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Eleventh Circuit Affirms Injunction Against Florida Statute Concerning Mandatory Diversity Training

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The U.S. Court of Appeals for the Eleventh Circuit affirmed an injunction against enforcement of portions of Florida's "anti-woke" law, which prohibits employers from requiring employees to attend training sessions or other activities that "espouse" or "promote" eight "concepts" relating to race, color, sex, or national origin. The unanimous decision in *Honeyfund.com, Inc. v. Governor, State of Florida* (11th Cir. Mar. 4, 2024) held that the Florida statute draws "distinctions based on viewpoint – the most pernicious forms of dividing lines under the First Amendment" – and cannot be sustained as an "attempt to control speech by recharacterizing it as conduct."

The Florida statute and the ensuing litigation illustrate the ongoing tensions between some employers' efforts to promote diversity, equity, and inclusion ("DEI") in the workplace and the political sensibilities of certain constituencies that oppose or claim to be offended by DEI-related "concepts" and measures. The *Honeyfund.com* decision should provide some comfort to employers that seek to advance DEI and other ESG objectives, and it could help protect them against retaliatory content-based governmental actions that seek directly or indirectly to regulate speech.

Statutory Background

In 2022, Florida enacted the Individual Freedom Act (the "IFA"), which Governor Ron DeSantis called the "Stop W.O.K.E. Act." The IFA amends the Florida Civil Rights Act of 1992 by expanding the definition of an unlawful employment practice to include mandating employees to attend training or other "required activity" that "espouses, promotes, advances, inculcates, or compels [employees] to believe any of" eight specified "concepts" relating to race, color, sex, or national origin. Those "concepts" include whether members of one group are "morally superior" to members of another group, whether a person is "inherently racist, sexist, or oppressive" by virtue of membership in a particular group, whether a person should be treated in a particular way because of membership in a group, whether a person "bears responsibility for, or should be discriminated against or receive adverse treatment because of" actions committed in the past, etc.

The IFA does not prohibit "discussion of the concepts listed therein as part of a course of training or instruction" if such "training or instruction is given in an objective manner without endorsement of the concepts." The statute thus applies only to endorsements of the targeted "concepts."

Factual Background

Several plaintiffs challenged the IFA under the First Amendment to the U.S. Constitution. Two plaintiffs are employers that want to conduct mandatory DEI training sessions that might be prohibited by the IFA. Another plaintiff is a DEI consultant who provides such training and who claims to have lost business because of the IFA.

Plaintiffs alleged that the IFA violates the First Amendment because it seeks to regulate speech based on content and viewpoint and cannot withstand strict scrutiny. They also claimed that the statute – including its carve-out for "objective" training – is unconstitutionally vague. The District Court agreed and granted a preliminary injunction, holding that the plaintiffs were likely to succeed on the merits and that the other criteria for granting preliminary injunctive relief also tipped in their favor. The Eleventh Circuit affirmed.

Eleventh Circuit Decision

The court first held that, “by limiting its restrictions to a list of ideas designated as offensive, the Act targets speech based on its content.” An effort to bar “only speech that endorses any of those ideas . . . penalizes certain viewpoints – the greatest First Amendment sin.”

Florida contended that the IFA was not a ban on speech but “really a ban on conduct because only the meetings are being restricted, not the speech.” The court rejected that argument, holding that “the only way to discern which mandatory trainings are prohibited is to find out whether the speaker disagrees with Florida. That is a classic – and disallowed – regulation of speech.”

Because the IFA regulates speech based on content, it is subject to strict-scrutiny review, “a notoriously difficult test, one that few laws survive.” Under that standard, “Florida must show that the Act’s prohibitions are the least restrictive way to achieve a stated – and crucial – purpose.” The court disagreed that Florida had a “compelling interest” in protecting employees from being “forced” to listen to speech “espousing” the eight “concepts” at issue. Rather, “Florida has no compelling interest in creating a per se rule that some speech, regardless of its context or the effect it has on the listener, is offensive and discriminatory.” “Banning speech on a wide variety of political topics is bad; banning speech on a wide variety of political viewpoints is worse.” “No government can shut off discourse solely to protect others from hearing it.”

The court also rejected Florida’s “captive audience theory,” which purportedly allows a government “to prevent discriminatory speech thrust upon an unwilling viewer or listener,” such as employees required to attend DEI training. The court noted that “the captive audience argument has historically been entertained only when the speaker intrudes on the privacy of the home or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.” Outside that context, however, “the government cannot decide to ban speech that it dislikes because this would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”

Because the court concluded that the IFA’s speech restrictions could not withstand strict scrutiny, it did not address the plaintiffs’ vagueness and overbreadth arguments.

Implications

As we noted in our blog about the District Court's decision in this case, DEI and other ESG issues have become politically volatile in recent years. Some investors (including some prominent institutional investors), employees, customers, and other corporate stakeholders are demanding that companies take steps to promote ESG-related considerations such as DEI, employee welfare, environmental impact, and impacts on communities at large. But other constituencies have expressed hostility to DEI and other ESG concerns and have sought to punish promoters, including by filing lawsuits attacking DEI training, initiatives, and funding. And some governmental entities have tried to retaliate against companies that have engaged in what they derogatorily term "woke" speech or activities.

The *Honeyfund.com* decision – a unanimous ruling by a panel consisting of two Republican appointees and one Democratic appointee – illustrates the extent to which the First Amendment can prohibit such retaliatory measures and allow companies to pursue ESG-related speech in which they wish to engage. The decision's reasoning, if accepted by other courts, might shield companies from (for example) legislation seeking to punish or discourage efforts to endorse the use of alternative energy sources instead of fossil fuels, or to take positions on guns, reproductive rights, and DEI issues.

But while the First Amendment can be an important shield, its use is hardly cost-free. Apart from the financial expenses of litigating a First Amendment challenge, a suit seeking to enjoin a statute as unconstitutional pits the litigant against the government in a politically charged context. Some corporations might not be willing to engage in such warfare, especially where the government has the power to regulate some of the company's activities. And some proponents of anti-ESG legislation might be interested in scoring political points to excite their core constituencies, regardless of whether their positions are legally tenable.

Moreover, the First Amendment does not necessarily protect conduct, as opposed to speech. If regulation of ESG-related conduct can be separated from regulation of ESG-related speech, other questions will arise about whether the First Amendment can shield an actor from governmental measures. As the Eleventh Circuit held, however, regulation of speech cannot so easily be recast as regulation of conduct. The court explained that one "reliable way" to distinguish speech from conduct is "to ask whether enforcement authorities must examine the content of the message that is conveyed to know whether the law has been violated." "In other words, we ask whether the message matters, or just the action. When the conduct regulated depends on – and cannot be separated from – the ideas communicated, a law is functionally a regulation of speech" and is subject to strict scrutiny under the First Amendment, as was the case with Florida's statute.

The Eleventh Circuit is currently grappling with another DEI-related issue involving the First Amendment: it recently heard argument in *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, a challenge under § 1981 of the Civil Rights Act of 1866 to a contest that awards grants to small businesses owned by Black women. The U.S. District Court for the Northern District of Georgia denied a motion for a preliminary injunction, holding that the plaintiff was unlikely to prevail on the merits because the defendant had a First Amendment defense. However, the Eleventh Circuit, in a 2-1 decision, granted an injunction pending appeal, holding that Fearless Fund's "racially exclusionary program . . . [was] substantially likely to violate 42 U.S.C. § 1981." The appeal is awaiting decision.

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