

GUEST COLUMN

DEI under the spotlight: Trump's DOJ v. EEOC

By Tal Burnovski Yeyni

Last week President-elect Donald J. Trump announced Harmeet Dhillon, a San Francisco attorney, as the nominee to lead the Department of Justice's Civil Rights Division (CRD).

A seasoned litigator involved in a host of First Amendment lawsuits and disputes over COVID-19 lockdowns, Dhillon is expected to challenge and reverse many policies implemented by President Joseph R. Biden surrounding Diversity, Equity, and Inclusion (DEI). In a post announcing Dhillon's nomination on Truth Social, Trump praised Dhillon for "suing corporations who use woke policies to discriminate against their workers."

Dhillon's expected approach would likely conflict with that of the federal Equal Employment Opportunity Commission. Led by a five-member board, the EEOC is projected to have a Democratic majority through at least 2026.

The EEOC enforces federal laws prohibiting discrimination, including Title VII of the Civil Rights Act of 1964. Title VII makes it illegal for employers to discriminate against a job applicant or an employee because of race, color, religion, sex (including pregnancy, childbirth, or related conditions, gender identity, and sexual orientation), or national origin.

Current EEOC guidance says Title VII permits affirmative action plans "designed to open up opportunities to everyone," provided the plan meets certain criteria. For



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example, in *United Steelworkers v. Weber*, (1979) 443 U.S. 193, the United States Supreme Court held the employer's voluntary affirmative action plan was legal as it did not require the discharge of others, did not create a bar to the advancement of others, was temporary to eliminate a manifest imbalance, etc.

After the Supreme Court's ruling last year in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* 600 U.S. 181 that use of race as a factor in admission violated the Equal Protection Clause, the EEOC's chair issued a statement in defense of DEI/affirmative action initiatives: "It re-

mains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

However, the DOJ under Trump's administration will likely challenge such DEI initiatives in private workplaces. But the DOJ may not file lawsuits or investigate private employers, as the EEOC is the only federal agency empowered to sue private employers for employment discrimination.

The DOJ may present its opposition in CRD Amicus Briefs in federal appellate cases involving federal civil rights enforcement. Or it may decide, through the Solicitor General, that the government will not file a petition seeking a court review in a matter the EEOC may wish to oppose. And in cases where court review is granted, the DOJ may make an argument that is in opposition to EEOC's view. This happened during the first Trump administration when the agencies disagreed on Title VII protections for gay and transgender workers. In 2019, the DOJ filed a brief in the matter of *R.G. and G.R. Harris Funeral Homes v. EEOC* 590 U.S. 644 in which the DOJ stated it disagreed with the EEOC's interpretation of Title VII's reach.

In the *R.G.* matter a funeral home terminated a long-time employee after the employee, who was hired as a male, later revealed she planned to "live and work full-time as a woman."

The employee filed a charge with the EEOC, and after investigation

and failure to resolve informally, the EEOC filed a Title VII lawsuit against the funeral home. The district court held that the EEOC's claim of transgender discrimination cannot proceed because it is not, per the court, a protected category under Title VII. The EEOC appealed and the Court of Appeals reversed and held, in part, that "discrimination on the basis of transgender and transitioning status violates Title VII." The funer-

al home sought and was granted review before the United States Supreme Court.

In its brief, which the EEOC refused to co-sign, the DOJ argued that Title VII, as written, did not prohibit gender-identity discrimination. This, per the DOJ, was a question for Congress, not the courts. Eventually, the Supreme Court sided with the EEOC and held that "Title VII prohibits all forms of discrimination because of

sex, however they may manifest themselves or whatever other labels might attach to them." 590 U.S. at 670.

Given the current democratic majority at the EEOC, we may see similar confrontations between the two federal agencies during the first few years of the new administration. Get ready for a bumpy ride.

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