What 2 Rulings On Standing Mean For DEI Litigation

By **Valecia McDowell, Joshua Lanning and Elena Mitchell** (June 28, 2024)

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Two recent federal court decisions shed new light on the ongoing wave of challenges to diversity, equity and inclusion initiatives following the U.S. Supreme Court's decision one year ago in Students for Fair Admissions v. President & Fellows of Harvard and Students for Fair Admissions v. University of North Carolina.[1]

On June 3, in American Alliance for Equal Rights v. Fearless Fund Management LLC, a three-judge panel on the U.S. Court of Appeals for the Eleventh Circuit granted a preliminary injunction, and effectively shuttered a minority grant program until the case is litigated to conclusion.[2]

The decision in Fearless Fund came about two weeks after the U.S. District Court for the Northern District of Ohio refused to enjoin a similar minority grant program in the Hello Alice case, Roberts v. Progressive Preferred Insurance Co.[3]

These recent developments mark significant updates to the changing DEI landscape. While both cases cited Title 42 of the U.S. Code, Section 1981, to challenge grant programs identifying black-owned small businesses as eligible applicants, the courts reached opposite conclusions on an important procedural question: Do the plaintiffs have standing to sue in federal court?

Generally, plaintiffs have standing if: (1) they have suffered an injury that is concrete, actual or imminent; (2) the injury was caused by a defendant; and (3) it is likely that the injury will be redressable by court action. While the decisions present as inconsistent at first blush, they are reconcilable and instructive for those who are contemplating how to best proceed with their own DEI programs and initiatives.

The Fearless Fund Ruling

In Fearless Fund, the American Alliance for Equal Rights challenged under Title 42 of the U.S. Code, Section 1981, the Fearless Fund's Strivers Grant Contest, a grant competition for black women-owned businesses.[4] In August 2023, the trial court denied the AAER's motion for preliminary injunction, finding that the AAER had standing but also that the grant contest was protected expression under the First Amendment.[5]

However, days later, the Eleventh Circuit reached the opposite conclusion, and temporarily enjoined Fearless Fund "from closing the application window or picking a winner" while the AAER's appeal was pending.[6] Then, in June, a three-judge panel reversed the trial court and granted AAER's preliminary injunction request.[7]

Although the trial court found that the AAER had standing, Fearless Fund argued on appeal that AAER lacked standing on the grounds that it had not sufficiently pled that its members, none of whom were identified in the complaint except by pseudonym, were "able and ready"

to enter the contest.[8]

The appellate panel held that the AAER had sufficiently identified several AAER members who would be able and ready to apply for a Fearless Fund grant in a specific and identified time frame in the absence of the race-based restriction.[9]

The panel also held that an organizational plaintiff need not identify the name of members on whose behalf it was suing to establish standing.[10] The court likewise rejected Fearless Fund's First Amendment argument, reasoning that if the refusal to entertain applications from business owners that are not of a certain race is "deemed sufficiently 'expressive' to warrant protection under the Free Speech Clause, then so would be every act of race discrimination, no matter at whom it was directed."[11]

Now, Fearless Fund has three clear options: (1) honor the ruling and continue to litigate the underlying case on the merits; (2) request a rehearing or rehearing en banc before the full Eleventh Circuit; or (3) appeal to the Supreme Court.

And it seems Fearless Fund intends to proceed via the second option. On June 25, Fearless Fund's motion for an extension of time to file a petition for a rehearing or rehearing en banc through July 24[12] was granted.[13]

The Hello Alice Ruling

In Roberts v. Progressive Preferred Insurance Co., Progressive ran a grant program that required applicants to be majority black-owned businesses.[14] Nathan Roberts, a white business owner, challenged this eligibility requirement under Title 42 of the U.S. Code, Section 1981, and the court dismissed his lawsuit for lack of standing.[15]

The U.S. District Court for the Northern District of Ohio noted that analyses on standing differ depending on the relief requested.[16]

For retrospective relief — i.e., damages — the court held that plaintiffs must allege that "under a race-neutral policy, they would have received the benefit."[17] The court then found that Roberts claimed damages for his injury, but failed to sufficiently allege that he would have received a grant had he been eligible to apply.[18]

For prospective relief — i.e., an injunction — the court held that a plaintiff must plead that it was "'able and ready' to apply to the program ... but that a discriminatory policy prevent[ed] it from doing so on an equal basis."[19] The court then found that Roberts sued after the application window for the grant program closed, and that upcoming Hello Alice grant programs were race-neutral.[20]

Therefore, Roberts was not able and ready to apply to a past grant program, and he had no basis to suggest that his race would prevent him from applying in the future.[21]

Similar Issues, Different Results

In summary, the differing results on standing challenges between Fearless Fund and Roberts turned on differences in timing and the nature of relief requested, not on differing analytical approaches to standing.

In Fearless Fund, the AAER requested prospective relief only, asking for declaratory and injunctive relief. Standing was found at the trial and appellate levels because the Strivers

Grant Contest was ongoing, and the AAER sufficiently pled that its members would be denied the opportunity to apply.

Since the AAER had no claim for damages, it did not need to demonstrate that its members would have won the contest if eligible to apply.

In Roberts, the court's legal approach to standing was not materially different, but the facts and requested relief were. Roberts' claim for damages failed because he could not plead facts showing he would have been awarded a grant if eligible to apply.

His claim for prospective injunctive and declaratory relief failed because the minority grant program at issue had concluded, and "the record before the Court suggests that the Grant, as challenged, was offered as a one-time opportunity in 2023," with no expectation that it would be offered in the future.[22]

In the event other courts rule in accord with Fearless Fund and Roberts, a process that will play out over at least the next several years, the lessons are clear: Plaintiffs will face significant hurdles when seeking damages.

Grant contests almost always have subjective criteria, and it is difficult to imagine how plaintiffs might prove they would have been awarded grants without the grant maker itself agreeing. By contrast, plaintiffs will have better luck pursuing prospective equitable relief when challenging ongoing, not past, programs that favor minority applicants.

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[1] Students for Fair Admissions Inc. v. President & Fellows of Harv. Coll.and Students for Fair Admissions v. University of North Carolina, 600 U.S. 181, available at https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.

[2] American Alliance for Equal Rights v. Fearless Fund Management LLC, No. 23-13138, 2024 WL 2812981 (11th Cir. June 3, 2024).

[3] Roberts v. Progressive Preferred Insurance Co., No. 1:23 CV 1597, 2024 WL 2295482 (N.D. Ohio May 21, 2024).

[4] 2024 WL 2812981, at *1.

[5] 2023 WL 6520763, at *1.

[6] Id.

[7] 2024 WL 2812981.

[8] Id. at *4-6.

[9] Id. at *5-6 (citing Carney v. Adams, 141 S.Ct. 493 (2020)).

[10] Id. at *4 (quoting Doe v. Stincer, 175 F.3d 879, 884 (11th Cir. 1999)).

[11] Id. at *9.

[12] Appellee's Unopposed Mot. Ext. Time File Pet. Reh'g En Banc, Am. All. for Equal Rights v. Fearless Fund Mgmt. LLC, No. 23-13138 (11th Cir. June 21, 2024), ECF No. 129.

[13] Order, Am. All. for Equal Rights v. Fearless Fund Mgmt. LLC, No. 23-13138 (11th Cir. June25, 2024), ECF No. 130.

[14] 2024 WL 2295482.

[15] Id. at *4-8.

[16] Id. at *4-5.

[17] Id. at *4 (quoting Aiken v. Hackett, 281 F.3d 516, 519 (6th Cir. 2002)).

[18] Id. at *5-7.

[19] Id. at *5 (quoting Beztak Land Co. v. City of Detroit, 298 F.3d 559, 566 (6th Cir. 2002)).

[20] Id. at *7-8.

[21] Id.

[22] 2024 WL 2295482, at *8.