

DEI and Reverse Discrimination – A Time for Reflection

A Practical Guidance® Article by Larry Turner, Morgan Lewis & Bockius



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Introduction

On May 25, 2020, police in Minneapolis, Minnesota, murdered George Floyd, a 46-year-old man, after arresting him for allegedly using a counterfeit \$20 bill to buy cigarettes. This tragedy shocked the world, leading hundreds of thousands of people, many of whom had been sheltering at home because of the pandemic, to take to the streets to protest his death and other incidents of police brutality, racially motivated violence against Black people, and systemic racism. The magnitude and significance of the George Floyd protests could not be ignored and served as a spark for Corporate America to meaningfully address diversity in its workforce. [CNN.com \(Oct. 7, 2021\)](#). Soon after Floyd's death, companies across the country began publicly announcing their support of diversity initiatives.

Below, we analyze one case involving an employer's efforts to address diversity and the resulting claim of reverse discrimination - *Duvall v. Novant Health, Inc.* *Duvall v. Novant Health Inc.*, 2022 U.S. Dist. LEXIS 143209, (W.D.N.C. 2022). While there is no one right approach to address diversity, we provide a few suggestions for employers to consider.

On October 26, 2021, a federal jury in the United States District Court for the Western District of North Carolina awarded David Duvall, a white male who was the former Senior Vice President of Marketing and Communications for Novant Health, Inc. ("Novant" or the "Company"), \$10

million in punitive damages, finding that his July 30, 2018, termination was in furtherance of his former employer's "intentional campaign to promote diversity in its management ranks" and constituted sex and race discrimination. Jury Verdict (Dkt. 99). Duvall asserted federal and state reverse discrimination claims, alleging that his sex and race were motivating factors in Novant's decision to terminate his employment, in violation of Title VII of the Civil Rights Act of 1964 and the public policy set forth in North Carolina's Equal Employment Practices Act. In a written Order addressing the parties' post-trial motions, the court stated that a reasonable juror could infer that the company was aware of federal anti-discrimination laws, understood the stated goals of its D&I Program, and was willing to terminate a white male in order to advance diverse candidates and promote the company's stated goals. Post-Trial Opinion (Dkt. 164), at 10.

Case Background

Diversity & Inclusion (D&I) Initiative on Trial

Novant is a health system based in Winston-Salem, North Carolina. Plaintiff's trial brief at 3. At the time of the seven-day trial, it employed more than 35,000 workers, had more than 2,300 doctors at nearly 800 locations in three states, and served more than 6 million patients annually. Dkt. 164 at 3; [Novant Health, Company Information](#). Novant's D&I effort ramped up in August 2015 after the Company signed a national hospital system initiative with the American Hospital Association ("AHA") to address healthcare inequities. After the Floyd murder, the AHA issued a statement condemning racism, bigotry, discrimination and violence of any kind, and reiterated its commitment to addressing health care disparities. [American Hosp. Assn. Statement on George Floyd's Death and Unrest in America \(June 1, 2020\)](#).

Similarly, Novant hosted podcasts and web chats to create safe spaces for team members to talk about challenging topics, such as Floyd's death, systemic racism, and how these issues impact their team members. [Novant Health Foundation, Courage in Action \(July 24, 2020\)](#).

As part of the Company's D&I effort in 2015, Novant selected a Black woman as Executive Vice President and Chief Diversity, Inclusion, and Equity Officer. She was previously the president of one of Novant's hospitals. Plaintiff's trial brief at 8. In her new role, she created a five-year strategic plan to embed D&I within Novant by 2020. She "spent most of 2017 promoting the D&I initiative, conducting trainings and workshops for employees on the value of D&I and building Business Resource Groups – organizing events to support various identity groups. Her team hired an outside vendor to provide leadership training for women." *Id.* at 10. In August 2017, she praised Duvall and his team for providing her the promotional materials for her D&I activities. *Id.* In February 2018, Novant formed a Diversity and Inclusion Executive Council (DIEC) and its first meeting involved a discussion on how to strengthen the "strategic direction" of D&I, including the development of metrics to measure its progress since 2015. *Id.* Duvall sat on the DIEC executive counsel and attended this meeting. *Id.*; Vol. I, 51:8-11.

During his opening statement to the jury, Duvall's counsel claimed that Novant used "targets" to increase its female and minority leadership and replaced leaders such as Duvall with female and diverse employees, to ensure that Novant's leadership reflected the workforce. Vol. I, 50:5-9, 11-15. His counsel further stated that there was a "perverse financial incentive built into meeting those diversity goals" that allowed leaders to "get more money" if they met those goals.] Vol. I, 53:23-54:7. Duvall's counsel stressed that this is what led to "[Duvall] losing his job." Granted, an attorney's comments during an opening statement are not evidence, but for the purpose of this analysis it is significant that there was a basis at this point in the case to provide Duvall's attorney with an opportunity to make these comments.

Novant's counsel challenged the characterization of the financial incentives and argued that there were no such "targets." Defendant's Motion for Judgment as a Matter of Law (Dkt. 125) at 16. As evidence, Novant's counsel argued that the decisionmaker regarding Duvall's termination testified that "he was not acting pursuant to any D&I based initiatives, goals, or financial incentives in relation to [Duvall's] termination or the hiring of [Duvall's] replacement – and no diversity-based numeric targets or incentives existed during [Duvall's] employment." Dkt. 125 at 15. Novant's counsel argued further that "the uncontested evidence at trial showed that there has never been any bonus

awarded for decreasing white men in the workforce or for hiring female or African American employees, which is the entire premise of [Duvall's] claim." Defendant's Reply ISO Motion for Judgment as a Matter of Law (Dkt. 154) at 3.

According to Duvall, as a display of the success of the diversity efforts, in September 2019 the Executive Vice President and Chief Diversity, Inclusion, and Equity Officer presented a new "Employer of Choice" report with trends in diversity metrics from 2016 to 2019 that showed a 5.6% decline in white leadership (vice president and higher), increases in leadership representation in all other racial or ethnic groups, and a 21.1% jump in the number of women in leadership. Dkt. 125 at 17. Duvall testified that "a very clear pattern started to emerge when you have . . . your chief legal officer, your chief experience officer, your chief medical officer, your chief IT officer, your president of the Charlotte market, yourself" – all males – all let go. Dkt. 164 at 2.

Novant, however, further argued that the 2019 to 2021 goal was effective only in years after Duvall's termination and had nothing to do with replacing white men in senior leadership positions. Instead, it related to closing the gap in Asian and Latino workforce representation. Dkt. 125 at 17.

Duvall's Employment with Novant

Novant hired Duvall in August 2013 to market the Novant brand to consumers. *Id.* Duvall detailed his numerous professional accomplishments as a Novant employee to the jury, including co-leading an \$8 million venture and having some of the highest employee satisfaction scores among the leaders at Novant. Plaintiff's Trial Brief (Dkt. 79) at 7; Vol. I, 55:17-25.

The testimony and emails provided by others bolstered Duvall's argument that his termination was not performance related. One witness testified that he was surprised at Duvall's termination and was dismayed at who was replacing him. Plaintiff's Response to Defendant's Motion for Judgment as a Matter of Law (Dkt. 145) at 16. Another proclaimed that "the next person had big shoes to fill" and thanked Duvall for his leadership. *Id.* at 20. Duvall's manager admitted that Duvall "overall, did a good job for [the] organization." Vol. II, 109:1. Indeed, his manager testified that he had seven white men as direct reports at the start of 2018 but none remaining by the time of the trial. *Id.* at 14.

However, the Company presented a different picture of Duvall's performance. He was depicted as not engaging with colleagues as well as the Company not having confidence in his leadership and growth. Both were provided as reasons for the termination of his employment. Defendant's Trial Brief (Dkt. 72) at 6. The Company described a situation in which Duvall walked off the stage during a presentation to the parent company and community Board of Directors,

which included over 100 executives and senior leaders. Duvall purportedly said during the presentation that “he couldn’t do it anymore”] but later returned to finish the presentation. *Id.* at 3. Duvall’s conduct, which he attributed to being ill, allegedly caused his manager, the same manager who testified that Duvall did a good job for Novant, to doubt Duvall’s ability to engage in public speaking and, therefore, his ability to be effective in his marketing and communications Senior Vice President role. *Id.*

The D&I initiative was in place at the time of the Board of Directors’ presentation. The Company also produced evidence that Duvall was not “anti-diversity and inclusion.” The evidence showed that Duvall was an advocate of the diversity initiative. Duvall testified that “no individual discriminated against him in this termination,” and that he “never complained about discrimination at any point during his employment with the Company” or “until eight months after his termination when he hired [his attorney].” Vol. 1, 66:21-67:16.

The Company did not terminate Duvall’s employment immediately after the Board presentation; instead, Novant invested in a job coach and provided increased speaking opportunities for him. Duvall’s manager testified that Novant did so because [Novant] wanted to see Duvall succeed. Vol. 1, 62:22-63:12. Despite these efforts, Novant observed Duvall delegate important public speaking tasks, including opportunities to present before the Board of Directors, to his subordinates. *Id.* His engagement with other Novant leaders was also questioned, and many leaders allegedly did not know how to reach him. *Id.* At 4. Although rated as high-performing in his written evaluations, he was rated as having low potential. *Id.* At 5. Duvall’s last act of delegating an important presentation to his subordinate was allegedly the last straw. The Company terminated Duvall’s employment shortly afterwards. *Id.* at 5-6.

The Jury and Verdict

The trial was held in the Charlotte Division of the United States District Court for the [Western District of North Carolina](#). This Division covers Anson, Gaston, Union, and Mecklenburg counties in North Carolina.

The eight-person jury for this case, however, was not composed of the “usual suspects.” It included six women and two men - six were white, one was Hispanic, and the forewoman was Black. NYT, Jury Awards \$10 Million to White Male Executive in Discrimination Case (Oct. 28, 2021). One of the female jurors led the diversity, equity and inclusion committee at her company. Vol. 1, 103:12-25. The verdict of \$10 million in punitive damages by the jury was unanimous.

The Judge’s Post-Trial Opinion

The presiding judge, David S. Cayer, is a federal magistrate judge for the United States District Court for the Western District of North Carolina. He was appointed for an eight-year term by the Board of Judges for the United States District Court for the Western District of North Carolina on April 3, 2009, and was reappointed to a second eight-year term in 2017. *U.S. District Court for the Western District of North Carolina*, “U.S. Magistrate Judge David S. Cayer reappointed,” March 23, 2017. Judge Cayer worked for ten years as a North Carolina District Court judge and then for six years as a North Carolina Superior Court judge before he was appointed to the federal court. *The Mecklenburg Bar News*, “Induction Ceremony Held for U.S. Magistrate Judge David S. Cayer,” July 2009.

The court’s written order on the post-trial motions is notable for several reasons but we highlight two here. First, the court noted that the parties elicited conflicting testimony, which the jury weighed and found in favor of Duvall. That evidence included facts that Duvall performed at a high level, gaining national recognition for himself and his employer. It included evidence that Duvall was terminated and replaced with two women – a white female immediately named Senior Vice President for Communications and a Black female hired later. There was also evidence that Duvall was terminated under circumstances that reasonable jurors could conclude resulted because of his race and gender, “namely the D&I initiative with an expressed timeline to remake the workforce to reflect the community and ‘embed’ a culture of ‘D&I’ at [the Company].” Moreover, the jury was presented statistical evidence illustrating the demographic effects of the D&I initiative. Finally, according to Duvall, the jury heard testimony of the reasons offered for Duvall’s termination, none of which were documented by his employer, and were contradicted by other evidence.

Second, in discussing punitive damages under the standard of “malice or reckless indifference to [Duvall’s] federally protected rights”, the court noted that the jury acted reasonably in finding that the Company, through Duvall’s manager, acted in the face of a perceived risk that the decision would violate federal law. Dkt. 164 at 11.

A reasonable juror could infer that [Duvall’s manager], as a high-level executive at a large corporation, had knowledge of federal anti-discrimination laws, understood the goals of the D&I Program, and was willing to terminate a white male in order to advance diverse candidates and promote [the Company’s] clearly stated goal to promote diversity and inclusion. It would be unreasonable to infer that [Duvall’s

manager] was ignorant of federal anti-discrimination laws. Evidence was presented to the jury that several white males were terminated by [Duvall's supervisor] during the same time period as Duvall's termination. Evidence was also presented that executive bonus structures were tied to advancing the D&I Program. [Duvall's manager] admitted there was no documentation supporting the reasons that he gave for [Duvall's] termination. Further, [Duvall's manager] repeatedly stated that [the Company] was moving in a "different direction" when explaining the reasons for [Duvall's] termination. Id. at 10.

Indeed, the Court noted that the Company's CEO bragged about the Company's D&I success. Id. at 12. The only reason upon which the court focused for reducing the punitive damage award from \$10 million to \$300,000.00 was Duvall's failure to request a jury instruction on punitive damages under state law.

Reflection

The Duvall verdict should not deter D&I efforts by employers. It is a learning moment. PWC's 2021 Annual Corporate Directors Survey showed that more than four out of five (86%) of director respondents agree that companies should be doing more to help promote gender and racial diversity in the workplace. PwC, *Leading on diversity, equity and inclusion*, Oct. 2021. The PWC Survey was published at or about the same time as the Duvall verdict was reached. Employers, however, should proceed with caution in their D&I efforts - particularly with their messaging and implementation. In essence, employers should make their D&I efforts "inclusive" and not "exclusive." Below are a few practices that organizations should consider when promoting and implementing D&I efforts.

Effective Practices When Implementing D&I Initiatives

Employers should consider:

1. Providing employees at every level of the organization a chance to voice their views regarding the D&I journey - cultural assessments and surveys are two effective methods.
2. Stressing the business case for diversity. This point cannot be made too often. Talent comes in a variety of genders and hues and the studies show that diversity improves the bottom line. Recent studies show the positive impact of diversity across several industries. See [Harvard Bus. Review \(Jan. 30, 2018\)](#); [World Economic Forum \(April 29, 2019\)](#); [McKinsey & Co. \(Jan. 18, 2018\)](#).
3. Having D&I teams work with human resources and legal departments when creating their strategies, disseminating messaging, and measuring and reporting results.
4. Accessing their risk tolerance throughout their D&I journey.
5. Handling D&I information carefully to ensure it is placed in the proper context. That context should balance the various factors - internal and external - that will affect its impact.
6. Reviewing whether tying compensation to diversity objectives is necessary. This practice is risky and should be approached with caution.
7. Avoiding the use of quotas or metrics that may be deemed to be illegal when hiring, making succession plans, or promoting employees.
8. Addressing employee performance issues in accordance with the employer's policies and in a timely manner that is documented.
9. Providing transparency regarding initiatives, metrics, and goals of the D&I program.
10. Using diverse hiring slates to expand the pool of candidates, rather than reduce it.

Conclusion

There is not one right answer to address diversity. A balanced approach builds the foundation employers need to take advantage of the many benefits diversity can bring to their workforces and reduces the legal risk associated with well-intentioned D&I initiatives/programs.

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Related Content

Resource Kit

- [Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit](#)

Practice Notes

- [Affirmative Action Programs and Diversity Initiatives: Key Considerations](#)
- [Affirmative Action Plans: OFCCP Compliance](#)

Cases

- [Duvall v. Novant Health Inc., 2022 U.S. Dist. LEXIS 143209 \(W.D.N.C. 2022\)](#)

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