

BakerHostetler



Fair Chance[®]
EVERY CHILD SUCCEEDS

Using the Law to Remediate Injustice: Legal Strategies for Nonprofits and Foundations

Alexander C. Campbell, Counsel, BakerHostetler

Alexander L. Reid, Partner, BakerHostetler

Erika K. Thomas, Partner, BakerHostetler

Gretchen Van der Veer, Ph.D., Chief Executive Officer, Fair Chance

Kristen Barney, Network Services Manager, Fair Chance

September 11, 2024



Speakers

BakerHostetler



Alexander C. Campbell
Counsel
BakerHostetler
T +1.216.861.7018
accampbell@bakerlaw.com



Alexander L. Reid
Partner
BakerHostetler
T +1.202.861.1676
areid@bakerlaw.com



Erika K. Thomas
Partner
BakerHostetler
T +1.202.861.1675
ekthomas@bakerlaw.com



Gretchen Van der Veer, Ph.D.
Chief Executive Officer
Fair Chance
Gvanderveer@fairchance.org



Kristen Barney
Network Services Manager
Fair Chance
kbarney@fairchance.org

Agenda

- Setting the Stage – Definitions and Settled Law
- Litigation Update on Fearless Fund Case
- Relevant Statute and Case Considerations
- Related Cases and the State of Play
- Exploring Hypotheticals – Grantmaking and Direct Service
- Resources for Measuring Inequity
- Panel Discussion with Q&A
- Wrap Up and Evaluation





Stronger Leaders. Successful Nonprofits. Life-changing Outcomes.®

Fair Chance strengthens local community-based organizations across communities impacted by racism, discrimination and poverty.

We work to build trusting relationships, address racial equity gaps, and ensure better outcomes for children youth, and families through...

- transformational capacity building,
- peer learning and convenings,
- partnership with funders, and
- advocacy with policy makers

to ensure every child has a fair chance to succeed.



Visit fairchance.org



Setting the Stage for Today's Conversation

- The definition of charitable for purposes of Section 501(c)(3) specifically includes:
 - “Relief of the poor and distressed or of the underprivileged”; and
 - “promotion of social welfare by organizations designed...
 - to lessen neighborhood tensions;
 - to eliminate prejudice and discrimination;
 - to defend human and civil rights secured by law.
- Organizations addressing race and racial issues have long been explicitly recognized as charitable
- Organizations addressing economic conditions, often as a proxy for race, have also been recognized as charitable
- Private foundation Treasury Regulations explicitly authorize race-based grantmaking
 - Indeed, a private foundation scholarship program with racial criteria was approved just this year (see IRS Approval Letter 202407006)



Fearless Case – Litigation Update

- **Aug. 2, 2023**, AAER lawsuit and motion for preliminary injunction filed in the Northern District of Georgia
- **Sept. 26, 2023**
 - District Court denied AAER's motion for preliminary injunction
- AAER appealed to the 11th Circuit Court of Appeals
- **Sept. 30, 2023**, 11th Circuit granted preliminary injunction pending appeal
- **June 3, 2024**, 11th Circuit reversed the District Court / granted the preliminary injunction
 - Sent the case back (remanded) to the District Court

The Relevant Statute

42 USC §1981

All persons within the jurisdiction of the United States ***shall have the same right*** in every State and Territory ***to make and enforce contracts***, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property ***as is enjoyed by white citizens***, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Fearless Case Considerations

- Contract vs. Grant
- Valid Remedial Program vs. Race-Based Exclusion
- Expressive Conduct vs. Discrimination
- Standing / Right to Sue (Injury in Fact vs. “Flopping”)
- What is the “public interest”?

Other Developments

- Do No Harm v. American Association of University Women (AAUW)
 - Parties agreed to a Joint Stipulation of Dismissal, in which AAUW agreed to no longer consider applicants' race or ethnicity.
 - Quote from AAUW: “While AAUW remains committed to achieving equity for women and girls, we acknowledge that recent Supreme Court decisions have changed how we must fight for equity. Rather than using the considerable resources this lawsuit would have consumed, AAUW has agreed to remove race as a criterion for its Focus Group Professions Fellowship.”
- Do No Harm v. Pfizer Inc.
 - Appeals court affirmed dismissal of reverse discrimination case for lack of standing.
- Law Firm Diversity programs
- Silicon Valley Diversity Programs (e.g., Girls In Tech)
- Do No Harm v. Cleveland Clinic Foundation

The State of Play

- What are we seeing?
- Common questions and concerns
- What to do if you receive a cease and desist letter (or worse)?
- Risk Mitigation Strategies
 - Green light, yellow light, red light



Hypotheticals

- A. Foundation seeking to fund equity gap
- B. Direct service agency with restrictive criteria for clientele



Resources for Measuring Racial Inequity and Injustice

- National Equity Atlas
 - Community level indicators to track key measures of inclusive prosperity
 - <https://nationalequityatlas.org/indicators>
- Urban Institute
 - Centering Racial Equity in Measurement and Evaluation
 - https://www.urban.org/sites/default/files/publication/104487/centering-racial-equity-in-measurement-and-evaluation_0.pdf
- Giving Gap
 - Research on the state of Black nonprofits
 - <https://givinggap.org/state-black-nonprofits-report/>
- Philanthropic Initiative for Racial Equity
 - Philanthropy's Response to the Call for Racial Justice
 - <https://racialequity.org/mismatched/>
- Initiative for Energy Justice
 - Renewable energy policy implementation
 - <https://iejusa.org/wp-content/uploads/2021/03/Justice-in-100-Metrics-2021.pdf>
- Strive Together
 - System-level education indicators
 - <https://www.strivetogether.org/wp-content/uploads/2021/09/A-guide-to-racial-and-ethnic-equity-systems-indicators.pdf>

Please send additional resources to kbarney@fairchance.org

Contact Us

BakerHostetler



Alexander C. Campbell
Counsel
BakerHostetler
T +1.216.861.7018
accampbell@bakerlaw.com



Alexander L. Reid
Partner
BakerHostetler
T +1.202.861.1676
areid@bakerlaw.com



Erika K. Thomas
Partner
BakerHostetler
T +1.202.861.1675
ekthomas@bakerlaw.com



Gretchen Van der Veer, Ph.D.
Chief Executive Officer
Fair Chance
Gvanderveer@fairchance.org



Kristen Barney
Network Services Manager
Fair Chance
kbarney@fairchance.org



Atlanta | Chicago | Cincinnati | Cleveland | Columbus | Costa Mesa

Dallas | Denver | Houston | Los Angeles | New York | Orlando

Philadelphia | San Francisco | Seattle | Washington, D.C. | Wilmington



These materials have been prepared by Baker & Hostetler LLP for informational purposes only and are not legal advice. The information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking professional counsel. You should consult a lawyer for individual advice regarding your own situation.

© 2024 BakerHostetler®