

# If Not Affirmative Action, Then What?

## Background

Roots of term Affirmative Action (AA) from Traditional Labor

Wagner Act (NLRA)

To ensure opportunities for workers who supported unions

AA as we relate it to employment was a product to overcome bias in the workplace

Many today suggest AA provides opportunities to those not qualified

This was not true when AA was first utilized nor true now

AA was meant to counter conduct and decisions that strictly were acts of discrimination

Refusals to hire, promote etc based strictly with the "intent" to deny opportunities to certain suspect classifications - Black, Indigenous, Jewish, women, etc

We have to study who this country was before we can appreciate why AA was necessary - currently this is being discouraged by certain individuals in this country leading to what is called "anti-woke" movements

Old adage says you can't know how to plan where you are going unless you know where you are coming from and where you are

## Civil Rights Act of 1964

In a lot of ways the Beginning of legal activity relative to discrimination in the workplace

Creation of EEOC and Title VII

Initiatives by companies to avoid claims of discrimination

AA per Title VII and Executive Orders - employers to take steps to ensure that they were not engaged in discrimination

No part of law or AA was ever meant to provide opportunities to individuals not qualified.

Reality was that even with AA individuals who were more qualified than others were denied opportunities because they were a particular member of a suspect classification

Multiple studies have shown that

A Black man without a criminal record is less likely to get a position than a white male with criminal record

Recent NY Times study demonstrating that using the same credentials in parallel resumes, that the resume with a Black sounding name less likely to be hired

AA actually beneficial to society and employers

Multiple studies have demonstrated the advantages of a diverse workforce

DEI efforts have helped employers homogenize their workforces and create workplace cultures that are positive and well received by the employees and client/customer based

Demands of workers and clients/customers to have exactly those kind of workplace environments

That said, we are not out of the woods yet

Workplaces still permeated by discrimination and denial of certain opportunities because of an individual's suspect classification

Today's program will discuss the Scotus' *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admission v. UNC* (collectively "SFFA") decision and its impact on our society and the world of employment

**AD:**

*The SFFA case and its progeny of cases*

*American Alliance for Equal Rights v. Fearless Fund Management (Fearless Fund)*

*Ultima Services Corp. v. U.S. Department of Agriculture (Tennessee MBE)*

*DEI and Law Firm cases*

**JW:**

*In your opinion have these line of cases affected how law firms view DEI?*

*Is DEI still a viable and valuable asset for law firms?*

*In a prior role, you worked for Walmart and played a significant role in selection of counsel? For some companies is it necessary to ensure that they do not fail to offer equal opportunities to all attorneys regardless of their suspect classification?*

*To the degree such steps as you and Walmart took are viewed as AA, what is the value for the institutions to take the steps to have diverse counsel?*

*At any point, would you say that the counsel you chose was less qualified because you took these steps?*

**JL:**

*When I first started practicing law some forty plus years ago the number of lawyers of color who were partners in firms or GCs were almost non-existent? Was that due to a lack of qualified individuals to hold those roles?*

*As a result of AA there are fortunately more attorneys of color graduating from law school? Has the institution of AA reduced the quality of lawyers graduating?*

*Given the increase, how has that impacted the percentage of attorneys of color who are partners of law firms or GCs?*

*Are law firms and companies abandoning their appreciation for the need for some form of affirmative steps to ensure a provision of equal opportunity?*

**NP:**

*As we confront claims of discrimination due to AA there is frequently the use of the term reverse discrimination- is there any difference in the elements of discrimination and if not why is discrimination due to AA given a special label?*

*I understand you are active in NELA, and that some of the leading plaintiff firms have made a commitment not to take these cases - is that correct?*

*From your perspective, if employers abandon their internal steps to ensure they are not engaged in discrimination, how do you foresee the plaintiff bar responding?*

**CL:**

*Similar question to you, from your perspective, if employers abandon their internal steps to ensure they are not engaged in discrimination, how do you foresee the union movement responding?*

*During a few of my negotiations I have observed some unions actually putting the issue of DEI on the table - are you familiar with this practice and will it continue? Why has this become a relevant issue for bargaining?*

*Historically certain trade unions were lacking in their ranks of people of color, are steps to ensure diversity in the ranks of these unions being impacted by the SFFA case? Apprentices programs?*

*Do you foresee any change in how management and unions collectively address this question?*

**ALL:**

*Has the SCOTUS decision actually changed the law relative to labor and employment issues of hiring, promotion, etc?*

*If not, why are so many institutions reacting? Is most of this just intimidation? (The cases and threats to institutions that if they don't change they will suffer consequences)*

*If institutions have AA/DEI programs compliant with current law do they need to be worried?*

*If AA is totally eliminated as some appear to be advocating, what impact would that have on our workplaces?*

*Is our society ready to operate without measures to ensure that discrimination is not part of the workplace?*

*If not, what types of measures are necessary?*