

## CLIENT ALERT

### Jury Awards \$10 Million in Punitive Damages to Former Executive in “Reverse Discrimination” Lawsuit

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On October 26, a jury in the U.S. District Court for the Western District of North Carolina awarded a white male former executive \$10 million in punitive damages in a “reverse” discrimination lawsuit, titled *Duvall v. Novant Health, Inc.*, No. 3-19-cv-00624. This verdict offers a cautionary tale for employers regarding the importance of ensuring that their diversity, equity and inclusion programs are carefully formulated, administered and implemented in a non-discriminatory manner.

David Duvall, a former Senior Vice President of Marketing and Communications, sued his former employer, Novant Health, alleging that the non-profit medical network fired him and seven other white male executives as part of its diversity push.

Duvall was terminated from employment just five days before his five-year anniversary with Novant Health, and claimed that he was replaced with a white female and a black female who shared his former duties. Despite receiving positive performance evaluations every year, Duvall contends, he was unceremoniously discharged without explanation.

Novant Health countered that Duvall had actually been underperforming and that, even though he had been hitting some of his targets, the Company did not think he exhibited leadership potential and was concerned that he missed several key opportunities. Further, it asserted that its Diversity, Equity & Inclusion (“DE&I”) program was a comprehensive initiative beneficial to the Company. According to Novant Health, Duvall cherry-picked his examples of white males discharged from employment from across different departments and leadership levels, which defeated his attempt to demonstrate a pattern of targeting white male leadership for separation.

The case proceeded to trial after the District Court rejected both parties’ motions for summary judgment. Duvall sought to prove that Novant Health discriminated against him under a “mixed motive” theory. To that end, he presented circumstantial evidence that his race and/or sex was a motivating factor in the discharge decision. His evidence centered around an alleged pattern of white males being terminated from employment and the specifics of Novant Health’s DE&I program. To support his claim, Duvall pointed to evidence that the Diversity and Inclusion Executive Council formed under the DE&I program determined in 2018 that Novant Health was failing to meet its diversity targets, specifically within its leadership ranks. Duvall then pointed to the temporal proximity between the Council’s meeting regarding these targets and the discharge of the first white male member of leadership within the same month. He demonstrated that by 2019, every white male who had been evaluated had been separated from employment, and every woman or person of color had been promoted.

Novant Health presented several defenses to Duvall’s claims. For example, the Company was adamant that Duvall had admitted that he had never been subject to discrimination while employed. It also argued that Duvall had been consistently underperforming and that, while his evaluations were strong generally, he was often described as lacking potential and failing to engage with his peers. In short, Novant Health asserted that it expected its senior executives “to be exceptional, not just good,” and had a legitimate performance-based explanation for its discharge decision.

After a seven-day trial, the District Court denied both parties' oral motions for judgment as a matter of law. The jury then deliberated for two days and handed down their verdict for Duvall. It found that he proved that his race and sex were a motivating factor in Novant Health's decision to terminate his employment and that the Company did not prove that it would have made the same decision to discharge Duvall regardless of his race or sex. Accordingly, the jury awarded him \$10 million in punitive damages, with a later hearing to determine back pay, front pay/reinstatement, other damages and attorneys' fees.

This jury verdict serves as a reminder that DE&I programs that are created with the best of intentions can be turned against employers in race or sex discrimination lawsuits. While these programs are critically important to promoting significant corporate and societal objectives, employers should take great care in communicating these initiatives to employees, rolling them out, and putting them into effect. The *Duvall* case provides food for thought as employers consider the goals of their DE&I efforts, undertake analyses in connection with such efforts, and launch targeted diversity-enhancing strategies. The *Duvall* case underscores the need to ensure laudable goals are achieved through legitimate means, without running afoul of anti-discrimination laws.

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