

Fearless Fund Settles Yearlong Suit with the American Alliance for Equal Rights

Description

Challenges to Race-based Initiatives Continue: Fearless Fund Settles Yearlong Suit with the American Alliance for Equal Rights, Ending the Strivers Grant Contest for Women of Color Business Owners

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Fearless Fund is a venture capital fund supporting minority business owners, particularly women of color.^[1] [Fearless Foundation is a Section 501(c)(3) charitable subsidiary of the Fund,] and also a named party to the litigation (collectively, the "Fund"). The Fund provides grants to business owners to support their entrepreneurial purpose.^[2] The Fund strives "to create a world where under-resourced entrepreneurs such as women of color have equal access to resources and support they need to succeed in business."^[3] As part of its diversity and inclusivity mission, the Fund created a grant-making program, the Strivers Grant Contest, exclusively for women of color.^[4]

The American Alliance for Equal Rights ("AAER") is a nonprofit entity dedicated to "ending racial classifications and racial preferences in America."^[5] Representing three business owners excluded from the Strivers Grant Contest, because they were not women of color, AAER filed suit against the Fund for violation of 42 U.S.C. § 1981 which prohibits racial discrimination in the making and enforcement of contracts.^[6] AAER sought a preliminary injunction to prevent the Fund from closing applications on the designated end date of the program, and selecting a contest winner.^[7] Leader of AAER, Ed Blum, who recently lead the case ultimately making affirmative action unconstitutional in higher education, continues to advocate that "race-exclusive programs like the one the Fearless Fund promoted are divisive and illegal."^[8]

After the district court denied the preliminary injunction, the appellate court reversed the decision and entered a preliminary injunction against the Fund, preventing the Fund from continuing with their Strivers Grant Contest.^[9]

As a preliminary matter, but one vital to the outcome of this suit, the courts had to determine if the grant-making program constituted a contract within the meaning of 42 U.S.C. § 1981, and was therefore subject to the statute.^[10] Both the district and the appellate courts ultimately held the grants do constitute contracts and are therefore subject to 42 U.S.C. § 1981.^[11] In making its decision, the appellate court considered many factors suggesting the program grants were contracts.^[12] First, the program application contained language designating the grant as a contract, in all capital letters the application wrote, "BY ENTERING THIS CONTEST, YOU AGREE TO THESE OFFICIAL RULES, WHICH ARE A CONTRACT."^[13] Although the Fund quickly removed this language after suit was filed, the court stressed that despite what they called it, the grant exchanged benefits and obligations amongst the parties, thus a contract.^[14] Under the rules of the program, a winner "obtains \$20,000 and valuable mentorship and, in return, grants Fearless permission to use its idea, name, image, and likeness for promotional purposes and agrees to indemnify Fearless to arbitrate any disputes that might arise."^[15] The court maintained that the terms of the contest match the hornbook law definition of a contract "to a T".^[16] Whatever you call it, the grant program "is a bargained-for exchange supported by good and sufficient consideration. It is, in other words, a contract."^[17]

The appellate court analyzed whether the contest fit into any exception to § 1981, or if it was protected by the First Amendment freedom of expression.^[18] Under the "remedial program" exception to the statute, primarily used in the employment context, a race-based program may be upheld if it addresses "manifest racial imbalances" and does not "'unnecessarily trammel' the rights of others or create 'an absolute bar' to the advancement of other employees."^[19] Without deciding if this exception applies outside the employment context, the court held the explicit exclusivity of the contest to women of color served as an "absolute bar" to

other contestants, making the exception inapplicable to the contest.^[20]

Further, the appellate court analyzed whether the program is protected by the First Amendment freedom of expression.^[21] Relying on the recent Supreme Court decision, *303 Creative LLC v. Elenis*^[22], holding a website designer couldn't be compelled to create and publish a message she disagreed with, the district court held the contest may be protected by the First Amendment freedom of expression.^[23] The appellate court opposed this opinion by distinguishing the First Amendment protection of expression from the act of racial discrimination.^[24] The court considered the web designer's conduct as an expression, and the grant-giving contest as an act of discrimination.^[25] The First Amendment protected the web designer's autonomy to express, or refrain from expressing, any particular message, whereas the exclusivity of the contest could not be considered an expression but rather an explicit act of discrimination, not protected by the First Amendment.^[26]

Just two months after this decision, the Fund and AAER settled the suit resulting in the end of the Strivers Grant Contest for the Fearless Fund.^[27] Although this settlement has the potential to influence diversity and inclusivity movements going forward, the Fund remains optimistic in its mission to promote diversity and inclusivity.^[28] The Fund acknowledges this outcome as a positive one and used settlement as a tool to avoid Supreme Court precedent that could be devastating for the diversity and inclusivity mission.^[29] Counsel for Fearless Fund assured that the "Fearless Fund was not going to allow Ed Blum to dictate how to run their business."^[30] Ultimately, the settlement ended the Strivers Grant Contest, however counsel notes this settlement "is very narrow".^[31] CEO and co-founder of Fearless Fund, Arian Simone, spoke out about the Fund's projected efforts and new investments in diversity and inclusivity post settlement.^[32]

Although the Eleventh Circuit Court of Appeals decision and subsequent settlement reflect continuous challenges for diversity initiatives, careful legal review, strategic planning and expansive criteria may allow these initiatives to be implemented in a compliant manner.

^[1] *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC et al.*, 103 F.4th 765, at 769 (11th Cir. 2024).

^[2] *Id.*

^[3] Fearless Foundation, <https://www.thefearless.foundation/> (last visited Oct. 21, 2024).

^[4] *Am. All. for Equal Rts.* at 770-71.

^[5] *Id.* at 770.

^[6] *Id.*

^[7] *Id.* at 771.

^[8] *Fearless Fund drops grant program for Black women business owners in lawsuit settlement*, CNN, [Fearless Fund: Venture capital firm drops grant program for Black women business owners | CNN](#) (Sept. 12, 2024, 8:55 AM).

^[9] *Am. All. for Equal Rts.* at 769.

^[10] *Id.* at 770.

^[11] *Id.* at 776.

^[12] *Id.* at 775-76.

^[13] *Id.* at 775.

^[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 776-77.

[20] *Id.*

[21] *Id.* at 777-79.

[22] *303 Creative LLC v. Elenis*, 600 U.S. 570, 143 S.Ct. 2298, 216 L.Ed.2d 1131 (2023).

[23] *Am. All. for Equal Rts.* at 777-79.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Jessica Guynn, *Fearless Fund settles DEI fight and shuts down grant program for Black women*, USA Today, [Fearless Fund ends grant contest for Black women to settle DEI lawsuit](#) (Sept. 11, 2024, 3:07 PM).

[28] *Fearless Fund drops grant program for Black women business owners in lawsuit settlement.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

Date Created

October 29, 2024