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Ohio Federal Court Holds White Litigant Lacked Standing to Challenge Contest Providing Funding for Black-Owned Businesses

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A federal District Court in Ohio recently ruled that a white litigant did not have standing to assert a discrimination claim against a contest that had provided grants to Black-owned businesses. The decision in *Roberts v. Progressive Preferred Insurance Co.* (N.D. Ohio May 21, 2024) held that the plaintiff lacked standing to seek retrospective relief under § 1981 of the Civil Rights Act because he had not alleged he would have received a grant had he been able to apply for one. He also lacked standing to seek prospective relief because the defendants had dropped the race-based eligibility criteria from the following year's grant program.

Reverse-discrimination litigation such as the *Progressive* case – sometimes known as the "Hello Alice" suit – appears to have become an increasingly popular tool in the anti-ESG/DEI backlash, especially in the wake of the Supreme Court's 2023 decision involving affirmative action in education. The Ohio court's ruling sharpens the focus on what a plaintiff must plead to establish standing to assert a § 1981 claim.

Background

The *Progressive* litigation arose from a program by Progressive Preferred Insurance Company to allow Black-owned small businesses to compete for a limited number of grants to buy commercial vehicles. The program was administered by Hello Alice, an online resource platform.

The plaintiff, who is a white small-business owner, allegedly began to apply for a grant but abandoned the process when he realized that the grants were available only to Black-owned businesses. Represented by America First Legal Foundation, which describes itself on its website as "Fighting Back against . . . the Radical Left," the plaintiff sued Progressive and the operator of Hello Alice, contending that the program violated § 1981 of the Civil Rights Act of 1866, which provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

Apparently anticipating an argument that Progressive's program is simply "a charitable endeavor" rather than a business arrangement, the plaintiff alleged that "the opportunity to compete for a grant and the awarding of the grant itself involved contracts, supported by mutuality of obligation and consideration." Grant recipients must use the money toward buying a commercial vehicle; in exchange, the grantor can use grant applicants' information "for cross-selling and other marketing purposes," including sharing the data with third parties and establishing goodwill for Progressive and its products, including Progressive's own commercial insurance for trucking and delivery companies.

The Court's Decision

The court dismissed the case for lack of standing without reaching the substantive arguments under § 1981.

The court first held that the plaintiff lacked standing to seek retrospective relief (damages) because he had not alleged he would have been awarded one of the ten available grants under a race-neutral policy. Without such a showing, an award of compensatory damages could put the plaintiff "in a better position than had the discrimination not occurred." Thus, "the more appropriate way to redress a plaintiff's inability to compete on equal footing is to remove the barrier – *i.e.*, prospective relief," rather than retrospective relief.

But the court also held that the plaintiff lacked standing to seek prospective relief because Progressive had eliminated race-based eligibility criteria from the next year's grant program, and the plaintiff had not alleged any facts suggesting that Progressive would again operate a grant program that included those criteria.

Implications

The *Progressive* decision is not a ruling on substantive aspects of § 1981, but it is reminiscent of another high-profile § 1981 case: *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, which is pending in the U.S. Court of Appeals for the Eleventh Circuit. That case involved the Fearless Strivers Grant Contest, which Fearless Fund Management (the "Fund") operated to award grants to small businesses owned by Black women. The contest was open only to Black women whose businesses were at least 51% owned by Black women. American Alliance for Equal Rights (the "Alliance") challenged the program under § 1981. The U.S. District Court for the Northern District of Georgia held that the plaintiff had standing to sue, but it denied a motion for a preliminary injunction, holding that the Alliance was unlikely to prevail on the merits because the Fund had a First Amendment defense: the Fund "clearly intends to convey a particular message in promoting and operating its grant program," and it carried out its message through expressive conduct by making grants to eligible contestants. The Eleventh Circuit, in a 2-1 decision, granted an injunction pending appeal, holding that the Fund's "racially exclusionary program . . . [was] substantially likely to violate 42 U.S.C. § 1981." The appeal is awaiting decision.

The *Progressive* court distinguished *Fearless Fund*'s standing analysis because the *Fearless Fund* plaintiffs had sought "only *prospective* relief relating to defendants' ongoing grant program." "Nothing in *Fearless Fund* supports Plaintiffs' position here that they can establish standing to recover *retrospective* damages based on their alleged inability to compete for the 2023 Grant without also alleging that under a race-neutral policy they would have received the benefit." The court did not address *Fearless Fund* in connection with its analysis of *prospective* relief, but nothing in the opinion suggests that Fearless Fund had changed its eligibility criteria for future grants, as Progressive had done.

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