

***FACING AND OVERCOMING DIVERSITY FATIGUE: HOW TO KEEP THE  
MOMENTUM GOING IN CHALLENGING TIMES***

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Diversity, Equity, Inclusion, and Belonging seem to have fallen on hard times lately. Some even whisper that “diversity is dead,” at least for the time being. It is easy to become discouraged in the current challenging political/legal/cultural environment.

“Diversity Fatigue” has been defined as “the emotional and psychological exhaustion individuals may experience when engaging in DEI-related activities or initiatives. This fatigue can manifest in a variety of ways, including feelings of burnout, frustration, and resentment. It is experienced by both those who may feel there is too much emphasis on DEI and those who feel responsible for driving DEI efforts forward.”<sup>1</sup>

The United States Supreme Court recently gutted Affirmative Action in *Students For Fair Admissions Inc. v. President and Fellows of Harvard College*, Case No. 20-1199 decided June 29, 2023. Emboldened by the decision, on July 17, 2023, U.S. Sen. Tom Cotton sent a letter to 51 law firms, claiming:

Employers should take to heart the Supreme Court’s recent declaration that ‘eliminating racial discrimination means eliminating all of it.’ Congress will increasingly use its oversight powers – and private individuals and organizations will increasingly use the courts – to scrutinize the proliferation of race-based employment practices. To the extent that your firm continues to advise clients regarding DEI programs or operate one of your own, both you and those clients should take care to preserve relevant documents in anticipation of investigations and litigation.”

*<https://www.cotton.senate.gov/news/press-releases/cotton-warns-top-law-firms-about-race-based-hiring-practices> (last visited July 25, 2023).*

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<sup>1</sup> Anetra Henry and Bobby Warren, *The Impact of Diversity Fatigue and How to Combat It*, <https://instituteforpr.org/the-impact-of-diversity-fatigue-and-how-to-combat-it>, (last visited June 7, 2024) February 23, 2023.

Similarly, on April 26, 2023, Walt Disney Company Parks and Resorts, U.S., Inc. (“Disney”) filed a 74-page complaint in federal court, alleging that the State of Florida had undertaken a “relentless campaign to weaponize government power against Disney in retaliation for expressing a political viewpoint unpopular with certain State officials.” Para. 4 *Walt Disney Parks and Resorts U.S., Inc., v. Ronald D. DeSantis, et. al.* Case 4:23-cv-00163-MW-MAF (U.S. District Court, Northern District Fla). Disney claims that because it spoke out against the Florida legislature’s so-called “Don’t Say Gay” bill, Florida’s government retaliated by revoking Disney’s statutory self-governance rights and substituted an all-new board with conservative members appointed by the Governor. The lawsuit claims that the Florida’s actions violate, *inter alia*, the Contracts Clause, the Due Process Clause, and the First Amendment. In its carefully crafted complaint, Disney told the Courts and the American people:

Disney wishes that things could have been resolved a different way. But Disney also knows that it is fortunate to have the resources to take a stand against the State’s retaliation – a stand smaller businesses and individuals might not be able to take when the State comes after them for expressing their own views. In America, the government cannot punish you for speaking your mind.

*Id.* at Para 18.

Over the last year, we’ve seen both Disney and prominent law firms fold under increasing and varied pressure. For example, Disney, despite its initial strong stand, eventually struck a deal with the State of Florida and said: “This agreement opens a new chapter of constructive engagement with the new leadership of the district and serves the interests of all parties by enabling significant continued investment and the creation of thousands of direct and indirect jobs and economic opportunity in the state[.]”<sup>2</sup> Similarly, several prominent law firms that were sued by affirmative-action foe Edward Blum appear to have capitulated to his demands and “removed race or gender in their programs’ eligibility criteria” and/or “quietly made similar changes to their criteria out of fear of being Blum’s next target.”<sup>3</sup>

Legislative and legal action are not the only way by which companies can be adversely affected by a government whose views are unaligned with a company’s

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<sup>2</sup> <https://apnews.com/article/disney-florida-ron-desantis-settlement-91040178ad4708939e621dd57bc5e494> (last visited June 10, 2024).

<sup>3</sup> <https://news.bloomberglaw.com/business-and-practice/blum-says-hes-done-suing-law-firms-as-winston-yields-on-dei> (last visited June 10, 2024).

position on DEIB. In March 2023, Florida filed an Administrative Complaint through the State Department of Business and Professional Regulation against the Hyatt Regency in Miami, seeking to revoke the hotel's liquor license on the basis that the hotel allegedly allowed a holiday show with drag performers depicting sexual content with minors present. Because hotel guests expect alcohol to be available, the economic threat posed to the hotel is significant. Consequently, the hotel settled with the DBPR, paid a \$5,000 fine, and agreed not to allow anyone under the age of 18 to attend any performance at the hotel that "contains, depicts or simulates any activities" deemed by Florida to be "lewd."<sup>4</sup>

For those who champion DEIB, the lack of fortitude displayed by those who "have the resources to take a stand," *Walt Disney Parks and Resorts U.S., Inc., v. Ronald D. DeSantis, supra*, is disappointing. Doing the "right" thing – or failing to do it – comes with a price. Those within the DEIB space feel deflated and undervalued as hard-earned recognition and progress is pushed backward. Some days we feel a little like the mythological figure Sisyphus, condemned to roll a boulder up a mountain, only for the boulder to roll all the way back down to the bottom whenever he neared the summit . . . for eternity.

But this newest set of setbacks is familiar but temporary. The journey toward inclusion and equality was never determined or ended by those who built line after retreating line in the sand in their quest to maintain an unjust status quo. Rather, the path to inclusion has been led by individuals without great resources who refused to back down. Harriet Tubman didn't ask for permission when she reached her hand out to slaves while dogs barked in the background. Eleanor Roosevelt said, "Courage is more exhilarating than fear, and in the long run it is easier. We do not have to become heroes overnight. Just one step at a time, meeting each thing that comes up, seeing it is not as dreadful as appeared, discovering we have the strength to stare it down." Harvey Milk encouraged patience too: "I cannot prevent anyone from getting angry, or mad, or frustrated. I can only hope that they'll turn that anger and frustration and madness into something positive."

Employers – law firms and others – have a business and professional interest in ensuring that they provide a safe, positive, and sustainable work culture in order to recruit, retain, and satisfy diverse talent. It is likely that we will continue to see the pendulum on DEIB swing and evolve both within and outside companies. As Dr.

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<sup>4</sup> <https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-drag-ban-settlement-rcna127620> (last visited June 10, 2024).

Martin Luther King, Jr. observed, “the moral arc of the universe is long, but it bends toward justice.”

In the meantime, it is important to recognize the stress that Diversity Fatigue can create, and take intentional steps to reduce it.

For further reading on the subject of Diversity Fatigue, we recommend the following resources (links provided in footnotes herein):

1. How to Fight Diversity Fatigue by: Jessica Mousseau, Diversity Resources
2. Diversity Fatigue: Addressing Burnout in DEI Efforts by: Kate Stone
3. The Impact of Diversity Fatigue and How to Combat It by: Anetra Henry and Warren, Bobby, Institute for Public Relations.

We also commend the resources provided by the plenary panel at this conference, *DEI Policies in the Crosshairs: A Discussion of Students for Fair Admissions v. Harvard and its Impact on DEI Initiatives in the Private Sector*.