

## (A)WOKE WORKPLACES

MICHAEL Z. GREEN\*

With heightened expectations for a reckoning in response to the broad support for the Black Lives Matter movement after the senseless murder of George Floyd in 2020, employers explored many options to improve racial understanding through discussions with workers. In rejecting any notions of the existence of structural or systemic discrimination, let alone the need to address the consequences of such discrimination, certain groups have begun to oppose BLM by seeking to diminish any social justice actions. One of those key resistance efforts includes labelling in pejorative terms any employers that pursue anti-racism objectives via social justice statements or internal initiatives as being “woke” workplaces. These groups have also criticized employers who adopt diversity, equity, and inclusion training to help workers address racial differences by arguing these sessions apply divisive Critical Race Theory principles that discriminate against and seek to stigmatize white participants. By using CRT and woke labels as weapons, critics leave employers in the unenviable position of determining how to implement anti-racism trainings in an environment of BLM reforms and race discrimination concerns. These all-encompassing anti-anti-racism narratives now force employers to show how their DEI trainings and related initiatives do not discriminate against white employees.

This Article offers unique insight for employers who pursue DEI measures to achieve racial progress and asserts they may circumvent anti-anti-racism narratives by continuing to rely on the litigation reforms and still-present empirical results that led to the growth of DEI training practices in the 1990s. Many employers had adopted DEI initiatives as good corporate citizens valuing diversity in human resources as a growth of affirmative action

---

\* Professor of Law and Director, Workplace Law Program, Texas A&M University School of Law. This Article benefitted from feedback given during the presentation of a prior draft during workshops held at the University of California, Irvine School of Law’s *Intellectual Life Workshop*, Law and Society’s *Prearity of Work: Anti-Racist Strategies for Social Change* program, the John Mercer Langston Law Scholars’ *Nascent Ideas Workshop* program, the Sixteenth Annual Colloquium on Scholarship in Employment and Labor Law (COSELL) program sponsored by Vanderbilt University School of Law, and the Association of American Law Schools Annual Meeting Employment Discrimination Law Section program, “*The Trump Administration’s Divisive & Derogatory Rhetoric and How It Has Affected Anti-Discrimination and Anti-Harassment Enforcement in the Workplace.*” For thoughtful and specific suggestions on this Article, I thank Swethaa Ballakrishnen, Mario Barnes, Alejandro Camacho, Bennett Capers, Hank Chambers, Kevin Douglas, Chai Feldblum, Kaaryn Gustafson, Jonathan Glater, Stacy Hawkins, Chaumtoli Huq, Carrie Menkel-Meadow, Rachel Moran, Gregory Parks, Mark Pearce, Angela Onwuachi-Willig, Daiquiri Steele, Shauhin Talesh, Elizabeth Tippet, Elizabeth Kronk Warner, Nancy Welsh, Jamillah Bowman Williams, and Kevin Woodson. I am also grateful for the discussions with many Fort Worth Society of Human Resource Management members who asked me to speak to them three times on this topic. Texas A&M Law students Ayanna Brown, Brianda Curry, Shayla Nguyen, Heather Raun, and Arielle Williams provided excellent research assistance.

in the 1970s. With legal concerns in the 1990s about huge jury verdicts in discrimination lawsuits and empirical indicators of systemic discrimination, employers embraced more comprehensive racial improvement and training steps via written consent decrees and judicially approved settlements. This Article concludes that awoke employers should adopt broader DEI goals and limit training on entry-level racial awareness given empirical data suggesting this particular approach tends to spark backlash without any resulting diversity improvements. Instead, awoke employers understand that most constituents want them to act and lead responsibly regarding comprehensive DEI measures by going beyond legal protections. Training can focus on managers who may subject a company to employment discrimination liability. Awoke training integrates key follow-ups and correlates to measurable DEI results. Focusing on DEI training alone ignores the more important structural change work.

Introduction: Increasing Anti-Anti-Racism Workplace Narratives ...	813
I. Cyclical Racial Reckoning in the Workplace After George Floyd Protests .....	821
A. Employer Racial DEI Training or Virtue Signaling Responses .....	824
B. Rushing to Discuss Popular New Anti-Racism Authors ..	827
C. Exposing Rushed and Undeveloped DEI Training .....	828
D. Whitelash to Increased DEI Measures: Woke/Anti-CRT Claims .....	833
1. Christopher Rufo: Self-Identified, Anti-CRT Architect .....	835
2. John McWhorter: “Woke Racism” Author .....	835
3. Florida’s New Workplace WOKE Law .....	837
II. Existing Systemic Race Discrimination Theories, Interventions, and Remedies .....	839
A. CRT’s Role in Unearthing Systemic Discrimination Beyond the Law .....	840
B. Workplace Legalities: Systemic Race Discrimination .....	846
1. Evidence of Workplace Systemic Race Discrimination .....	846
2. Workplace Systemic Race Discrimination Legal Models .....	849
3. Liability Prevention: DEI Training and Its Limits ...	853
4. Post-1991 Class Action Consent Decrees as DEI Remedies .....	854
III. Establishing Employer DEI Accountability .....	857
A. Deciding DEI Justifications .....	857
B. Critiquing DEI Training .....	860
IV. Seeking Awoke Employers: Legally Mindful And Socially Responsible .....	863
A. Identifying DEI Metrics Versus Window Dressing .....	863

B. Legal and Social Responses to CRT/Woke Backlash.....	866
Conclusion.....	870

INTRODUCTION: INCREASING ANTI-ANTI-RACISM WORKPLACE  
NARRATIVES

After the tragic murder of George Floyd in May 2020 and the international protests in response, employers wrestled with how to address their employees' growing concerns about racial justice.<sup>1</sup> A number of companies embraced the Black Lives Matter (BLM) movement, engaged in discussions about the existence of systemic racism, and hired consultants on matters of race to speak to and train their workers.<sup>2</sup> Companies, facing the aftermath from the Floyd protests, decided to respond to such a singular, societal moment concerning race by making a public statement about diversity, equity, and inclusion (DEI) and BLM.<sup>3</sup> Some companies have even commented on broader subjects that do not address workplace concerns directly but may affect their workers and others in our society, including issues on legislation regarding voting rights, LGBTQ+ rights, gun rights, and abortion-access rights.<sup>4</sup>

---

1. See Kathy Gurchiek, *Employers React to Widespread Protests*, SHRM (June 1, 2020), <https://www.shrm.org/hr-today/news/hr-news/pages/employers-react-to-widespread-protests.aspx> [<https://perma.cc/LVL3-SM4F>] (discussing statements by Apple CEO Tim Cook condemning the killing of Floyd while recognizing the existence of racial injustice in the United States and “offering resources to employees who are feeling afraid, and noting the company is making donations to a variety of groups, including the Equal Justice Initiative”); Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America’s \$50 Billion Promise*, WASH. POST (Aug. 24, 2021, 7:03 PM), <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/> [<https://perma.cc/Y8QL-MMZA>] (referring to how a number of “America’s 50 biggest public companies and their foundations collectively committed at least \$49.5 billion since Floyd’s murder” to “organizations focused specifically on criminal justice” but only a few companies appeared committed to “diversifying their workforces up to the highest-paid C-suite jobs”).

2. See, e.g., Isaac Chotiner, *Robin DiAngelo Wants White Progressives to Look Inward*, NEW YORKER (July 14, 2021), <https://www.newyorker.com/news/q-and-a/robin-diangelo-wants-white-progressives-to-look-inward> [<https://perma.cc/Z7J3-5MRA>].

3. See Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 20–26 (2022); Candice Norwood, *Racial Bias Trainings Surged After George Floyd’s Death. A Year Later, Experts Are Still Waiting for ‘Bold’ Change*, PBS NEWS HOUR (May 25, 2021, 6:38 PM), <https://www.pbs.org/newshour/nation/racial-bias-trainings-surged-after-george-floyds-death-a-year-later-experts-are-still-waiting-for-bold-change> [<https://perma.cc/9G9D-7PM3>].

4. See Simon Montlake, *‘Woke Capitalism’ on the Rise—and Running into Resistance*, CHRISTIAN SCI. MONITOR (June 10, 2022), <https://www.csmonitor.com/USA/Politics/2022/0610/Woke-capitalism-on-the-rise-and-running-into-resistance> [<https://perma.cc/9VZP-Z7FK>]; see also Todd Haselton, *MLB Pulls 2021 All-Star Game out of Atlanta Sue to Georgia’s New Restrictive Voting Law*,

As businesses have adopted broad statements on social issues and boosted their DEI trainings on race due to the Floyd protests, they now face attacks from forces who label those companies as engaging in “woke capitalism.”<sup>5</sup> On April 11, 2021, The Heritage Foundation, a think tank with the aim of uniting conservatives, explained the reasoning behind these attacks on its weekly podcast, *Heritage Explains*.<sup>6</sup> The podcast asserts that the term “woke capitalism” was coined by a New York Times writer, Ross Douthat, when he referred to “how companies signal their support for progressive causes in order to maintain their influence in society.”<sup>7</sup> In line with this explanation, the podcast’s commentaries argued that companies pursuing socially progressive statements and broad DEI initiatives should be criticized for being “woke” as a negative term.<sup>8</sup> This attack on companies for being “woke” has become amplified over the last couple of years as a reaction to more anti-racist narratives arising from the BLM movement protests and corresponding supportive corporate responses.<sup>9</sup>

---

CNBC (Apr. 2, 2021, 8:04 PM), <https://www.cnn.com/2021/04/02/major-league-baseball-pulls-2021-all-star-game-out-of-atlanta-due-to-the-states-new-restrictive-voting-law.html> [https://perma.cc/A3ST-RNQ3] (discussing Major League Baseball’s decision to move its 2021 All-Star game from Atlanta to Denver to demonstrate how it “supports voting rights for all Americans and opposes restrictions to the ballot box” after Georgia passed new voting laws); Elizabeth Blair, *After Protests, Disney CEO Speaks Out Against Florida’s ‘Don’t Say Gay’ Bill*, NPR (Mar. 10, 2022, 9:10 AM), <https://www.npr.org/2022/03/08/1085130633/disney-response-florida-bill-dont-say-gay> [https://perma.cc/P9F2-24YQ] (discussing Disney’s statements against proposed Florida law related to LGBTQ+ issues). See generally Vivek Ramaswamy, *Woke, Inc.: Inside Corporate America’s Social Justice Scam* (Center Street 2021) (criticizing several companies for engaging in social issues).

5. Montlake, *supra* note 4.

6. See *Woke Corporate Capitalism*, HERITAGE FOUND. (Apr. 11, 2021), <https://www.heritage.org/progressivism/heritage-explains/woke-corporate-capitalism> [https://perma.cc/TH46-YUNX].

7. *Id.*

8. *Id.*

9. Ben White, *Corporate America Got More ‘Woke.’ Will it Last?*, POLITICO (May 25, 2021, 5:00 AM), <https://www.politico.com/news/2021/05/25/george-floyd-death-corporate-america-diversity-490016> [https://perma.cc/KHY4-6YC4] (discussing how companies engaged in more committed initiatives to address racial diversity due to BLM after protests occurring in response to the killing of George Floyd in 2020); see also Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Work Matters*, 70 SMU L. REV. 639, 678, 678 n.233 (2017) (describing some positive company responses to BLM by Ben & Jerry’s, AT&T, Facebook, and Starbucks well before George Floyd’s death). Although these anti-anti-racism narratives, especially with respect to challenging affirmative action, have existed for a while, these attacks on anti-racism may be increasing out of fears that anti-racism programs are “likely to increase in the wake of 2020’s racial reckoning.” See Jason Yackee, *Targets of Opportunity? The History, Law, and Practice of Affirmative Action in University Faculty Hiring*, 2020 WIS. L. REV. 1199, 1200–03 (lamenting that more criticisms of race-based

This Article coins the positive term, “awoke workplaces,” to represent how companies signal their support for social justice by adopting concrete and transparent measures to implement structural changes and provide ongoing checks to measure and report their progress in an accountable fashion. Although an analysis of critiques of so-called “woke” narratives could cover gender, disability, LGBTQ+, religion, and many other DEI matters, this Article focuses on challenges to workplace anti-racism narratives given that “two-thirds of Americans want companies to speak out more publicly on racial injustice.”<sup>10</sup> This Article explores the uniqueness of reforms resulting from racial protest and how any progress appears to result in eventual backlash and retrenchment efforts, a major concern of Critical Race Theory (CRT) legal scholarship.<sup>11</sup>

These backlash attacks assert reverse discrimination and other critiques of anti-racism initiatives as part of an overall anti-anti-racism narrative.<sup>12</sup> These anti-anti-racism narratives also argue that individual

---

affirmative action policies through discussions about reverse discrimination narratives have not come forward and suggesting that this form of an anti-anti-racism narrative would be subjected to “scorn” even as more race-based programs will probably “increase in the wake of 2020’s racial reckoning”).

10. White, *supra* note 9. Although this Article focuses on racial narratives related to Black workers, this does not suggest some form of Black essentialism or that matters of workplace race can only be addressed if cabined within a Black-white binary paradigm, especially when Black identity presents in many forms. See Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855, 857, 862 (1999) (describing how focusing on the plight of Black women can “only become[] essentialist when the experiences discussed are taken to portray a uniform Black experience or a uniform experience that applies to every other group” and “Blacks are not consigned to a superimposed, pre-ordained, uniform, universal, biological identity”). Instead, this Article responds to specific issues created for Black workers by offering a framework and a workplace response to the challenges arising specifically from the growth of BLM and protests related to police treatment of Black citizens after the death of George Floyd. Responding to workplace attacks on other group anti-subordination narratives, albeit an important issue and one that I may undertake in the future, is beyond the scope of what is covered herein.

11. See Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 89 (2021) (discussing racial reform as a series of progress and retrenchment) (citing Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988)).

12. See Fabiola Cineas, *Critical Race Theory, and Trump’s War on It, Explained*, Vox (Sept. 24, 2020, 2:20 PM), <https://www.vox.com/2020/9/24/21451220/critical-race-theory-diversity-training-trump> [<https://perma.cc/V5CJ-2QLJ>] (describing how President Trump issued an Executive Order banning CRT in workplace training for federal contractors and workers as part of a broader political attack on matters of race). Kimberlé Crenshaw, a founder of CRT, referred to recent CRT challenges as “lump[ing] everything together: critical race theory, the 1619 project [reviewing the impact of slavery in America], whiteness studies, talking about white privilege” all for the purpose of quieting “discourses that refuse to participate

white people have done nothing wrong and should not be subjected to anti-racist DEI initiatives.<sup>13</sup> The narratives operate as a general entreaty to acknowledge that any race discrimination occurring in our country is not systematic and only represents the actions of a few “bad apples.”<sup>14</sup> In seeking a colorblind form of anti-anti-racism narrative, the result may cancel Black individuals and others who assert that racism is systemic or who want to shine a light on or encourage awareness of any historic aspects of racism in the country through education and training.<sup>15</sup>

This Article analyzes a specific anti-anti-racism narrative that has recently become prominent for attacking certain DEI trainings in the so-called “woke” workplace as being affected by CRT analysis that

---

in the lie that America has triumphantly overcome its racist history, that everything is behind us.” *Id.*

13. See Jarvis DeBerry, *‘Woke’ Has Been Weaponized to Label Those Fighting the Oppressors*, MSNBC (Nov. 28, 2021, 4:40 AM), <https://www.msnbc.com/opinion/woke-has-been-weaponized-label-those-fighting-oppression-oppressors-n1284129> [<https://perma.cc/2PXQ-NBLE>] (referring to how conservatives are more concerned with white persons being discriminated against and they operate with this “delusion” to “ma[ke] a weapon out of ‘woke’” because Black people used that term to refer to “being aware of oppressive systems”); see also Crenshaw, *supra* note 11, at 1342 (identifying the neoconservative argument that “even when injustice is found, efforts to redress it must be balanced against, and limited by, competing interests of white workers—even when those interests were actually created by the subordination of Blacks” because “[t]he innocence of whites weighs more heavily than do the past wrongs committed upon Blacks and the benefits that whites derived from those wrongs”); Hamilton, *supra* note 11, at 94–97 (describing claims of white innocence as a concern).

14. See Chiraag Bains, *“A Few Bad Apples”: How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine*, 93 IND. L.J. 29, 30 (2018) (referring to U.S. Attorney General Jeffrey Sessions’ 2017 decision requiring reevaluation of all existing Department of Justice consent decrees with various police departments as unnecessarily based on the acts of individual bad actors). Sessions’ successor, Attorney General William Barr, also supported this narrative in 2020. Katie Benner, *Barr Says He Sees No Systemic Racism in Policing and Won’t Limit Immunity*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/justice-department-barr-racism-police.html>.

15. See Jack Brewster, *Nikole Hannah-Jones—‘1619 Project’ Journalist—Rejects UNC’s Tenure Offer*, FORBES, <https://www.forbes.com/sites/jackbrewster/2021/07/06/nikole-hannah-jones-1619-project-journalist-rejects-uncs-tenure-offer> [<https://perma.cc/N74X-EGY5>] (July 6, 2021, 5:08 PM) (referring to alleged racist and political meddling at the University of North Carolina in rejecting the tenured appointment to the journalism school of Black Pulitzer prize award-winning journalist, Nikole Hannah-Jones). The initial tenure denial was purportedly made because of Jones’ 1619 slavery history project but resulted in the school’s subsequent reversal with an offer of tenure after numerous protests on and outside the campus. *Id.*; see also Charlotte Klein, *“It’s Just Not Something I Want Anymore”: Nikole Hannah-Jones Rejects UNC’s Tenure Offer*, VANITY FAIR (July 6, 2021), <https://www.vanityfair.com/news/2021/07/nikole-hannah-jones-rejects-uncs-tenure-offer> [<https://perma.cc/7TPC-RXX5>] (reviewing Jones’ decision to reject the tenure offer and accept Howard University chair in journalism).

purportedly discriminates against white participants.<sup>16</sup> As a result of this anti-anti-racism narrative, employers, committed to DEI principles, must now face questions regarding whether their training sessions may be illegal or (at least) immoral for being discriminatory in their treatment of white employees.<sup>17</sup> This Article seeks to answer those questions and

---

16. See Stephen Kears, *GOP Lawmakers Intensify Efforts to Ban Critical Race Theory in Schools*, PEW (June 14, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools> [<https://perma.cc/4M6V-U9WB>] (describing increasing number of proposals in state legislatures to ban CRT in schools); Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [<https://perma.cc/VAS3-UDHA>] (describing same). I note that use of the term “woke” by certain persons represents a form of “appropriating the language of social activism” for their own purposes not related to the initial social activist goals that led to the creation of this term. See Aja Romano, *A History of “Wokeness,”* VOX (Oct. 9, 2020, 10:00 AM), <https://www.vox.com/culture/21437879/stay-woke-woke-ness-history-origin-evolution-controversy> [<https://perma.cc/9JCR-XKQF>] (tracing the history of the use of the word “woke” and how it became a cautionary term used in the BLM movement but has now been so politically weaponized that its use is unclear, causing some Black activists to request that the term no longer be used); see also Malaika Jabali, Laura Kipnis, Rebecca Solnit, Bhaskar Sunkara & Thomas Chatterton Williams et al., *We Need to Discuss the Word ‘Woke,’* GUARDIAN (Nov. 9, 2021, 10:08 AM), <https://www.theguardian.com/commentisfree/2021/nov/09/woke-word-meaning-definition-progressive> [<https://perma.cc/QYD6-2PEA>] (referring to disagreement arising between Democratic political consultant James Carville and Democratic Congresswoman Alexandria Ocasio-Cortez about the use of the word “woke” and providing various commentaries suggesting how the word “woke” is now being misused as a weapon by people who don’t understand or support its original activist usage); Erin Dowell & Marlette Jackson, *“Woke-Washing” Your Company Won’t Cut It*, HARV. BUS. REV. (July 27, 2020), <https://hbr.org/2020/07/woke-washing-your-company-wont-cut-it> [<https://perma.cc/ZLH6-EQ39>] (referring to how corporate entities appropriated the term “woke” to suggest they are racially progressive as a public image without really listening to Black voices in their workplaces). Hence, this Article does not seek to be distracted by the misappropriation of the word “woke” from its original meaning and focuses on companies that are “awoke” in understanding their needs for racial improvement and committed to developing successful strategies for progress.

17. See Trey Williams, *The War on ‘Wokeness’ Is Coming for Companies*, FORTUNE (July 14, 2022, 3:11 PM), <https://fortune.com/2022/07/14/what-stop-woke-act-means-for-corporate-diversity-programs> [<https://perma.cc/NQ6R-Q58F>] (describing Florida’s July 1, 2022 action in becoming “the first state to pass a law specifically calling out corporations for their diversity programs” and making it illegal to require that employees participate in such broad terms that attorneys questioned “whether all diversity, anti-racism, and anti-harassment trainings will be prohibited” even after some pushback and the filing of two lawsuits, and it is “only a matter of time before” other states adopt similar laws); see also Patrick Tyrrell, *What Is Wrong with Corporate Wokeism on Political Causes*, DAILY SIGNAL (Sept. 29, 2021), <https://www.dailysignal.com/2021/09/29/what-is-wrong-with-esg-wokeism> [<https://perma.cc/6DEG-A5J8>] (arguing corporations taking on political causes demonize those “who disagree with its bossy, woke explanations of how things are” and these companies’ political actions should be challenged as a disservice to shareholders). These anti-anti-racism attacks are not limited to DEI employee training initiatives. A group,

remove doubt about what forms of workplace training and any other DEI measures based on race should and may be conducted in the midst of these hostile anti-CRT attacks and their supporting anti-anti-racism narratives.

This Article argues that employers may still pursue DEI and anti-racism training measures while escaping any lasting negative consequences presented by the current political and legal challenges to the use of CRT principles in so-called “woke” corporate workplaces. Employers can, at a minimum, target their actions toward preventing legal liabilities and attaining measurable DEI goals.<sup>18</sup> Corporations have global commitments to their various constituencies, including their younger employees who tend to expect that their employers will commit to DEI and broader social matters.<sup>19</sup> Although these companies might prefer to avoid upsetting any constituency, other agendas have forced them to pick a side in these debates. Unless a company has pursued a narrow agenda that ignores DEI initiatives and has enrolled all its key constituencies in that pursuit as a business focus,<sup>20</sup> if the company desires

---

allegedly representing investors in Coca-Cola’s corporation, threatened to bring a shareholder action challenging the Company’s now-former general counsel’s policy of considering diversity in the racial and gender make-up of its outside law firm selections. See Tom Hals, *In Brief: Coca Cola Investors Threaten Suit over Law Firm Diversity Policy*, REUTERS (June 11, 2021, 5:16 PM), <https://www.reuters.com/legal/litigation/brief-coca-cola-investors-threaten-suit-over-law-firm-diversity-policy-2021-06-11/> [<https://perma.cc/NSP7-DEM8>].

18. See Robert Iafolla, *Canceling Anti-Racism Training Weakens Agency Liability Shields*, BLOOMBERG L. (Sept. 9, 2020, 12:52 PM), <https://news.bloomberglaw.com/daily-labor-report/canceling-anti-racism-training-weakens-agency-liability-shields> [<https://perma.cc/P5VA-ALKR>] (quoting comments from workplace counsel and scholars on the value of anti-racism training in protecting employers from liability from racial harassment claims and prevention of punitive damages); Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. FORUM 869, 874–75 (2021) (discussing the importance of a company identifying measurable DEI metrics).

19. See Peggie Pelosi, *Millennials Want Workplaces with Social Purpose. How Does Your Company Measure Up?*, CHIEF LEARNING OFFICER (Feb. 20, 2018), <https://www.chieflearningofficer.com/2018/02/20/millennials-want-workplaces-social-purpose-company-measure/> [<https://perma.cc/JX6R-G2PE>] (citing Fred Dews, *Brookings Data Now: 75 Percent of 2025 Workforce Will Be Millennials*, BROOKINGS (July 17, 2014), <https://www.brookings.edu/blog/brookings-now/2014/07/17/brookings-data-now-75-percent-of-2025-workforce-will-be-millennials> [<https://perma.cc/7436-NRS6>] (showing how millennials will be seventy-five percent of the workforce by 2025 and they “want to be active participants in the social purpose of the companies they work for”).

20. See, e.g., David Jesse, *Battle over ‘Wokeness’ at Christian Colleges Isn’t Just About Politics, It’s About Dollars*, DETROIT FREE PRESS, <https://www.freep.com/in-depth/news/education/2022/07/30/wokeness-christian-colleges-enrollment-politics-hillsdale/9627765002> [<https://perma.cc/7D4M-47NP>] (July 30, 2022, 9:12 AM) (describing challenges to CRT being taught at a conservative independent Christian



to maintain any authenticity, any messages about DEI training and other activities must align with the company's goals to improve DEI.<sup>21</sup>

Awoke employers may implement DEI training that makes it clear to all employees what practices have been banned by the employer to prevent liability from workplace discrimination and harassment lawsuits based upon race and other protected classes.<sup>22</sup> Engaging in mandatory training on racial awareness with a goal of getting certain individuals to change their beliefs and adopt anti-racist principles afterwards is unlikely and often leads to backlash.<sup>23</sup> Some degree of backlash or discomfort may be necessary if the training responds to correct a specific incident rather than just offering general awareness training.<sup>24</sup> Empirical information suggests, however, that framing DEI training around legal compliance narratives based on civil rights laws can help achieve the best training results.<sup>25</sup>

---

college because the school caters to and mirrors their donors', alumni's, and faculty's beliefs on conservative issues).

21. See Brian O'Connell, *A New Era in Corporate Responsibility*, SHRM (Jan. 4, 2020), <https://www.shrm.org/hr-today/news/all-things-work/pages/a-new-era-in-corporate-responsibility.aspx> [<https://perma.cc/6FZ4-LP52>] (discussing concerns that commitment to social responsibility could result in mere window dressing that "could lead to cynicism and charges of hypocrisy").

22. See Iafolla, *supra* note 18 (discussing how employers view the need to have anti-racism training to prevent liability and how it is mandated by law in some states).

23. See Tony Ewing, *How to Be Vulnerable in a Woke Workplace*, FORBES (Nov. 22, 2020, 9:23 AM), <https://www.forbes.com/sites/tonyewing/2020/11/22/5-tips-on-how-to-be-vulnerable-in-a-woke-workplace/> [<https://perma.cc/29K3-9A8M>] (suggesting employers should understand how woke workplaces make employees acknowledge vulnerabilities and they may act irrationally as a response); Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1473, 1503–09 (2017) (discussing reasons that generate backlash to diversity training); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/68LH-VBH8>] (describing how people who undergo DEI training do not tend to "shed their biases" and any "positive effects of diversity training rarely last beyond a day or two, and a number of studies suggest that it can activate bias or spark a backlash").

24. See Emily Stewart, *What Starbucks Is Teaching Its Employees During Anti-Bias Training*, VOX (May 29, 2018, 3:10 PM), <http://www.vox.com/identities/2018/5/29/17405338/starbucks-racial-bias-training-why-closed> [<https://perma.cc/4M6N-KJCY>] (asserting new training became necessary to make sure employees understood new policy adopted as a response to an incident).

25. Compare Williams, *supra* note 23, at 1498–1501, 1509–11, 1501 n.102 (describing empirical findings from a sample study comparing a focus on business rationale versus legal compliance rationale as the motivation for DEI training and finding legal compliance motivation more likely to lead to successful results), with Dobbin & Kalev, *supra* note 23 ("[H]eadlining the legal case for diversity and trotting out stories of huge settlements . . . that's how we got your attention . . . but threats, or 'negative incentives,' don't win converts."), and LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 11, 122–23, 164–65, 190, 224 (2016) (discussing empirical data suggesting that courts are more willing to defer to largely

Awoke employers will not just limit DEI training to legal protections or succumb to merely performative DEI training—that never moves the needle in improving measurable DEI results. This Article also argues that most workplace anti-racism training focusing on generalized forms of racial awareness should be aimed at supervisors and managers who make decisions that can lead to potential legal violations of anti-discrimination policies resulting in employer liabilities. These trained supervisors and managers, as opposed to entry-level workers, are also in the best position to practice what was learned from the DEI awareness training. As racially aware supervisors and managers, they can then be held accountable for mentoring employees of color, an important goal or metric in assessing workplace DEI improvements for awake employers.<sup>26</sup> Requiring entry-level workers to undergo awareness training without ongoing follow-up training to deal with any feelings of resentment and backlash that may arise can be a recipe for disaster.<sup>27</sup> As a result, this Article contends that entry-level employee awareness training (beyond what is needed to focus on legal compliance) should be offered only on a voluntary basis rather than being mandated.<sup>28</sup>

---

ineffective and symbolic structures such as diversity programming as representing merely “cosmetic compliance” and wrongly “judges infer nondiscrimination from the presence of policies that managers ignore, when they look at the presence of diversity training programs rather than whether organizations are in fact diverse”).

26. Dobbin & Kalev, *supra* note 23 (discussing the value of using mentoring to chip away at bias); Williams, *supra* note 23, at 1509–11 (suggesting that complying with antidiscrimination law as a focus for DEI training can have positive results); *see also* Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 1020–21 (2013) (suggesting that more successful diversity efforts should be aimed at “processes for integration and learning in relations—that adequately tie tensions in specific relationships to broader, systemic equal-opportunity” such as changing of grievance procedures “to foster conversation and learning over entrenchment and denial, thus leading to more positive relationships that translate into better success rates for racial minorities”); Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1048, 1066 (2016) (discussing the value of diversity programs’ focus on mentoring especially “cross-racial and cross-gender mentor-protégé relationships that expand the access of minorities and women to career- and skill-building relationships”).

27. Dobbin & Kalev, *supra* note 23 (asserting mandated anti-racism training does not “motivate people to make changes” and social science research “shows force-feeding can activate bias rather than stamp it out” through employee “blaming and shaming”); *see also* Norwood, *supra* note 3 (discussing comments from several diversity consultants being employed in the midst of the Floyd protests and how “one and done” training presentations are not sustainable).

28. Dobbin & Kalev, *supra* note 23 (looking at mandatory diversity training in 800 firms over thirty years and finding “no improvement in the proportion of white women, black men and Hispanics . . . and the share of black women actually decreased” and suggesting awareness training should be voluntary to have the best results); *see also* Rebecca K. Lee, *Core Diversity*, 19 TEMP. POL. & C.R. L. REV. 477, 495–96 (2010) (referring to empirical analysis and suggesting DEI awareness training should be voluntary: “employers may want to make diversity-related trainings voluntary rather than

The discussion in this Article unfolds as follows. Part I identifies the systemic racism concerns that arose in the workplace in light of BLM and George Floyd activism and the resulting backlash. Part I also discusses how companies rushed haphazardly into expanding DEI training to highlight the work of several popular anti-racism authors and many anti-anti-racism narratives responded by attacking CRT. Part II addresses systemic racism in the workplace pursuant to legal and empirical analysis as well as CRT's role in exposing this discrimination beyond current legal theories and prevention strategies that companies tend to prioritize. Part III focuses on employer accountability including identifying any justifications for pursuing DEI measures, reviewing empirical data critiquing DEI training, and establishing clear DEI metrics to guide employer actions. Part IV addresses how awoke workplaces may pursue DEI actions including anti-racism training related to social justice goals while operating within the legal restrictions required by federal law and even under developing state laws.<sup>29</sup> The Article concludes by imploring awoke employers to identify and track their performance in obtaining measurable DEI goals and align their training and other DEI measures with being accountable to achieve those goals, all while meeting the broad social justice expectations of many of their constituencies.

#### I. CYCLICAL RACIAL RECKONING IN THE WORKPLACE AFTER GEORGE FLOYD PROTESTS

The United States has a controversial history of addressing racial matters.<sup>30</sup> In a cyclical pattern, each step forward appears to result in an

---

compulsory, particularly if the organization is not in dire straits with respect to diversity, because elective training sessions have been found to produce better results than required sessions"). Although beyond the scope of this Article, there is still important room for an organization to encourage rather than attempt to avoid interracial interactions between workers that involve developing safe spaces to improve communications and providing joint responsibilities related to performance of DEI goals. *See* Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 *BERKELEY J. EMPL. & LAB. L.* 1, 20–27 (2005); Green, *supra* note 26, at 975–81, 1004–08, 1012–15 (recognizing how interracial antagonism and avoidance should be addressed through encouraging high levels of interracial engagement that can lead to positive results).

29. *See* Rich, *supra* note 26, at 1087–88, 1097 (arguing how diversity rationales can be extended to a broader legal protection based upon equality if “courts should hold to the principle that an organization's expression of its motivation to promote diversity is not evidence of discrimination absent proof that ‘diversity’ is a pretext or proof of a causal connection between a specific diversity practice and some legally cognizable adversity”).

30. *See* Olivia B. Waxman, ‘Critical Race Theory Is Simply the Latest Bogyman.’ *Inside the Fight over What Kids Learn About American History*, *TIME*,

eventual step to halt the ensuing progress.<sup>31</sup> Key racial reforms implemented during Reconstruction (including Constitutional amendments that developed after ending slavery through a Civil War), however, led to backlash and retrenchment personified by Jim Crow laws.<sup>32</sup> A century later, during the 1960s Civil Rights Movement and its protests, racial reforms continued pursuant to specific federal legislation<sup>33</sup> and remedial affirmative action plans based on race.<sup>34</sup> The protest efforts in the 1960s also resemble the current BLM protest movements for racial reform as both movements have faced similar attacks.<sup>35</sup> Backlash responses and retrenchment efforts in the 1960s and in the 2020s have been framed as reverse discrimination claims and dedicated commitments to colorblind approaches when considering anti-racism measures.<sup>36</sup> The racial reform efforts arising during the terms of

---

<https://time.com/6075193/critical-race-theory-debate/> [<https://perma.cc/B38X-LCLX>] (July 16, 2021, 7:42 PM).

31. Hamilton, *supra* note 11, at 90–94 (discussing cyclical aspects of reform and retrenchment based on race, starting with slavery and leading up to Floyd-related reforms and current attacks on CRT as the most recent retrenchment efforts); *see also* Adam Serwer, *The New Reconstruction*, ATLANTIC (Oct. 2020), <https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475> [<https://perma.cc/9E4C-PJAY>] (discussing how retrenchment efforts prevailed due to “[t]he South’s intransigence in defeat, and its campaign of terror against the emancipated” slaves and how Reconstruction era amendments to the Constitution led to reform).

32. *See* Tristin K. Green, *Rethinking Racial Entitlements: From Epithet to Theory*, 93 S. CAL. L. REV. 217, 219 (2020); Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002, 1019–20 (2019) (book review).

33. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

34. *See* Jackie Mansky, *The Origins of the Term ‘Affirmative Action,’* SMITHSONIAN MAG., <https://www.smithsonianmag.com/history/learn-origins-term-affirmative-action-180959531> [<https://perma.cc/E748-TF4W>] (Nov. 1, 2022) (discussing the origins of affirmative action and President John F. Kennedy’s initial use of the words in an executive order in 1961 that demanded federal contractors take “affirmative action to ensure that . . . employees are treated during employment without regard to their race, creed, color or national origin” and the words spiked when President Lyndon B. Johnson issued Executive Order 11,246 on September 24, 1965 and created the Office of Federal Contracts Compliance Programs in the U.S. Department of Labor to enforce the Executive Order).

35. *See* Eyer, *supra* note 32, at 1019 (describing how the same arguments attacking the civil rights movement of the 1960s have arisen today in attacks on the current BLM movement).

36. *See* Jacqueline M. Prats, *Diversity Initiatives and the Backlash of Reverse Discrimination Claims*, 95 FLA. BAR J. 42 (Sept.–Oct. 2021), <https://www.floridabar.org/the-florida-bar-journal/diversity-initiatives-and-the-backlash-of-reverse-discrimination-claims> [<https://perma.cc/3HE6-95LT>] (discussing reverse discrimination claims as backlash resulting from diversity efforts pursued after Floyd protests); David B. Oppenheimer, Henry Cornillie, Henry Bluestone Smith, Thao Thai & Richard Treadwell, *Be Careful What You Wish For: Ronald Reagan, Donald Trump, the Assault on Civil Rights, and the Surprising Story of How Title VII Got Its*

the first Black president and the rise of the BLM movement received national and international support with the appalling death of George Floyd in 2020.<sup>37</sup> As a result, further racial reforms related to systemic workplace discrimination started to be considered by employers and legislatures.<sup>38</sup> Those reform efforts now face specific retrenchment responses through societal challenges aimed at attacking anti-racism measures in public- and private-sector settings including workplace DEI training.<sup>39</sup>

---

*Private Right of Action*, 39 BERKELEY J. EMP. & LAB. L. 147, 148 (2018) (referring to Republican administration attacks on Title VII legislation and its enforcement via anti-affirmative action measures but finding “employment discrimination law has survived and continues to be an often-effective tool against racism” due to private court actions); Green, *supra* note 32, at 233–37, 248–56; *see also* Williams, *supra* note 23, at 1497–1501 (discussing unsuccessful awareness training leading to reverse discrimination claims as direct opposition to DEI efforts in the workplace); Eyer, *supra* note 32, at 1007, 1010, 1034, 1007 n.12 (suggesting that “race-neutral” and “colorblind” approaches have operated as a form of “Jim Crow”); Mansky, *supra* note 34 (describing affirmative action challenges on the basis of the Fourteenth Amendment Equal Protection Clause).

37. *See* Jorge L. Ortiz, ‘It’s Nothing But Pain’: *The Latest on the Cases of Violence Against Black People that Sparked America’s Racial Reckoning*, USA TODAY, <https://www.usatoday.com/story/news/nation/2020/09/09/george-floyd-breonna-taylor-jacob-blake-what-we-know/5753696002/> [<https://perma.cc/NQ3E-BVJE>] (Sept. 11, 2020, 9:28 AM); *see also* Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 407–08, 412–13 (2018) (referring to BLM as one of the “social movements seeking to transform the state . . . in a project of reconstruction and transformation”); Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1091–92 (2018) (noting that the movement goes beyond traditional civil rights to fight for “full civil, social, political, legal, economic and cultural rights”); Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 386 (2015) (describing an emerging “young people’s justice movement [that] has taken the name Black Lives Matter” to seek racially just reforms).

38. *See, e.g.*, Jessica Guynn, *One Year After George Floyd’s Death, Two-Thirds of Workers Want Their Companies to Speak Out Against Racism*, USA TODAY, <https://www.usatoday.com/story/money/2021/05/20/george-floyd-racism-workers-corporate-america-black-lives-matter/5154145001/> [<https://perma.cc/ZGR3-T37R>] (May 20, 2021, 2:03 PM) (describing how employee activism for racial justice has grown in response to the death of George Floyd and BLM efforts that led to legislative efforts in California to pass the “Silence No More Act” to “protect workers from nondisclosure agreements in situations where they face discrimination or racism”).

39. *See* Christian Watson, *American Workers Have Attended More Diversity Seminars Than Job Training*, NEWSWEEK (May 2, 2022, 12:46 PM), <https://www.newsweek.com/american-workers-have-attended-more-diversity-seminars-job-training-opinion-1702635> [<https://perma.cc/G9KU-T2EP>] (referring to the “leaking out” and critique of certain DEI training sessions that told white employees to “be less white” and “cede power to people of color” and “repent” for the country’s racism).

*A. Employer Racial DEI Training or Virtue Signaling Responses*

In a market study conducted shortly after George Floyd’s murder and following “an estimated 200,000 people protesting in Washington, D.C., on June 6, 2020,” the Clutch Company surveyed 755 workers across the United States and found 62% employee support for the protests.<sup>40</sup> Although 78% of the employees in the survey from large companies (over 500 employees) believed that racism was a concern for employers, only 54% believed their workplaces had any racism issues.<sup>41</sup> While approximately 64% of Black workers believed that racism and discrimination were issues at their workplace, only 44% of the workers surveyed overall believed it was a problem at their own workplace.<sup>42</sup> Interestingly, 49% of the workers surveyed indicated that their employers had addressed the Floyd protests in some fashion with the following responses being most popular: (1) released a public statement at 30%; (2) held an open discussion with leadership at 19%; (3) donated to causes at 10%; (4) promised to hire a more diverse workforce at 7%; and (5) made it easier to take time off at 6%.<sup>43</sup> Additionally, the study found that many of the largest companies with “a global influence” understood “that they have a role in societal change.”<sup>44</sup>

Ben & Jerry’s Company responded to the Floyd protests by creating a website page declaring: “We Must Dismantle White Supremacy: Silence Is NOT An Option.”<sup>45</sup> Other companies also took responsive steps: Amazon and IBM paused law enforcement’s use of their facial recognition technology in response to allegations of racial profiling and privacy violations; Estee Lauder pledged to “increase the percentage of employees of color at all levels within the next five years;” and Netflix used its platform to highlight “awareness to black injustice.”<sup>46</sup>

---

40. Kristen Herhold, *How Businesses Are Responding to the Death of George Floyd and the Resulting Protests*, CLUTCH (June 10, 2020), <https://clutch.co/hr/resources/how-businesses-are-responding-george-floyd-death-resulting-protests> [<https://perma.cc/NWV2-9U4F>].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Edward Segal, *One Year Later: How Companies Have Responded to George Floyd’s Murder*, FORBES (May 25, 2021, 6:10 AM), <https://www.forbes.com/sites/edwardsegal/2021/05/25/one-year-later-how-companies-have-responded-to-george-floyds-murder> [<https://perma.cc/4DYL-CPDF>].

46. *Id.* Although American companies pledged approximately fifty billion dollars to civil rights organizations and to change recruiting and training efforts within their organizations after George Floyd’s murder in 2020, there has been pushback from some companies and a year after Floyd’s death only about \$250 million had been committed. See Marco Quiroz-Gutierrez, *American Companies Pledged \$50 Billion to*

Even before George Floyd's protests, Nike, Inc., in a heavily debated move, distributed an advertisement supporting a National Football League (NFL) player, Colin Kaepernick, in the midst of his call for racial justice by taking a knee when the national anthem played before the start of games.<sup>47</sup> With anti-anti-racism proponents, as well as President Donald Trump, all complaining about Kaepernick's kneeling actions, it appeared that Nike would be harmed financially by associating with Kaepernick.<sup>48</sup> But shares of Nike stock reached an all-time high shortly after the advertisement with Kaepernick.<sup>49</sup> Nike sales also increased 31% immediately thereafter.<sup>50</sup> In reviewing the Nike example, one must confirm whether its corporate responses ended up being integrated with DEI "efforts into all aspects of internal operations" and to certify that those actions work in "[a] symbiotic relationship" with "external work to create real change."<sup>51</sup> Given Nike's history regarding workers that had sometimes placed it "on the wrong side of social justice," its advertisement raised questions about whether Nike's actions were merely to benefit financially by associating with Kaepernick's racial justice cause without any meaningful commitment to that cause, a practice sometimes referred to as "woke washing" by its critics.<sup>52</sup> After

---

*Black Communities. Most of It Hasn't Materialized*, FORTUNE (May 6, 2021, 1:35 PM), <https://fortune.com/2021/05/06/us-companies-black-communities-money-50-billion> [<https://perma.cc/WD2M-NBDY>] (on file with author).

47. See Jonathan Berr, *Nike Stock Price Reaches All-Time High After Colin Kaepernick Ad*, CBS NEWS, <https://www.cbsnews.com/news/nike-stock-price-reaches-all-time-high-despite-colin-kaepernick-ad-boycott> [<https://perma.cc/T83V-KSA5>] (Sept. 14, 2018, 4:15 PM).

48. See Gina Martinez, *Despite Outrage, Nike Sales Increased 31% After Kaepernick Ad*, TIME, <https://time.com/5390884/nike-sales-go-up-kaepernick-ad> [<https://perma.cc/4AZR-4A4R>] (Sept. 10, 2018, 12:47 PM).

49. *Id.*; see also Jack Baer, *Nike Stock Closes at All-Time High in Aftermath of Colin Kaepernick Ad Campaign*, YAHOO! NEWS (Sept. 13, 2018), <https://www.yahoo.com/news/nike-stock-closes-time-high-aftermath-colin-kaepernick-ad-campaign-225007582.html> [<https://perma.cc/A8BF-ZLKP>].

50. See Martinez, *supra* note 48.

51. Segal, *supra* note 45; see also Jack Royston, *How Meghan Markle's Procter & Gamble Partnership Follows Woke-Washing Claim*, NEWSWEEK (May 12, 2021, 5:34 AM), <https://www.newsweek.com/meghan-markle-procter-gamble-archewell-partnership-woke-washing-1590706> [<https://perma.cc/WK2S-X4PC>] (noting Procter & Gamble "fully integrated" progressive politics as its business model and "committed to being a force for good in the areas of community impact, equality and inclusion").

52. See Joshua Hunt, *Colin Kaepernick, Nike, and the Myth of Good and Bad Companies*, ATLANTIC (Sept. 5, 2018), <https://www.theatlantic.com/business/archive/2018/09/nike-kaepernick/569371/> [<https://perma.cc/4UZE-B48Y>] (suggesting duplicity in Nike doing business with Kaepernick and the NFL, the entity "has done its best to stifle Kaepernick's protest movement"); Jessica Vredenburg, Amanda Spry, Joya Kemper & Sommer Kapitan, *Woke Washing: What Happens When Marketing Communications Don't Match Corporate Practice*, CONVERSATION (Dec. 5, 2018, 4:14 AM), <https://theconversation.com/woke-washing-what-happens-when-marketing->

some marketing researchers surveyed consumers about the Nike advertisement, 60% “felt positively about Nike” while only 45% of those who felt positively believed that “Nike had a genuine commitment to these values.”<sup>53</sup>

Company commitments to social values can also be questioned for those businesses that spend billions of dollars unsuccessfully on DEI programs.<sup>54</sup> Companies began implementing “traditional exercises like unconscious bias training as part of their response to Floyd’s killing, as well as issuing ubiquitous statements proclaiming that [BLM], donating to social justice organizations and promising more diverse hiring.”<sup>55</sup> But Floyd’s murder also led to the unusual action of discussing the stories and narratives of fellow Black workers. Shocked by the brutal and visual disregard for Floyd’s life, many employees became willing to listen to their Black co-workers’ experiences about being subjected to racism in our society.<sup>56</sup>

When workers’ concerns about racism rose after the Floyd protests, employers were already engaged in dealing with a global pandemic that led many DEI consultants to lose and downsize their businesses.<sup>57</sup> As companies sought help in talking with workers regarding race, DEI consultants became engaged and, in some cases, reemployed in developing workplace training sessions that had been previously created to help companies in their DEI efforts.<sup>58</sup> Now those newly hired DEI consultants (and also internal DEI managers) were being asked to address anti-racism concerns that became more heightened in the workplace in

---

communications-dont-match-corporate-practice-108035 [https://perma.cc/P329-5EML] (discussing how skepticism about the social justice messages being sent by some companies results in “woke washing” or a belief that the company is being “inauthentic in their marketing, as their practices may not clearly align with their messaging”); see also Dowell & Jackson, *supra* note 16 (discussing “woke washing”); Royston, *supra* note 51 (same).

53. Vredenburg, Spry, Kemper & Kapitan, *supra* note 52.

54. Theresa Agovino, *Companies Try a New Approach to Diversity, Equity and Inclusion: Honest Conversations*, SHRM (Aug. 28, 2020), <https://www.shrm.org/hr-today/news/hr-magazine/fall2020/pages/a-new-approach-to-diversity-and-inclusion.aspx> [https://perma.cc/6TDF-MRG4] (referring to a McKinsey Report identifying that companies spend eight billion dollars a year on diversity training without much to show for it).

55. *Id.*

56. *Id.*

57. Bridget Read, *Doing the Work at Work: What Are Companies Desperate for Diversity Consultants Actually Buying?*, THE CUT (May 26, 2021), <https://www.thecut.com/article/diversity-equity-inclusion-industrial-companies.html> [https://perma.cc/9B8V-EMQV].

58. *Id.*



light of the BLM movement and specifically after broad reactions to calls for racial reforms by the Floyd protests.<sup>59</sup>

### B. Rushing to Discuss Popular New Anti-Racism Authors

A lot of the discussions about race in the workplace after George Floyd's death referred to two popular sources.<sup>60</sup> This included a book by a sociologist, Robin DiAngelo, *White Fragility: Why It's So Hard for White People to Talk About Racism*,<sup>61</sup> a 2018 bestseller.<sup>62</sup> The other key source was *How to Be an Antiracist*,<sup>63</sup> a 2019 bestselling book by Ibram X. Kendi, a history and humanities professor.<sup>64</sup> Although those two authors' books cite to principles from CRT scholars,<sup>65</sup> it is a stretch to portray their works as representative of the legal analysis developed by CRT scholars. Even one key critic and a leader in the anti-anti-racism narrative movement, John McWhorter, has acknowledged that many who

59. *Id.*; see also Norwood, *supra* note 3; Frances Dodds, *How Should You Be Talking with Employees About Racism?*, ENTREPRENEUR (June 5, 2020), <https://www.entrepreneur.com/article/351522> [https://perma.cc/GG4K-778A] (describing input from a number of diversity consultants on why employers had to engage workers about race after the Floyd protests); see also Brummer & Strine, *supra* note 3, at 4, 20–21 (noting how Floyd protests halted companies that felt it was inappropriate to pursue DEI efforts as they could no longer disregard race matters in their companies and communities); Hamilton, *supra* note 11, at 68–69 (showing how Floyd matter led to broader conversations to address racism within the workplace).

60. Hamilton, *supra* note 11, at 91 (describing how after “the racial justice movement that began in spring 2020 . . . [p]eople sought to become educated on matters of race” and “[b]ooks like Ibram X. Kendi’s *How to Be an Antiracist* and Robin DiAngelo’s *White Fragility* became national bestsellers”).

61. See ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* (Beacon Press 2018); see also Katy Waldman, *A Sociologist Examines the “White Fragility” That Prevents White Americans from Confronting Racism*, NEW YORKER (July 23, 2018), <https://www.newyorker.com/books/page-turner/a-sociologist-examines-the-white-fragility-that-prevents-white-americans-from-confronting-racism> [https://perma.cc/UX7Q-P37B] (reviewing *White Fragility*).

62. See Hamilton, *supra* note 11, at 73, 91.

63. See Ibram X. Kendi, *Profile*, B.U. ARTS & SCIS. HIST., <https://www.bu.edu/history/profile/ibram-x-kendi> [https://perma.cc/EDL2-4QF9] (last visited Mar. 18, 2023); see also Eric Deggans & Audrey Nguyen, ‘*Racism Is Death, Anti-Racism Is Life*’ Says Author Ibram Kendi, NPR (Oct. 24, 2020, 12:03 AM), <https://www.npr.org/2020/10/23/927100641/racism-is-death-anti-racism-is-life-says-author-ibram-kendi> [https://perma.cc/AP5S-CJWW] (describing how Kendi was “pulled into a whirlwind of commentary and public contemplation” and new opportunities including “starting a new Center for Antiracist Research at Boston University”); see Afua Hirsch, *How to Be an Antiracist by Ibram X Kendi Review—a Brilliantly Simple Argument*, GUARDIAN (Oct. 11, 2019, 7:00 AM), <https://www.theguardian.com/books/2019/oct/11/how-to-be-an-antiracist-by-ibram-x-kendi-review> [https://perma.cc/LWK7-HQMD] (reviewing *How to Be an Antiracist*).

64. Hamilton, *supra* note 11, at 73, 91.

65. *Id.* at 73.

use the works of DiAngelo and Kendi “have never even heard of the theoretical work, itself,” and are “unable to explain their tenets themselves.”<sup>66</sup> Therefore, it is important to understand that “CRT is not a diversity and inclusion ‘training’ but a practice of interrogating the role of race and racism in society that emerged in the legal academy and spread to other fields of scholarship.”<sup>67</sup> Because conspirators have alleged that CRT principles have tainted DEI training by referring to the works of DiAngelo and Kendi, an important part of the analysis must examine how some companies felt so compelled to respond to the George Floyd protests that they failed to monitor or assess their training responses.

### *C. Exposing Rushed and Undeveloped DEI Training*

While responding to George Floyd’s murder by engaging in more DEI training and discussions about race in the workplace, the presence of a pandemic also contributed to the unique circumstances. Employees who worked from home and gathered around their computer screens on Zoom or some other digital platforms were now placed in an easy position to make copies of their training materials or create screenshots and videos on their phones of training exercises and discussions. Then, with just as much ease, participants could pass this information on to outsiders to reflect on the nature of the training materials being presented as DEI measures.<sup>68</sup>

In highlighting worst-case scenarios to the public in his own personal documentary on DEI trainings gone awry,<sup>69</sup> a Seattle journalist, Christopher Rufo, began discussing information he received from the

---

66. See JOHN MCWHORTER, *WOKE RACISM: HOW A NEW RELIGION HAS BETRAYED BLACK AMERICA* 65 (Portfolio/Penguin 2021).

67. See Janel George, *A Lesson on Critical Race Theory*, 46 HUM. RTS. MAG. 2, 2 (2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory) [<https://perma.cc/AL88-ZZCD>].

68. See, e.g., Lia Eustachewich, *Coca-Cola Slammed for Diversity Training that Urged Workers to Be ‘Less White,’* N.Y. POST, <https://nypost.com/2021/02/23/coca-cola-diversity-training-urged-workers-to-be-less-white> [<https://perma.cc/2EZ9-2YP5>] (Feb. 23, 2021, 10:29 AM).

69. In some aspects using the term “gone awry” reflects a derivation of the title from a Christopher Rufo article titled “Progressives Gone Wild,” in which he attacked the City of Seattle and King County for its DEI training efforts to address systemic racism even before the Floyd protests occurred. See Christopher F. Rufo, *Progressives Gone Wild*, CITY J. (Dec. 17, 2019), <https://www.city-journal.org/seattle-progressive-municipal-employees> [<https://perma.cc/S5CM-YG7F>].

City of Seattle, King County, and Washington employees.<sup>70</sup> After one disclosure, Rufo learned of a training session with the title, “Lunch with Cultural Presentation,” that included a Black local entertainer, who identified “as a trans woman” and danced topless in a sheer body suit while covered with pasties.<sup>71</sup> Rufo wrote a story about this incident and provided a link to a Facebook video of the dance showing various City of Seattle employees smiling and interacting with the dancer.<sup>72</sup> This video included the Director of County Homelessness who oversaw the program and she was suspended and later terminated as a result of the disclosures.<sup>73</sup>

In a story that criticized a couple of other Seattle DEI initiatives and their leaders’ training decisions, Rufo stated: “City government employs more than 10,000 workers, all subject to rigorous diversity training and politically correct thinking. Despite the occasional public-relations fiasco, the progressive grip on Seattle’s political culture shows no sign of loosening.”<sup>74</sup> When Rufo learned from a “tip” about another City of Seattle DEI training session that had invited only white employees to a program about “internalized racial superiority” and “complicity in the system of white supremacy,” Rufo made public records requests and obtained slides and materials from that training and criticized the program.<sup>75</sup> Rufo also received an outpouring of complaints from others about DEI training they were being required to attend after George Floyd’s death.<sup>76</sup> This led Rufo to revealing components of DEI training programs that focused on white privilege issues at various companies including American Express, Bank of America, Lowe’s, Truist Financial Corporation, and Disney.<sup>77</sup>

---

70. See Christopher F. Rufo, *Cult Programming in Seattle*, CITY J. (July 8, 2020), <https://www.city-journal.org/seattle-interrupting-whiteness-training> [https://perma.cc/W54D-D67T].

71. See Scott Greenstone, *After Dancer Strips at Seattle Conference on Homelessness, Agency Director Suspended*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/homeless/after-dancer-strips-at-seattle-conference-on-homelessness-agency-director-suspended> [https://perma.cc/QNM6-LFM2] (Dec. 12, 2019, 6:00 PM).

72. Rufo, *supra* note 69 (citing Christopher F. Rufo, *Seattle Hires Transgender Stripper with Taxpayer Money*, FACEBOOK (Dec. 14, 2019) <https://www.facebook.com/realchrisrufo/videos/2635052099919927>).

73. See *id.*

74. *Id.*

75. See Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Targeting Critical Race Theory*, WASH. POST (June 21, 2021, 6:22 PM), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans> [https://perma.cc/Y2MC-EUJJ].

76. *Id.*

77. See Tyler O’Neil, *Major Corporations Had ‘Woke’ Trainings Exposed in 2021*, FOX BUS. (Dec. 24, 2021, 6:19 AM), <https://www.foxbusiness.com/politics/major-corporations-woke-trainings-exposed-in->

Rufo's anti-anti-racism attempts to reveal diversity training details did shine a light on the lack of employer monitoring. Although diversity consultants tend to be expert trainers, a lot of the problem still rests at the feet of employers who choose to pursue various aspects of diversity training in a narrow and merely performative way.<sup>78</sup> One commentator provides an excellent description:

Most of us know the drill. There's a national tragedy that directly impacts Black people. . . . Then one by one, the companies where we spend our money and that employ us release carefully crafted statements reassuring employees and consumers that they're thinking of us and on our side. What follows is often a vague commitment to do better and the introduction of new policies or benefits that fall in line with trends across the corporate landscape—listening sessions, diversity days, hiring DEI professionals, and adopting slogans like #BlackLivesMatter. . . . In and of themselves, these actions that companies take aren't bad. But when executives don't go any further—they don't analyze the internal structures that breed inequality, don't consider how they are complicit,

---

2021 [<https://perma.cc/2RKP-YA9Z>] (discussing multiple whistleblower documents provided to Rufo on what has occurred regarding DEI trainings with respect to White privilege discussions, etc.); Daniel Villarreal, *Disney Corp Asks Employees to Complete 'White Privilege Checklist', Pivot Away from 'White Dominant Culture', Leaked Docs Show*, NEWSWEEK (May 8, 2021, 12:23 AM) <https://www.newsweek.com/disney-corp-asks-employees-complete-white-privilege-checklist-pivot-away-white-dominant-1589775> [<https://perma.cc/24LE-HK6J>] (identifying documents published by Rufo on Twitter from Disney that allegedly cover “white privilege,” “white fragility,” “white saviors,” “microaggressions,” and “antiracism” and asking participants to complete a “white privilege checklist”).

78. See PAMELA NEWKIRK, *DIVERSITY, INC., THE FAILED PROMISE OF A BILLION DOLLAR BUSINESS* 206–08 (2019) (discussing how “it would be easy to dismiss many of the high-profile [diversity] efforts as window dressing—as flashy public relations ploys to ameliorate tensions or take an institution out of the news” while also recognizing that the investment in diversity may actually be intended to prevent employment discrimination liability); see also Norwood, *supra* note 3 (discussing failure to pursue sustained DEI training); Williams, *supra* note 23, at 1507 (referring to companies “that represent themselves as committed to diversity” but “these are false representations that amount to mere rhetoric and symbolic window dressing”); Trey Williams, *Most Employees Think Their Companies Are Guilty of Performative Allyship*, FORTUNE, (July 2, 2022, 7:30 AM), <https://fortune.com/2022/07/02/risks-of-performative-allyship> [<https://perma.cc/XA8M-FR2H>] (citing Tara Van Bommel, Katharina Robotham & Danielle M. Jackson, *Words Aren't Enough: The Risks of Performative Policies*, CATALYST (2022), <https://www.catalyst.org/reports/risks-performative-policies> [<https://perma.cc/3JZW-ASXG>]) (referring to a recent Catalyst survey, which indicated that out of “roughly 7,000 employees in 14 countries around the globe . . . an astonishing three-quarters of employees reported that their organization's racial equity policies were not genuine”).

don't turn the magnifying glass on their own employees and invest real resources to support newly launched diversity programs—they are guilty of performative allyship.<sup>79</sup>

In the midst of rushing to pursue some quick racial response in the workplace, some companies have exacerbated concerns that businesses are seeking to give the appearance of valuing diversity by lobbing some money at any form of training to complete a checklist. In at least one high profile example, a company used training through a third party that involved accessing a website to see a recycled presentation from a diversity expert that appears to be a form of do-it-yourself (DIY) training.<sup>80</sup> This training asked the participants to be “less white” as excerpts from the training were posted on social media and the company claimed that the training was not required, even though some whistleblowers said the training had been required.<sup>81</sup> The training was removed from the third-party vendor's website, and the diversity expert and consultant whose prior presentation appeared in a training video claimed she had nothing to do with the creation of this training.<sup>82</sup>

This minimalist and cost-cutting approach to diversity training caused a public relations nightmare for this particular company. This example highlights the need to have the diversity consultant immersed fully in the work related to the training and also its follow-ups. A DIY approach disregards the necessary contributions made by a DEI consultant's experience with designing the training and following up with participants regarding particular aspects.<sup>83</sup> Some diversity consultants

---

79. Williams, *supra* note 78.

80. Coca-Cola apparently offered training to employees that included a slide telling them to be less white. See Paul Bond, *After Coca-Cola Backlash, LinkedIn Removes Diversity Lesson Telling Employees to 'Be Less White,'* NEWSWEEK (Feb. 23, 2021, 4:19 AM) <https://www.newsweek.com/linkedin-removes-diversity-lesson-less-white-1571205> [<https://perma.cc/6WJQ-ZZLT>]. There was some dispute as to whether Coca-Cola required the training as employees who were whistleblowers claimed when they passed information on to a YouTube commentator who posted its content which had participants go to a LinkedIn video on *Confronting Racism* that included a slide asking employees to be “less white.” Eustachewich, *supra* note 68.

81. Bond, *supra* note 80.

82. See Bradford Betz, *Robin DiAngelo Distances Herself from 'Be Less White' Diversity Training*, FOX NEWS (Feb. 24, 2021, 5:57 PM), <https://www.foxnews.com/us/robin-diangelo-distances-herself-from-be-less-white-diversity-training> [<https://perma.cc/PS3HDDFF>] (referring to controversial DEI training being offered to Coca-Cola employees that merely used a LinkedIn training seminar with videos of a Robin DiAngelo interview for another entity and DiAngelo stated she had nothing to do with the training on the LinkedIn page that was offered to Coca-Cola employees).

83. See NEWKIRK, *supra* note 78, at 194 (referring to how “[t]he best efforts of diversity professionals are bound to fail without a true commitment to institutional transformation” and, without that commitment, all that the employers are “going to do is come up with some training programs, hiring programs, the standard stuff everyone's

refer to some of this rushed diversity training that occurs without much thoughtfulness as being “bad pornography: low budget nonsensical, poorly written, too funny to be taken seriously.”<sup>84</sup> The participants are not “learning anything meaningful or relevant about bias” and sometimes the “absurdity [of the exercise at issue] undermines the entire enterprise.”<sup>85</sup> Even worse, the training could “perpetuate sex- and race-based stereotypes.”<sup>86</sup>

Cyrus Mehri, an attorney involved in a number of high-profile litigation matters resulting in DEI initiatives, explained the problem with merely performative training:

Everybody is quick to do unconscious bias training and not interventions. . . . It’s about looking like you’re doing something. They want drive-by-diversity. If diversity and inclusion is buried in the organizational structure, it’s not going to have a lot of power. When you keep choosing the options on the menu that don’t create change, you’re purposely not creating change. It’s part of the intentional discrimination.<sup>87</sup>

By rushing to implement DEI training without identifying an expected objective or determining any measures as to how it will be followed up as part of a comprehensive change of workplace structures, it is understandable why studies of diversity training show limited results.<sup>88</sup> If a company commits to training that focuses on understanding the behavior that can create liability and the training highlights a systematic approach to changes that top management reinforces, that DEI training can have impact in the overall DEI transformation of a workplace.<sup>89</sup>

---

been doing the last few decades. . . . [a]nd it hasn’t really worked”) (quoting Michael Middleton, then-interim president for the University of Missouri).

84. See Bridget Read, *Doing the Work at Work, What Are Companies Desperate for Diversity Consultants Actually Buying?*, THE CUT (May 26, 2021), <https://www.thecut.com/article/diversity-equity-inclusion-industrial-companies>. [https://perma.cc/38RL-7WR4].

85. *Id.*

86. See EDELMAN, *supra* note 25, at 165, 285–86 n.49.

87. NEWKIRK, *supra* note 78, at 193–94.

88. See Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS, 61, 75–76 (2017) (discussing how some studies have found that diversity training produces little results).

89. *Id.* (discussing how not just training but how the development of diversity management structures improves equality); Lee, *supra* note 28, at 496 (discussing successful training when “clearly connected to the larger effort of working toward awareness and accountability”).

*D. Whitelash to Increased DEI Measures: Woke and Anti-CRT Claims*

A high-profile and anti-anti-racism narrative that began as a response to DEI measures taken after Floyd protests started by asserting that education and training seeking to achieve better racial understanding and awareness has become corrupted by racially-divisive CRT analysis.<sup>90</sup> This anti-anti-racism narrative achieved some initial success through a Presidential Executive Order.<sup>91</sup> This narrative has also resonated in various state and local initiatives seeking to prohibit schools and employers from engaging in any anti-racism education and training purportedly based upon CRT principles.<sup>92</sup>

---

90. The self-proclaimed lead architect of this attack is Christopher Rufo. See Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/NTC4-7RHQ>] (identifying how Rufo decided that CRT represented the “perfect villain” for conservatives to fight in its culture wars). Rufo’s use of CRT as “a promising political weapon” not only led to an Executive Order but also inspired various state legislatures to be guided by his language in proposing and passing measures to ban or restrict CRT use in any training or instruction in schools. *Id.* Also, Republican leaders, including Florida Governor Ron DeSantis and U.S. Senator Tom Cotton from Arkansas, tweeted attacks on CRT that referred to some of Rufo’s comments. *Id.*; see also Paul Best, *Ron DeSantis Introduced the Stop W.O.K.E. Act—and Name-Dropped MLK*, VICE (Dec. 16, 2021, 9:39 AM), <https://www.vice.com/en/article/g5qyqy/ron-desantis-florida-anticritical-race-theory-bill> [<https://perma.cc/VB8J-3K4E>] (describing new Florida legislation introduced by DeSantis with Rufo present at the signing that is aimed at giving a private right of action to sue schools and employers requiring CRT training).

91. See, e.g., Exec. Order. No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020) [hereinafter *President Trump’s Executive Order*]. President Biden immediately rescinded President Trump’s Executive Order when he issued a new Executive Order 13,985 on January 20, 2021. See Exec. Order. No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

92. See Jonathan P. Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 723, 725–26, 725 n.8 (2022) (highlighting the proliferation of draft legislation to stop coverage of CRT in schools that has been framed as anti-CRT but countering by arguing that this description is “inaccurate” because the bills do not propose “substantive, good faith critiques of CRT” and rather represent a “disinformation campaign”); Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 21, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory> [<https://perma.cc/DYP9-WPVJ>]; Waxman, *supra* note 30 (describing how “critical race is rarely taught below the graduate level” but “conservative politics” has sought “to restrict the way history is taught or ban the use of CRT . . . and antiracism training [as] ‘discriminatory’ and illegal ‘in many instances’”); see also Heather Hollingsworth & Thomas Beaumont, *Culture War Fight Finds Mixed Success in School Board Races*, ASSOCIATED PRESS (Nov. 6, 2021), <https://apnews.com/article/elections-education-race-and-ethnicity-racial-injustice-school-boards-bed36a1460957cb6be4df9d18583a765> [<https://perma.cc/T2DG-7P4V>] (describing how school board candidates relying on CRT bans as a culture war has led to mixed results in elections); Kearse, *supra* note 16.

In the workplace, anti-anti-racism narratives have also concentrated on exposing and challenging particular DEI- and CRT-based training exercises as representing discrimination against white persons.<sup>93</sup> Some commentators have asserted that this attack on CRT embodies an extended level of “whitelash,” a form of “backlash” fomented by white grievance that arose after Barack Obama’s election as the first Black president and continued during the 2016 election as President Trump embraced white racial gripes.<sup>94</sup> According to Darren Hutchinson, this whitelash has continued after the 2020 election to include “attacks on antiracist intellectuals” as an effort to “chill antiracist activism, and stigmatize antiracist intellectuals.”<sup>95</sup> Three key proponents of this anti-CRT form of whitelash are Christopher Rufo, John McWhorter, and Florida Governor Ron DeSantis, who has led his state to pass laws pursuing these anti-anti-racism narratives including workplace bans on CRT training.<sup>96</sup>

---

93. See, e.g., Michael Levenson, *Jury Awards \$10 Million to White Male Executive in Discrimination Case*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/28/us/david-duvall-firing-lawsuit-diversity.html>; Rachel Stone, *Ex-Exec Slams Novant’s Bid to Overturn \$10M Bias Verdict*, LAW360 (Feb. 22, 2022, 5:50 PM), <https://www.law360.com/employment-authority/articles/1467052/ex-exec-slams-novant-s-bid-to-overturn-10m-bias-verdict> [<https://perma.cc/EWE7-T6EV>] (describing verdict for white male manager based on gender and race diversity measures and the employer’s attempt to reverse the verdict); *President Trump’s Executive Order*, *supra* note 91 (asserting that workplace diversity training is “rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some [white] people, simply on account of their race or sex, are oppressors” and this type of training “perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint”).

94. See Darren Lenard Hutchinson, *Continuous Action Toward Justice*, 37 J.L. & RELIGION 63, 63 & n.1 (2022) (citing TERRY SMITH, *WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX* 3, 8 (2020)); Josiah Ryan, *‘This Was a Whitelash’: Van Jones’ Take on the Election Results*, CNN, <https://www.cnn.com/2016/11/09/politics/van-jones-results-disappointment-cnn/index.html> [<https://perma.cc/HRP2-TSZV>] (Nov. 9, 2016, 9:16 AM); see also Serwer, *supra* note 31 (discussing how during the Obama presidency “white Americans became convinced not only that racism was a thing of the past but also that, to the extent racial prejudice remained a factor in American life, white people were its primary victims” and those views only changed in leading to current efforts to seek racial reform when the BLM movement and other activists highlighted via videos the “gruesome” evidence how Black people experienced policing including George Floyd’s murder). Some of this “whitelash” may follow from recognition of just how many white allies became interested in pursuing racial justice as part of the Floyd protests. Hutchinson, *supra* note 94, at 69, 71.

95. Hutchinson, *supra* note 94, at 64.

96. See Cathy Young, *Ron DeSantis, Chris Rufo, and the College Anti-Woke Makeover*, BULWARK (Jan. 16, 2023, 5:30 AM), <https://www.thebulwark.com/ron-desantis-chris-rufo-and-the-college-anti-woke-makeover-florida> [<https://perma.cc/TBM6-UJF8>].



## 1. CHRISTOPHER RUFO: SELF-IDENTIFIED ANTI-CRT ARCHITECT

Christopher Rufo, a Seattle journalist, freelance photographer, and fellow at the conservative think tank, the Manhattan Institute, has used his investigations of DEI training sessions to initiate many of the anti-anti-racism narratives.<sup>97</sup> According to Rufo, DEI training tended to cite the works of anti-racism authors, Robin DiAngelo and Ibram Kendi, who both referred to the work of CRT scholars, Derrick Bell and Kimberlé Crenshaw, and their identification of “structured disadvantages” based on race rather than individual racist actions.<sup>98</sup> Rufo then seized upon the term “critical race theory” to assert it had Marxist roots that could be used as a new weapon in culture wars because asserting “political correctness” was too old and “cancel culture” was too “vacuous,” but CRT was exactly the “perfect villain.”<sup>99</sup>

## 2. JOHN MCWHORTER: “WOKE RACISM” AUTHOR

John McWhorter, a Black male and linguistics professor, has framed his anti-anti-racism narratives as being against “woke” activism.<sup>100</sup> Many of the overall anti-anti-racism narratives, similar to McWhorter’s, attack any calls for racial accountability as being part of a “cancel culture” that disrespects and infringes on legitimate perspectives and the rights of white persons as its own form of racial discrimination.<sup>101</sup> Despite being one of the most prominent critics of so-called woke narratives,

---

97. See Wallace-Wells, *supra* note 90; see also *supra* notes 68–76, 89–91 and accompanying text.

98. Wallace-Wells, *supra* note 90.

99. *Id.*

100. See McWhorter, *supra* note 66, at 1–7 (discussing examples of white employees and other “innocent people” losing their jobs for arguably innocuous comments being deemed racist due to what the author refers to as a “Third Wave Antiracism” movement of “social justice warriors” or “the woke mob” who “no longer just quietly pride themselves on their enlightenment in knowing to be offended about certain things, but now see it as a duty to excoriate and shun those (including [B]lack people) who don’t share their degree of offense”).

101. See John McWhorter, *Academics are Really, Really Worried About Their Freedom*, ATLANTIC (Sept. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724> [<https://perma.cc/C7GF-4CGG>]; Helen Lewis, *How Capitalism Drives Cancel Culture*, ATLANTIC (July 14, 2020), <https://www.theatlantic.com/international/archive/2020/07/cancel-culture-and-problem-woke-capitalism/614086/> [<https://perma.cc/CQ6K-2W2M>]; see also Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 460–62, 468–70 (2014) (describing how efforts to adopt an anti-racist approach could be rejected by a white person who would have identity struggles and instead seek efforts aimed at transparency and innocence that block racial progress).

McWhorter's recent book, *Woke Racism, How a New Religion Has Betrayed Black America*, still never defines clearly what "woke" means. He uses the term in the title but then only mentions it in the text a few times.<sup>102</sup> McWhorter acknowledges the term "woke" has been "used in derision," and he finds it "unsuitably dismissive."<sup>103</sup> In denouncing this derision and instead of using "woke" more directly, McWhorter chose to refer to what he calls "the influence of a frame of mind . . . a movement whose adherents are more often termed . . . 'the woke mob.'"<sup>104</sup>

According to McWhorter, anti-racism activities led to "innocent people losing their jobs" and "forc[ing] us to teach our actual ten-year olds . . . to believe in sophistry in the name of enlightenment."<sup>105</sup> To McWhorter, "ordinary statements that once were thought of as progressive, like 'I don't see color'" are deemed racist, and "if you are white, you are to despise yourself as tainted with 'white privilege' in everything you do."<sup>106</sup>

McWhorter has focused on critiquing the work of a few anti-racist scholars including Ta-Nehisi Coates, Robin DiAngelo, and Ibram Kendi.<sup>107</sup> Although he reserved some of his most hostile comments for Coates and another scholar, Nicole Hannah-Jones,<sup>108</sup> his most consistent attacks concentrate on the works of Kendi and DiAngelo. Eventually, McWhorter referred to them collectively by coining the term "KenDiAngelonian" as an adjective.<sup>109</sup> In some aspects, most of McWhorter's critique is a bit of a polemic with few references or sources being cited in support of his claims.<sup>110</sup> Nevertheless, McWhorter, at a minimum, is a key voice in the anti-anti-racism movement that has led efforts to not only criticize so-called woke workplaces, but to also pursue actions to prevent these workplaces from pursuing a "woke" or anti-racist agenda.<sup>111</sup>

102. McWhorter, *supra* note 66, at 4, 18, 152.

103. *Id.* at 18, 152.

104. *Id.* at 4.

105. *Id.* at 5–6.

106. *Id.* at 16.

107. *Id.* at 30–33, 57–58.

108. *Id.* at 107–08 (asserting Coates had "no sympathy for the white cops and firemen who died at the World Trade Center on 9/11" and was "irresponsible for someone billed as a public intellectual" and "Hannah-Jones's claim is quite simply false").

109. *Id.* at 137, 175 (referring, respectively, to the "KenDiAngelonian gospel" and "KenDiAngelonian religion").

110. See Cedric Merlin Powell, *Woke? John McWhorter's Woke Racism*, 25 GREEN BAG 123, 132–33 (2022) (referring to McWhorter's "polemical" arguments).

111. See Sean Illing, *The Anti-Antiracist*, VOX (Nov. 2, 2021, 8:00 AM), <https://www.vox.com/vox-conversations->

## 3. FLORIDA'S NEW WORKPLACE WOKE LAW

One state has affirmatively decided to attack diversity training based upon CRT.<sup>112</sup> Under the leadership of Governor Ron DeSantis, the state of Florida enacted legislation on March 10, 2022, to become the first state in the nation to pass a law that limits the topics employers can discuss during their employees' diversity training.<sup>113</sup> Before passage of the legislation, DeSantis stated: "In Florida, we are taking a stand against the state-sanctioned racism that is critical race theory, . . . [w]e must protect Florida workers against the hostile work environment that is created when large corporations force their employees to endure CRT-inspired 'training' and indoctrination."<sup>114</sup>

The legislation, known as the "Stop WOKE Act," targets both employers and schools to prohibit trainings and lessons that make participants "uncomfortable" about their ancestors' actions.<sup>115</sup> Employers with more than fifteen employees can be sued under the Florida Civil Rights Act for committing a violation.<sup>116</sup> Governor DeSantis has identified "WOKE" in the title of the statute as an acronym for "Wrongs to our Kids and Employees."<sup>117</sup> Employers cannot require employees to attend trainings that cover any of the prohibited subjects, but they can allow that training to be offered on a voluntary basis.<sup>118</sup> Those prohibited subjects are as follows:

---

podcast/2021/11/2/22728801/voxconversations-john-mcwhorter-woke-racism [https://perma.cc/P2BA-Y3HK] (referring to McWhorter as one of the "chief" critics of antiracism and of Kendi and DiAngelo).

112. See David Lyons, *State 'Anti-Woke' Law Rattles Employer Diversity Programs: Are They on the Way Out?*, S. FLA. SUN-SENTINEL (Apr. 3, 2022, 8:00 AM), <https://www.sun-sentinel.com/business/fl-bz-anti-woke-law-florida-businesses-20220403-bs6by2oihvdldcke67mfctw5xy-story.html> [https://perma.cc/K2SB-4C95]; Cristina Portela Solomon & Kate L. Pamperin, *Florida's "Stop Woke" Act Limits the Topics Employers Can Discuss in D&I Training*, FOLEY (Mar. 28, 2022), <https://www.foley.com/en/insights/publications/2022/03/florida-stop-woke-act-limits-topics-employers> [https://perma.cc/TU7P-AQEB].

113. Solomon & Pamperin, *supra* note 112.

114. See Jade Bremner, *Ron DeSantis 'Stop Woke' Act Could Bar Disney from Diversity Trainings*, INDEPENDENT (Mar. 21, 2022, 5:42 PM), <https://www.independent.co.uk/news/world/americas/ron-desantis-disney-woke-don-t-say-gay-b2040506.html> [https://perma.cc/2F6W-7LVV].

115. Lyons, *supra* note 112.

116. Solomon & Pamperin, *supra* note 112.

117. Lyons, *supra* note 112.

118. Solomon & Pamperin, *supra* note 112.

1. Members of one race, color, sex, or national origin are morally superior to members of another race, color, sex, or national origin.
2. An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. An individual's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.
4. Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.
5. An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.
6. An individual, by virtue of his or her race, color, sex, or national origin, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
7. An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin.
8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.<sup>119</sup>

This law allows mention of these subjects as long as offered in an “objective manner without endorsement of such concepts.”<sup>120</sup> The statute does not explain how that line will be drawn in determining what is an objective manner.<sup>121</sup> The president of the University of Florida passed on a presentation to faculty to help them become familiar with the law and

---

119. *Id.*

120. *Id.*

121. *Id.*

how to comply with it.<sup>122</sup> Lawsuits have been filed to challenge the law, and the resolution of those lawsuits may end up showing what type of diversity training employers may consider in Florida.<sup>123</sup>

## II. EXISTING SYSTEMIC RACE DISCRIMINATION THEORIES, INTERVENTIONS, AND REMEDIES

With Supreme Court Justice Sandra Day O'Connor's acceptance in 2003 that "race . . . still matters,"<sup>124</sup> and despite her so-far inaccurate prediction that race would no longer matter by 2028,<sup>125</sup> the Floyd protests suggest that our society is even more divided on issues of race that affect the workplace. McWhorter mentions CRT as a racial concern by stating that the problem arose when Richard Delgado "began teaching non-whites to base their complaints about injustice not on something so 'rigid' as objective truth, but upon the 'broad story of dashed hopes and centuries long mistreatment.'"<sup>126</sup> Also, McWhorter criticized the work of Regina Austin as being about the "significance of black lawbreaking" as opposed to "preoccupation with civility, respectability, sentimentality, and decorum."<sup>127</sup>

---

122. Giselle Thomas, *UF Sends a Video Explaining "Stop Woke Act" to Faculty*, CBS 4 NEWS (May 2, 2022, 5:23 PM), <https://mycbs4.com/news/local/uf-sends-a-video-explaining-stop-woke-act-to-faculty> [<https://perma.cc/5EZV-UPQZ>].

123. See Selene San Felice, *Clearwater Company Leads Suit Against DeSantis for "Stop WOKE" Act*, AXIOS, <https://www.axios.com/local/tampa-bay/2022/06/22/clearwater-company-suit-desantis-stop-woke-act> [<https://perma.cc/6Z5N-VZ94>] (June 23, 2022) (describing lawsuit asserting First Amendment violation by Stop WOKE Act, which became effective July 1, 2022). A Ben & Jerry's franchisee has joined the lawsuit. See *Battles Continue as "Stop WOKE Act" Law Takes Effect*, CBS MIA., <https://www.cbsnews.com/miami/news/battles-continue-as-stop-woke-act-law-takes-effect> [<https://perma.cc/6YF3-HC64>] (July 1, 2022, 3:40 PM); see also Zach Schonfeld, *Judge Blocks DeSantis's 'Stop WOKE Act,' Says Florida Feels Like a 'First Amendment Upside Down,'* THE HILL, <https://thehill.com/regulation/court-battles/3607213-judge-blocks-desantiss-stop-woke-act-says-florida-feels-like-a-first-amendment-upside-down> [<https://perma.cc/AT8TJH7S>] (Aug. 19, 2022, 11:43 AM) (describing federal district court judge's ruling enjoining the implementation of certain parts of the Stop WOKE Act as a violation of the First Amendment's free speech provisions and of the Due Process Clause of the Fourteenth Amendment for being vague).

124. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (finding that "race unfortunately still matters").

125. *Id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

126. MCWHORTER, *supra* note 66, at 62 (referring to RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 29 (1996)).

127. *Id.* at 62–63 (referring to Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1775, 1791 (1992)).

It is not surprising that non-legal commentators fail to offer any in-depth analysis for their view of what they believe CRT encompasses. As an example, McWhorter makes short statements, essentially soundbites, about the works of Delgado and Austin and provides a single reference, without any discussion, to “Crenshaw, Gotanda, Peller, and Thomas . . . one of the signature CRT anthologies.”<sup>128</sup> At no point does McWhorter attempt to explain or define the CRT founders’ terms. McWhorter merely uses the term “CRT” as a placeholder for suggesting that anti-racism narratives rely upon ignoring any racial progress and upon vilifying white persons.<sup>129</sup> As mentioned, McWhorter’s approach (like Rufo’s) is emblematic of a broader conspiracy to recast the term “Critical Race Theory” and misidentify its meaning for political purposes.<sup>130</sup> Instead, and without any citation or reference, McWhorter says that “Critical Race theory tells you that everything is about hierarchy, power, their abuses—and that if you are not Caucasian in America, then you are akin to the captive oarsman slave straining belowdecks in chains.”<sup>131</sup> Unfortunately, these soundbites do not capture the heart of CRT with respect to expanding considerations beyond basic legal regimes to think about what structural barriers perpetuate racial disparity.

#### A. CRT’s Role in Unearthing Systemic Discrimination Beyond the Law

In contrast to McWhorter’s views,<sup>132</sup> Khiara Bridges has recently helped to explain the debates about CRT as part of a collective anti-anti-

---

128. *Id.* at 61–66.

129. *See* Powell, *supra* note 110, at 135 (describing how McWhorter attempts to “turn legitimate claims for equality into reverse racism claims where the oppressed become the oppressors” and ignoring “the realization that in 2022 there are identifiable vestiges of past discrimination”).

130. *See* Khiara M. Bridges, *Language on the Move: “Cancel Culture,” “Critical Race Theory,” and the Digital Public Sphere*, 131 *YALE L.J. F.* 767, 787 & n.110 (2022) (referring to the conservative “misdescriptions of CRT” and providing sources that those conservative commentators could explore to properly identify CRT but that would be in conflict with their agenda); *see also* Waxman, *supra* note 30 (discussing how “[c]onservative advocacy groups, legal organizations and state legislatures have mounted a campaign to weaponize the teaching of critical race theory, driven by a belief that fighting it will be a winning electoral message” and how an *Economist/YouGov* poll shows “that although only about a third of respondents had a good idea of what CRT was, most people who knew about it had an unfavorable opinion”); Wallace-Wells, *supra* note 90 (describing Rufo’s actions seeking to weaponize the term “CRT”).

131. McWHORTER, *supra* note 66, at 63.

132. *See* Powell, *supra* note 110, at 126, 130, 135 (criticizing McWhorter’s book as discounting systemic discrimination by focusing on individual encounters while doing very little to explain or understand CRT or discount its analysis in anti-racism discussions).

racism campaign while also providing a backdrop to understanding CRT's role in rooting out systemic discrimination. As noted by Bridges, "a vocal cadre of conservatives has been on the warpath, seeking to expunge CRT from schools, institutions, and, it seems, all of public life."<sup>133</sup> Bridges has also highlighted the significance of the internet and social media in creating these hostile commentaries.<sup>134</sup> Within this "digital public sphere," key and powerful actors "pay individuals to pose as unpaid users in order to influence other users and the terms of the debate."<sup>135</sup> Under this modern approach to digital communication, phrases such as "Critical Race Theory" and "cancel culture" have become further weaponized by conservative forces. "Cancel culture," "woke," and "CRT" all have a history as terms that were used by the Black community to speak truth to power.<sup>136</sup>

Those desiring to circumvent the political gamesmanship in weaponizing<sup>137</sup> CRT should recognize exactly what CRT represents. This Article does not seek to unpack all of the rich history leading to and explaining the development of CRT and its initial critiques as those seeking to weaponize the term have not demonstrated their actions represent a clear exploration of and understanding of the tenets of CRT. For the purpose of responding to efforts to prohibit diversity training by criticizing CRT, it is important to engage in a brief overview of CRT to understand how its tenets may apply to DEI initiatives.

To start, one must be willing to accept that "there is . . . a depressingly strong and invariant correlation between resources and race in this country."<sup>138</sup> In line with that understanding, a specific definition of CRT was espoused by one of the founders, Derrick Bell, when he stated the following in 1995:

The answers to what is critical race theory are fairly uniform and quite extensive. . . . [C]ritical race theory is a body of legal

---

133. See Bridges, *supra* note 130, at 768.

134. *Id.* at 770–71.

135. *Id.* at 773.

136. *Id.* at 776, 785–87, 787 n.110 (discussing derivation of cancel culture while "crediting black people for the cultural expression" and "Black Twitter" so that "origins of canceling are located in the black community . . . as a province of the disempowered" while referring to "actual CRT" as the examination of "the law's role in producing, protecting, and naturalizing racial inequality"); Romano, *supra* note 16 (describing derivation of "woke" from the Black community's social activist use of the term and its current misappropriation by conservative commentators).

137. See Linda S. Greene, *Critical Race Theory: Origins, Permutations, and Current Queries*, 2021 WIS. L. REV. 259, 267 (describing comments of Kendall Thomas suggesting that the Trump Executive Order banning training on critical race theory had involved "weaponization" by the Trump Administration).

138. See Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 894.

scholarship, now about a decade old, a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by law.<sup>139</sup>

CRT also recognizes that neutral or colorblind analysis of discrimination leaves the law to address only the most obvious forms of discrimination.<sup>140</sup> As a result, Bell was very much critical of the use of diversity as a substitution for anti-racism because it could narrow the scope of inquiry regarding systemic and non-overt levels of discrimination.<sup>141</sup>

Because CRT is a body of legal scholarship, it is not surprising that non-legal commentators, including McWhorter and Rufo, do not explore what CRT really means.<sup>142</sup> A desire to understand CRT's true meaning

139. *Id.* at 898.

140. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3, 8 (3d ed. 2017).

141. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (asserting that relying on a diversity rationale can support efforts to ignore racism). Others have also explained how using diversity can limit exploration of concerns based on race. See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013). Many of the critiques of diversity within workplace culture also derive from empirical work that demonstrates how using diversity concepts can diminish actual protection of workers from race discrimination as employers become more focused on cultural aspects and appearances rather than worker rights. See ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* 205–22 (2015) (reviewing the application of diversity in the human resources department of a Fortune 500 company through empirical information generated by thirty-one interviews to describe how diversity transitioned the fight for legal rights to be free from workplace discrimination based upon race to more of a focus on competitive advantages based upon cultural differences); see also Ellen Berrey, *Diversity Is for White People: The Big Lie Behind a Well-Intended Word*, SALON, [https://www.salon.com/2015/10/26/diversity\\_is\\_for\\_white\\_people\\_the\\_big\\_lie\\_behind\\_a\\_well\\_intended\\_word/](https://www.salon.com/2015/10/26/diversity_is_for_white_people_the_big_lie_behind_a_well_intended_word/) [<https://perma.cc/7NBL-6HUA>] (Oct. 26, 2015, 9:58 AM) (discussing how “diversity talk is not enough” in response to racial challenges in the workplace and rather “pernicious” as it allows businesses to adopt various non-racial meanings of diversity while pursuing initiatives including “counterproductive diversity trainings” that fail to improve the workplace for people of color and water down concerns of race to discussing issues of cultural difference rather than racial discrimination); Edelman, *supra* note 25, at 138–49, 164–56 (criticizing growth of diversity and diversity training programs as performative and symbolic structures that prevent employees from mobilizing legal rights against discrimination); Rich, *supra* note 26, at 1074–75, 1098 (referring to the use of diversity as being a defense to a claim by women or people of color while allowing the use of diversity as proof of reverse discrimination claims and criticizing a focus on diversity as an institutional benefit that can be “exploitative” versus using diversity as a legal measure to pursue equality).

142. There are certainly legal scholars who have attacked CRT as a whole, mostly at its formative stages. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809, 814



conflicts with the intentions of those anti-anti-racism forces that have sought to demonize the term. As Rufo openly stated, he intended to weaponize the term as part of a culture war to lead to a situation where someone in “the public [would] read something crazy in the newspaper and immediately think ‘critical race theory.’”<sup>143</sup> Likewise, McWhorter explained his similar goal by saying he sees CRT issues arising “at the PTA meeting, or when you open up websites of what were once your favorite news sources, or . . . when you submit to ‘diversity training’ at work that leads to nothing you can perceive except the mouthing of vacuous mantras. . . .”<sup>144</sup>

After a discussion about the purpose of these undeveloped attacks on CRT with Kimberlé Crenshaw, also one of the CRT founders, one will likely conclude that opposition to CRT stems from “a misinformation campaign changing the rules we live by.”<sup>145</sup> Also, as Crenshaw notes, responding to these misguided challenges to CRT by trying to explain and stop the misinformation about CRT is not really “a debate that is winnable” as the critics of CRT are more focused on “a weapon they’re using to hold on to power.”<sup>146</sup> Anti-anti-racist attackers have no intention of really attempting to understand CRT because that would include acknowledging that CRT exposes how racial progress in our country has not followed a linear progression.<sup>147</sup> This does not mean that CRT denies racial progress as a whole or that CRT sets up a structure where racial progress can never be obtained, as some critics would argue.<sup>148</sup> Instead, despite progress, CRT proponents continue to seek an “egalitarian state

---

(1993); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1748 (1989); see also Jeffrey Rosen, *The Bloods and the Critics*, NEW REPUBLIC (Dec. 8, 1996), <https://newrepublic.com/article/74070/the-bloods-and-the-critics>.ew [https://perma.cc/HQP3-XHEB] (arguing that CRT somehow ignores the achievements and gains from the 1960s civil rights movement).

143. See Trip Gabriel, *He Fuels the Right’s Cultural Fires (and Spreads Them to Florida)*, N.Y. TIMES (Apr. 24, 2022), <https://www.nytimes.com/2022/04/24/us/politics/christopher-rufo-crt-lgbtq-florida.html> (quoting Chris Rufo (@realchrisrufo), TWITTER (Mar. 15, 2021, 2:17 PM), <https://twitter.com/realchrisrufo/status/1371541044592996352> [https://perma.cc/FL3S-SE8R]).

144. MCWHORTER, *supra* note 66, at 17.

145. Rita Omokha, “*I See My Work as Talking Back*”: *How Critical Race Theory Mastermind Kimberlé Crenshaw Is Weathering the Culture Wars*, VANITY FAIR (July 29, 2021), <https://www.vanityfair.com/news/2021/07/how-critical-race-theory-mastermind-kimberle-crenshaw-is-weathering-the-culture-wars> [https://perma.cc/Y7C2-6V2P].

146. *Id.*

147. See Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607 (2011) (referring to this cyclical dynamic as the “reform/retrenchment dialectic”); see also Hamilton, *supra* note 11, at 66.

148. See Bell, *supra* note 138, at 902 (asserting that CRT proponents are not “victim-mongers seeking sympathy in return for a sacrifice in pride”).

of affairs” with the understanding that purported neutrality may actually lead to value judgments that marginalize people by race.<sup>149</sup> As a result, CRT demands a race-conscious perspective that others may criticize or seek to delegitimize.<sup>150</sup>

Continuing to seek racial reforms as a response to the Floyd protests does not mean that our society has failed to make any racial progress.<sup>151</sup> Although there are many individual examples of progress for Black people, systemic racial barriers do still exist.<sup>152</sup> In 2022, a significant achievement occurred with the confirmation of the first Black woman Supreme Court Justice, Ketanji Brown Jackson.<sup>153</sup> Also, Sandra Douglass Morgan became the first Black woman to become president of a professional NFL team, the Las Vegas Raiders.<sup>154</sup> Then Melody Hobson became the first Black woman to be scheduled to have an ownership stake in an NFL team, the Denver Broncos, as she joined with the Walton-Penner group making a June 2022 bid to purchase that team.<sup>155</sup> The former Secretary of State and first Black woman to serve in

149. *Id.* at 901–02 (discussing commentaries by Charles Lawrence and Mari Matsuda both challenging neutrality arguments being asserted regarding free speech rights as when analyzing hate speech and Bell’s agreement with their challenges).

150. *Id.* at 908 (discussing such criticism presented by Black Harvard Law Professor, Randall Kennedy); Greene, *supra* note 137, at 267–68 (referring to comments by Dean Angela Onwuachi-Willig asserting that CRT principles are helpful in understanding what younger generations should demand for equality and how “colorblind approaches are not an effective means for dismantling subordination”).

151. See Darren Lenard Hutchinson, “*With All the Majesty of Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 101 CAL. L. REV. 371, 394–95 (2022) (describing many “changes in judicial and legislative responses to racial inequality” as some of the many reasons leading to “[r]acial progress” by the middle of the twentieth century).

152. See Melissa De Witte, *Stanford Scholars Examine Systemic Racism, How to Advance Racial Justice in America*, STAN. NEWS (Feb. 1, 2022), <https://news.stanford.edu/2022/02/01/examining-systemic-racism-advancing-racial-equity> [<https://perma.cc/L9CC-YZF3>] (describing efforts by Stanford scholars to tackle existing systemic discrimination based on race in our society in areas such as the disproportionate effect of the pandemic, attempts to disenfranchise voters and stop voter discrimination protections, actions to remove anti-racist teachings from schools, disparate treatment of Black men in the criminal justice system, and other studies of disparities based on race in the health and medicine, technology and workplace settings).

153. See Ximena Bustillo, *Ketanji Brown Jackson Sworn in as First Black Woman on the Supreme Court*, NPR, <https://www.npr.org/2022/06/30/1108714345/ketanji-brown-jackson-supreme-court-oath-swearing-in> [<https://perma.cc/K6PH-5MXF>] (June 30, 2022, 2:03 PM).

154. Michela Moscufo, *Sandra Douglass Morgan Makes History as First Black Woman to Lead NFL Team*, YAHOO! NEWS (July 14, 2022), <https://www.yahoo.com/gma/sandra-douglass-morgan-speaks-being-145830881.html> [<https://perma.cc/MS2V-UEMY>].

155. See Shanique Yates, *Melody Hobson to Be an Owner of Denver Broncos, Making Her Apart of Few Black Women with an Equity Stake in a Team*, YAHOO! (June

that position, Condoleezza Rice, is also expected to join Hobson as another Black woman having an ownership stake in the Denver Broncos after the bid for ownership was approved as expected during an NFL owners meeting on August 9, 2022.<sup>156</sup> While the achievements of Justice Brown Jackson, President Douglass Morgan, and owners-to-be Hobson and Rice represent significant accomplishments in 2022, these one-off examples of firsts that were long overdue do not suggest transformational change given how long it has taken to place a Black woman in these positions.

Justice Brown Jackson explained this long progression after her confirmation by stating: “[i]t has taken 232 years and 115 prior appointments for a Black woman to be selected to serve on the Supreme Court of the United States, but we’ve made it!”<sup>157</sup> Further, the significant battle it took to confirm Justice Brown Jackson despite her “stellar credentials and more judicial experience than any of the sitting justices when they were nominated”<sup>158</sup> does not bode well for future appointments of Black women to the Supreme Court who care about social justice and have any history serving as a judge.<sup>159</sup> Despite her great qualifications, most Republican senators did not vote for Justice Brown Jackson and several challenged her directly on issues appearing hostile and unwarranted.<sup>160</sup>

CRT critiques of societal discrimination demonstrate how, after levels of racial progress are achieved, retrenchment responses to that

9, 2022), <https://www.yahoo.com/video/melody-hobson-owner-denver-broncos-160622133.html> [<https://perma.cc/P49P-JJ7G>].

156. See David Close, *NFL Owners Approve Sale of Denver Broncos to Walton-Penner Family, Led by Walmart Heir Rob Walton*, CNN, <https://www.cnn.com/2022/08/09/sport/denver-broncos-sold-to-walmart-family-group> [<https://perma.cc/7Y2D-AZ6B>] (Aug. 9, 2022, 10:28 PM); Tim Lynch, *Approval of Broncos Sale Expected from NFL Owners at August 9th Meeting*, MILE HIGH REP. (July 20, 2022, 4:27 PM), <https://www.milehighreport.com/2022/7/20/23272078/broncos-sale-rob-walton> [<https://perma.cc/VL5V-UDPD>] (discussing Walton-Penner Group led by a Walmart heir, Rob Walton, who will be the primary owner and his daughter and son-in-law, respectively, Carrie Walton Penner and Greg Penner, will run the day-to-day business).

157. Bustillo, *supra* note 153.

158. David Knowles, *The Most Noteworthy Republican Objections to Confirming Ketanji Brown Jackson to the Supreme Court*, YAHOO! NEWS (Apr. 7, 2022), <https://news.yahoo.com/ketanji-brown-jackson-republican-objections-supreme-court-195309426.html> [<https://perma.cc/3PPD-CML4>].

159. See Tierney Sneed, *Ambitious Trial Judges Could Be Wary After GOP Attacks on Judge Jackson’s Sentencing Record*, CNN, <https://www.cnn.com/2022/04/11/politics/jackson-sentencing-supreme-court-nominations/index.html> [<https://perma.cc/R33C-CDXS>] (Apr. 11, 2022, 7:21 AM) (suggesting that Republican Senators’ attacks on Justice Brown Jackson during the confirmation hearing were intended to send a chilling message to judges who might aspire to higher appointments).

160. See Knowles, *supra* note 158.

progress continue to pose a concern.<sup>161</sup> CRT analysis expands beyond legal changes focused on intentional discrimination against individuals based on race and looks at structural and institutional bases as well as implicit bases for discrimination.<sup>162</sup> In some aspects, the solution for awoke employers addressing anti-anti-racism attacks, as asserted by this Article, follows key CRT tenets by recognizing the progress provided by a legal-based solution and then expanding the debate to seek racial equality beyond any legal interventions.<sup>163</sup> Nevertheless, it is not a peculiar legal position or theory to argue that Black employees may charge employers with systemic discrimination in the workplace. To the contrary, most scholars and practitioners familiar with workplace law understand that employees' systemic race discrimination claims may be brought in court under Title VII and employers may be found liable for compensatory and even punitive damages due to such discrimination.<sup>164</sup>

### *B. Workplace Legalities: Systemic Race Discrimination*

Although CRT offers an analytical paradigm to uncover systemic discrimination based on race, critics of CRT, including those steeped in colorblind ideologies, may still not acknowledge the presence of this form of discrimination. These critics may only be willing to accept the existence of intentional and overt acts of discrimination perpetrated by a few bad actors rather than recognizing racial discrimination may result from overall structural barriers. Despite the existence of these systemic discrimination naysayers, the legal reality for employees and employers

---

161. Hamilton, *supra* note 11, at 90 (discussing how “the halting nature of racial progress over the course of U.S. history” is one of CRT’s “core ideas”); *see also* Erika George, Jena Martin & Tara Van Ho, *Reckoning: A Dialogue About Racism, Antiracists, and Business & Human Rights*, 30 WASH. INT’L L.J. 171, 184 (2021) (referring to how CRT “was born from a frustration with how advancements in civil rights were being dismantled by the legal system”).

162. George, Martin & Van Ho, *supra* note 161, at 183.

163. *See* Crenshaw, *supra* note 11, at 1335 (“[A] realistic examination of the limited alternatives available to Blacks makes it clear that legal reform was a viable pragmatic strategy for Blacks confronted with the threat of unbridled racism on one hand and co-optation on the other.”).

164. *See* Katrina Lee, *Discrimination as Anti-ethical: Achieving Systemic Change in Large Law Firms*, 98 DENV. L. REV. 581, 597 (2021) (finding “[s]ystemic discrimination has long been recognized by scholars in the employment realm”); Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1136 (2015) (describing systemic discrimination as “bias that is built into systems, originating in the way work is organized”); Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 398–99 (2011) (referring to systemic discrimination as an employer “producing wrongdoing on an aggregate basis”); Iafolla, *supra* note 18 (describing employer liability for punitive damages in employment discrimination lawsuits).

is that they must address systemic discrimination concerns on a regular basis.

To demonstrate these legal realities, the following discussion proceeds first by making the evidentiary case for the existence of systemic race discrimination via anecdotal and empirical reports. Then this discussion explores the development of legal models based on systemic race discrimination that continue to be used in employee lawsuits that employers must be prepared to defend. This discussion then examines employer defensive actions through training interventions including assessing the pros and cons of DEI training aimed at preventing systemic race discrimination lawsuits. This discussion concludes by reviewing class action litigation based on systemic race discrimination that led to and continues to lead to settlements and consent decrees requiring the implementation of employer DEI measures and training programs that employees encounter on a regular basis.

#### 1. EVIDENCE OF WORKPLACE SYSTEMIC RACE DISCRIMINATION

Despite the racial progression achieved in our society, there is evidence suggesting systemic race discrimination in the workplace still exists. In a 2020 Wall Street Journal article about the use of non-disclosure agreements to settle employment discrimination claims based upon race, more than a dozen Black executives at companies including PepsiCo, Medtronic PLC, and Prudential described their overall problems with race discrimination in the workplace and what led them to consider signing settlement agreements.<sup>165</sup> Discovering evidence of systemic discrimination in a particular workplace can present a challenge as employers have a clear desire to prevent employment discrimination liability based upon race and some employers prefer further to resolve those claims in a private manner rather than a publicly disclosed litigation matter.<sup>166</sup> Although the potential for public backlash after the Floyd protests has deterred some employers from demanding their Black workers must sign non-disclosure agreements keeping any discrimination

---

165. Khadeeja Safdar, *Racial-Discrimination Settlements Usually Came with an NDA. That's Changing.*, WALL ST. J. (Oct. 20, 2020, 11:36 AM), <https://www.wsj.com/articles/racial-discrimination-settlements-usually-came-with-an-nda-thats-changing-11603208180>.

166. *Id.* (describing comments from one employer attorney saying that “companies [want] to save money on legal fees, avoid the distraction of litigation and prevent negative publicity”).

matters private by preventing them from sharing with others their racial experiences as an employee.<sup>167</sup>

Some empirical data establishes the existence of race discrimination in the workplace as Black workers “face significant gaps in the labor market when it comes to promotion, pay and opportunity, costing the U.S. economy billions of dollars.”<sup>168</sup> Black men are paid “\$0.71 for every dollar paid to white men” and Black women “are paid just \$0.63 for every dollar paid to white men.”<sup>169</sup> A 2019 report by global management consulting firm, McKinsey & Company, analyzed data about Black employees from twenty-four participating companies ranging in size from 10,000 to 1.4 million employees and across all United States geographies, representing a total of about 3.7 million employees.<sup>170</sup> According to this McKinsey report, Black workers face unique challenges as a result of “structural inequities” including a lack of representation by Black workers in positions “with high growth opportunities” and higher representation in lower wage industries such as “entry-level healthcare jobs, retail and food services.”<sup>171</sup> Also, this McKinsey report found that Black workers “leav[e] their jobs more often than their white peers.”<sup>172</sup>

167. *Id.* (describing an employer attorney saying that attempts to enforce confidentiality agreements regarding “allegations related to race discrimination” in the workplace would represent “a PR nightmare right now”).

168. Courtney Connley, *Why Black Workers Still Face a Promotion and Wage Gap That’s Costing the Economy Trillions*, CNBC, <https://www.cnbc.com/2021/04/16/black-workers-face-promotion-and-wage-gaps-that-cost-the-economy-trillions.html> [https://perma.cc/CX42-9S2G] (May 4, 2021, 10:38 AM).

169. *Id.* (citing Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, ECON. POL’Y INST. (June 1, 2020), <https://www.epi.org/publication/black-workers-covid> [https://perma.cc/CN8Y-58D8]); *see also U.S. Black Workers Still Earning Less than Whites—Report*, REUTERS, <https://www.reuters.com/business/us-black-workers-still-earning-less-than-whites-report-2021-06-17> [https://perma.cc/57ML-7MCB] (June 17, 2021, 3:04 PM) (describing a report from the Conference Board finding that “Black workers in the United States continue to earn less than their white counterparts even as American companies are raising diversity and inclusion as a cornerstone of their brands and business strategies” and any efforts aimed at “[r]eversing these trends will require addressing deeply rooted labor market segmentation and geographical segregation in restricting access to high-growth fields”).

170. Bryan Hancock, Monne Williams, James Manyika, Lareina Yee & Jackie Wong, *Race in the Workplace: The Black Experience in the US Private Sector*, MCKINSEY & CO. (Feb. 21, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/race-in-the-workplace-the-black-experience-in-the-us-private-sector> [https://perma.cc/TTF2-H369].

171. *Id.*

172. *Id.*

These findings suggest that more than just seeking to remove systemic and structural barriers for Black employees through DEI measures, employers must keep track of and be transparent about the number of workers hired and promoted, as well as their pay based upon race.<sup>173</sup> The Equal Employment Opportunity Commission (EEOC), the agency charged with enforcement of many of the key federal employment discrimination statutes, has noted that approximately thirty-three percent of all workplace discrimination charges filed were based upon race.<sup>174</sup> In 2019, an “EEOC supervisor attorney” indicated that “roughly 80%” of the charges based on race were filed by Black employees.<sup>175</sup> Further, President Biden has indicated the importance of dealing with racial fairness by signing forty executive actions related to this issue since entering office in 2021.<sup>176</sup>

## 2. WORKPLACE SYSTEMIC RACE DISCRIMINATION LEGAL MODELS

Alan David Freeman’s *Legitimizing Racial Discrimination: A Critical Review of Supreme Court Doctrine* is an important article on the developmental stages of identifying models for statutory employment discrimination liability.<sup>177</sup> Freeman criticized the progress of anti-discrimination law from the 1960s to late 1970s because it still allowed structural inequalities based upon race to prosper by focusing on proving the individual intent of the alleged wrongdoer rather than defining discrimination by its group effects.<sup>178</sup> This legal distinction continues today under the Court’s interpretation of race-based claims under the Constitution as only allowing intentional discrimination challenges.<sup>179</sup>

---

173. Connley, *supra* note 168.

174. See *Charge Statistics (Charges Filed with the EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> [https://perma.cc/3U89-MEDF] (finding actual percentages in 2019 were 33%, 32.7% in 2020, and 34.3% in 2021).

175. Connley, *supra* note 168.

176. *Id.*

177. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1074–75 (1978); see also Robert S. Chang, *Will LGBT Antidiscrimination Law Follow the Course of Race Discrimination Law?*, 100 MINN. L. REV. 2103, 2107–11 (2016) (describing the significance of the Freeman article in showing discrimination law is essentially ineffectual in addressing structural barriers as well as its early contribution to the development of CRT).

178. Freeman, *supra* note 177, at 1055–56; see also Chang, *supra* note 177, at 2110–11 (describing perpetrator and victim perspectives).

179. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”).

Statutory employment discrimination law allows employees to seek liability pursuant to a disparate impact theory, not requiring a focus on the intent of the alleged perpetrator.<sup>180</sup> The landmark *Griggs v. Duke Power*<sup>181</sup> decision established that job requirements of a high school diploma and the passage of a general intelligence test, albeit neutral conditions of employment on their face, had a discriminatory impact on Black workers to create liability under Title VII.<sup>182</sup> Title VII also allows claims based upon the theory of systemic disparate treatment where structural patterns or practices that work to disadvantage groups based on race can create liability when those patterns infer intentional employment discrimination.<sup>183</sup> Title VII can subject an employer to liability under what Freeman would call both perpetrator and victim-based theories with individual and systemic discrimination being a basis for claims under that statute.<sup>184</sup>

Despite executive agency and legal efforts to diminish disparate impact analysis, even under Title VII, a non-perpetrator theory of discrimination not only exists but became reinforced in express language by the Civil Rights Act of 1991, which responded to the efforts by justices appointed by President Reagan to limit this form of discrimination.<sup>185</sup> Even after those clear indications by Congress to continue employing the disparate impact theory for Title VII claims, there are still some who argue that the Supreme Court further limited the application of this theory in *Ricci v. DiStefano*.<sup>186</sup> In *Ricci*, Justice Antonin Scalia asserted that the decision “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”<sup>187</sup> Regardless of Justice Scalia’s prophecy and foreboding outlook on the viability of disparate impact law, this theory still applies

---

180. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (finding completion of high school and passage of intelligence tests were discriminatory in impact under Title VII).

181. *Id.*

182. *Id.* at 432 (“Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”).

183. See Green, *supra* note 164, at 402–04 (discussing systemic disparate treatment cases *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977)).

184. See Green, *supra* note 164, at 400–04.

185. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1408, 1535 (2014) (referring to Justice Scalia and other textualist justices as prime drivers in changes to Title VII).

186. 557 U.S. 557 (2009).

187. *Id.* at 594 (Scalia, J., concurring).



to statutory employment discrimination claims.<sup>188</sup> Unless the current Supreme Court chooses to make a Constitutional matter of it, the existence of that theory should guide employers as reasonable actors in developing anti-racist DEI initiatives and training programs.

Given that employers have a legal obligation pursuant to federal law and a business obligation or necessity to prevent or limit any financial liabilities related to individual and systemic workplace discrimination,<sup>189</sup> taking remedial actions based upon race has long been an acceptable practice approved by the courts pursuant to agreed settlements in consent decrees responding to litigation claims.<sup>190</sup> In *Local No. 93, International Association of Firefighters v. City of Cleveland*,<sup>191</sup> the Supreme Court held that the imposition of race-conscious remedies as agreed to by the parties and entered into by a court as a consent decree in a class action was authorized “under § 706(g) of Title VII.”<sup>192</sup> The Court found that voluntary compliance represented the preferred means to achieve Title VII’s goals.<sup>193</sup> The *Local Number 93* Court, whose inquiry also centered on the permissibility of consent decrees that grant greater relief than can be obtained in a civil action, noted the importance that courts accord to parties’ voluntary settlements in Title VII actions.<sup>194</sup>

By focusing on litigation frameworks to advance DEI measures and training, this approach responds to criticisms offered in narratives by McWhorter, Rufo, and others implying that diversity training concentrates on attacking white people.<sup>195</sup> To remedy major workplace

188. See Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2163, 2166 (2013) (describing how disparate impact theory is “vulnerable to [C]onstitutional attack” after *Ricci* and especially based upon the analysis supplied by Justice Scalia, but arguing that there is analysis that can “harmonize disparate-impact liability” with Constitutional requirements).

189. See Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J. C.R. & C.L. 335, 383 (2016) (describing how “[t]he threat of liability for failure to take reasonable efforts to avoid discriminatory outcomes would incentivize employers to adopt personnel practices that promote greater racial fairness”).

190. See, e.g., *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986) (explaining that a consent decree draws its force from “the agreement of the parties, rather than the force of the law upon which the complaint was originally based”); see also Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1522 (2017) (discussing public value of consent decree settlement in civil rights matters).

191. 478 U.S. 501.

192. *Id.* at 513.

193. *Id.* at 515–17.

194. *Id.* at 522–25.

195. McWHORTER, *supra* note 66, at 64 (referring to CRT as suggesting that “any claim of racism a black person makes must automatically qualify as valid” and how it is best that “[a] white person embraces [this claim] as a way of showing how thoroughly they understand that racism exists”); WALLACE-WELLS, *supra* note 90 (discussing Rufo’s beliefs that CRT in diversity trainings attack white persons); see also O’Neil, *supra* note

discrimination suits, employers, with approval from courts involved as allowed by *Local No. 93* and supporting Supreme Court jurisprudence,<sup>196</sup> have agreed to race-conscious measures based upon seeking reforms consistent with DEI principles.<sup>197</sup> The underlying principle in adopting these measures has accepted that an effective response to racial discrimination is to take affirmative actions based upon race to level the playing field. A longstanding executive order also requires federal contractor employers to establish affirmative action programs that take race into account in rooting out and remedying racial discrimination in the workplace.<sup>198</sup> Specifically, Executive Order 11,246 creates incentives for employers to improve their workplace settings based upon race by identifying affirmative action goals and timetables to achieve those goals.<sup>199</sup> The Supreme Court has enforced the application of employer affirmative action plans as a remedial measure under Title VII as long as those plans operate within certain requirements.<sup>200</sup>

An employer may take race into account in pursuing the remedial goals identified in an affirmative action plan.<sup>201</sup> Title VII allows those remedial approaches when the plan is intended to correct a manifest racial imbalance in the workplace, it does not “unnecessarily trammel” upon the interests of other workers, and it is temporary.<sup>202</sup> Employers, as mentioned previously, may also face group-based liability under federal employment discrimination laws pursuant to disparate impact theory.<sup>203</sup> Under that theory, employment practices—albeit neutral on their face and not even intended to discriminate—may still, in effect, cause a disparate racial impact in the workplace.<sup>204</sup> This creates affirmative obligations for

---

77 (describing the same from Rufo); Villarreal, *supra* note 77 (describing the same from Rufo).

196. See *Local No. 93*, 478 U.S. at 513–17.

197. See Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 370–71, 387–405 (2008) (describing class action settlement consent decrees of companies including Coca-Cola, Home Depot, Mitsubishi, Texaco and Shoney’s that led to major diversity efforts); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1468–69 (2002) (listing large corporation discrimination lawsuits); see also Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1251 (2003) (identifying “diversity training” arising post-litigation “either as part of the settlement or to repair public relations damage”).

198. See Exec. Order No. 11,246, 3 C.F.R. § 202 (1965).

199. See 41 C.F.R. §§ 60-1 to -999 (2020).

200. *United Steelworkers v. Weber*, 443 U.S. 193, 208–09 (1979).

201. See Debra A. Millenson, *W(h)ither Affirmative Action: The Future of Executive Order 11,246*, 29 U. MEM. L. REV. 679, 697 (1999).

202. *Id.* at 698–99.

203. See, e.g., *Griggs v. Duke Power*, 401 U.S. 424, 432 (1971).

204. *Id.*

employers to adopt practices that do not subject them to disparate impact liability along with the right to adopt affirmative action plans within certain limits to address any discriminatory inequities. Employers can rely on these legal obligations to structure their ongoing DEI activities and other training agendas.<sup>205</sup>

### 3. LIABILITY PREVENTION: DEI TRAINING AND ITS LIMITS

A key reason for the growth in workplace training in the 1980s was workplace harassment claims.<sup>206</sup> The EEOC had developed guidelines in 1980 that created definitions for harassment based upon sexual conduct.<sup>207</sup> Those guidelines made a significant contribution as most workplace training from the 1980s and 1990s, as well as more current training programs, tend to include concepts from those guidelines.<sup>208</sup> In a landmark Supreme Court decision, *Meritor Savings Bank v. Vinson*,<sup>209</sup> and subsequent Supreme Court decisions related to workplace harassment litigation,<sup>210</sup> employers discovered they could avoid liability by asserting certain defenses supporting the claim that they were not aware of the harassment.<sup>211</sup> Then by providing a process to train employees to notify the employer of the harassment, employers would not be liable if employees failed to use that process.<sup>212</sup>

After *Vinson*, harassment “training really took off” and “spurred a growth industry in training, videos, seminars, and consultants.”<sup>213</sup> Susan Bisom-Rapp explained her skepticism about support for this growth: “This premise, broadly held and rarely questioned by the legal profession, has spawned a multi-billion dollar sexual harassment training

205. See Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 803, 832 (2020) (discussing the encouragement of voluntary compliance under Title VII).

206. See Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOCIO. 1203, 1210–20 (2007).

207. See Equal Employment Opportunity Commission, 45 Fed. Reg. 74,676 (1980) (codified at 29 C.F.R. § 1604.11).

208. Elizabeth C. Tippet, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481, 510–11 (2018).

209. 477 U.S. 57 (1986).

210. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765–66 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998).

211. *Vinson*, 477 U.S. at 72.

212. See *id.* at 72–73 (noting that use of grievance procedures is “plainly relevant” but “not necessarily dispositive” of the case); *Ellerth*, 524 U.S. at 765 (describing employer’s duty to exercise reasonable care to prevent and correct promptly any harassing behavior); *Faragher*, 524 U.S. at 792 (noting that use of a grievance procedure is “relevant to the liability” but would not “result automatically in employer immunity”).

213. See Dobbin & Kelly, *supra* note 206, at 1215–16.

industry staffed by attorneys, consultants, and human resource professionals who offer programs aimed at litigation prevention.”<sup>214</sup> Despite the criticism, providing and requiring employee awareness training to help employees become familiar with anti-harassment principles and employer-implemented policies also assisted employers in developing a key preventative and responsive measure to address workplace harassment liability based on race and sex.<sup>215</sup> Some states now require that certain businesses provide anti-harassment training.<sup>216</sup> Employer financial concerns may drive the focus of some of this training rather than the concerns identified by antidiscrimination laws in creating workplace equality.<sup>217</sup> Some commentators assert that more drastic legal problems than the ones seeking to be averted by DEI training programs may be created if these actions lead to reverse discrimination against white people and men.<sup>218</sup> Nevertheless, focusing on legal liability prevention matters can still lead to and support a beneficial DEI training program.<sup>219</sup>

#### 4. POST-1991 CLASS ACTION CONSENT DECREES AS DEI REMEDIES

In 1996, the largest employee settlement in a race discrimination lawsuit at that time in the amount of \$176 million arose in the case of

---

214. See Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 148 (2001).

215. See Tippett, *supra* note 208, at 484 (describing barriers to race and sex due to racial and ethnic harassment and sexual harassment and referring to how training is considered a key and “useful measure to prevent and reduce workplace harassment”).

216. See JoAnna Suriani, Note, “Reasonable Care to Prevent and Correct”: *Examining the Role of Training in Workplace Harassment Law*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 832–34 (2018) (noting that California, Connecticut, Delaware, Maine, and New York require harassment training).

217. See Hawkins, *supra* note 88, at 96 (asserting that when “business managers translate legal rules into business practice, they get filtered in a way that reorients them away from an emphasis on legal compliance and towards an emphasis on managerial concerns such as maximizing productivity and profitability”).

218. *Id.* at 71 n.48; see also Daniel Villarreal, *Company Ordered to Pay \$10 Million for Firing White Man, Won’t Change Diversity Drive*, NEWSWEEK (Oct. 28, 2021, 9:57 PM), <https://www.newsweek.com/company-ordered-pay-10-million-firing-white-man-wont-change-diversity-drive-1643697> [https://perma.cc/CX8K-A8T3] (describing ten-million-dollar verdict that included punitive damages in an employment discrimination lawsuit by a white male executive who claimed his termination was based upon race and sex due to diversity measures taken by his company after receiving low diversity scores, removing most of its white male management, and replacing him with a white woman and a Black woman).

219. See Williams, *supra* note 23, at 1509 (describing how framing diversity training and other measures through a legal lens that uses narratives about overcoming civil rights violations can have a positive effect).

*Roberts v. Texaco*.<sup>220</sup> The *Texaco* case became known for a smoking gun tape recording where executives were heard using the n-word and were complaining about having to deal with “this diversity thing,” as one executive stated: “[y]ou know how all the black jelly beans agree” and another executive responded: “[t]hat’s funny . . . [a]ll the black jelly beans seem to be glued to the bottom of the bag.”<sup>221</sup> When the tape was played on the ABC Nightline television show during an interview with the CEO Peter Bijur, the *Texaco* lawsuit settled shortly thereafter as it had been languishing for two years in litigation.<sup>222</sup> That settlement led to major diversity reform initiatives at Texaco.<sup>223</sup>

The same attorney involved in the *Texaco* lawsuit, Cyrus Mehri, filed another lawsuit on April 22, 1999, on behalf of a class of Black employees who charged Coca-Cola with “systematic racial discrimination.”<sup>224</sup> The lawsuit claimed that Black employees at Coca-Cola received “lower pay, fewer promotions, and unsatisfactory performance evaluations.”<sup>225</sup> Also, the suit alleged that in its 113-year history, Coca-Cola had only one Black senior vice-president.<sup>226</sup> After a tremendous amount of negative publicity, the parties in *Ingram v. Coca-Cola*<sup>227</sup> settled in 2000 for \$192.5 million, the largest amount ever for a race discrimination case.<sup>228</sup> The settlement gave \$113 million to Black employees, and included \$20 million in attorney’s fees, \$43.5 million to adjust salaries, and \$50 million to the company’s foundation to pursue community initiatives.<sup>229</sup>

Beyond the financial relief for the plaintiff employees, the Coca-Cola settlement also provided \$36 million to address oversight of company employment practices and “created a system of outside monitoring of compliance.”<sup>230</sup> Coca-Cola formed a “seven-member task force to serve as watchdogs to ensure that the company complied with the [settlement] agreement.”<sup>231</sup> That task force was headed by Alexis Herman, the first Black woman to serve as United States Secretary of

---

220. NEWKIRK, *supra* note 78, at 137.

221. *Id.* at 142 (quoting Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES (Nov. 4, 1996), <https://www.nytimes.com/1996/11/04/business/texaco-executives-on-tape-discussed-impeding-a-bias-suit.html>).

222. *Id.* at 142–43.

223. *Id.* at 143.

224. *Id.*

225. *Id.*

226. *Id.* at 146.

227. 200 F.R.D. 685 (N.D. Ga. 2001).

228. NEWKIRK, *supra* note 78, at 136, 149.

229. *Id.* at 149.

230. *Id.* at 136, 149.

231. *Id.* at 150.

Labor.<sup>232</sup> Coca-Cola also created an ombudsman to review complaints and provide annual reports.<sup>233</sup>

Also, as part of this settlement, Coca-Cola was asked to address “systemic and cultural issues that the lawsuit had highlighted” including a decision to “measure, quantitatively, everything that touches an employee” in “nine key areas: performance management, staffing, compensation, diversity education, equal employment opportunity, problem resolution, career development, succession planning, and mentoring.”<sup>234</sup> The task force overseeing the Coca-Cola settlement made several suggestions to improve responses in those areas and top leadership bought into making those changes.<sup>235</sup> When the task force issued its last report to the federal court in December 2006, it noted that the company had made “major strides” towards integrating a DEI strategy into its “human resources, marketing, philanthropy, and supplier strategies.”<sup>236</sup> *Black Enterprise* magazine listed Coca-Cola in its forty best companies for diversity in 2006 and the company placed number three in *Diversity, Inc.* magazine that same year.<sup>237</sup>

Nancy Levit has also captured the major class action employment discrimination settlements from *Texaco* and *Coca-Cola* and discussed the discrimination settlements by other companies in the 1990s and early 2000s including Shoney’s for \$132.5 million in 1993, Publix Supermarkets for \$81.5 million in 1997, Home Depot for \$65 million in 1998, Mitsubishi for \$34 million in 1998, Boeing for \$72 million in 2004, Morgan Stanley for \$54 million in 2004, and Walgreens for \$20 million in 2007.<sup>238</sup> The prospect of large verdicts and huge litigation defense costs, as well as bad publicity when concerned about overall customer goodwill, had motivated these major companies to settle.<sup>239</sup> Not just within the time covered by Levit, but between 2000 and 2020, “99% of Fortune 500 companies have paid settlements in at least one discrimination or sexual harassment lawsuit, according to a report from Good Jobs First, and that’s not including the cases without a public record or incidents victims didn’t report.”<sup>240</sup>

232. *Id.*

233. *Id.* at 151.

234. *Id.* at 151–53.

235. *Id.* at 154–57.

236. *Id.* at 156.

237. *Id.* at 158.

238. Levit, *supra* note 197, at 368–69, 387–405.

239. *Id.* at 408.

240. See Tyler Sonnemaker, *2020 Brought a Wave of Discrimination and Harassment Allegations Against Major Companies Like Amazon, McDonald’s, and Pinterest. These Are Some of the Year’s High-Profile Legal Battles.*, BUS. INSIDER (Dec.

Also, since 2018 and due to movements such as BLM, employees have filed discrimination lawsuits where “companies like Google, Uber, Fox News, Riot Games, UPS, Coca-Cola, and Target have paid out multimillion-dollar settlements.”<sup>241</sup> Even as major class action litigation has led to settlements and consent decrees with training and other comprehensive DEI measures tied to them, Michael Selmi has lamented that due to lack of regulation to guarantee enforcement of these agreements, very little systemic change has occurred.<sup>242</sup> As a result, if an employer really wants to make DEI changes, it must consider doing more than just adhering to its legal obligations even if created by consent decree settlement of major litigation.

### III. ESTABLISHING EMPLOYER DEI ACCOUNTABILITY

“They’re academic, esoteric. Most diversity consultants have never done this inside a business with all of the complexity of budgets, bureaucracy, politics—all of this stuff that gets in the way. It’s unfortunate that they are very good at marketing. There are diversity consultants out there making a fortune.”<sup>243</sup>

This comment from an experienced Diversity Consultant, Steven Bucherati, former Coca-Cola global chief diversity officer, suggests that any employer ought to look before leaping to hire a diversity consultant or trainer. Initially, employers should consider focusing on what their business justification or reasoning for any DEI initiatives may be. That focus will guide the business before it decides to hire a DEI consultant or trainer. Then based upon that clear focus, a company can assess what goals are to be achieved and what follow-ups will be provided for any training offered. Finally, the company’s justification for training should be transparent and linked to a measure of full DEI accountability as expected by its constituents.

#### *A. Deciding DEI Justifications*

Some believe employers have a general duty to diversify their workplaces and impact the societal relationships they have with the clients and the communities they serve.<sup>244</sup> A 2019 survey found that

---

31, 2020, 6:07 PM), <https://www.businessinsider.com/every-company-that-was-sued-discrimination-and-harassment-lawsuits-2020-2021-1> [<https://perma.cc/C4RX-8UAM>].

241. *Id.*

242. *See* Selmi, *supra* note 197, at 1252.

243. Newkirk, *supra* note 78, at 184 (quoting Newkirk’s interview of Steven Bucherati, February 5, 2019).

244. *See* Brummer & Strine, *supra* note 3, at 4 (“This commitment to Diversity, Equity, and Inclusion . . . is not just one corporations are being asked to make internally,

“54% of employees globally believe that CEOs should speak publicly on controversial political and social issues they care about” and “53% of consumers agree that every brand has a responsibility to get involved in at least one social issue that does not directly impact its business.”<sup>245</sup> Other companies have also made statements in support of antidiscrimination narratives about broad societal issues.<sup>246</sup> Procter & Gamble is an excellent example of a company that has decided it will embrace openly the socially responsible model in its communications:

The reality is today, stakeholders of all kinds, whether it’s consumers, investors, or employees, they expect more from brands than just selling products. They want to know what they believe in. They want to know their values. They want to know the people behind them and the actions they’re taking on important issues.<sup>247</sup>

This comment by Procter & Gamble executive Carolyn Tastad reflects a direct concern about doing more than making money. Similarly, many companies may view their role as engaging in specific strategies and narratives aimed at creating DEI progress based on race as a broader contributor in matters of social justice.<sup>248</sup> Their employees,

---

but is also one requiring companies to evaluate how they treat their consumers and the communities in which they have an impact.”).

245. See Paul A. Argenti, *When Should Your Company Speak Up About a Social Issue?*, HARV. BUS. REV. (Oct. 16, 2020), <https://hbr.org/2020/10/when-should-your-company-speak-up-about-a-social-issue> [<https://perma.cc/9DH4-XNV7>]; see also Montlake, *supra* note 4 (describing how “not just . . . consumers” but “younger employees . . . expect companies to reflect their progressive values and to speak out” as they “want companies to stand for something more than making profits for shareholders” as studies of “ESG investing” recognize “[m]illennials . . . bring their values to their economic activities”).

246. See Aisha Hassan, *The Exec Behind \*That\* Gillette Ad Says Brands Have a Responsibility to Challenge Toxic Masculinity*, QUARTZ (May 24, 2019), <https://qz.com/quartz/1626698/pg-exec-behind-viral-gillette-ad-talks-toxic-masculinity> [<https://perma.cc/CE9F-EG8B>]; see also Megan McCluskey, *Gillette Makes Waves with Controversial New Ad Highlighting ‘Toxic Masculinity,’* TIME, <https://time.com/5503156/gillette-razors-toxic-masculinity> [<https://perma.cc/S56R-UGEF>] (Jan. 16, 2019, 1:51 PM) (describing advertisement).

247. See Hassan, *supra* note 246.

248. See, e.g., Jeff Green & Saijel Kishan, *America’s Political Right Has New Enemy No. 1: ESG Investors*, DAILY BUS. REV. (May 20, 2022, 1:01 PM), <https://www.law.com/dailybusinessreview/2022/05/20/americas-political-right-has-new-enemy-no-1-esg-investors> [<https://perma.cc/A3BG-XEM5>] (describing company social responsibility focus based on investors’ focus); Tim Ryan & Traci Fiette, *These Companies Are Following Through on Their Promises on Diversity, Equity, and Inclusion*, FORTUNE (Jan. 17, 2022, 8:00 AM), <https://fortune.com/2022/01/17/diversity-pledges-ceo-action-social-justice> [<https://perma.cc/ZN2E-A2AU>] (reviewing business coalition CEO Action for Diversity



customers, and investors expect these awoke companies to weigh in on important societal matters.<sup>249</sup>

Others have questioned whether companies should take on the mantle of social responsibility and should instead just focus on engaging profits for the benefits of their shareholders without being distracted from that goal.<sup>250</sup> The diversity rationale has represented a good case for maximizing profits and the value of the firm as a key component in inducing some corporations to not feel distracted by taking on social responsibilities pursuant to DEI.<sup>251</sup> Lisa Fairfax has identified several business rationales that companies use to support their diversity efforts. First, a diverse company leadership may better understand a diverse set of customers and clients in providing goods and services to diverse markets, sometimes referred to as a market rationale for diversity.<sup>252</sup> Also, a diverse company leadership may help in avoiding or limiting the effects from major litigation based on race, sex, etc., sometimes referred to as a litigation rationale.<sup>253</sup> A diverse company leadership may also spark greater productivity through establishing fair policies that appeal to a broad cross-section of workers, sometimes referred to as an employee relations rationale.<sup>254</sup> Finally, a diverse company leadership may make better decisions and provide improved oversight of the business, sometimes referred to as a governance rationale.<sup>255</sup>

Regardless of these rationales, companies may believe that they will be subject to some form of liability if they do not adhere to what is legally

---

& Inclusion, and its “pledges made by CEOs to fight systemic social racism”); Amy Liu & Reniya Dinkins, *From Commitments to Action: How CEOs Can Advance Racial Equity in Their Regional Economies*, BROOKINGS (Mar. 11, 2021), <https://www.brookings.edu/essay/from-commitments-to-action-how-ceos-can-advance-racial-equity-in-their-regional-economies> [https://perma.cc/W4KD-4LFK] (reviewing corporate options to address racism in our society); Natalie Mayrath, *What Companies Can Do to Close the Gender Gap*, YAHOO! FIN. (Jan. 16, 2019), <https://finance.yahoo.com/news/companies-can-close-gender-gap-001518159.html> [https://perma.cc/NQ3F-PVGW] (reviewing company actions to address gender issues).

249. See Argenti, *supra* note 245; Montlake, *supra* note 4.

250. See, e.g., Montlake, *supra* note 4 (describing conservative commentator and consumer backlash to perceived “woke capitalism”); see also Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 851 (“[T]here are many corporate scholars who contend that the corporation's primary, if not only, concern should be the maximization of profit.”).

251. See Fairfax, *supra* note 250, at 795–97, 810, 851–52 (discussing how business rationales have become a key reason for companies to justify their diversity efforts by arguing these actions will have a positive impact on company value and profitability).

252. *Id.* at 820–24.

253. *Id.* at 825–28.

254. *Id.* at 828–30.

255. *Id.* at 831–37.

required.<sup>256</sup> A business rationale for pursuing diversity is believed to be necessary to counter those who feel hostile towards businesses that address societal discrimination without focusing on the bottom line.<sup>257</sup> On the other hand, just focusing on the laws as a need to diversify may lead to workplace hostility and backlash when those efforts do not appear to be tied to business results.<sup>258</sup> In particular, a focus on DEI can foster resistance if the participants only view it as providing benefits for special groups of which they are not members.<sup>259</sup> Jamillah Bowman Williams conducted a laboratory experiment studying sixty-three white students and discovered that using a business rationale for diversity led to backlash and negative treatment towards minority participants versus those participants who were not subjected to a business rationale for diversity.<sup>260</sup> Williams found that “corporate diversity-training programs in which managers describe the performance benefits of diversity to persuade employees to hold pro-equality attitudes and engage in inclusive behavior . . . may backfire.”<sup>261</sup> Instead, using survey software, Williams concluded that a focus on compliance with the law to frame diversity training can have a positive influence.<sup>262</sup>

### B. Critiquing DEI Training

The value of diversity training has led to a significant debate.<sup>263</sup> Elizabeth Tippett has conducted a deep exploration of the quantitative

---

256. Brummer & Strine, *supra* note 3, at 4 (discussing “possible legal risk for failing to focus solely on corporate profit”).

257. See David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1555–56 (2004).

258. See Williams, *supra* note 23, at 1489–90; see also Hawkins, *supra* note 88, at 62–63 (recognizing that those on the left also have criticized DEI programs for just going through the motions, not delivering DEI results, and just causing backlash).

259. Williams, *supra* note 23, at 1490.

260. *Id.* at 1492.

261. *Id.* at 1497.

262. *Id.* at 1501.

263. See Carmen Morris, *Don’t Jump into Unconscious Bias Training Until You Read This*, FORBES (July 21, 2020, 7:42 AM), <https://www.forbes.com/sites/carmenmorris/2020/07/21/dont-jump-into-unconscious-bias-training-until-you-read-this> (asserting, from the perspective of a Black woman and long-term diversity consultant, that unconscious bias training has failed to make changes in the workplace because it focuses on awareness of individual biases rather than focusing on “leadership in terms of changing behaviours and reducing workplace racism”); Zulekha Nathoo, *Why Ineffective Diversity Training Won’t Go Away*, BBC (June 16, 2021), <https://www.bbc.com/worklife/article/20210614-why-ineffective-diversity-training-wont-go-away> [<https://perma.cc/7RKT-47XV>] (discussing how diversity training is unsuccessful in improving the workplace but will continue to be used as judges

and qualitative aspects of seventy-four harassment prevention trainings.<sup>264</sup> Because there is very little “social science research” examining the effectiveness of training *materials*, new trainers entering the field tend to replicate what has been done without much review of what legal trends might suggest.<sup>265</sup> Instead, trainers tend to structure their workshops primarily to satisfy employers by creating a step in pursuit of legal compliance.<sup>266</sup> Sociology professors Frank Dobbin and Alexandra Kalev have concluded in research over “more than a decade” that anti-bias trainings tend to fail in reducing bias at work.<sup>267</sup> In fact, DEI training is the “most expensive, and least effective, diversity program around.”<sup>268</sup> Dobbin and Kalev identified five reasons why this type of training fails: (1) “short-term educational interventions in general do not change people”; (2) “asking people to suppress stereotypes tends to reinforce them”; (3) employee exposure to anti-discrimination programs in the training can lead to overly-confident trust and complacency about their own biases; (4) whites feel threatened and exhibit animosity toward “multicultural” messages and want a message of colorblindness that will likely lead to a no-win situation; and (5) people want “autonomy” and “react negatively to efforts to control” their behavior so that, when asked “to reduce bias, they respond[] by increasing bias . . . .”<sup>269</sup>

Given the missteps<sup>270</sup> in training that have emboldened the anti-CRT attacks and the lack of any empirical support to show the trainings lead

---

view it valuably and companies like the optics of having such programs even if they are ineffective); David Robson, *What Unconscious Bias Training Gets Wrong . . . and How to Fix It*, *GUARDIAN* (Apr. 25, 2021, 6:00 AM), <https://www.theguardian.com/science/2021/apr/25/what-unconscious-bias-training-gets-wrong-and-how-to-fix-it> [<https://perma.cc/Z8M5-4SUC>] (describing “a severe backlash against the very idea of unconscious bias and diversity training” and criticizing such training as ineffective in creating any change as usually too short, more like a lecture without offering tools for changes and as people become defensive if called prejudiced, these trainings should not be viewed as a quick fix).

264. Tippet, *supra* note 208, at 485.

265. *Id.* at 515.

266. *Id.* at 516.

267. See Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?*, *ANTHROPOLOGY NOW* (Oct. 27, 2018), <https://anthronow.com/uncommonsense/why-doesnt-diversity-training-work> [<https://perma.cc/4Q65-NELU>] (noting that “hundreds of studies dating back to the 1930s suggest that anti-bias training does not reduce bias, alter behavior or change the workplace”).

268. *Id.*

269. *Id.*

270. See, e.g., Audrey McGlinchy, *After ‘Damaging’ Diversity Training, City Won’t Use Company Again for Similar Workshops*, *AUSTIN MONITOR* (Sept. 11, 2020), <https://www.austinmonitor.com/stories/2020/09/after-damaging-diversity-training-city-wont-use-company-again-for-similar-workshops> [<https://perma.cc/4WCL-GFGX>] (discussing mandatory DEI trainings involving racist and sexist comments with “two dozen unnamed employees” complaining that the training “was not only offensive, but

to improved DEI opportunities, employers should be vigilant about the consultants they hire to engage in workplace training and should confirm that such trainings match the employer's rationales for its DEI initiatives. Legal considerations and fears about fostering backlash that creates more problems will always be concerns. DiAngelo asserts that having a single workshop is not an effective diversity-enhancing tool and ongoing follow-ups are necessary to create sustaining changes.<sup>271</sup> So far, attempts to encourage white people's adoption of anti-racism principles through mandatory DEI training rarely lead to positive results.<sup>272</sup> Rather, some research suggests this form of workplace training exacerbates racial tensions and hostilities in the workplace and does not improve an employer's DEI results.<sup>273</sup> Thus, awoke employers must reconsider what they expect from racial-awareness training. This reflection should involve collaborating with experts to create training establishing workplace behavior norms, monitoring carefully what occurs in the training sessions, and correlating behavior expected from the training with accountable workplace performance measures.

---

entirely inaccurate at times and 'emotionally and professionally damaging'" and the employer admitted that "it does not routinely observe or monitor workshops offered by contractors").

271. See Chotiner, *supra* note 2 ("[W]e're not educated in this country on our racial history, and of course workshops are an excellent way to gain that education. If they are not followed up and sustained by continuing conversations, then they're not very effective. Stand-alone, one-time workshops I don't think are effective.") (quoting DiAngelo).

272. See Aditi Shrikant, *Can Anti-Bias Trainings Make Workplaces Fair and Bridge the Pay Gap? Scholars and Employees Weigh In*, GROW, archived at <https://web.archive.org/web/20220528034955/https://grow.acorns.com/do-anti-bias-workplace-trainings-work/> [<https://perma.cc/8XP8-AZQP>] (May 18, 2021, 2:24 PM) (on file with author); J.C. Pan, *Workplace "Anti-Racism Trainings" Aren't Helping*, JACOBIN (Sept. 9, 2020), <https://jacobinmag.com/2020/09/workplace-anti-racism-trainings-trump-corporate-america> [<https://perma.cc/L56Z-2EH7>] [hereinafter *Workplace "Anti-Racism Trainings" Aren't Helping*]; J.C. Pan, *Why Diversity Training Isn't Enough*, NEW REPUB. (Jan. 7, 2020), <https://newrepublic.com/article/156032/diversity-training-isnt-enough-pamela-newkirk-robin-diangelo-books-reviews> [<https://perma.cc/NY9G-3FWF>] (reviewing NEWKIRK, *supra* note 78).

273. See Dobbin & Kalev, *supra* note 23 (looking at mandatory diversity training in 800 firms over thirty years and finding "no improvement in the proportion of white women, black men and Hispanics in management, and the share of black women actually decreased" as benefits from "diversity training rarely last beyond a day or two").

#### IV. SEEKING AWOKE EMPLOYERS: LEGALLY MINDFUL AND SOCIALLY RESPONSIBLE

Corporations are still not very racially diverse: 65% of entry-level workers are white and 32% are people of color.<sup>274</sup> But their leadership positions have even less diversity as white persons hold 81% of vice president posts with only 19% of people of color in those positions and “[t]here are only three Black CEOs in the Fortune 500.”<sup>275</sup> To accomplish DEI goals, companies have to match workplace performance incentives to those goals and have those measures of success addressed in annual reviews.<sup>276</sup>

##### A. Identifying DEI Metrics Versus Window Dressing

Companies have done little to demonstrate that their diversity activities have achieved positive results.<sup>277</sup> Concerns about just using training, pledges, and other statements as some form of “virtue signaling” or “window dressing” is an ongoing concern.<sup>278</sup> Governmental efforts at the federal and the state level have mostly concentrated on getting businesses to disclose DEI information while doing little to

274. Agovino, *supra* note 54 (reporting data from a May 2020 McKinsey report).

275. *Id.*

276. *Id.* (referring to comments from David Kenny, Chief Executive Officer of Nielsen Holding). Although there are some who believe that tying anti-racism training to performance evaluations goes too far in allowing employers to affect job security. *See Workplace “Anti-Racism Trainings” Aren’t Helping*, *supra* note 272 (arguing that holding employees accountable for performance based upon exposure to “social justice consciousness-raising sessions will never benefit workers when they’re organized, administered, and evaluated by bosses” who set those performance standards).

277. *See* Fairfax, *supra* note 250, at 810 n.64 (referring to a study showing a positive correlation for corporate value but not actual causation).

278. *See* Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 *GEO. J. GENDER & L.* 449, 473 (2022) (noting a “concern is when the corporate decision is aimed at signaling virtue to the online crowd without changing how the company works with stakeholders on a daily basis”); Williams, *supra* note 23, at 1507 (discussing companies just espousing diversity as “window dressing”); Tippet, *supra* note 208, at 496 (discussing how training can be employed for “symbolic” reasons and merely to “check[] a box”); *see also* Cheryl L. Wade, “We Are An Equal Opportunity Employer”: *Diversity Doublespeak*, 61 *WASH. & LEE L. REV.* 1541, 1547–56 (2004) (discussing companies with a focus on issuing DEI statements and participating in various DEI programs as doublespeak when they do not even mention or talk about how the company provides close monitoring of its practices to make sure it is in compliance with discrimination laws and instead this doublespeak allows the discrimination to develop and prosper within their organization). Nancy Leong also explains how corporate efforts to use diversity as a winning marketing or business strategy can represent a negative attempt at racial capitalism intended to benefit financially from commodifying race. Leong, *supra* note 141, at 2153–54.

change the corporate structures that enable racism.<sup>279</sup> These disclosure laws do not require any company action to diversify and merely involve data gathering.<sup>280</sup> Just identifying numbers may not be enough to reach any true value in corporate board diversity unless there is also an accountable change in culture to allow more diverse leaders to be activists not bound by prior non-diverse thinking.<sup>281</sup>

Veronica Root Martinez and Gina-Gail S. Fletcher assert that companies need to be held accountable for their DEI initiatives.<sup>282</sup> Martinez and Fletcher criticized companies for pursuing DEI trainings without linking them and other DEI efforts to achieving DEI goals: “tools relied upon throughout industry to this day—are not effective at

279. See Cheryl L. Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 LOY. U. CHIC. L.J. 611, 614–15 (2018) (finding that a SEC Rule requiring disclosure of corporate diversity information has “led to more disclosure that has done little to advance the interests of people of color on corporate boards” and the Dodd-Frank Act requiring agency monitoring of diversity efforts “has generated more disclosure relating to people of color and women, but the benefits for people of color are obscured in the avalanche of information that has resulted”); Gregory H. Shill & Matthew L. Strand, *Diversity, ESG, and Latent Board Power*, 46 DEL. J. CORP. L. 255, 297–304 (2022) (describing California law mandating a certain number of women and underrepresented groups as board directors, Maryland’s law mandating a certain number of women board members, diversity disclosure requirements for corporate boards in California, Illinois, New York, and Colorado, and other jurisdictions considering such laws as well as Nasdaq’s disclosure requirements for its listed companies); see also Andrew Ramonas, *SEC’s Board Diversity Drive Runs Risk of More Legal Challenges*, BLOOMBERG NEWS (Oct. 22, 2021, 5:00 AM), <https://news.bloomberglaw.com/securities-law/secs-board-diversity-drive-runs-risk-of-more-legal-challenges> [https://perma.cc/34K7-R76W] (discussing legal challenges to Nasdaq diversity disclosure rules).

280. Wade, *supra* note 279, at 621; see also Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 214–15 (2019) (describing California’s law mandating gender diversity on corporate boards). Darren Rosenblum and Yaron Nili have argued that creating term limits might lead to gender diversity on corporate boards based on a male-female binary without needing to mandate the number of women that must serve. *Id.* at 216. Both of California’s laws mandating gender diversity and underrepresented group diversity have been successfully stopped in the courts for now. Alisha Haridasani Gupta, *Another California Board Diversity Law Was Struck Down, but It Already Had a Big Impact*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/business/california-board-diversity-women.html> (describing how both laws have now been rejected as unconstitutional in violation of the Equal Protection Clause but the State of California has said it will appeal both court rulings).

281. See June Carbone, *Board Diversity: People or Pathways?*, 85 L. & CONTEMP. PROBS. 167, 212 (2022) (“More diverse boards can thus be instruments to facilitate closer examination of the practices that link gender disparities and corporate malfeasance—but only where there is a will to look and acknowledge the results of greater board activism.”); see also Brummer & Strine, *supra* note 3, at 63 (“Quotas are also gameable.”).

282. See Martinez & Fletcher, *supra* note 18, at 875–76.

increasing the numbers of white women, Black women, and Black men in management.”<sup>283</sup> According to Martinez and Fletcher, most of the DEI efforts after the Floyd protests have resulted in “performative actions that met the moment” but failed to “create sustained, meaningful change through their organizations.”<sup>284</sup> Martinez and Fletcher suggest that measurable goals should start at the top by getting institutional investors to get companies to disclose their diversity information that can be used as a baseline for measuring ongoing diversity performance.<sup>285</sup>

Some prominent investors have looked at a corporation’s performance on “environmental, social, and governance (ESG) issues” to determine financial support.<sup>286</sup> Martinez and Fletcher believe that if institutional investors demand DEI data from companies, this data can be used to measure demographic diversity and create an empirical profile for entire industries in an effort to root out systemic discrimination.<sup>287</sup> In a forthcoming article, *Disclosing Corporate Diversity*, Atinuke Adediran agrees with the value of having more comprehensive reporting of ESG diversity information.<sup>288</sup> Adediran argues also that Congress should adopt

---

283. *Id.* at 887.

284. *Id.* at 873–74.

285. *Id.* at 902–04.

286. *Id.* at 892. *But see* Green & Kishan, *supra* note 248 (criticizing investor use of ESG factors); Tyrrell, *supra* note 17 (criticizing the use of ESG by “woke” investors and suggesting that corporations stray from their roles in meeting the needs of shareholders when pursuing political or social objectives). Investor use of ESG did not start with a particular United States investor or company promoting it; instead, it originated through a United Nations conference in 2005. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2613 (2021) (“The term ESG was coined by the United Nations following its 2005 conference ‘Who Cares Wins,’ which brought together institutional investors, financial analysts, consultants, and regulators.”). Notably, there is also backlash being waged against having investors demand ESG responsibility from corporations. *See* Liz Hoffman & Charley Grant, ‘Woke Inc.’ Author’s Startup to Take On BlackRock, WALL ST. J. (May 10, 2022, 12:01 PM), <https://www.wsj.com/articles/upstart-money-manager-gets-billionaires-to-back-the-anti-blackrock-11652134919> [<https://perma.cc/42EW-X28V>] (describing startup asset management firm formed by entrepreneur and author of *Woke Inc.*, Vivek Ramaswamy, and some billionaire investors, that will tell corporations not to engage in social responsibility actions and focus on making money as a response to BlackRock’s social responsibility investing inquiries aimed at looking at ESG); Montlake, *supra* note 4 (describing Ramaswamy’s firm and purpose).

287. Martinez & Fletcher, *supra* note 18, at 901–05.

288. *See* Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023). Given the divisions in Congress and the fact that some conservative forces have also started to attack and weaponize ESG as a form of “woke capitalism,” the likelihood of passing legislation to mandate company disclosures of diversity appears unlikely. *See* Andrew Petillon, *The Republican War on “Woke Capitalism” Is Really Just a War on Capitalism*, SLATE (June 23, 2022, 2:41 PM), <https://slate.com/business/2022/06/woke-capitalism-esg-investing-republicans-mike-pence.html> [<https://perma.cc/66AJ-6W94>]; *see also* Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 2022 WIS. L. REV. 1367.

specific legislation with broader measures that would require this reporting and describes how shareholder and employee activist groups can also nudge this reporting if Congress fails to require it.<sup>289</sup> At a minimum, awoke employers should persist in developing transparent measures that match DEI activities including trainings with achieving certain goals.

*B. Legal and Social Responses to CRT and Woke Backlash*

[T]o hold ourselves accountable to our professed ideals . . . requires *rigor* to challenge our complacency, especially when we think we're already doing the right thing. It also requires going beyond mere criticism to providing *useful solutions*, whether they be in terms of concepts, doctrines, policies, practices, or redesigns. . . . [S]uccess must be measured through real change even if it is iterative.<sup>290</sup>

This statement by Jerry Kang, UCLA's Founding Vice Chancellor for Equity, Diversity and Inclusion (2015–20), explains that in addressing challenges to any diversity measures, awoke employers should take measured steps to achieve DEI results. Behavioral science researchers have recently found that successful DEI training programs should employ the following approaches:

- (1) Recognize the limits of a one-time offering without more comprehensive follow-ups “as training alone cannot guarantee change once attendees leave a session”;
- (2) Understand the goals to be accomplished by recognizing that training may provide awareness of biases but it does not fix manager-level diversity disparities or “promise comprehensive change that will eliminate all bias”;
- (3) Recognize that participant discomfort will be likely to occur given different expectations and processing of anti-bias training by various groups so that the focus should be on the learning needs of the primary audience without attempting to get positive reviews from the attendees;
- (4) Beyond just facilitating awareness of biases, conscious or unconscious, training must engage in persuasion and

---

289. Adediran, *supra* note 288.

290. Jerry Kang, *Home*, JERRY KANG, jerrykang.net [https://perma.cc/49LG-FT4C] (last visited Mar. 19, 2023); *see also* UCLA Office of Equity, Diversity and Inclusion, *Implicit Bias: Lesson 6: Countermeasures*, YOUTUBE (Sept. 9, 2016), https://www.youtube.com/watch?v=RIOGenWu\_iA [https://perma.cc/M8HXE75C] (discussing mindset, debiasing, and decoupling to decrease implicit biases).



- development of “concrete bias-management strategies” that provide enough suggestions without being overwhelming; and
- (5) Beyond thinking through content and framing, all DEI anti-bias training must include measures to evaluate the impact of the training to show it met its goals and was worth the investment.<sup>291</sup>

One might assess how these five approaches can operate successfully within the requirements of Florida’s WOKE law prohibiting a university’s training or instruction that tells students or employees they could be engaging in unconscious discrimination.<sup>292</sup> A lawyer and president of the Association of Title IX Administrators, Brett Sokolow, recently explained a tactic suggesting how to proceed with DEI anti-racism training in Florida:

[N]othing about the Florida law prevents [DEI] training generally, but employers need to be careful to ensure that the trainings that are provided do not veer into topics that Florida has banned. There is much to be said and learned about racism/bigotry without having to address moral superiority or inferiority of any particular protected class of people, or to insist on the idea of inherent racism, guilt, or responsibility for historical hatred, slavery, and other acts of discrimination.<sup>293</sup>

Although likely to be fleshed out in litigation, Florida employers can meet their DEI objectives while still falling within the parameters of this law. Some steps might include specifying that the training will not insist on the idea of inherent racism, guilt, or responsibility for historical hatred or slavery, and will focus on present behavior and compliance with employer policies and laws.

If a public outcry arises because of a workplace issue based on race, many corporations may still respond by pursuing DEI training.<sup>294</sup> These responses may also work best when there are broad and high levels of institutional support for it.<sup>295</sup> A possible example of such training

---

291. Evelyn R. Carter, Ivuoma N. Onyeador & Neil A. Lewis, Jr., *Developing & Delivering Effective Anti-Bias Training: Challenges & Recommendations*, 6 BEHAV. SCI. & POL’Y, no. 1, 2020, at 59–65.

292. Ryan Dailey, *New Florida Law Could Transform Anti-Bias Training on Campus*, DAILY BUS. REV. (Jun. 24, 2022, 9:51 AM), <https://www.law.com/dailybusinessreview/2022/06/24/new-florida-law-could-transform-anti-bias-training-on-campus> [<https://perma.cc/F8TV-G97Z>].

293. *Id.*

294. *See, e.g.*, Carter, Onyeador & Lewis, *supra* note 291, at 58 (describing incidents involving Starbucks, Delta Airlines, and the Napa Valley Wine Train, considering how they spent time and money in diversity training programs after high-profile racist incidents).

295. *Id.*

occurred in May 2018 when Starbucks decided to close 8,000 stores to conduct anti-bias training for approximately 175,000 workers as a response to a single, specific incident.<sup>296</sup> Two Black men had arrived for a meeting at a Starbucks store in Philadelphia and were waiting for a colleague.<sup>297</sup> A Starbucks employee called the police after the two men had not sought to purchase anything and asked to use the restroom which Starbucks considers to be available only to paying customers.<sup>298</sup> The police arrested the men and a video of their arrest became viral.<sup>299</sup> The training for entry-level workers, not typically trained on racial awareness, responded to the specific Philadelphia incident.<sup>300</sup>

In line with the criticism that DEI bias training does not lead to any effective change, some questioned whether Starbucks' approach to the training represented the best way to address the problem.<sup>301</sup> Nevertheless, this training provided a specific opportunity to discuss the Philadelphia incident with all employees and explain why Starbucks had changed its policy to welcome anyone including nonpaying guests into its stores and restrooms while identifying how it expected employees to respond to that change.<sup>302</sup> The real measure of the effectiveness of the training will have to be assessed by matching the training's expectations and any additional training needed as a follow-up with Starbucks' overall reinforcement of the substance covered in the training.<sup>303</sup> At a minimum, Starbucks did something "to tip your hat to," while one must still recognize that if this represents merely a "one and done" program, it will not likely deliver any results.<sup>304</sup>

---

296. See Stewart, *supra* note 24.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. See Christopher Petrella & Ameer Hasan Loggins, *Starbucks Closed Its Stores for Unconscious-Bias Training. Here's What It Should Have Taught Instead.*, INTELLIGENCER (May 30, 2018), <https://nymag.com/intelligencer/2018/05/starbucks-took-the-wrong-approach-to-anti-racism-training.html> [https://perma.cc/7S5L-HBAL] (asserting the training should have focused more on anti-racism, systemic discrimination and the effects of white supremacy).

302. Anna Orso, *One Year Later: A Timeline of Controversy and Progress Since the Starbucks Arrests Seen 'Round the World*, PHILA. INQUIRER, <https://www.inquirer.com/news/starbucks-incident-philadelphia-racial-bias-one-year-anniversary-stutter-dilworth-park-homeless-tables-20190412.html> [https://perma.cc/V2QV-S6E4] (Apr. 12, 2019, 5:00 AM).

303. See Dan Pontefract, *Did the Starbucks Racial-Bias Training Work?*, FORBES (June 1, 2018, 8:03 AM), <https://www.forbes.com/sites/danpontefract/2018/06/01/did-the-starbucks-racial-bias-training-plan-work/?sh=2344499f591e> [https://perma.cc/GW29-Q8SS].

304. *Id.*

Although there are anti-anti-racism minefields that must be navigated by experienced facilitators, offering anti-racism training that addresses biases of managers and follows up with additional steps to break through any barriers can be helpful in pursuing DEI goals. It represents diversity training that breaks the mold from the historical, performative, or destructive DEI training typically subjected to very strong criticism. Even when done right, training will not deliver changes in DEI measures. Thus, awoke workplaces must balance on one side the whitelash from reverse discrimination claimants rejecting anti-racism training and, on the other side, the resulting hostility from Black workers who believe the training merely represents virtue signaling. DEI training, as a legal compliance focus, creates a minimum basis for employers to proceed with the training despite anti-anti-racism challenges.<sup>305</sup> This training can be effective when the participants are enrolled in the legal compliance through hearing narratives about antidiscrimination law that focus on how anti-racism actions have changed matters in the workplace.<sup>306</sup>

As long as acting in good faith to comply with antidiscrimination laws and socially responsible DEI policies, companies will have better standing legally and socially even when confronted with challenges by employees asserting reverse discrimination.<sup>307</sup> Nevertheless, awoke workplaces can follow a new approach to DEI training that does not constitute a performative check on a legal prevention list. Instead, these awoke workplaces will act pursuant to social justice perspectives that their employees now expect, while providing measurable opportunities

---

305. See Brummer & Strine, *supra* note 3, at 71–77, 83–86 (discussing a corporation’s legal duty to take good faith efforts to be proactive and monitor its employees’ behavior in complying with antidiscrimination law or be subjected to shareholder derivative actions leading to major fines and penalties); see also Lisa M. Fairfax, *Empowering Diversity Ambition: Brummer and Strine’s Duty and Diversity Makes the Legal and Business Case for Doing More, Doing Good, and Doing Well*, 75 VAND. L. REV. EN BANC 131, 131–32, 146–54 (2022) (discussing how an article by Brummer and Strine, *Duty and Diversity*, provides strong legal justification for businesses to conduct DEI training and other initiatives and while agreeing that the article also provides strong support for a safe harbor from legal liability for pursuing innovative DEI programs beyond the legal minimum and in response to reverse discrimination claims, reputational harms related to missteps in pursuing innovative DEI measures are not protected by law); Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187, 1201–05, 1227–28 (2017) (describing fiduciary liability for corporations in not complying with antidiscrimination laws and how Supreme Court law allows companies to take socially-responsible actions).

306. See Williams, *supra* note 23, at 1510–11.

307. Brummer & Strine, *supra* note 3, at 89–90 (suggesting that as long as the promotion of DEI measures was done with advice of counsel and not intended to create reverse discrimination, companies have better legal standing than if being sued for failing to comply with antidiscrimination laws, in general, and not having policies to address it).

for supervisors and managers undergoing DEI training to be held accountable for developing positive mentoring relationships with employees of color.

#### CONCLUSION

The empirical literature clearly suggests that companies with more inclusive and diverse workplaces “achieve better business outcomes.”<sup>308</sup> While conflicting studies exist, “there are several studies suggesting that, at a minimum, diversity may have a positive impact on the financial operations of a company.”<sup>309</sup> But awoke workplaces will see a broader objective in pursuing measurable DEI goals. They will be acting as their employees, prospective employees, customers, investors, and communities expect them to perform by going beyond the business and legal justifications to address broader social responsibilities based on race at such a crucial time.<sup>310</sup>

How does an employer address anti-racism in the workplace if facing attacks asserting CRT constitutes divisive discrimination against white workers? This increasing, zero-sum ideology of dealing with the pressing issues of race in the workplace must be countered by responding to the current hostilities towards workplace anti-racism training and DEI efforts while moving forward to combat racism. Looking at legal constraints can provide an opportunity for employers considering the growing levels of backlash and denial of workplace racial concerns. However, just pursuing the minimum approach of preventative legal maneuvering, or even the now well-developed problem of focusing on diversity as a measure of cultural difference without making any improvements in workplace equality, will not be enough for the new group of awoke employers who view their role as acting socially responsible. As a result, any new forms of DEI training and related initiatives should “be more than ‘colorful window dressing’ that unintentionally angers a substantial portion of the workforce.”<sup>311</sup> Before

---

308. *Id.* at 29; *see also* Atinuke O. Adediran, *Racial Allies*, 90 *FORDHAM L. REV.* 2151, 2161 (2022) (identifying how there are “studies that show the advantages of racial diversity in the for-profit context; research suggests that increasing racial diversity can result in increased sales revenue and customers, greater market share, greater relative profits, and measurable performance benefits”) (citing Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 *AM. SOCIO. REV.* 208, 215–16 (2009)); Martha Lagace, *Racial Diversity Pays Off*, *HARV. BUS. SCH. (JUNE 21, 2004)*, <https://hbswk.hbs.edu/item/racial-diversity-pays-off> [<https://perma.cc/9R66-DXUY>].

309. Brummer & Strine, *supra* note 3, at 32 (cleaned up).

310. *Id.* at 48.

311. *See* Tessa L. Dover, Brenda Major & Cheryl R. Kaiser, *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, *HARV. BUS. REV.* (Jan. 4, 2016), <https://hbr.org/2016/01/diversity-policies-dont-help-women-or>

implementing diversity initiatives, “policies must be researched, assessed for effectiveness, and implemented with care so that everyone in the workplace can feel valued and supported.”<sup>312</sup> Company executives must remain steadfast in leading “racial equity initiatives” and responding to opposition in a way that can still result in “sustained success.”<sup>313</sup>

The emphasis on DEI that has resulted from George Floyd’s murder, BLM, and even the complexities of dealing with a global pandemic, must now focus on making sure that DEI principles become instilled within all levels of the organization, especially at the top.<sup>314</sup> DEI policies should even extend beyond the company and reach out to overall industries and communities being served as most employees and constituencies prefer.<sup>315</sup> Employers may integrate anti-racism training with their liability prevention efforts through concrete narratives about complying with civil rights laws prohibiting workplace discrimination.<sup>316</sup>

Employers should be transparent and assume that any training being conducted is being read and followed over the internet. With that mindset, employers should also be prepared to defend any training provided. Of course, employers can and should pursue efforts beyond the minimum legal requirements because they want to send a message to their workers, customers, and investors that they are socially responsible companies, which is ultimately part of their overall woke company strategy.<sup>317</sup> Despite attacks on “woke” corporations, including direct legislative measures like the ones pursued in Florida to stifle socially responsible actions, they have economic reasons to “appeal to a wide variety of people.”<sup>318</sup> At a minimum, employers should be awake about

---

minorities-and-they-make-white-men-feel-threatened [https://perma.cc/9KFR-73XA] (referring to study of diversity programs of over 700 companies finding diversity training does not increase representation of diverse groups and may decrease representation).

312. *Id.*

313. See Rosalind M. Chow, L. Taylor Phillips, Brian S. Lowery & Miguel M. Unzueta, *Fighting Backlash to Racial Equity Efforts*, 62 MIT SLOAN MGMT. REV. MAG., Summer 2021, at 26.

314. See James D. White, *How to Build an Antiracist Company*, HARV. BUS. REV., May–June 2022, at 99–103 (describing the key leadership role and steps a CEO should play in leading DEI initiatives and making DEI changes).

315. See S. Mitra Kalita, *What Your Diversity Officer Needs*, TIME (June 7, 2022, 7:30 AM), <https://time.com/charter/6184739/chief-diversity-officers-george-floyd-anniversary/> [https://perma.cc/ESF6-MB38].

316. See Williams, *supra* note 23, at 1510; see also Adediran, *supra* note 308, at 2212 (discussing how an integrated approach to bias training may be more successful if knowledge about systemic racism is integrated into anti-poverty advocacy).

317. See Argenti, *supra* note 245 (describing how companies should make socially progressive messages if they can tie their responses into an alignment with company strategy and if the company is willing to put its money where its mouth is on the subject if this is something their key constituencies want them to address).

318. Montlake, *supra* note 4 (citing Dartmouth professor Paul Argenti’s assertion that companies faced with choosing between social responsibility and a

both the legal and societal concerns that could create discrimination liability and try to prevent those factors from infiltrating their workplaces while still leveraging measurable DEI goals.

Imagine an employer being challenged for providing allegedly divisive CRT trainings because it had employees watch a video about the work of Bryan Stevenson, a Black male attorney and a nationally known social justice activist.<sup>319</sup> If a participant complained and challenged it as a form of divisive CRT training, an employer might have to address it especially if the matter turns into a public or legal controversy. If forced to respond to liability challenges under a law like the one in Florida, what position should employers take? Given the racial reckoning following George Floyd's murder and the indicators that most constituents desire companies that act with social responsibility, this Article suggests that awoke employers will be justified in implementing trainings that might show a video like the one of Bryan Stevenson. Employers can view these actions as operating under the lens of complying with legal-prevention strategies and also conveying the company's social-justice stance.

---

particular state's conservative agenda will lead to the company choosing the social agenda due to broader appeals to the corporation's constituencies including even leaving hostile states).

319. See Kathryn Post, *Grove City College Condemns 'Alleged Drift into CRT Advocacy,'* CHRISTIANITY TODAY (Apr. 25, 2022, 4:43 PM), <https://www.christianitytoday.com/news/2022/april/grove-city-college-critical-race-theory-crt-jemar-tisby-rep.html> [<https://perma.cc/6GE7-RRHE>] (referring to Grove City College in Pennsylvania Board condemning the use of CRT at its school after parents complained of a few items including a "chapel screening of a pre-recorded TED talk by Bryan Stevenson, an Equal Justice Initiative founder and criminal justice reform advocate"); Jesse, *supra* note 20 (discussing same matter).