sexual_Harassment_in_Federal_Workplaces_Understanding_and_Addressing_the_Problem_1987037.pdf (finding that in the federal workforce, “women were more than twice as likely as men to experience sexual harassment, with a rate of 21% for women compared to 9% for men”); Afroditi Pina, Theresa A. Gannon, & Benjamin Saunders, *An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues*, 14 AGGRESSION & VIOLENT BEHAV. 126, 128 (2009) (“Although it is not always the case, sexual harassment is an act more frequently perpetrated by men against women.”); Folke & Rickne, *supra* note 50, at 2165 (“Like most earlier research, we find that women’s harassment rate grows with the share of men in the workplace.”).

gender roles is one barrier to a more gender-diverse workforce and allows sexual harassment to persist in some work environments.⁵³

An email sent by Honeywell International to its employees illustrates both the business case and the social justice case for unconscious bias training. Honeywell International required employees to complete an online Unconscious Bias Awareness Training.⁵⁴ The email containing a link to the training explained that a reason for the training was to create an “inclusive environment,” and also provided the business case for this training by emphasizing that eliminating unconscious bias offered stronger business results.⁵⁵ Specifically, the email stated:

While it’s human nature to have biases, we must strive to overcome them to create an environment that values everyone’s perspectives—a workplace based on trust, respect, and open communication. This training aims to equip you with the insights and tools needed to help spot and challenge the ways biases prevent us from creating an inclusive environment. When we work to eliminate our implicit biases, we not only treat each other better, but we become a better company. Combating unconscious bias allows us to build a culture that supports better customer service, stronger business results, and a more engaged workforce.⁵⁶

The Honeywell email articulates that the reason the firm requires unconscious bias training is to improve organizational performance. Other employers are likely to have the same rationale.⁵⁷ Even someone opposed to training would be challenged to argue against firms voluntarily adopting a workplace policy that they expect will improve performance. But as the next Part explores, despite the prevalence of workplace training, there is mixed evidence on whether organizational performance is improved by unconscious bias training.

53. Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights into Gender and Context*, 38 LAW & HUM. BEHAV. 58, 68 (2014) (“[S]tereotypes of women (e.g., as submissive, weak, best suited for domestic roles) are inconsistent with that of a competent worker . . . women face increased denigration and rejection, that is, gender harassment.”); Folke & Rickne, *supra* note 50, at 2180 (“Strongly male-stereotyped occupations clearly have the highest harassment rates for women: motor vehicle drivers (40%) and engineers and architects (35%).”).

54. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Neither Party, *supra* note 41, at 3. Honeywell’s mandatory training followed the grand jury decision to not indict two police officers who had shot and killed Breonna Taylor in Louisville, Kentucky in March 2020, and this case has been described as “one of the main drivers of wide-scale demonstrations that erupted that year over policing and racial injustice in the United States.” Richard A. Oppel Jr., Derrick Bryson Taylor, & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Aug. 23, 2024), <https://www.nytimes.com/article/breonna-taylor-police.html>.

55. *Vavra v. Honeywell Int’l Inc.*, 688 F. Supp. 3d 758, 762 (N.D. Ill. 2023).

56. *Id.*

57. See, e.g., Rohini Anand & Mary-Frances Winters, *A Retrospective View of Corporate Diversity Training From 1964 to the Present*, 7 ACAD. OF MGMT. LEARNING & EDUC. 356, 362 (2008) (“While some organizations continue to view diversity training as tangential to core business issues, many of the programs now considered as best practice by the industry are fueled by the desire to achieve business success, profitability, and growth.”).

B. The Professional Training Industry

DEI training is a big business.⁵⁸ As noted, organizations have provided diversity training under various names since the 1960s.⁵⁹ This Section discusses two factors relevant to allegations that DEI training constitutes illegal harassment under Title VII.

One factor is the introduction of the Implicit Association Test (IAT) in 1994.⁶⁰ Designed by a team of Harvard psychologists, subjects taking this test were directed to associate negative or positive words with an individual with specific characteristics.⁶¹ The test, which is freely available online,⁶² has been taken millions of times, and routinely reports that subjects associate positive words more quickly with those from a favored demographic group and likewise associate negative words more quickly with those from a disfavored group.⁶³ In combination with substantial evidence of implicit bias, this test added evidence in support of the possibility that businesses were missing profitable opportunities because employers and employees were unreasonably biased against some groups.⁶⁴ Workplace anti-bias training emerged with training professionals and academic research claiming benefits to workplace diversity.⁶⁵ It is worth noting that race is not the sole focus of diversity training. Instead, trainings would typically focus broadly on overcoming stereotype biases, such as assuming that a female medical professional is a nurse and a

58. Jesse Singal reports that the U.S. market for DEI training reached an estimated \$3.4 billion in 2020. Jesse Singal, *What if Diversity Training Is Doing More Harm Than Good?*, N.Y. TIMES (Jan. 17, 2023), <https://www.nytimes.com/2023/01/17/opinion/dei-trainings-effective.html>. Joanne Lipman reports a larger figure of almost \$8 billion a year. Joanne Lipman, *How Diversity Training Infuriates Men and Fails Women*, TIME (Jan. 25, 2018, 6:27 AM), <https://time.com/5118035/diversity-training-infuriates-men-fails-women>. There is substantial media coverage of the business of workplace anti-bias training. See, e.g., Nora Zelevansky, *The Big Business of Unconscious Bias*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/style/diversity-consultants.html>.

59. See Kratz, *supra* note 3.

60. See generally Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 7, 20 (1995). Project Implicit was founded in 1998 as a “non-profit organization and international collaborative of researchers who are interested in implicit social cognition.” *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> (last visited July 7, 2025).

61. PROJECT IMPLICIT, *supra* note 60.

62. *Take a Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/takeatest.html> (last visited July 5, 2025).

63. Kate A. Ratliff & Colin Tucker Smith, *The Implicit Association Test*, 153 DAEDALUS 51, 54–55 (2024).

64. See, e.g., Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LAB. ECON. 523, 524 (2010) (“[I]t is found that employers’ job interview callback rates for applicants with Arab-Muslim sounding male names are negatively correlated in a statistically significant way with their implicit attitudes”); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553, 561 (2005) (“[I]mplicit racism interacted with a climate for racial bias to predict discrimination; when individuals were given a business justification for racial discrimination their implicit racist attitudes were positively related to their discriminatory behavior.”).

65. See Singal, *supra* note 58.

male medical professional is a doctor, or assuming that older people are not technologically savvy.⁶⁶

Despite its wide usage and academic pedigree, the reliability of the IAT as a predictor of individual bias has been challenged.⁶⁷ Of specific relevance to DEI training, the plaintiff in *Vavra v. Honeywell International, Inc.*⁶⁸ claimed that because he received inconsistent results when taking the online IAT, DEI trainings were “unreliable” and “incapable of validation.”⁶⁹ Vavra’s experience with the IAT may be contaminated by his own biases and in any case does not offer credible evidence against the value of DEI trainings.

A second and more impactful factor that raised the visibility of DEI training is the murder of George Floyd on May 25, 2020. The murder of George Floyd while in police custody⁷⁰ brought massive attention to the history of racial injustice in the United States and launched the Black Lives Matter movement, which has been described as possibly the largest movement in United States history.⁷¹ Organizations publicly announced DEI initiatives and training to signal their commitment to social justice. A number of prominent firms launched diversity goals and initiatives.⁷² To meet these diversity goals, firms hired professional experts in diversity training.

It is worth emphasizing that firms that adopt DEI policies or trainings do so voluntarily. In a market economy such as the United States, we expect that private-sector firms that voluntarily adopt policies and trainings do so in pursuit of their business interests.⁷³

Furthermore, it is necessary to clarify the difference between firms’ public statements regarding their interest in promoting DEI within their

66. A search for videos on “unconscious bias training” turns up a number of videos that are not focused primarily or exclusively on race.

67. See, e.g., Beth Azar, *IAT: Fad or Fabulous?*, AM. PSYCH. ASS’N (July/Aug. 2008), <https://www.apa.org/monitor/2008/07-08/psychometric> (“The IAT has also attracted its share of critics. Some debate the test’s psychometric validity and reliability. Others worry that the publicity is pushing it into the public sphere—particularly into the hands of legal scholars who argue it can be used to reshape antidiscrimination laws—before it’s been properly vetted.”).

68. 106 F.4th 702 (7th Cir. 2024).

69. Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Neither Party, *supra* note 41, at 6.

70. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

71. Larry Buchanan, Quoc Trung Bui, & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

72. For an example of the initiatives by several large firms, an article by Joni Hersch provides discussion on the topic. Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 TUL. L. REV. 1, 27 (2021) (describing efforts to recruit diverse candidates).

73. The calculation underlying businesses’ decisions about political engagement, and in particular DEI policies, is usefully summarized by German Lopez, *Corporate Politics*, N.Y. TIMES (June 30, 2025), <https://www.nytimes.com/2025/06/30/briefing/corporate-politics-pride-blm.html> (“Businesses look at activism almost in the same way they set a price, said Nooshin Warren, a marketing expert at the University of Arizona: They want to find an equilibrium that will gain them the most profits and lose them the least.”).

workplace and workplace DEI training. Until revoked by President Trump, federal contractors (which include most large firms and universities) had an obligation under EO 11246 to pursue affirmative action goals in hiring.⁷⁴ Promoting DEI in the workplace could generally be understood as firms signaling their compliance with their obligations as a federal contractor.

It is also important to recognize that EO 14173 does not directly ban DEI training itself. However, since the order has gone into effect, any initiative associated with DEI has faced particular ire. Justice Clarence Thomas wrote in his concurring opinion in *Ames v. Ohio Department of Youth Services*,⁷⁵ “But a number of this Nation’s largest and most prestigious employers have overtly discriminated against those they deem members of so-called majority groups. American employers have long been ‘obsessed’ with ‘diversity, equity, and inclusion’ initiatives and affirmative action plans.”⁷⁶

Organizations and the training industry have responded to the changed legal environment in ways that continue to indicate a commitment to a diverse workforce but without invoking race or gender.⁷⁷ Organizations are rebranding their diversity efforts by replacing DEI with terms such as “culture” and “belonging.”⁷⁸ The training industry has responded by offering fewer trainings on race and gender and increasing their trainings on topics such as neurodivergence, mental health, and generational differences.⁷⁹ Despite suppression of explicit DEI training, organizations continue to offer or require unconscious bias training.

C. Evidence on Efficacy of Anti-Bias Training

Despite the large investments that organizations have made in implicit bias training, the limited evidence of efficacy has been widely noted.⁸⁰ Efficacy of training is measured in various ways. One method to identify if training can affect implicit bias, based on an experimental design, examines responses to the IAT (or a similar test) before and after subjects are exposed to a manipulation designed to address implicit bias.

74. See Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965) (describing equal employment opportunity); Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025) (revoking Executive Order 11246).

75. 605 U.S. 303 (2025).

76. *Id.* at 318 n.3 (Thomas, J., concurring).

77. Jennifer Elias & Annie Palmer, *In Trump Era, Companies Are Rebranding DEI Efforts, Not Giving Up*, CNBC (Mar. 30, 2025, at 8:00 ET), <https://www.cnbc.com/2025/03/30/in-trump-era-companies-are-rebranding-dei-efforts-not-giving-up.html>.

78. *Id.*

79. Niko Gallogly, *The D.E.I. Industry, Scorned by the White House, Turns to ‘Safer’ Topics*, N.Y. TIMES (July 16, 2025), <https://www.nytimes.com/2025/07/15/business/trump-dei-race-gender-mental-health.html>.

80. The lack of evidence showing that DEI training has measurable effects on bias is widely recognized in the business media. See, e.g., Mahzarin Banaji & Frank Dobbin, *Why DEI Training Doesn’t Work—and How to Fix It*, WALL ST. J. (Sept. 17, 2023, at 10:00 ET), <https://www.wsj.com/business/c-suite/dei-training-hr-business-acd23e8b> (“[T]he typical DEI training doesn’t educate people about bias and may even do harm.”).

A large meta-analysis shows weak effects of such training.⁸¹ Other studies have produced similar negative results.⁸²

Another outcome expected to follow from diversity training and goals is an increase in the diversity of the workforce.⁸³ A study that examines the impact of universities employing a chief diversity officer shows at most a small effect on the diversity of faculty hiring.⁸⁴ The limited impact of having a high-ranking university administrator dedicated to increasing faculty diversity casts doubt about whether diversity trainings have an important effect on hiring as suggested by the Tenth Circuit in *Young*.⁸⁵ In other words, if workplace DEI initiatives, like anti-bias trainings, are ineffective in reaching diversity goals, can they really “encourage racial preferences in hiring, firing, and promotion decisions”?⁸⁶

III. CAN DEI TRAININGS BE UNLAWFUL HARASSMENT?

As Part II discusses, anti-bias trainings can serve as a defense against liability and to further business objectives. A reduction in incidents of workplace harassment as an outcome of training would support both objectives—less harassment would lead to less liability and a more productive workforce.⁸⁷

Although no courts to date have found trainings to be unlawful discrimination, the Tenth Circuit in *Young* suggested that such trainings complained of by *Young* were “well on the way to arriving at objectively and subjectively harassing messaging.”⁸⁸ As discussed below, the legal standard for harassment requires that the harassment be severe or pervasive, which the Tenth Circuit concluded was not met in the *Young* case. But that does not close off the possibility that this standard will be met in other cases. This Part discusses the elements that would contribute to an analysis of whether DEI trainings could be unlawful harassment.

81. Patrick S. Forscher, Jordan R. Axt, Michelle Herman, Brian A. Nosek, Calvin K. Lai, Charles R. Ebersole, Patricia G. Devine, & Brian A. Nosek, *A Meta-Analysis of Procedures to Change Implicit Measures*, 117 J. PERS. & SOC. PSYCH.: ATTITUDES & SOC. COGNITION 522, 522 (2019). (reporting on a meta-analysis from 492 studies with 87,418 participants and concluding that “changes in implicit measures are possible, but those changes do not necessarily translate into changes in explicit measures or behavior”).

82. See, e.g., Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?*, 10 ANTHROPOLOGY NOW 48, 49 (2018) (“In their review of 39 similar studies, Bezrukova, Joshi and Jehn identified only five that examined long-term effects on bias, two showing positive effects, two negative, and one no effect.”); see also DOYIN ATEWOLOGUN, TINU CORNISH, & FATIMA TRESH, EQUAL. & HUM. RTS. COMM’N, UNCONSCIOUS BIAS TRAINING: AN ASSESSMENT OF THE EVIDENCE FOR EFFECTIVENESS 6, <https://www.equalityhumanrights.com/sites/default/files/research-report-113-unconscious-bias-training-an-assessment-of-the-evidence-for-effectiveness-pdf.pdf> (“The evidence for UBT’s ability effectively to change behaviour is limited.”).

83. See Gino & Katherine Coffman, *supra* note 46.

84. Steven W. Bradley, James R. Garven, Wilson W. Law, & James E. West, *The Impact of Chief Diversity Officers on Diverse Faculty Hiring*, 89 S. ECON. J. 4 (2022).

85. 94 F.4th 1242, 1251 (10th Cir. 2024).

86. *Id.*

87. See *supra* text accompanying notes 46–48.

88. *Young*, 94 F.4th at 1251.

A. “Severe or Pervasive” Standard

Ultimately, whether DEI trainings constitute unlawful harassment is a question of degree. The standard for unlawful harassment requires that the harassment be “so severe or pervasive that it alter[s] a term, condition, or privilege of [the plaintiff]’s employment and create[s] an abusive environment.”⁸⁹ Moreover, the Tenth Circuit has explained that to meet this standard, the harassment must be both objectively and subjectively offensive.⁹⁰ In making this determination, the court considers several factors: “[1] [T]he frequency and severity of the discriminatory conduct; [2] whether the conduct is physically threatening or humiliating or merely an offensive utterance; and [3] whether the conduct unreasonably interferes with an employee’s work performance.”⁹¹

B. Protected Characteristics

A primary concern raised in opposition to DEI training is that it unlawfully invokes race in a way that discriminates against members of the majority group, particularly against White people.⁹² Discrimination against those in the majority group is referred to as “reverse discrimination.”⁹³ Claims of reverse discrimination by majority-group plaintiffs pose similar issues for workplace discrimination under Title VII as they do for minority-groups plaintiffs, in particular, whether majority-group plaintiffs are members of a protected class and whether the harassing conduct is due to their membership in a protected class.

Circuits have differed in whether majority-group plaintiffs were required to meet a higher standard of proof based on a “background circumstances” test for discrimination claims.⁹⁴ The rationale for a higher evidentiary standard for majority-group plaintiffs is the expectation that employers rarely discriminate against the majority.⁹⁵ The Tenth Circuit has assumed that the heightened evidentiary standard applies to White individuals.⁹⁶ The Supreme Court resolved the circuit split in *Ames*, which held that the same standard applies to all Title VII employment

89. *Id.* at 1249.

90. *Id.* at 1251.

91. *Id.* (citing *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1365 (10th Cir. 1997)).

92. See, e.g., Rafi Schwartz, *Inside Trump’s Plan to Fight ‘Anti-White Racism’ in the White House*, THE WEEK (Apr. 8, 2024), <https://theweek.com/politics/trump-second-term-anti-white-racism-civil-rights-stephen-miller>.

93. 1 ENCYCLOPEDIA OF RACE, ETHNICITY, AND SOCIETY 1118 (Richard T. Schaefer ed., 2008) (“[T]he term *reverse racism* (or *reverse discrimination*) has been coined to describe situations where typically advantaged people are relegated to inferior positions or denied social opportunities to benefit racial and ethnic minorities . . .”).

94. *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 307, 308 n.1 (2025).

95. *Id.* at 303 (quoting *Ames v. Ohio Dep’t of Youth Servs.*, 87 F.4th 822, 825 (6th Cir. 2023)) (“Like the District Court, the Sixth Circuit held that *Ames* had failed to meet her prima facie burden because she had not shown ‘background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.’”).

96. *Id.* at 317–18 (Thomas, J., concurring) (quoting *Taken v. Oklahoma Corp. Comm’n*, 125 F.3d 1366, 1369 (10th Cir. 1997)) (“The Tenth Circuit, for example, assumed that the rule applies to ‘white plaintiff[s]’ on the ground that white individuals are ‘members of a historically favored group.’”).

discrimination cases regardless of whether the plaintiff is a member of the majority group or not.⁹⁷

Ames, therefore, is relevant to whether DEI training constitutes unlawful harassment. As a thought experiment, consider whether the content or a specific component of training would be considered unlawful harassment if the positions of the majority and minority parties were reversed. In this thought experiment, the “role-reversal” exercise in *Hartman v. Pena*⁹⁸ (discussed in Part III) would likely reach the legal standard for sexual harassment if men were groping women’s genitals instead of the other way around.⁹⁹

C. EEOC Guidance

A primary agenda of the Trump Administration is eliminating programs that it interprets as DEI-related.¹⁰⁰ In terms of the relationship between DEI initiatives and employment discrimination, a webpage titled “What You Should Know About DEI-Related Discrimination at Work,” was added to the EEOC website in 2025.¹⁰¹ The webpage includes, under a question-and-answer page, the following text:

Can an employer’s DEI training create a hostile work environment?

Title VII prohibits workplace harassment, which may occur when an employee is subjected to unwelcome remarks or conduct based on race, sex, or other protected characteristics. Harassment is illegal when it results in an adverse change to a term, condition or privilege of employment, or it is so frequent or severe that a reasonable person would consider it intimidating, hostile, or abusive. Depending on the facts, an employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context. In cases alleging that diversity trainings created hostile work environments, courts have ruled in favor of plaintiffs who present evidence of how the training was discriminatory (for example, in the training’s design, content, or execution) or, at the motion-to-dismiss stage, who make plausible allegations that explain how the training was discriminatory.¹⁰²

97. *Id.* at 313.

98. 914 F. Supp. 225, 227 (N.D. Ill. 1995).

99. See *id.* at 227–29 (describing the role reversal exercise and the standard the court used to evaluate).

100. See Schwartz, *supra* note 92 (describing the change in the Justice Department’s interpretation of Civil Rights-era laws).

101. *What You Should Know About DEI-Related Discrimination at Work*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work> (last visited Oct. 23, 2025).

102. *Id.* Additionally, footnote 42 refers to and provides quotes from the Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Neither Party. See *id.* at n.42; Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Neither Party, *supra* note 41, at 21.

In support of the statement that courts have “ruled in favor of plaintiffs who present evidence of how the training was discriminatory,” the website cites three cases in a footnote: *Vavra*, *Hartman*, and *De Piero v. Pennsylvania State University*.¹⁰³ As the following review of these cases (and of two additional cases) shows, the above statement is highly misleading. Courts have *not* found that DEI training reaches the level of unlawful discrimination.

D. Courts Say DEI Training Is Not Harassment—So Far

This Section describes five cases in which plaintiffs have alleged that DEI training is discrimination under Title VII. The first three cases discussed below are the cases listed in footnote 42 on the EEOC Q&A webpage. Presumably, those are the cases that the EEOC considers to provide the strongest support to the assertion that DEI training itself can be illegal discrimination. Although there are differences among the cases in both the content of DEI training alleged to be discriminatory and in the adverse employment outcome that is alleged to be a consequence of the training, in none of these cases has a court found that DEI training reached the level of unlawful workplace harassment under Title VII.

1. *Vavra v. Honeywell International, Inc.*

In response to the 2020 decision of a Kentucky grand jury to not indict two police officers who shot and killed Breonna Taylor, John Waldron, the President and CEO of Honeywell International, Inc.’s Safety and Productivity Solutions, introduced and required completion of an approximately twenty- to thirty-minute-long online Unconscious Bias Awareness Training.¹⁰⁴ Participants were not required to attest that they agreed with the contents.¹⁰⁵ Consistent with company policy for other mandatory trainings, the consequence of noncompletion was termination.¹⁰⁶

The plaintiff, Charles Vavra, is a White man.¹⁰⁷ He declined to take the training and as a result did not know the contents.¹⁰⁸ However, he assumed that the training was discriminatory and inherently racist.¹⁰⁹ Among his numerous objections to the training, Vavra maintained that Waldron was “making his non-white colleagues all victims and turning his white colleagues . . . into villains,”¹¹⁰ that the training was “ridiculous” and “doesn’t work,” and that “so-called ‘systemic racism’ is just another manufactured crisis to keep people at odds with each other and ‘unconscious bias’ training is the decades old joke of a solution to a

103. 711 F. Supp. 3d 410 (E.D. Pa. 2024).

104. *Vavra v. Honeywell Int’l Inc.*, 688 F. Supp. 3d 758, 761–62 (N.D. Ill. 2023).

105. *Id.* at 766.

106. *Id.* at 762.

107. *Id.* at 761.

108. *Id.* at 766.

109. *See id.* (describing how the plaintiff thought the training would make him feel guilty).

110. *Vavra v. Honeywell Int’l Inc.*, 688 F. Supp. 3d 758, 764 (N.D. Ill. 2023).

problem that doesn't even exist to anywhere near the extent they make it out to."¹¹¹

Although Vavra assumed—without taking the training—that it was inherently racist, his direct supervisor contradicted this assumption, telling him “that he [the supervisor] did not perceive it as racist, noting that it included a video of a situation in which a white male is subjected to unconscious bias.”¹¹²

After receiving numerous reminders to take the training and warnings that failure to do so would result in termination of employment, Vavra's employment was subsequently terminated.¹¹³ Vavra filed suit, claiming that his termination for refusing to take mandatory unconscious bias training and for complaining about the training as racially biased was unlawful retaliation under Title VII.¹¹⁴ The district court granted summary judgment to the employer, which was upheld on appeal.¹¹⁵

The EEOC website cites *Vavra* as support for the statement that “courts have ruled in favor of plaintiffs who present evidence of how the training was discriminatory (for example, in the training's design, content, or execution) or, at the motion-to-dismiss stage, who make plausible allegations that explain how the training was discriminatory.”¹¹⁶ However, neither the district court nor the appellate court ruled in favor of the plaintiff: The district court granted summary judgment for the employer, and the Seventh Circuit affirmed.¹¹⁷ Furthermore, and perhaps most important to whether Honeywell's DEI training was inherently discriminatory, the plaintiff did not present any evidence in support of this claim.¹¹⁸ The plaintiff did not take the training, did not know the contents (and declined to accept his supervisor's description of the contents as not racist), and did not present any evidence of how the training was discriminatory.¹¹⁹ His “evidence” consisted of his conclusory statements such as that the training was “ridiculous,” and an “old joke.”¹²⁰

2. *Hartman v. Pena*

Legal protection against workplace harassment began as courts recognized sexual harassment as a form of sex discrimination that is prohibited under Title VII.¹²¹ Plaintiff Douglas Hartman's employer, the Federal Aviation Authority (FAA), sponsored a three-day cultural diversity

111. *Id.* at 763–64.

112. *Vavra v. Honeywell Int'l Inc.*, 106 F.4th 702, 704–05 (7th Cir. 2024) [hereinafter *Vavra II*].

113. *Id.* at 705.

114. *Id.*

115. *Id.*

116. *What You Should Know About DEI-Related Discrimination at Work*, *supra* note 101 n.42.

117. *Vavra II*, 106 F.4th at 705–06.

118. *Id.*

119. *Id.*

120. *Vavra v. Honeywell Int'l Inc.*, 688 F. Supp. 3d 758, 764–65 (N.D. Ill. 2023).

121. *See supra* notes 14–17 and accompanying text.

workshop.¹²² The workshop began in June 1992 and included exercises that focused on sexual harassment.¹²³ One such exercise required employees to complete what was described as a “role-reversal” exercise as a component of sexual harassment training.¹²⁴ Simulating the “gauntlet” experiences of women at the Tailhook Convention,¹²⁵ male employees walked between two lines of female employees.¹²⁶ The defendant employer described the activity as one in which female participants made “comments,” and “may have touched the men on the arm or may have given the man a ‘little slap on the butt.’”¹²⁷ Hartman claimed that the activities directed at him went further than described by the defendant: “[W]omen touched his genitalia and other parts of his body, while the preceding male participants laughed and derided him.”¹²⁸

In denying summary judgment on the sexual harassment claim,¹²⁹ the court held that “a reasonable person might find such an environment hostile.”¹³⁰ Notably, the described activities included touching and humiliating behavior, which the Supreme Court has identified as legally significant indicators of workplace harassment.¹³¹ But the court did not go so far as to say that the training itself reached the level of unlawful sexual harassment under Title VII. Instead, it merely denied summary judgment, holding that there was an issue of “as to whether and at what point the simulation [of harassment] became the act [of harassment].”¹³²

3. *De Piero v. Pennsylvania State University*

In *De Piero*, a professor alleged that the university’s workplace training that focused on race, and in particular ascribed negative traits to White people, subjected him to a racially hostile work environment, with the atmosphere becoming more heated in a way that targeted White people after the murder of George Floyd.¹³³

In his lawsuit, De Piero described that over a span of a year and a half, he was subjected to “a series of university-sanctioned professional development meetings and comments from supervisors that addressed

122. Hartman v. Pena, 914 F. Supp. 225, 227 (N.D. Ill. 1995).

123. *Id.*

124. *Id.*

125. By 1991, the “gauntlet” had become a tradition at the Tailhook Conference. Women were forced or urged to walk through a corridor at the conference between rows of male military officers who grabbed and groped the women while chanting “gauntlet, gauntlet.” This tradition received extensive media coverage. See, e.g., *The Gauntlet*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/navy/tailhook/gauntlet.html> (last visited July 6, 2025).

126. Hartman, 914 F. Supp. at 227.

127. *Id.*

128. *Id.*

129. The plaintiff also claimed racial and religious discrimination, and retaliation. The court granted summary judgment for the defendant on these claims. *Id.* at 230–31.

130. *Id.* at 229.

131. See e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (holding that the court will consider factors including whether something was physically threatening or humiliating).

132. Hartman, 914 F. Supp. at 230.

133. De Piero v. Pa. State Univ., 711 F. Supp. 3d 410, 415–16 (E.D. Pa. 2024).

racial issues in sweeping, absolute terms.”¹³⁴ Some of his complaints alleged that the content of the racially focused diversity training included guidance to take race into account when grading.¹³⁵ He also cited the content of various emails and workshops. As one example, an email sent to all employees by the Director of Diversity, Equity, and Inclusion included text “calling on white people” to “feel terrible,” about their “own internalized white supremacy,” and to “hold other white people accountable.”¹³⁶ Another example is a training video that faculty were urged to watch called, “White Teachers Are a Problem.”¹³⁷

De Piero resigned from his position at Penn State but filed a lawsuit claiming employment discrimination under Title VII on the basis of both disparate treatment and a hostile work environment.¹³⁸ The adverse employment action was his resignation from his job. Although voluntary, he claimed that his resignation was a constructive discharge as his job had become intolerable by his interpretation that the diversity training directed him to incorporate consideration of race into grading and other aspects of his teaching.¹³⁹ However, the district court concluded that his circumstances did not support that he had suffered conditions so intolerable that he was forced to resign and dismissed this claim.¹⁴⁰

But the district court held that De Piero’s allegations regarding the race-based hostile work environment raised a plausible claim against the university and declined to dismiss this claim.¹⁴¹ However, after discovery, the court granted summary judgment for the university, finding that no reasonable jury could conclude that De Piero’s allegations of harassment were sufficiently severe.¹⁴²

Relevant to whether trainings can themselves be unlawful discrimination, the court made clear that such trainings did not necessarily violate federal law, stating, “To be clear, discussing in an educational environment the influence of racism on our society does not necessarily violate federal law.”¹⁴³ The court also noted that discussing and providing trainings on “implicit bias,” particularly “in the aftermath of very real in-

134. *Id.* at 416.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 415.

139. *De Piero v. Pa. State Univ.*, 711 F. Supp. 3d 410, 420 (E.D. Pa. 2024).

140. *Id.* at 421.

141. *Id.*

142. *De Piero v. Pa. State Univ.*, 769 F. Supp. 3d 329, 349 (E.D. Pa. 2025) (“No rational trier of fact could view occurrences such as receiving campus-wide e-mails about the murder of George Floyd, Juneteenth, and the hiring of police officers; being invited to review scholarly materials and engage in conversations about antiracist approaches to teaching and learning; and, discussing allegations of harassment levied by and against him as sufficiently ‘extreme’ to sustain his charge of ‘severe’ harassment.”).

143. *De Piero*, 711 F. Supp. at 424.

stances of racialized violence like the murder of George Floyd does not violate Title VII.”¹⁴⁴

4. *Diemert v. City of Seattle*

In *Diemert v. City of Seattle*,¹⁴⁵ the plaintiff alleged a hostile work environment caused by mandatory race and social justice training. The City of Seattle had a “Race and Social Justice Initiative” in effect since 2004, with a mission to “end institutional racism and race-based disparities in City government.”¹⁴⁶ Employees were required to complete two social justice-related activities per year, although there were no adverse employment consequences to non-participation.¹⁴⁷

In trainings that the plaintiff attended before opting out of future trainings, he claimed that the co-trainer made statements such as “racism is in white people’s DNA” and “white people are like the devil.”¹⁴⁸ Other training activities that Diemert found objectionable included playing “privilege bingo,” in which employees identified their different privileges such as height, religion, and gender.¹⁴⁹

Diemert also provided numerous comments made by coworkers that referred to race as evidence of a hostile work environment. As a connection to the DEI training, Diemert argued that the city’s race and social justice training initiatives “[a]id the foundation for all the racial harassment . . . [he] would face.”¹⁵⁰ Some of the comments that Diemert characterizes as racially discriminatory took place in the trainings. But the court found that making comments in the context of training may serve a valuable purpose:

Racially charged comments made in this setting, while still potentially harmful, are better framed as attempts to express perspectives or challenge ideas within the training’s scope. Such comments made in the presence of a skilled facilitator can be addressed constructively, turning the moment into a learning opportunity, not a personal attack. This is very different than comments made, for example, on a production room floor that serve no educational purpose.¹⁵¹

The *Diemert* decision predated the Supreme Court decision in *Ames* and reasoned that because “instances of discrimination against the *majority* are rare and unusual[,] . . . D.E.I. programs aimed at addressing racial inequalities against Black people and other minorities are not by their very nature discriminatory against whites.”¹⁵² But the court continued to

144. *Id.*

145. 776 F. Supp. 3d 922 (W.D. Wash. 2025).

146. *Id.* at 930.

147. *Id.* at 931.

148. *Id.*

149. *Id.*

150. *Id.* at 938.

151. *Diemert v. City of Seattle*, 776 F. Supp. 3d 922, 942–43 (W.D. Wash. 2025).

152. *Id.* at 930.

explain that even without allowing for differing standards for proving discrimination for majority or minority group members, as now prohibited under *Ames*, the discriminatory effect of the DEI training was not “so objectively severe or pervasive as to create a racially hostile-work environment against white people in general or him in particular.”¹⁵³

Further, the court strongly supported anti-discrimination programs, stating, “These training programs are needed because racial discrimination and inequality are present-day problems, not problems of the distant past.”¹⁵⁴

Because the court found that DEI and anti-discrimination training is not per se illegal, Diemert’s claim that the training comprised an illegal employment practice would be viable only if he demonstrated that the trainings “harassed him personally on account of his race.”¹⁵⁵ The court held that no reasonable jury would find that the trainings created an objectively hostile work environment or that he experienced racially motivated discrimination because of the trainings.¹⁵⁶ Accordingly, the court granted the defendant’s summary judgment motion.¹⁵⁷

5. *Young v. Colorado Department of Corrections*

In *Young*,¹⁵⁸ the plaintiff claimed that a one-time mandatory Equity, Diversity, and Inclusion (EDI) training subjected him to a racially hostile work environment.¹⁵⁹ As support for the racially harassing content of the training, he claimed that the “training materials were based upon a glossary of terms stating that all whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that ‘whiteness’ and ‘white supremacy’ affect all ‘people of color within a U.S. context.’”¹⁶⁰ He provided other examples from the training materials that included recommended videos and books that he considered racist against White people.¹⁶¹

Young resigned from his position, claiming that it was because of harassment due to the training.¹⁶² But he did not provide evidence of any specific adverse treatment he suffered because of the training.¹⁶³ The district court dismissed Young’s claims, and the Tenth Circuit upheld the dismissal on appeal, concluding that Young’s allegations did not meet

153. *Id.*

154. *Id.* at 940.

155. *Id.*

156. *Id.* at 941–42.

157. *Diemert v. City of Seattle*, 776 F. Supp. 3d 922, 951 (W.D. Wash. 2025).

158. 94 F.4th 1242 (10th Cir. 2024).

159. *Id.* at 1244.

160. *Id.* at 1246.

161. *Id.* at 1247.

162. *Id.* at 1248.

163. *Id.* at 1251.

the severe or pervasive threshold of a Title VII hostile work environment claim.¹⁶⁴

The decision in *Young* offers an interesting contrast to the *Diemert* court. In *Diemert*, the court lauded trainings as a valuable approach to address ongoing racial discrimination, including acknowledging that training may include racially charged comments.¹⁶⁵ By contrast, in *Young*, the court pointed out that Title VII and the Equal Protection Clause “prohibit[s] employers from allowing work conditions to be permeated with hostile racial or sexual animus. To the extent diversity programs generate such animus, they are equally subject to the prohibitions of Title VII and the Fourteenth Amendment.”¹⁶⁶

IV. THE FUTURE OF DEI TRAINING HARASSMENT CLAIMS

A. Disparate Impact or Disparate Treatment Liability

To date, no court has found that DEI training itself was a cause of workplace harassment that reached the legal threshold of severe or pervasive and caused an adverse change in the plaintiff’s “terms, conditions, or privileges of employment.” To be sure, the Supreme Court’s holding in *Muldrow v. City of St. Louis*¹⁶⁷ that lowered the bar for employment actions to be considered actionably adverse may potentially lower the threshold of severity for workplace harassment.¹⁶⁸ But this lower standard is more likely relevant in assessing whether workplace behaviors—such as coworkers’ or supervisors’ racially biased comments—reach the severe or pervasive level to comprise a violation of Title VII. It remains hard to identify how training causes harassment. Furthermore, as the court in *Diemert* points out, comments made during training sessions that are interpreted as racially biased might reveal the kinds of implicit biases that such sessions are intended to confront and correct.¹⁶⁹

If there is no evidence that the plaintiff experienced severe or pervasive harm as a *causal* consequence of DEI trainings, the claim that the training itself was the disparate treatment is unlikely to be successful. In a workplace imbued with racial hostility, a plaintiff could make a hostile work environment claim and provide evidence of specific racially motivated harassing behavior in support of the claim. Under *Ames*, the legal standard for this claim would not differ by whether the plaintiff was in the majority or the minority group.¹⁷⁰

164. *Young v. Colo. Dep’t of Corr.*, 94 F.4th 1242, 1254 (10th Cir. 2024).

165. *Diemert v. City of Seattle*, 776 F. Supp. 3d 922, 940 (W.D. Wash. 2025).

166. *Young*, 94 F.4th at 1244–45.

167. 601 U.S. 346 (2024).

168. *Id.* at 354–57 (holding that Title VII requires plaintiffs only to show “some injury” and that actionable injuries are not limited to “economic or tangible” changes in the terms or conditions of employment).

169. *Diemert*, 776 F. Supp. 3d at 940–41.

170. *Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 310 (2025) (“Our case law thus makes clear that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group.”).

But to the extent that trainings contained content that ascribed negative traits to White people generally, and not targeted at specific individuals, could a disparate impact claim succeed? This too is a challenging claim to support. For liability under Title VII, disparate impact cases generally rely on statistical evidence that shows that a facially neutral policy has a disparate impact on a protected class, and the policy is not related to job performance.¹⁷¹

Regardless of content, DEI trainings offered to—or required of—all employees would be facially neutral. Training required as a corrective measure for workplace misconduct would also be facially neutral. By contrast, training required only of those of a specific race, such as White employees, would not be facially neutral. Employers require trainings with the objective of improving working conditions and therefore productivity, or to avoid liability, so job-relatedness can be assumed. Evidence of limited efficacy of trainings may call into question how job-related the trainings are, but even if deemed not job-related, what measurable outcome would identify whether the trainings had a disparate impact?

Furthermore, the future of disparate impact employment discrimination remains in doubt. President Trump issued an executive order that directed the DOJ and EEOC to drop investigations and lawsuits of claims based on the disparate impact theory “to the maximum degree possible.”¹⁷² Trump’s order states that disparate impact theory actually promotes discrimination, saying, “Disparate-impact liability all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability.”¹⁷³ But by reducing the option for the DOJ and EEOC to pursue disparate impact claims, the Trump Administration has limited the legal avenue for plaintiffs to assert that DEI training is itself discriminatory.

B. Adverse Job Action Threshold

At issue is whether DEI trainings are discriminatory. But as every court that has contemplated this issue has held, DEI training is not inherently discriminatory. If an individual plaintiff faced discrimination on the basis of race, then what work does the presence of DEI training do? If, say, a coworker refuses to work with, or provide work product to, a White male because he is a White male, and in doing so prevents the White male from doing his job, does it really matter whether the workplace had required DEI training? Plaintiffs so far have failed to establish a direct line from workplace training to discriminatory treatment.

171. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (describing why the Court barred the institution of a literacy test but writing that Congress did not intend to guarantee a job to every person); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (“[O]ur cases make it unmistakably clear that ‘[s]tatistical analyses have served and will continue to serve an important role’ in cases in which the existence of discrimination is a disputed issue.”).

172. Exec. Order No. 14281, 90 Fed. Reg. 17537, 17537–38 (Apr. 28, 2025).

173. *Id.* at 17537.

To show the specific training is discriminatory, the new standard promulgated by the EEOC is that plaintiffs must present evidence that the specific training was discriminatory in content, application, or context.¹⁷⁴ Notably, this requirement is a departure from the long-standing *McDonnell Douglas*¹⁷⁵ three-step test for whether an individual was a victim of discrimination. The *McDonnell Douglas* test requires evidence of an adverse employment action.¹⁷⁶ That is, an adverse outcome would need to result from discriminatory treatment. Training that creates a hostile work environment may be evidence of an adverse employment action by changing the terms, conditions, and privileges of employment. But the focus on “content, application, or context,” regardless of whether it caused an adverse employment action, is a departure from considering whether the *outcome* is discriminatory.¹⁷⁷ It shifts the legal burden to demonstrating that an *input* into the employment relationship is discriminatory.

C. Lessons from *Young v. Colorado Department of Corrections*

In *Young*, the Tenth Circuit left open the possibility that DEI training that uses race-based rhetoric could meet the standard for harassment under Title VII, saying,

If not already at the destination, this type of race-based rhetoric is well on the way to arriving at objectively and subjectively harassing messaging. Taken seriously by managers and co-workers, the messaging could promote racial discrimination and stereotypes within the workplace. It could encourage racial preferences in hiring, firing, and promotion decisions. Moreover, employees who object to these types of messages risk being individually targeted for discriminatory treatment—especially if employers explicitly or implicitly reward discriminatory outcomes.¹⁷⁸

We now consider what DEI training could meet the standard for harassment under Title VII. Note that this statement refers to harassing *messaging* and also speculates that this messaging could lead to discriminatory “racial preferences in hiring, firing, and promotion decisions.”¹⁷⁹ Exam-

174. *What You Should Know About DEI-Related Discrimination at Work*, *supra* note 101.

175. 411 U.S. 792 (1973).

176. *Lucas v. Off. of Colo. State Pub. Def.*, 705 F. App’x 700, 703 (10th Cir. 2017) (“Under [the *McDonnell Douglas*] framework, a plaintiff must first establish a prima facie case of discrimination by demonstrating that he is a member of a protected class and suffered an adverse employment action under circumstances giving rise to an inference of discrimination.”).

177. *Compare What You Should Know About DEI-Related Discrimination at Work*, *supra* note 101 (“[A]n employee may be able to plausibly allege or prove that a diversity or other DEI-related training created a hostile work environment by pleading or showing that the training was discriminatory in content, application, or context.”), with *Lucas*, 705 F. App’x at 703 (requiring plaintiffs to plead that an “adverse employment action” occurred).

178. *Young v. Colo. Dep’t of Corr.*, 94 F.4th 1242, 1251 (10th Cir. 2024). It is worth noting that in his concurrence, Judge Matheson stated that “I do not think the court otherwise needs to comment on the EDI training or the potential for future legal challenges to it or other EDI programs” *Id.* at 1257 (Matheson, J., concurring).

179. *Id.* at 1251 (majority opinion).

ples of behaviors that may qualify as harassment, as stated by the EEOC and by courts, include intimidation, physical contact, racially based insults, and racist statements that adversely affect the workplace.¹⁸⁰ By contrast, the Tenth Circuit's reference to "messaging" does not indicate any specific component of the DEI training that tips the training from commonly provided unconscious bias training into harassing messaging that would lead to discriminatory racial employment practices.

In line with court interpretations in other harassment contexts, "objectively harassing messaging" would indicate that the messaging would be considered harassing to the reasonable person.¹⁸¹ "Subjectively harassing messaging" refers to the effect on the victim of this harassment. As courts have ruled, it is not necessary that the victim suffers verifiable psychological harm, but it also requires that subjective harm be reasonably proportionate to the exposure and more than a mere reflection of the victim's sensitivities.¹⁸²

In contrast to typical workplace harassment cases that involve individual behavior, the issue here is whether a workplace training required of all employees can itself constitute workplace harassment, especially if only one employee claims that they were racially harassed by the training itself. That is, if the victim complained of workplace harassment on the basis of race and provided specific examples of harassing behavior, the DEI training would have little relevance, and the legal claim would be based on the direct evidence of harassment. But in the *Young* context, the concern is whether the specific DEI behavior permeated the culture in a way that creates a hostile workplace, even in the absence of any specific harassing behaviors. This allegation, which lacks evidence of disparate treatment, might fall under the disparate impact theory of liability; but as discussed earlier, that option seems to be both closed off due to the Trump Administration's priorities and unlikely to be successful.

In addition, we need to consider whether messaging must be *both* objectively and subjectively harassing, or if it can be *either* objectively *or* subjectively harassing to reach the standard for harassment under Title VII. This inquiry is akin to the severe or pervasive standard in conventional workplace harassment claims.

That is, did the training induce an objectively hostile work environment? And if not, is it sufficient that Mr. Young subjectively per-

180. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993); *Harassment*, *supra* note 11.

181. See, e.g., *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015) ("[It] is not enough that a particular plaintiff deems the work environment hostile; it must also be of the character that it would be deemed hostile by a reasonable employee under the same or similar circumstances.").

182. See *Harris*, 510 U.S. at 22 ("We therefore believe the District Court erred in relying on whether the conduct 'seriously affect[ed] plaintiff's psychological well-being' or led her to 'suffe[r] injury.' Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (citation omitted)).

ceived that the workplace was hostile to him, or must the reasonable person also perceive the workplace as hostile under the same circumstances?

Finally, we should carefully consider how the Tenth Circuit expects that training could lead to discriminatory “racial preferences in hiring, firing, and promotion decisions.”¹⁸³ There is massive evidence of racial discrimination in hiring.¹⁸⁴ But, as described in Section II.C, there is substantial evidence that DEI training is largely ineffective.¹⁸⁵ With such limited support for the efficacy of DEI training in increasing workplace diversity, the Tenth Circuit’s concern that DEI training would lead to discriminatory racial preferences in hiring, firing, and promotion decisions seems exaggerated if not entirely unfounded.

The Tenth Circuit decision in *Young* goes further than other cases in which the plaintiff alleged that DEI training is discriminatory by suggesting that there is some threshold that may tip training itself, even in the absence of an adverse employment outcome, into a violation of Title VII. Along with a number of other employment practices that are currently being challenged in a newly unstable legal environment, this case raises a number of issues that will need to be resolved.

CONCLUSION

Anti-discrimination law, business objectives, and social justice goals have traditionally worked together to support initiatives that counter implicit racial bias and promote greater workplace diversity. DEI training has long been a staple of workplaces. But DEI initiatives of any kind are currently under attack. Plaintiffs have alleged that DEI training is itself racial discrimination prohibited under Title VII. Courts to date have not found that DEI training is unlawful employment discrimination. But in *Young*, the Tenth Circuit suggested that DEI training such as that alleged in *Young* is coming close to being unlawful discrimination as objectively and subjectively harassing messaging, and that the messaging could itself promote workplace discrimination. Drawing on court cases in other circuits and social science evidence on the efficacy of DEI training, this Article concludes that, for now, DEI training is unlikely to be found to be unlawful employment discrimination.

183. *Young*, 94 F.4th at 1251.

184. See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004); Patrick M. Kline, Evan K. Rose, & Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers*, 137 Q.J. ECON. 1963, 1963 (2022).

185. See sources cited *supra* note 82.