

ARE WE THERE YET?  
FORTY YEARS AFTER THE PASSAGE OF  
THE CIVIL RIGHTS ACT:  
REVOLUTION IN THE WORKFORCE  
AND THE UNFULFILLED PROMISES  
THAT REMAIN

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INTRODUCTION

As recently as forty years ago, classified advertisements were commonly limited to “whites only,” “men only,” or those that announced: “no blacks need apply.” In just one generation, demands for greater equality in workplace relations have resulted in a remarkable legislative response, placing the power of the law behind the mission for social justice. As a consequence, many of the overtly discriminatory employment practices that operated to stigmatize and marginalize minority groups have waned in the recent decades.

Anti-discrimination legislation has played an essential role in the struggle to end occupational segregation and minority exclusion from the workforce. The most significant anti-discrimination legislation to emerge from this era is Title VII of the 1964 Civil Rights Act.<sup>1</sup> The pas-

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1. 42 U.S.C. §§ 2000e to 2000e-17 (2000). Section 703 of Title VII, as amended, provides in relevant part, that: “(a) It shall be an unlawful employment practice for an employer—(1) . . . to

sage of this Act represented a significant shift in political consensus—one that finally acknowledged a need to back the civil rights cause with federal legislative power.<sup>2</sup>

The “moral crisis” of race discrimination prompted President Kennedy to introduce a civil rights bill in Congress.<sup>3</sup> Contemporaneous with his signing the Civil Rights Act of 1964 into law, President Lyndon B. Johnson outlined the social injustices underpinning the passage of that Act:

We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights. We believe that that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin. . . .

But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. Morality forbids it. And the law I will sign tonight forbids it.<sup>4</sup>

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discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . .” *Id.* § 2000e-2(a)(1).

2. See Michael W. Combs & Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal and Political Perspective*, 47 *HOW. L.J.* 627, 649 (2004).

From 1960 [to] 1964, both the Democrat and Republican parties were committed to a civil rights agenda that would ultimately reconfigure the power ratio between African Americans and Whites at several levels, including the electoral process, the distribution of jobs and opportunities, the impact of racist values and institutions on the lives of African Americans . . . .

*Id.* at 651. The culmination of this effort was the passage of the Civil Rights Act of 1964. See *id.* at 649. Currently, the federal laws that prohibit job discrimination include: (1) Title VII of the Civil Rights Act of 1964; (2) the Equal Pay Act of 1963 (EPA); (3) the Age Discrimination in Employment Act of 1967 (ADEA); (4) Title I and Title V of the Americans with Disabilities Act of 1990 (ADA); (4) Sections 501 and 505 of the Rehabilitation Act of 1973; and (5) the Civil Rights Act of 1991. See EEOC, FEDERAL LAWS PROHIBITING JOB DISCRIMINATION QUESTIONS AND ANSWERS, available at <http://www.eeoc.gov/facts/qanda.html> (last modified May 24, 2002) [hereinafter EEOC Q&A].

3. THE LIBRARY OF AMERICA, REPORTING ON CIVIL RIGHTS 1941–1973, at <http://www.reportingcivilrights.org/timeline/year.jsp?year=1963> (last accessed Jan. 28, 2005) [hereinafter LIBRARY OF AMERICA]. Kennedy labeled racial discrimination “a moral crisis” during a televised address given on June 11, 1963. *Id.*

4. Michael Jay Friedman, U.S. DEP’T OF STATE, NATION CELEBRATES ANNIVERSARY OF LANDMARK CIVIL RIGHTS LAW: 1964 CIVIL RIGHTS ACT 40 YEARS OLD, (June 24, 2004), at <http://usinfo.state.gov/usa/civilrights/a062404.htm>. President Johnson signed the 1964 Civil Rights

As President Johnson's statement evinces, the enactment of Title VII establishes the need to prohibit discrimination upon two beliefs—that it is *unfair* and it is *immoral* to discriminate on the basis of the immutable characteristics of race, sex, religion and national origin.<sup>5</sup> Consequently, when assessing the impact of Title VII, one cannot divorce the legal mandates from the moral ideals underlying the law.

Packed into the Act are promises that continue to drastically transform the American workforce. Title VII has broad reach, extending to the following terms and conditions of employment: “hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; [or] pay, retirement plans, and disability leave.”<sup>6</sup> In addition, Title VII prohibits certain forms of harassment, retaliation against an individual who is involved with the filing or investigation of a charge of discrimination and decision-making on the basis of proscribed stereotypes.<sup>7</sup>

The Equal Employment Opportunity Commission (EEOC) and federal courts began to tackle legal challenges to workplace discrimination immediately after the enactment of the 1964 Civil Rights Act. Their interpretations of Title VII's broad proscriptions inevitably fueled widespread social change. In essence, forty years of employment discrimination case law and EEOC guidelines blueprint a dramatic cultural revolution.

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Act into law on July, 2, 1964. *Id.* The Act signified a culmination of the growing political will to enact and enforce bold remedies for employment discrimination:

Even though some Americans continued to fight for more expansive civil rights protections, only a broad political consensus could overcome the racial segregation that prevailed in much of the South. It took several generations, and a number of new developments, to produce that consensus. After the second World War, Black migration to the northern states gradually increased political pressure on officeholders there, Northern Democrats in particular, to back civil rights legislation against the objections of pro-segregation Southern Democrats. . . . The Supreme Court began to rethink its earlier, pinched interpretation of Constitutional civil rights guarantees, most notably in *Brown v. Board of Education*, 347 U.S. 483 (1954) . . . .

*Id.* Moreover, the “contrast between the non-violent civil rights movement and its opponents’ often savage response convinced growing numbers of Americans that justice required effective legal guarantees.” *Id.*

5. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 31 (Aspen Publishers, 6th ed., 2003).

6. EEOC Q&A, *supra* note 2.

7. *See id.* Note that when a violation of Title VII is found, relief to a successful plaintiff may include back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation or any other actions that would return the individual to the condition in which he or she would have been but for the discrimination. *Id.* A plaintiff may also recover attorneys’ fees, expert witness fees, court costs, compensatory and punitive damages. *Id.*

This Article will provide an overview of the evolutionary developments in employment law, placed in the context of Title VII jurisprudence, with an eye toward whether we have achieved the lofty goals embodied in that legislation. Statistics covering discrimination incidents and charges filed with the EEOC will be examined to trace the impact that anti-discrimination efforts have had on employment opportunities in this country. Through anecdotal evidence of the employment discrimination faced by Americans in each decade, Section II will assess the legal and social changes promised by the Act. The changes resulting from the enforcement of Title VII prohibitions will be examined by tracing incremental jumps in the number of charges filed to social events that increased the popular awareness of proscribed discrimination. Finally, Section III will look at the developing face of America's workforce to predict future issues likely to challenge the efforts to eradicate employment discrimination.

ANALYSIS OF EEOC STATISTICS THROUGH THE LENS OF  
SOCIAL CHANGE AND LANDMARK COURT DECISIONS:  
A DECADE BY DECADE APPROACH

The number of discrimination charges filed with the EEOC has steadily increased over the years.<sup>8</sup> In 1966, 8,854 charges of discrimination were filed.<sup>9</sup> By 2003, that number had increased to 81,293.<sup>10</sup>

Initially, the majority of the charges filed with the EEOC consisted of claims of race discrimination. Race-based complaints comprised nearly 60% of the cases.<sup>11</sup> Charges of sex discrimination were the second most frequently filed, equaling about 37% of total charges.<sup>12</sup> In 2003, by contrast, only 35% of charges filed with the EEOC alleged discrimination on the basis of race.<sup>13</sup> That year, the total charges filed consisted of approximately 35% race-based charges, 30% sex,

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8. EEOC, CHARGE STATISTICS: FY 1992 THROUGH FY 2003, *available at* <http://www.eeoc.gov/stats/charges.html> (last modified Mar. 8, 2004) [hereinafter CHARGE STATISTICS 1992–2003]. Although the overall number of charges filed continues to increase, EEOC reports evidence slight decreases in 1995, 1996 and 2003. *Id.*

9. *See* EEOC FIRST ANN. REP., 90TH CONGRESS, 1ST SESSION, H.R. DOC. NO. 86, at 58 (1967) [hereinafter FIRST ANN. REP.] (reporting EEOC charges filed from July 2, 1965 to June 30, 1966).

10. CHARGE STATISTICS 1992–2003, *supra* note 8.

11. *See* FIRST ANN. REP., *supra* note 9, at 58.

12. *Id.*

13. CHARGE STATISTICS 1992–2003, *supra* note 8.

28% retaliation, 10% national origin, and 3% religion.<sup>14</sup> Although the number of race and sex discrimination claims have steadily increased over the past thirty years and still remain the most frequently filed charges of discrimination, religion, national origin and especially retaliation claims are being filed with increasing frequency.<sup>15</sup>

The following sections take a decade by decade look at the past forty years, with a view toward identifying the specific jurisprudential and cultural events that have most impacted the number of discrimination charges filed, and their general impact upon employment in the United States.

### *1960s: Getting Off the Ground*

The employment practices of the beginning to mid-1900s were far different from that of today. For example, classified advertisements once overtly excluded minorities and women from employment opportunities.<sup>16</sup> Alternatively, “[r]ace, religion and age were all considered legitimate requirements for poorly paid positions.”<sup>17</sup> One employment ad in an early 20th century New York newspaper sought a “[n]eat colored girl;” another requested a “[g]irl, light colored” applicant.<sup>18</sup> And a reference manual, entitled *Getting and Keeping Classified Advertising*, provided the following instruction to employers: “Most newspapers in America prohibit mention of the phrase ‘no Filipinos’ or ‘Mohammedans’ in their advertising . . . . On the other hand, an inclusive restriction such as ‘Mohammedans only,’ by expressing a preference, implies a compliment and is therefore never rejected.”<sup>19</sup> As the above examples suggest, throughout the country, discriminatory employment practices—including those based specifically on race or gender classifications—were the rule, not the exception. In the 1960s, however, this would all begin to change.

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14. *Id.* The percentages are rounded and therefore do not equal 100%.

15. *Id.* For a discussion regarding the increasing frequency with which charges of retaliation and discrimination on the basis of national origin and religion are filed, see Section III of this Article.

16. See Cynthia Crossen, *Classified Ads Tell Tales of Social Change: Sober Need Not Apply*, WALL ST. J., Apr. 16, 2003, at B1 (citing, for example, the common request for “White Only” job applicants).

17. *Id.*

18. *Id.*

19. *Id.* (quoting MORTON J.A. McDONALD, *GETTING AND KEEPING CLASSIFIED ADVERTISING* (1935)). An EEOC report claimed that the practice of discriminatory advertising by Southern self-help columns persisted into the 1970s. FIRST ANN. REP., *supra* note 9, at 6 (reporting that, in the South, self-help columns continued to designate jobs as “White or colored”).

### Congress Creates the Equal Employment Opportunity Commission in the Civil Rights Act of 1964

It had been estimated that two thousand charges of discrimination would be filed the first year after the passage of the Civil Rights Act.<sup>20</sup> But on July 2, 1965, the EEOC first opened its doors to an “instant backlog of nearly 1,000 complaints, called ‘charges.’”<sup>21</sup> From July to December 1965, 8,852 total charges would be filed, far exceeding the original estimates.<sup>22</sup> In fact, by the late 1960s, the EEOC had already received more than 1,500 charges against one company alone.<sup>23</sup>

At this time, the EEOC was not an agency with independent enforcement powers.<sup>24</sup> Instead, the Commission consisted of “a five-member bipartisan commission” that had only the “power to receive, investigate, and conciliate complaints where it found reasonable cause to believe that discrimination had occurred.”<sup>25</sup> But the lack of enforcement power did not diminish the ability of the Agency to influence employment practices. During this period, the EEOC focused its attention on educating the public through the issuance of interpretive Guidelines and through its use of the EEO-1 reports submitted to the Agency by employers each year.<sup>26</sup>

A central responsibility assumed by the EEOC was the issuance of Guidelines that helped define discrimination in the workplace.<sup>27</sup> Because there was little judicial precedent available to guide employers seeking

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20. EEOC, THE STORY OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS, at 5 (2000) [hereinafter EEOC STORY]. The National Association for the Advancement of Colored People Legal Defense Fund was responsible for most of the charges initially sent to the Commission. *Id.*

21. *Id.*

22. *Id.*

23. *EEOC and AT&T Agreement: Prelude to a New Era of Enforcement*, EEOC STORY, *supra* note 20, at 10. American Telephone & Telegraph is the company referred to in the text (AT&T). *See id.* (detailing the charges filed against AT&T).

24. EEOC STORY, *supra* note 20, at 1.

25. *Id.* at 3. “[T]he statute provided only that individuals could bring private lawsuits, and where [the] EEOC found evidence of ‘patterns or practices’ of discrimination, [the] EEOC could then refer such matters to the Department of Justice for litigation.” *Id.*

26. Companies that have more than one hundred employees, or employ fifty or more employees and have Federal contracts totaling \$50,000 or more, are required to complete an annual EEO-1 report. EEOC, *A Charge Has Not Been Filed Against my Company. Do I Need to Keep Records or File Reports with the EEOC?*, at <http://www.eeoc.gov/employers/recordsandreports.html> (last modified June 28, 2002). The report submitted by the employer must detail that company’s composition in terms of gender and racial/ethnic group. EEOC STORY, *supra* note 20, at 9.

27. *See id.* at 6–7 (describing the various Guidelines issued by the EEOC).

to comply with the new law, and Congress did not specifically define “discrimination” in the statutory text of Title VII, the Guidelines provided much needed interpretative assistance.<sup>28</sup> For example, the EEOC tackled issues such as “how to prove discrimination; what remedies were available under the law; and how to reconcile the seniority rights of current ‘innocent’ employees with the rights of victims who, but for an employer’s discrimination, would have greater seniority.”<sup>29</sup>

The EEOC is also responsible for monitoring the submission of EEO-1 reports by employers.<sup>30</sup> “The EEO-1 reports and studies, other labor force data, and charge information [are] an invaluable tool to pinpoint possible zones of employment discrimination, and to identify major patterns of exclusion and discriminatory practices in select industries, job categories, and geographic areas.”<sup>31</sup> For example, in 1967, after just one year of reporting, the EEOC identified multiple employment areas in which discriminatory practices were particularly egregious.<sup>32</sup> The EEOC then sponsored a series of hearings to draw public attention to their findings.<sup>33</sup> The following are examples of discriminatory employment practices documented and presented during the 1967 hearings:

Although minorities constituted more than 30% of the population in South Carolina and 22% in North Carolina, African Americans were only 8.4% of textile industry employees. Moreover, 99% of African Americans were in the lowest-paid job categories, and only 2.3% of

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28. *Id.* at 5, 7. Court opinions frequently cite EEOC Guidelines to support their holdings. For example, the 1968 EEOC Guidelines on Sex Discrimination declared that federal law preempted state-level protective legislation. *Id.* at 7. The EEOC further declared that the protective legislation, “which purported to help women by providing special benefits such as extra work breaks, shorter work hours, and early retirement,” in fact “operated to discriminate against and exclude women from jobs.” *Id.* at 7–8. This interpretation was relied upon by the federal courts when deciding *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1224–25 (9th Cir. 1971) and *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969).

29. THE EEOC STORY, *supra* note 20, at 5–6.

30. Section 709(c) of Title VII granted authority to the EEOC to require private employers to submit records and reports on the employment status of minorities and women. *See* 42 U.S.C. § 2000e-8(c) (2000). The EEOC can compel an employer to submit a report by obtaining an order from a District Court. EEOC, STANDARD FORM 100, REV. 3-97, EMPLOYER INFORMATION REPORT EEO-1, 100-118, INSTRUCTION BOOKLET, <http://www.eeoc.gov/eeo1survey/e1instruct.html> (last modified Apr. 20, 2000).

31. EEOC STORY, *supra* note 20, at 9.

32. *Id.* at 9–10.

33. *Id.* at 9. “These hearings focused on the textile industry in the South; white collar employment in major New York corporations; aerospace, entertainment, banking, insurance and other industries in Los Angeles; discriminatory practices preventing minorities and women from participating in Houston’s expanding economy; and nationwide practices of the pharmaceutical and utility industries.” *Id.* at 9–10.

African Americans were in craftsman or foreman positions.

Of 4,278 New York City companies submitting EEO-1 reports in 1967, about 1,827 did not employ a single African American worker in a white collar job, and 1,936 did not employ a single Puerto Rican or other Spanish-surnamed individual in such jobs.

Concentrations of minorities and women were found in Houston's unskilled, lowest-paying jobs in the lowest-paying industries despite generally rising employment opportunities.

Discriminatory employment patterns existed in the nation's 32 largest pharmaceutical firms.

The utility industry ranked last in employment of African American workers among the 23 largest U.S. industries and had fewer women and Spanish-surnamed employees than most other industries.<sup>34</sup>

The reports were and continue to be important tools used to educate the public about discriminatory employment practices. The reports may also play a role in litigation; plaintiffs and defendants can use the data collected in EEO-1 forms to support or defend against charges of employment discrimination.

The next two subsections discuss two most prevalent forms of discrimination reported in the 1960s: discrimination on the basis of "race" and "sex."

#### Discrimination on the Basis of Race in the 1960s

In the 1960s, occupational segregation, like the racial discrimination prevalent in all other realms of society, was widespread.<sup>35</sup> The Su-

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34. *Id.* at 10.

35. The housing industry, for example, was notoriously segregated. For many years the industry issued official policies warning about desegregated neighborhoods. Regarding the presence of African Americans in white neighborhoods, the Federal Housing Administration underwriting manual noted that "change in social or racial occupancy generally contributes to instability and a decline in values." Combs, *supra* note 2, at 638 (quoting FED. HOUS. ADMIN., UNDERWRITING MANUAL, §§ 934, 937 (1934)). Their presence was expressly deemed to be an "adverse influence." *Id.* Also exemplifying the racial division that marked this decade: "Freedom Rides" of 1961; the confrontation between federal marshals and a mob over the court-ordered admission of James Meredith to the University of Mississippi in 1962; the 1963 Birmingham protest (where rioters were



preme Court had only recently decided *Brown v. Board of Education*,<sup>36</sup> thus ending a tradition of unequal treatment for African Americans sanctioned by law.<sup>37</sup> But this achievement was still marred by a persistent “code of separation” that operated to effectively keep African Americans “out of the mainstream of American life.”<sup>38</sup>

Anecdotal evidence collected from this decade demonstrates the extent of the country’s racial division. For example, in a Civil Rights Documentation Project Interview, James Miller describes having to search for employment only open to minorities.<sup>39</sup> When asked whether the “white” and “black” job distinction was an unofficial policy or way out in the open, Mr. Miller responded:

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attacked with dogs and fire hoses); riots in Los Angeles in 1965; riots in Newark and Detroit in 1967; and the assassination of Martin Luther King Jr. in 1968. See LIBRARY OF AMERICA, *supra* note 3.

36. 347 U.S. 483 (1954).

37. *Id.* at 495. The infamous *Dred Scott* decision adds historical context to the racial struggles of this country. In that case, the U.S. Supreme Court addressed the inferior status afforded blacks:

They had . . . been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute . . . .

*Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856). The following recounts the watershed social implications of the Supreme Court’s holding in *Brown*:

*Brown* ranks among the first instances in which a modern American institution actually tackled the cultural basis of racism and discrimination. More directly, during oral arguments to consider the separate but equal doctrine of *Plessy v. Ferguson*, the Justices seemed to have understood the political and cultural importance of possibly overturning the doctrine that shaped race relations for more than fifty years. The Warren Court’s strategy to treat severally the constitutional pronouncement and the remedial decree suggests its awareness of how the separate but equal doctrine legitimated and gave rise to the institution of racial practices and a way of life that was clearly manifested throughout the American society. These racial practices and patterns were particularly manifested in the South. The separate but equal doctrine did not create the racial culture addressed in *Brown* and subsequent decisions, but rather represented the constitutionalization of post-Civil War cultural traditions and policy.

Combs, *supra* note 2, at 627–28 (citations omitted). For more information on the ways in which *Brown* “served as a catalyst for cultural transformation in America,” see *id.* at 644–49.

38. Combs, *supra* note 2, at 635 (citations omitted).

39. Interview by Stephanie Scull Millet with James P. Miller Sr., Civil Right Documentation Project Interview (2000), at [http://www.usm.edu/crdp/html/transcripts/manuscript-miller-james-p\\_sr.html](http://www.usm.edu/crdp/html/transcripts/manuscript-miller-james-p_sr.html).

Oh, that was in the open. Like in the contract book, they had about six locals represented at the paper mill at that time. And five of them were white, and one served all the black people at the paper mill. That was before the days of black women at the paper mill, too. . . . So the personnel director . . . said, "Hey, that boy over there . . ." I said, "Man, that sounds like me." . . . Made my way up through the crowd, and like I say, then your credentials didn't mean nothing because you had a certain job you were going to do anyhow.<sup>40</sup>

Mr. Miller's interview tells of African American factory workers who were often assigned the most difficult and dangerous jobs.<sup>41</sup> He was fired from that job after fifteen years for "insubordination."<sup>42</sup> According to Mr. Miller, he was terminated for suggesting that a manufacturing procedure could be improved.<sup>43</sup>

#### Discrimination on the Basis of Sex in the 1960s

A 1957 Presidential Commission found that "both men and women generally take it for granted that the male is the family bread winner and that he has a superior claim to available work, particularly over the woman who does not have to support herself."<sup>44</sup> This attitude evidences a cultural attitude unprepared to grant women easy access to the workforce. In the early 1960s, for example, women were afforded no protection against disadvantageous seniority systems, promotion and training policies.<sup>45</sup>

More than one-third of the charges filed with the Equal Employment Commission in its first year included allegations of sex discrimination.<sup>46</sup> The charges filed generally contained allegations regarding three issues: benefits; workplace opportunities; and post-marriage or post-birth terminations.<sup>47</sup> Charges of discrimination involving benefits alleged that "men receiv[ed] better life insurance, health and pension benefits."<sup>48</sup> In addition, "[o]ne-quarter of the complaints addressed work opportunities with women complaining that they were shut out of jobs

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 211 (2001).

45. See Vicki Lens, *Supreme Court Narratives on Equality and Gender Discrimination in Employment: 1971-2002*, 10 CARDOZO WOMEN'S L.J. 501, 507 (2004).

46. See *id.* at 507 n.36 (citing FIRST ANN. REP., *supra* note 9, at 58-59).

47. *Id.* at 507.

48. *Id.*

because of seniority rules or because men were preferred over women after layoffs.”<sup>49</sup>

The decade was not without progress. Congress passed the Equal Pay Act in 1963,<sup>50</sup> which required equal pay for equal work.<sup>51</sup> But some believed that the redress available through that Act proved an inadequate response to the inequities faced by women in the workplace:

[T]he Act, the first major piece of federal legislation that directly addressed sexual discrimination in the workplace, had serious deficiencies. Since women did few[er] jobs that men did, the equal pay for equal work formula was often not applicable. Earlier versions had proposed equal pay for *comparable* work, a distinction that would have permitted comparisons between women’s gender segregated jobs and men’s more lucrative jobs. The word “equal” was substituted for “comparable” as a compromise to obtain passage of the Act since its purpose was also to protect men, even sometimes at women’s expense. Requiring employers to pay men and women the same for equal work discouraged employers from hiring women because they could pay them less, a practice begun during World War II.<sup>52</sup>

Title VII would provide a solution to many of the Equal Pay Act loopholes. With its passage, the EEOC began to redefine the practices listed above as discrimination, instead of viewing them as natural and appropriate roles of women in society.<sup>53</sup> Many of these problematic inequities in sex-based discrimination would be exposed and addressed during the 1970s, when public opinion began to shift, and “women’s liberation had become a household word.”<sup>54</sup>

*1970s: Fundamental Changes and Major Issues Confronted:  
Hiring, Discharge, And Segregation*

The greatest increase in charges based on race and sex discrimination occurred between 1970 and 1972. Several factors were likely to have contributed to this increase. First, Congress, confronted with statis-

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49. *Id.* (citation omitted).

50. *See* 29 U.S.C. § 206 (2000); *see also* Lens, *supra* note 45, at 506.

51. 29 U.S.C. § 206.

52. Lens, *supra* note 45, at 506 (internal citations omitted).

53. *Id.* at 508.

54. *Id.* at 509 (internal citations omitted). Lens cites a study that found that nearly 40% of women were in favor of “most efforts to strengthen and change women’s status in society” in the early 1970s. *Id.* (citing MYRAK MARX FERREE & BETH HESS, *CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS FOUR DECADES OF CHANGE* 88 (2000)).

tics revealing pervasive employment discrimination,<sup>55</sup> expanded the authority of the EEOC in 1972.<sup>56</sup> Most importantly, Congress granted the EEOC direct enforcement powers, enabling the Commission to become more active in its equal employment litigation efforts.<sup>57</sup> In addition, during the early part of this decade, a number of important federal and Supreme Court decisions set the framework for plaintiffs to successfully combat workplace discrimination.

Perhaps the most significant development in case law during this decade was the development of a shifting burden of proof framework that enabled a plaintiff to establish discriminatory intent through use of circumstantial evidence. The Supreme Court set forth this structure in *McDonnell Douglas Corp. v. Green*.<sup>58</sup> That case involved a charge of disparate treatment discrimination, a situation where one employee alleges that he or she is treated differently than another similarly situated employee based on his or her race (or other protected characteristic).<sup>59</sup> Under the *McDonnell Douglas* proof structure:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.<sup>60</sup>

After a plaintiff has successfully established such a prima facie case of discrimination, "[t]he burden then must shift to the employer to articulate some legitimate, non[-]discriminatory reason for the employee's rejection."<sup>61</sup> After the employer sets forth this reason, the burden shifts back to the plaintiff, who must then establish that the

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55. Congress concluded during a public hearing held in 1971 that "employment discrimination is even more pervasive and tenacious than . . . Congress had assumed . . . [when] it passed the 1964 Act." EEOC, *THE STORY*, *supra* note 20, at 15.

56. 42 U.S.C. § 2000e-4(g) (2000). In the Equal Employment Act of 1972, "[the] EEOC received litigation authority to sue nongovernmental 'respondents'—employers, unions, and employment agencies; EEOC could file pattern and practice lawsuits; Title VII coverage was expanded to include the federal government and state and local governments, educational institutions; [and] the number of employees . . . [were] reduced from 25 to 15 . . . ." EEOC *STORY*, *supra* note 20, at 15.

57. See 42 U.S.C. § 2000e-4(g)(6) (2000).

58. 411 U.S. 792 (1973).

59. *Id.* at 801–02.

60. *Id.* at 802.

61. *Id.*

back to the plaintiff, who must then establish that the employer's articulated non-discriminatory reason is in fact mere pretext for discriminatory intent.<sup>62</sup> Thus, although the ultimate burden always remains with the plaintiff to prove a violation of Title VII, the *McDonnell Douglas* burden-shifting framework affords plaintiffs a fair opportunity to demonstrate an adverse employment decision and that the reasons given for that decision were in reality a cover-up for a proscribed discriminatory decision.<sup>63</sup> The *McDonnell Douglas* case therefore created a method of proof which allows victims of a more subtle form of discrimination a better chance of establishing their claim.

#### Discrimination on the Basis of Race in the 1970s

In the 1970s, a number of important federal and Supreme Court decisions began to define the parameters of discrimination proscribed by Title VII. For example, in *Slack v. Havens*,<sup>64</sup> three African American employees alleged that they were discriminatorily discharged when refusing to do heavy clean-up work that was not in their job descriptions.<sup>65</sup> This same task was not required by a white employee employed in the same position.<sup>66</sup> The significance of this case lay in its attribution of the blatant discriminatory comments made by the supervisor.<sup>67</sup> Such comments included: "[c]olored people are hired to clean because they clean better" and that "[c]olored people should stay in their places."<sup>68</sup> The *Slack* court made clear that such comments could bear a causal relation to the plaintiffs' subsequent termination, evidencing an intent to discriminate for which the employer would be liable.<sup>69</sup>

Cases such as *Slack* emphasized the dangers of stereotyping in the workplace and the discrimination that may derive from employer perceptions about various minority groups. One study, conducted in 1975, warned of decision-making by employers that was unconsciously influenced by stereotypes.<sup>70</sup> Although today theories about unconscious stereotyping may seem relatively well-known and accepted, it was only

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62. *Id.* at 804.

63. *See id.* at 807.

64. 522 F.2d 1091 (9th Cir. 1975).

65. *Id.* at 1092-93.

66. *Id.* at 1092.

67. *Id.* at 1092-93.

68. *Id.*

69. *Id.* at 1095.

70. Stephen L. Cohen & Kerry A. Bunker, *Subtle Effects of Sex Role Stereotypes on Recruiters' Hiring Decisions*, 60 J. APPLIED PSYCHOL. 566, 572 (1975).

in the 1970s that these theories gained legal momentum and recognition from the federal courts.

From disparate treatment, the courts turned their attention to disparate impact. At the beginning of the 1970s, the Supreme Court first applied Title VII to eliminate seemingly arbitrary job employment tests and qualifications, when those requirements were unrelated to the job at issue. In *Griggs v. Duke Power Co.*,<sup>71</sup> Chief Justice Burger demanded “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”<sup>72</sup> Under Title VII, the court held “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”<sup>73</sup> In turn, Chief Justice Burger held that “[t]he touchstone is business necessity . . . [.] [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”<sup>74</sup> Thus, the Court focused on whether the *effect* of the requirement was discriminatory, regardless of whether the employer had the *purpose* to discriminate.<sup>75</sup>

Nevertheless, disparate treatment and even disparate impact did not address the lingering effects of 250 years of institutionalized racism. Consequently, affirmative action came into existence. The United States Commission on Civil Rights defined affirmative action as “any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent dis-

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71. 401 U.S. 424 (1971).

72. *Id.* at 431. The *Griggs* Court stated:

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

*Id.* at 425–26.

73. *Id.* at 430.

74. *Id.* at 431–32.

75. “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.” *Id.* at 432. *But cf.* *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 560 (1977) (holding that an employer cannot be held liable for a time-barred discriminatory act even if the effects of that act are still being felt by the employee).

crimination from recurring in the future.”<sup>76</sup> Affirmative action policies are implemented in a variety of settings, including the grant of government contracts, university admission policies, and public and private sector decision-making processes regarding the hiring or promotion of certain individuals.<sup>77</sup>

In the 1970s, the Supreme Court addressed affirmative action programs in two major opinions. In *Regents of the University of California v. Bakke*,<sup>78</sup> the Court found that race may be used as a determinative factor when choosing among qualified applicants for university admission.<sup>79</sup> The *Bakke* Court also ruled that a school may not reserve a set number of seats out of each entering class for minority students.<sup>80</sup> The Supreme Court next addressed affirmative action programs in *United Steel Workers of America, AFL-CIO v. Weber*,<sup>81</sup> ruling that that race-conscious affirmative action efforts designed to eliminate a conspicuous racial imbalance in an employer’s workforce resulting from past discrimination are permissible if they are temporary and do not violate the rights of white employees.<sup>82</sup> The Court further ruled that affirmative action “does not unnecessarily trammel the interest of white employees . . . [Since] half of those trained in the program will be white [and] the plan is [only] a temporary measure[,] it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.”<sup>83</sup> Thirty years later, these landmark court holdings would be revisited, in *Gratz v. Bollinger*<sup>84</sup> and *Grutter v. Bolinger*,<sup>85</sup> as an implicit recognition by the Court of the continual need to evaluate and reassess methods employed to remedy past discriminatory practices.

#### Discrimination on the Basis of Sex in the 1970s

##### Help wanted advertisements soliciting “women only” applicants

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76. NEWS BATCH, RACE AND ETHNIC POLICY ISSUES, at <http://www.newsbatch.com/race.htm> (last modified Sept. 2004) [hereinafter NEWS BATCH].

77. *Id.*

78. 438 U.S. 265 (1978).

79. *See id.* at 314.

80. *See id.* at 307.

81. 443 U.S. 193 (1979).

82. *Id.* at 208–09.

83. *Id.* at 208.

84. 539 U.S. 244 (2003) (ruling that the use of race by an undergraduate institution’s freshman admission policy violated the Equal Protection Clause, Title VI and Section 1981).

85. 539 U.S. 306 (2003) (holding that a law school may consider race and ethnicity as a factor in its admission program).

persisted into the 1970s, despite the proscriptions of the Civil Rights Act.<sup>86</sup> Female-dominated jobs consisted primarily of low-wage positions: waitresses, secretaries, cashiers, or domestic workers.<sup>87</sup> One study, evidencing this trend, found that women comprised 98.5% of secretaries and typists in 1976.<sup>88</sup> Accordingly, dramatic disparities still remained between the employment status and opportunities available to men and women. “As surveys during the decade demonstrated, men still overwhelmingly (95%–97%) comprised senior management and executive positions in the nation’s largest corporations and although the disparity between women’s and men’s wages decreased during the decade, by its end women were still earning only seventy-four cents to a man’s dollar.”<sup>89</sup>

But the 1970s also brought forth a variety of new legislation<sup>90</sup> and interpretative case law designed to elevate the status of women. Prior to 1970, the Supreme Court often upheld protective legislation limiting women’s ability to work.<sup>91</sup> During the 1970s, by contrast, court opinions began to reject former stereotypes regarding women’s status in society.<sup>92</sup> In *Frontiero v. Richardson*,<sup>93</sup> for example, Justice Brennan emphasized this shift:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism,’ which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was also able to proclaim: [m]an is, or should be; woman’s protector and defender. The natural and proper timidity and delicacy which belongs

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86. Judith L. Lichtman, *The Glass Ceiling: Lifted or Shattered?*, EEOC STORY, *supra* note 20, at 16.

87. *Id.*

88. Lens, *supra* note 45, at 509 n.57 (citing Nancy Maclean, *The Hidden History of Affirmative Action: Working Women’s Struggles in the 1970s and the Gender of Class*, 25 FEMINIST STUD. 43, 55 (1999)).

89. *Id.* at 512 (internal citations omitted).

90. See Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (2000) (prohibiting discrimination in credit transactions); Civil Rights Act, 20 U.S.C. § 1681(a) (2000) (prohibiting sex discrimination in educational programs that are federally funded); Equal Pay Act of 1972, 29 U.S.C. § 206(d) (2000); Women’s Educational Equity Act of 1974, 20 U.S.C. § 3041 (2000) (repealed in 1982).

91. For a more detailed look at the development of women’s status in the workplace, see generally Lens, *supra* note 45, at 503–17.

92. See *id.* at 526.

93. 411 U.S. 677 (1973).



to the female sex evidently unfits it for many of the occupations of civil life . . . .

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right.<sup>94</sup>

The 1970s ultimately proved to be a watershed period for challenging traditional notions of gender as women fought for an end to occupational segregation. Along with the attainment of equal workplace opportunities, women sought to end workplace harassment as well.

#### Sexual Harassment Generally Unrecognized as an Actionable Form of Discrimination in the 1970s

Today it is generally recognized that a supervisor's sexual advances or demands of an employee impose a sex-based "term or condition" of employment that is prohibited by Title VII. But for many years after the enactment of Title VII, courts did not universally recognize that sexual advances fall within the definitional ambit of Title VII.<sup>95</sup> The initial battles regarding the scope of Title VII coverage struggled to distinguish the interpersonal disputes of employees (in which courts should not be involved) from the use of supervisory or managerial power to force subordinate submission to sexual advances (which would then qualify as a policy or practice prohibited by Title VII).

Prior to 1976, conduct that today would constitute "sexual harassment" was treated by the courts as a *purely personal matter*, rather than an issue of workplace equality.<sup>96</sup> Accordingly, defendants successfully

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94. *Id.* at 684–85 (internal citations omitted).

95. *See, e.g.,* *Corne v. Baush & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) ("[T]here is nothing in the Act which could reasonably be construed to have it apply to 'verbal and sexual advances' by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment."); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) ("[S]exual harassment and *sexually* motivated assault do not constitute sex discrimination under Title VII.")

96. *See, e.g.,* *Smith v. Rust Eng'g Co.*, No. 78-M-0479, 1978 WL 126 (N.D. Ala. Oct. 25, 1978) (McFadden, Arb.). The *Rust Engineering* court found that claims of sexual advances and remarks must be related to a term or condition of employment to state a claim under Title VII. *Id.* at \*1. That court held that where the male employee did the same type of work as the plaintiff, and did not promise plaintiff anything with respect to her employment, the plaintiff could not show that the

argued that plaintiffs could not make a case of sex discrimination under Title VII because the harassment alleged was not a policy or regulation of the office and instead constituted a purely personal matter that should not be the concern of the courts.<sup>97</sup> For example, in *Tomkins v. Public Service Electric & Gas Co.*,<sup>98</sup> the plaintiff claimed that her employer conditioned her employment upon her submission to the sexual demands of a male supervisor.<sup>99</sup> The District Court dismissed the plaintiff's sex discrimination claim, holding that the acts of the plaintiff's supervisor constituted a mere "abuse of authority for personal purposes" and was therefore not actionable under Title VII.<sup>100</sup> Another court found that:

Title VII is directed at acts of employment discrimination and not at individual acts of discrimination. Therefore, individual acts of sexual harassment by employees of a defendant employer are not actionable, unless they are in some manner whether actively or tacitly, sanctioned by the employer or constitute an official policy of the employer.<sup>101</sup>

One of the first cases in which a federal court acknowledged sexual harassment as a viable theory of relief was *Barnes v. Costle*,<sup>102</sup> decided in 1977. In *Barnes*, the D.C. Court of Appeals rejected an argument that the sexual advances of a supervisor should be treated by the court as a harmless personal escapade that did not fall within the regulatory ambit of Title VII.<sup>103</sup> The lower court in that case had granted the defendant-employer's motion for summary judgment, holding that Title VII did "not offer redress for [the female employee's] complaint that her job at the Environmental Protection Agency was abolished because she repulsed her male superior's sexual advances."<sup>104</sup> The appellate court re-

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sexual advances were connected to a condition of employment so as to establish a viable claim of sex discrimination under the Act. *Id.* at \*1-2.

97. *See id.*

98. 568 F.2d 1044 (3d Cir. 1977).

99. *Id.* at 1045-46.

100. *Tomkins*, 422 F. Supp. at 556. The dismissal of the plaintiff's claim was reversed upon appeal. *Tomkins*, 568 F.2d at 1048-49 (holding that sexual advances in a certain context could constitute evidence of a job-related condition which amounted to an additional duty or burden imposed because of the employee's gender, thereby triggering the protections afforded by Title VII).

101. *Ludington v. Sambo's Rest., Inc.*, 474 F. Supp. 480, 483 (E.D. Wis. 1979) (internal citation omitted).

102. 561 F.2d 983 (D.C. Cir. 1977).

103. *Id.* at 984, 995.

104. *Id.* at 984. The circumstances under which the *Barnes* case arose are alleged as follows: Shortly after commencement of the employment, she claims, the director initiated a quest for sexual favors by "(a) repeatedly soliciting [her] to join him for social activities after office hours, notwithstanding [her] repeated refusal to do so; (b) by making re-

versal of this holding signaled the emergence of a new concept of sex-based discrimination, making clear that sexual advances by a supervisor could give rise to Title VII liability.<sup>105</sup> The very public implications of what was once deemed an entirely private matter would only achieve greater recognition in the decades to come.

*1980s and 1990s: Refining Title VII Jurisprudence and  
Tackling More Subtle Forms of Discrimination*

By the start of the 1980s, the Supreme Court had set forth a conceptual framework for two theories of discrimination under Title VII: disparate treatment and disparate impact.<sup>106</sup> The Court spent much of this decade refining the two theories. The Court also addressed concepts regarding affirmative action, bona fide occupational qualifications, affirmative defenses, and sexual harassment.

Sex Discrimination and Sexual Harassment in the 1980s

For the first time in the 1980s, the majority of women were participants in the labor force—51.2% of all women worked in 1980.<sup>107</sup> Yet, despite the increased participation, the terms of women's employment remained unequal.<sup>108</sup> Surveys conducted in the early 1980s found that sexual harassment was commonly found in the workplace.<sup>109</sup> For exam-

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peated remarks to [her] which were sexual in nature; (c) by repeatedly suggesting to [her] that if she cooperated with him in a sexual affair, her employment status would be enhanced." Appellant states that she "continually resisted [his] overtures . . . and finally advised him that notwithstanding his stated belief that many executives 'have affairs with their personnel,' she preferred that their relationship remain a strictly professional one." Thereafter, she charges, the director "alone and in concert with other agents of [appellee], began a conscious campaign to belittle [her], to harass her and to strip her of her job duties, all culminating in the decision of [appellee's] agent . . . to abolish [her] job in retaliation for [her] refusal to grant him sexual favors." These activities, appellant declares, "would not have occurred but for [her] sex."

*Id.* at 985 (internal citations omitted). The *Barnes* trial court granted the defendant-employer's motion for summary judgment, holding that plaintiff had failed to plead facts entitling her to relief under Title VII. *Id.* at 984.

105. *See id.* at 994.

106. Disparate impact involves seemingly neutral job standards or qualifications and the unintended but prohibited discrimination that results from those standards or qualifications. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

107. *Lens*, *supra* note 45, at 509. By contrast, only 43.3% of women were employed in 1970. *Id.*

108. *See id.*

109. *Id.* at 513.

ple, the first federal survey conducted by the U.S. Merit Systems Protection Board found that 40% percent of female federal employees that were surveyed had been victims of sexual harassment.<sup>110</sup>

The EEOC did not issue guidelines defining sexual harassment as a form of sex discrimination until 1980.<sup>111</sup> It was during this decade that the concept of sexual harassment quickly expanded. "Sexual harassment was broadened to include, in addition to requesting sexual favors in exchange for jobs, promotions, and other job related benefits, the creation of a hostile work environment, which made it difficult for women to perform their jobs."<sup>112</sup>

But many courts still remained hesitant to find sexual harassment in the workplace. For example, in a 1981 district court decision, the court found that a female employee's claims of sexual harassment were insufficient to establish a prima facie case of sex discrimination, despite her allegations that her immediate supervisor patted her on the bottom, touched her breast area and attempted to begin an affair with her while both attended a job-related convention.<sup>113</sup> The defendant, Voight, "acknowledge[ed] the bottom patting incidents, stating they occurred rarely (three to five such incidents from 1973 to 1978), always in the presence of others, and were not sexually oriented, but intended as a show of support and encouragement when plaintiff expressed a lack of confidence in herself and her ability."<sup>114</sup> The court cited the following as evidence that

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110. *Id.*

111. See 29 C.F.R. § 1604.11(a) (2004). The EEOC regulations provide, in pertinent part:

(a) Harassment on the basis of sex is a violation of section 703 of title VII [sic]. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

*Id.*

112. Lens, *supra* note 45, at 513.

113. See *Walter v. KFGO Radio*, 518 F. Supp. 1309, 1314–15 (D.N.D. 1981); see also *Huebschen v. Dep't of Health & Soc. Servs.*, 716 F.2d 1167 (7th Cir. 1983). The *Huebschen* court found that there was no legal basis for a claim under Title VII in a sexual discrimination action brought by a male employee alleging sexual harassment by a female supervisor because his supervisor was not an "employer" and therefore could not violate Title VII. 716 F.2d at 1170–71.

114. *Walter*, 518 F. Supp. at 1314.

the plaintiff's employment did not suffer as a result of the actions taken by her male co-worker:

During the time period when the above noted sexual overtures were made, plaintiff continued in her job, continued to retain and carry out job related duties and responsibilities, and apparently continued receiving raises. Further, plaintiff received public praise from Voight; was featured in a 1975 brochure which included several pictures of plaintiff and described her as 'extremely popular with her large following, which includes both rural and urban listeners, on and off the air;' and was promoted as a station personality in a 1976 billboard campaign.<sup>115</sup>

According to the court, therefore, plaintiff presented "no evidence to demonstrate that Voight's conduct had the effect of substantially interfering with plaintiff's work performance or created an intimidating, hostile or offensive working environment."<sup>116</sup> Instead, the court found that the plaintiff's allegations of unwanted sexual advances amounted to nothing but a ploy to secure a new position at work.<sup>117</sup> Later court holdings would interpret the "terms and conditions of employment" more liberally, rejecting undue focus upon the presence or absence of economic harm suffered by the plaintiff as a result of the alleged sexual conduct.<sup>118</sup>

The Supreme Court did not recognize sexual harassment until the middle of the decade.<sup>119</sup> Instead, during the 1980s, the Supreme Court largely concerned itself with "equalizing job opportunities by challeng-

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115. *Id.* at 1315–16.

116. *Id.* at 1316.

117. *Id.*

118. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67–68 (1986) ("[T]he District Court apparently believed that a claim for sexual harassment will not lie absent an *economic* effect on the complainant's employment. . . . [S]ince it appears that the District Court made its findings without ever considering the 'hostile environment' theory of sexual harassment, the Court of Appeals' decision to remand was correct."). In another pioneer Supreme Court case decided during this decade, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court held that an employer violates Title VII if gender is a motivating factor in an employment decision. *See id.* at 242. In that case, the Court found "clear signs . . . that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'" *Id.* at 235. In addition, objections were made to her swearing "because it[']s a lady using foul language." *Id.* But the "coup de grace," according to the Supreme Court, was the supervisor who told Hopkins that to improve her chances for partnership, she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* These sex-based terms of evaluation were held to violate Title VII by the Supreme Court. *See id.* at 235, 258.

119. *See Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

ing discriminatory seniority rules and women's exclusion from male dominated occupations. These issues increasingly dominated the court's docket in the late 1980s."<sup>120</sup> Challenges to salary differences between men and women also took the forefront.<sup>121</sup> Accordingly, "[n]ew approaches to increasing women's wages were implemented during the 1980s[;] [w]hereas in the 1970s women entered previously male occupations as a way to eliminate the wage gender gap, in the 1980s women used the principle of pay equality to increase the pay and status of the traditionally female occupations."<sup>122</sup>

Today, the practice by employers of formally adopting anti-harassment and discrimination policies perhaps best evidences the impact Title VII jurisprudence has had on the American workforce. Yet, in the 1980s, such policies were not common — "[d]espite the legal and social recognition of sexual harassment, many businesses were hesitant to implement sexual harassment policies or grievance procedures."<sup>123</sup> Business would not begin to institute formal policies and responses to issues of sexual harassment in the workplace until the 1990s.<sup>124</sup>

#### Discrimination on the Basis of Race in the 1990s

Relations between African Americans and whites have improved in past decades. The fact that the "races associate with far more frequency in the workplace" likely contributed to any improvements.<sup>125</sup> Other factors cited to explain improved relations include the increasingly greater percentage of persons who know, interact and are friendly with those of other races, increasing numbers of mixed marriages, and the role of mass media.<sup>126</sup> Each "has contributed mightily to improve cross-racial percep-

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120. Lens, *supra* note 45, at 524. During the 1980s, the Supreme Court "decided eight cases in this category (in contrast to four the decades before), encompassing such diverse issues as women's exclusion from the draft, the impact of sexism in previously male-dominated professions such as accounting, the effect of seniority systems on women's opportunities and the legitimacy of affirmative action programs." *Id.* (internal citations omitted).

121. *See id.* at 511–12, 524.

122. *Id.* at 512. This concept of pay equality "meant that jobs involving similar skill levels, effort, working conditions, and level of responsibility would be compensated at the same rate of pay. This highlighted the inequality of paying teachers, nurses and secretaries less than, for example, the typical male jobs of tree trimmers or sign painters." *Id.* (internal citations omitted).

123. *Id.* at 513–14.

124. *See id.* at 515. During the 1990s: "In response to several Supreme Court decisions, businesses . . . began adopting sexual harassment policies in greater numbers." *Id.*

125. NEWS BATCH, *supra* note 76.

126. *Id.* Some cite the media portrayal of African American athletes as being particularly influential. *See id.* ("With far more frequency, African Americans who have become successful ath-

tions between blacks and whites.”<sup>127</sup> Even the “‘racially conscious etiquette,’ which forbids racially derisive speech[,] [that] has emerged particularly among college educated Americans in most areas of the country” reflects the change in relations between people of different races.<sup>128</sup>

In the 1990s and continuing into the 2000s, the courts not only dealt with employment measures that discriminated against minorities, but also those that proposed to benefit historically disadvantaged groups. Today this country remains sharply divided over the recent cases in which courts have grappled with measures taken by employers and educational facilities to remedy past discriminatory practices.

Perhaps the most notable of these efforts are two cases addressing the admissions policies at the University of Michigan, *Gratz v. Bollinger*<sup>129</sup> and *Grutter v. Bollinger*.<sup>130</sup> In *Gratz*, the Supreme Court struck down the policy of the University of Michigan to automatically add twenty points to a minority candidate’s admission score, holding that the automatic addition of points violated the Constitution by not being narrowly tailored to the legitimate government interest of achieving diversity.<sup>131</sup> The *Gratz* decision demands that institutions implementing affirmative action policies are drawn narrowly enough to provide consideration of each individual applicant.<sup>132</sup> In *Grutter*, by contrast, the Supreme Court upheld the University of Michigan College of Law’s admission plan, holding that the Law School “has a compelling interest in attaining a diverse student body.”<sup>133</sup> The difference between *Gratz* and *Grutter* was the individualized consideration of each applicant by the Law School.

In *Grutter*, Justice O’Connor specifically referenced the impact that

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letes are not stereotyped racially but are admired for their skill and human qualities. It is not surprising that African Americans cherish this aspect of their progress in American society.”).

127. *Id.*

128. *Id.* Despite the progress made to improve black-white relationships, the race chasm persists. And the potential for violence also remains – the 1992 Los Angeles riots being a clear example. See William Booth & Jeff Adler, *10 Years After Riots: Challenges Remain for Los Angeles*, THE MIAMI HERALD, Apr. 28, 2002, <http://www.miami.com/mld/miamiherald/news/3149454.htm> (providing an assessment of race relations in Los Angeles ten years after the riots). One California merchant blamed much of the tension on the unemployment facing minorities in Los Angeles: “‘The rich and poor gap is getting bigger. That is the reason for riots. The job is not done with getting a McDonald’s there. It is the unemployment.’” *Id.* Although the riots were spurred by the acquittal of the police officers charged with beating Rodney King, the above statement suggests that the general unrest among certain groups of racial minorities in California has far deeper roots. *Id.*

129. 539 U.S. 244 (2003).

130. 539 U.S. 306 (2003).

131. *Gratz*, 539 U.S. at 270.

132. See *id.* at 271–75.

133. *Grutter*, 539 U.S. at 328.

educational opportunities have on employment. According to Justice O'Connor, "exposure to widely diverse people, cultures, ideas, and viewpoints" best prepares students for competition in an increasingly global marketplace.<sup>134</sup> These students will, in turn, benefit their future American employers with that exposure.<sup>135</sup>

Issues involving affirmative action programs, or programs that provide different benefits to minority candidates, are still controversial today and will face continual review and refinement by the courts. In the *Grutter* opinion, Justice O'Connor stressed the temporary nature of affirmative action programs.<sup>136</sup> She concluded her opinion by stating that,

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. *We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.*<sup>137</sup>

This statement could be construed to suggest the year 2029 (or before) as a termination point for race-conscious admissions programs.<sup>138</sup> Although affirmative action plans are often justified as a means to remedy past discrimination, Justice O'Connor's prediction that the problem of racial inclusion will be solved in just twenty-five years seems remarkably idealistic. As Justice Thomas observed in his dissent, educational statistics regarding minority applicants to law school are not improving:

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134. *Id.* at 330; *see also* Combs, *supra* note 2, at 674.

135. Justice Thomas, by contrast, emphasized what he believed to be a negative stigma of under-achievement that accompanied the use of different standards for minority applicants: "I believe [African Americans] can achieve in every avenue of American life without the meddling of university administrators." *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part). Thomas further claimed that "[w]hen [African Americans] take positions in the highest places of government, industry and academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma . . ." *Id.* at 373. Thomas also quoted from *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), stating that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 378.

136. *Grutter*, 539 U.S. at 343.

137. *Id.* (citation omitted) (emphasis added).

138. The Supreme Court has emphasized the temporary nature of minority inclusion plans before. In *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) the Court wrote that promising a stopping point "[a]ssure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* at 510 (O'Connor, J., plurality opinion).



The majority does not and cannot rest its time limitation on any evidence that the gap in credentials between black and white students is shrinking or will be gone in that timeframe. In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. In 1993 blacks constituted 1.1% of law school applicants in that score range, though they represented 11.1% of all applicants. . . . In 2000 the comparable numbers were 1.0% and 11.3%. No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years.<sup>139</sup>

The dissenting opinions suggest that the twenty-five year limit to affirmative action programs serves as a means to salvage the constitutionality of the admission program—strict scrutiny review requires that remedial measures be temporary.<sup>140</sup> Regardless, the division among even the members of the Supreme Court regarding the constitutionality, the effectiveness, the merit and the proposed duration of affirmative action programs suggests that the controversy over the use of affirmative action plans will not soon subside.

Raising Public Awareness About Discrimination on the  
Basis of Sex in the 1990s:  
Anita Hill, Tailhook and the “Glass Ceiling”

In the early 1990s, the number of charges filed by women alleging discrimination increased dramatically.<sup>141</sup> The continuing development of sexual harassment jurisprudence has likely fueled this increase. For example, the Supreme Court in *Harris v. Forklift Systems, Inc.*<sup>142</sup> found that a “concrete psychological harm [is] an element that Title VII does not require.”<sup>143</sup> *Harris* increased the chances of a victorious plaintiff by rejecting a requirement that the plaintiff prove that the alleged harassing conduct “‘seriously affect[ed] [the employee]’s psychological well-

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139. *Grutter*, 539 U.S. at 375–76 (Thomas, J., dissenting) (internal citations omitted).

140. *Id.* at 386–87.

141. See generally NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, WOMEN AT WORK: LOOKING BEHIND THE NUMBERS 40 YEARS AFTER THE CIVIL RIGHTS ACT OF 1964 at 4, 6 (July 2004) *available at* <http://www.rationalpartnership.org/portals/ps/library/CivilRightsAffAction/WomenAtWorkCRA40tHAnnReport.pdf> (discussing how the EEOC received an increased number of sex discrimination complaints from 1992 to 2003).

142. 510 U.S. 17 (1993).

143. *Id.* at 22.

being' or led [the plaintiff] to 'suffe[r] injury'"<sup>144</sup> by finding that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."<sup>145</sup> The *Harris* opinion instead urged courts to look at the totality of the circumstances surrounding the conduct, thus further defining the parameters of a valid sexual harassment claim.<sup>146</sup>

In addition to the passage of the 1991 Civil Rights Act,<sup>147</sup> there were several other high-profile events in 1991 that likely contributed to the increased allegations filed: the Anita Hill controversy; the U.S. Navy Flyers at the Tailhook Association Convention; and The Glass Ceiling Act.<sup>148</sup>

#### Anita Hill, Tailhook and Educating the Public about the Prevalence of Sexual Harassment in the Workplace

The issue of sexual harassment gained widespread public attention with "[t]he nomination of Clarence Thomas for Supreme Court justice and the accompanying charges of sexual harassment by his former assistant, Anita Hill, in 1991."<sup>149</sup> That year, Anita Hill submitted a confidential affidavit to the Senate Judiciary Committee, charging that U.S. Supreme Court nominee Clarence Thomas sexually harassed her from 1981 to 1983.<sup>150</sup> The Senate hearings were televised, and the entire country

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144. *Id.*

145. *Id.*

146. *See id.* at 23.

147. 2 U.S.C. §§ 601, 1201–02, 1219–20 (2000). Note that Congress enacted the first legislation acknowledging the competing demands of work and parenting in this decade. The Family and Medical Leave Act of 1993 [FMLA], 29 U.S.C. §§ 2601–19, 2651–54 (2000) "was the first law to address this idea by permitting up to twelve weeks unpaid leave of absence for both women and men for family needs." Lens, *supra* note 45, at 516.

148. "[T]he Glass Ceiling Act (part of the Civil Rights Act of 1991) mandate[d] the establishment of a Glass Ceiling Commission to examine barriers to women and minority advancement in corporate America and formulate a strategic plan to overcome it." Lens, *supra* note 45, at 515. "The Commission found a litany of barriers demonstrating that, despite women's gains over the past decades, a thick residue of discrimination and bias remained. They included corporate climates that alienated and isolated women, the failure to recruit, mentor or train women for higher positions, biased rating, performance and testing systems and harassment by colleagues. The Commission also noted the 'lack of vigorous, consistent monitoring and law enforcement.'" *Id.* (internal citations omitted).

149. *Id.* at 515.

150. Gail Schmoller Philbin, *The Unspoken Accusation: Decades into the Women's Movement, Victims of Sexual Harassment are Still Suffering in Silence*, ORLANDO SENTINEL, Mar. 24, 2004, at G1 ("Thanks to the Clarence Thomas-Anita Hill hearings in 1991 and other high-profile cases, more people than ever know what it is and know [that sexual harassment] is illegal, and many employers have instituted training programs and policies to address it.").

watched and learned while Anita Hill recounted the incidents of harassment she endured.<sup>151</sup>

Nineteen ninety-one was also the year of the Navy's Tailhook Association convention. Reports of rampant sexual abuse by naval officers dominated the national media.<sup>152</sup> One-hundred and seventeen officers were ultimately accused by the Defense Department as having sexually abused 83 women and 7 men.<sup>153</sup>

In 1992, one year after the Anita Hill and Tailhook incidents were first covered by the national media, the EEOC reported a 62% increase in the number of charges filed with the Commission alleging sexual harassment.<sup>154</sup> This dramatic increase leaves little doubt regarding the unique ability of high profile discrimination cases to educate the public about impermissible forms of discrimination.<sup>155</sup>

### Raising Public Awareness about the "Glass Ceiling"

A *Wall Street Journal* article in 1986 first popularized the term "glass ceiling."<sup>156</sup> The term refers to structural barriers within the workforce that prevent the advancement of women and minorities.<sup>157</sup> Statistics, such as those evidencing meager proportions of women employed as executives or corporate officers,<sup>158</sup> fueled voices calling for an end to these barriers.<sup>159</sup> In response, as part of the 1991 Civil Rights Act, Congress formed the Glass Ceiling Commission.<sup>160</sup> "[Its] mission was to investigate the opportunities for and artificial barriers to the advancement of women and minority men into management and decision-making positions in corporate America, and to make recommendations based on [those] findings."<sup>161</sup>

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151. *Id.*

152. Lens, *supra* note 45, at 515.

153. Philbin, *supra* note 150.

154. *Id.*

155. During the Clarence Thomas hearings, 9to5, National Association of Working Women, reported receiving 2,000 calls from women who "said they had no idea the behavior they had endured on the job was illegal . . ." *Id.* They also found that "[i]n 1999, when the Dear Abby advice column printed a letter from a teenager about sexual harassment in an after-school job, 9to5 received another 1,000 calls . . ." *Id.*

156. Karen Blumenthal, *Room at the Top*, WALL ST. J., Mar. 24, 1986, at 7D.

157. *Id.*

158. See Lens, *supra* note 45, at 515 (reporting that "the proportion of women corporate officers in the 500 largest corporations was only 12% in 1999").

159. See *id.*

160. See *id.*

161. Lichtman, *The Glass Ceiling: Lifted or Shattered?*, EEOC STORY, *supra* note 20, at 17.

One of the first reports compiled by the Glass Ceiling Commission exposed the extent of occupational segregation that persisted along race and gender lines.<sup>162</sup> The March 1995 report<sup>163</sup> found that although white men comprised only 43% of the workforce, they held 95% of senior management positions.<sup>164</sup> Close to 40% of middle management jobs were held by white women, but only five percent of those jobs were held by African American women.<sup>165</sup> African American men held even less.<sup>166</sup>

The Glass Ceiling Commission report also sought to educate employers about the benefits of a diverse workforce.<sup>167</sup> That report concluded that companies that “excel at leveraging diversity (including hiring and promoting minorities and women into senior positions) can experience better financial performance in the long run than those which are not effective in managing diversity[;]” and that “it is against the best interests of business to exclude those Americans who constitute two-thirds of the total population, two-thirds of the consumer markets, and more than half of the workforce.”<sup>168</sup> Just as the Anita Hill-Clarence Thomas hearings and Tailhook scandal focused national attention upon the problems of sexual harassment, popularizing the Glass Ceiling theories educated the nation about invisible barriers to advancement, our responsibilities regarding those barriers, and the ultimate need to provide equal workplace achievement opportunities to all employees.

#### Discrimination on the Basis of National Origin and Religion

In 2002, the biggest increases in charges filed with the EEOC consisted of allegations of religious discrimination<sup>169</sup> (increasing 21%)

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The Commission first met in 1992, and held five hearings around the United States before presenting its findings before Congress in 1995. *See id.*

162. *Id.*

163. FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, (Mar. 1995) [hereinafter GOOD FOR BUSINESS].

164. *See id.* at 12; *see also* Lichtman, *The Glass Ceiling: Lifted or Shattered?*, EEOC STORY, *supra* note 20, at 17.

165. *Id.*

166. *Id.*

167. GOOD FOR BUSINESS, *supra* note 163, at iv.

168. *Id.* at 11, 14.

169. Religion includes “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.” 42 U.S.C. § 2000e(j) (2000).

and discrimination on the basis of national origin<sup>170</sup> (increasing 13%).<sup>171</sup> This increase is significant because, prior to 2001, the numbers of charges filed alleging discrimination on the basis of religion or national origin remained fairly flat.<sup>172</sup> For example, the number of people who filed charges alleging religious discrimination only increased by about one hundred per year from 1972 until 2001.<sup>173</sup> In 2002, by contrast, the number of claims filed increased by nearly 500.<sup>174</sup> Charges alleging discrimination on the basis of national origin also increased sharply in 2002, from 8,025 charges filed to 9,046 charges filed.<sup>175</sup>

This increase in charges filed after 2001 can most likely be traced to the September 11, 2001 terrorist attacks upon the World Trade Center.<sup>176</sup> Immediately following the attacks, “[t]he EEOC reported ‘a significant increase’ in the number of charges alleging discrimination because of national origin or discrimination because of religion.”<sup>177</sup> This increase resulted despite statements issued by the EEOC,<sup>178</sup> Department

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170. “National Origin” is not defined in Title VII. The Supreme Court has stated that the “term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.” *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). In addition, the EEOC has issued guidelines to aid in defining ‘national origin’ discrimination. See EEOC, NATIONAL ORIGIN DISCRIMINATION, EEOC COMPLIANCE MANUAL, § 13-II (Dec. 2, 2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html>.

171. Press Release, EEOC, EEOC Reports Discrimination Charge Filings Up, at <http://www.eeoc.gov/press/2-6-03.html>.

172. See EEOC SEVENTH ANN. REP. (1973); see also EEOC TWENTY-FIFTH ANN. REP. (1991).

173. CHARGE STATISTICS 1992–2003, *supra* note 8.

174. See *id.*

175. *Id.* In 2003, the number of charges filed alleging discrimination on the basis of national origin or religion decreased slightly from 9,046 to 8,450 and 2,572 to 2,532, respectively; but, note that the charges filed by every protected group (race, sex, religion, national origin) decreased that year. *Id.*

176. Other factors cited include: “[t]he movement toward a twenty-four-hours-a-day/seven-days-a-week economy, with consequent conflict with religious demands for rest and worship on Saturdays, Sundays, or holidays” [;] “[o]ur nation’s increasing diversity, marked by a broad spectrum of religious traditions, some of which may clash with workplace parameters that do not take into account the religious observances of immigrant communities; . . . [a]nd growing emphasis on material values at the expense of spiritual ones, with employers indicating that workplace requirements take priority over religious practices.” Richard T. Foltin & James D. Standish, *Reconciling Faith and Livelihood: Religion in the Workplace and Title VII*, 31 HUM. RTS., Summer 2004, at 19.

177. DEBRA S. KATZ & ALAN R. KABAT, *Current Developments in Employment Law: Harassment in the Workplace*, ALI-ABA COURSE OF STUDY 559 (2004) (citing EEOC, *Questions and Answers about Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs* (July 16, 2002), available at <http://www.eeoc.gov/facts/backlash-employer.html>).

178. Three days after the terrorist attack, Cari M. Dominguez, Chair of the EEOC publicly released the following statement:

of Justice, FBI, and numerous other federal agencies warning against targeting post-attack animosity at those of Arab-American or Southern Asian descent.<sup>179</sup> For example, the Director of the FBI issued a statement on September 17, 2001 providing that:

Since the horrific attacks on September 11, dozens of retaliatory hate crimes have been directed at members of the Arab-American community, including assaults, arson, threatening communications and two possibly-and I say "possibly"-ethnically motivated murders. Many of these criminal acts have been directed at Muslim houses of worship and at Muslim community centers.<sup>180</sup>

The workplace has not escaped the effects of the backlash.<sup>181</sup> "As of May 7, 2002, the EEOC received 488 charges filed by individuals who believed that they have experienced September 11 'backlash discrimination,' and harassment was alleged in 194 of these charges."<sup>182</sup> In one account, for example, five Pakistani-Americans who worked at a steel plant sued their employer after reporting the taunting they faced by their co-workers while praying each day at work.<sup>183</sup> The men reported

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We should not allow our anger at the terrorists responsible for this week's heinous attacks to be misdirected against innocent individuals because of their religion, ethnicity, or country of origin . . . In the midst of this tragedy, employers should take time to be alert to instances of harassment or intimidation against Arab-American and Muslim employees. Preventing and prohibiting injustices against our fellow workers is one way to fight back, if only symbolically, against the evil forces that assaulted our workplaces Tuesday morning.

Press Release, EEOC, EEOC Chair Urges Workplace Tolerance in the Wake of Terrorist Attacks (Sept. 14, 2001), at <http://www.eeoc.gov/press/9-14-01.html> [hereinafter Press Release, Sept. 14, 2001].

179. See, e.g., CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, *Statements of Department of Justice Officials*, at <http://www.usdoj.gov/crt/legalinfo/dojstatements.html> (last updated Oct. 23, 2001).

180. Robert Mueller, Remarks at FBI News Conference (Sept. 17, 2001), at <http://www.usdoj.gov/crt/legalinfo/dojstatements.html>. Attorney General John Ashcroft also issued a statement, claiming that "[s]ince September 11, the Civil Rights Division, working closely with the United States Attorneys and the FBI, has opened over 60 investigations into acts involving force or threats of force committed in retaliation for the events of September 11. All of these acts include killings, assaults, the destruction or attempted destruction of businesses, attacks on mosques and worshipers and death threats." Attorney General John Ashcroft, Excerpt of Testimony Before the Senate Committee on the Judiciary (Sept. 25, 2001), at <http://www.usdoj.gov/crt/legalinfo/dojstatements.html>.

181. See Press Release, Sept. 14, 2001 *supra* note 178.

182. KATZ & KABAT, *supra* note 177 (citing Press Release, EEOC, EEOC Provides Answers about Workplace Rights of Muslims, Arabs, South Asians and Sikhs (May 15, 2002), available at <http://www.eeoc.gov/press/5.15.02.html>).

183. See Z-FILE EMPLOYMENT DISCRIMINATION, EXAMPLES EXPLAINED, at <http://www.kevin-ho.com/Employment%20Discrim%20Site/Pages/exam.htm> (last accessed Mar. 8,

being called “camel jockeys” and “ragheads.”<sup>184</sup> In addition, they claimed to receive the worst work assignments.<sup>185</sup> Ultimately, the men pursued claims that they were discriminated against on the basis of their national origin and religion. The case was settled for one million dollars.<sup>186</sup>

Discrimination against those of different cultures and ethnic heritage, of course, is not a new phenomenon. Immigrants have historically struggled to assimilate. “The last great immigration wave produced a bitter backlash, epitomized by the Chinese Exclusion Act of 1882 and the return, in the 1920s, of the Ku Klux Klan, which not only targeted African Americans, but Catholics, Jews and immigrants as well.”<sup>187</sup> As the American workforce becomes increasingly diversified,<sup>188</sup> it is likely that problems involving ethnic, racial and religious differences will continue to arise, despite the progress being made to eradicate other forms of discrimination proscribed by Title VII.

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2005) [hereinafter EXAMPLES EXPLAINED].

184. *See id.*

185. *See id.* For more examples, see Press Release, EEOC, EEOC Sues Alamo Car Rental for Religious Bias (Sept. 30, 2002), *available at* <http://www.eeoc.gov/press/9-30-02-f.html> [hereinafter Press Release, EEOC Sues Alamo]; Press Release, EEOC, EEOC Files Post-9/11 National Origin Discrimination Suit Against Chromalloy Castings Tampa Corporation (Sept. 30, 2002), *available at* <http://www.eeoc.gov/press/9-30-02-e.html> [hereinafter Press Release, EEOC Files Post-9/11 National Origin Discrimination Suit]; Press Release, EEOC, EEOC Files Post-9/11 Religion and National Origin Termination Lawsuit Against Worcester Art Museum (Sept. 30, 2002), *available at* <http://www.eeoc.gov/press/9-30-02.html> [hereinafter Press Release, EEOC Files Post-9/11 Religion and National Origin Termination Lawsuit].

186. *See* EXAMPLES EXPLAINED, *supra* note 183.

187. William Booth, *One Nation, Indivisible: Is It History?*, THE WASH. POST, Feb. 22, 1998, at A1, <http://www.washingtonpost.com/wp-srv/national/longterm/meltingpot/melt0222.htm>. Booth comments upon the difference between the historical efforts to assimilate and those of today: “many historians argue that there was a greater consensus in the past on what it meant to be an American, a yearning for a common language and culture, and a desire—encouraged, if not coerced by members of the dominant white Protestant culture to assimilate.” *Id.* “Today, [by contrast,] there is more emphasis on preserving one’s ethnic identity, of finding ways to highlight and defend one’s cultural roots.” *Id.*

188. Currently, “[f]oreign-born workers make up nearly 13 percent of the U.S. workforce.” BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, REPORT ON AMERICAN WORKFORCE 25 (2001), *available at* <http://www.bls.gov/opub/rtaw/pdf/chapter1.pdf> [hereinafter REPORT ON AMERICAN WORKFORCE]. For additional projections regarding the future workforce, see *infra* Section III.

### Increasing Numbers of Title VII Retaliation Claims are Filed in the 1990s

In recent years, courts have seen an increasing number of Title VII actions alleging retaliation.<sup>189</sup> Likewise, charges filed with the EEOC alleging retaliation have doubled in the past decade.<sup>190</sup> In 1990, 7,579 charges of retaliation were filed with the EEOC.<sup>191</sup> By 2003, over 20,000 charges of retaliation were filed.<sup>192</sup> Moreover, the EEOC recently reported that retaliation complaints now constitute 25% of the charges currently before the Commission.<sup>193</sup>

Courts vary in their application of the prohibition against retaliation. Some courts only consider adverse employment decisions to be actionable, such as termination or transfer,<sup>194</sup> whereas other courts will find illegal retaliation upon a finding of less severe retaliatory conduct, such as harassment, threats or unfavorable evaluations.<sup>195</sup> The protection against adverse employment action taken in retaliation extends to employees or former employees who file a charge or suit against his or her employer,<sup>196</sup> employees who testify in a Title VII proceeding or hearing,<sup>197</sup> and employees who assist in the investigation of a Title VII

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189. Section 704(a) makes it illegal for an employer "to discriminate against any [of his applicants or employees] . . . because [that person] has opposed any practice made an unlawful employment practice by this [Act], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [Act]." 42 U.S.C. § 2000e-3(a) (2000).

190. CHARGE STATISTICS, 1992-2003, *supra* note 8.

191. EEOC TWENTY-FIFTH ANN. REP. *supra* note 172.

192. CHARGE STATISTICS, 1992-2003, *supra* note 8. According to that EEOC report, exactly 22,690 charges of retaliation were filed in 2003. *Id.*

193. BARRY GURRYAN ET AL., *Retaliation: The New Vogue in Employment Litigation: Don't Get Mad. Don't Get Even. Just be Savvy.*, ALI-ABA COURSE OF STUDY 879 (2004).

194. See *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997) (finding that management's instruction to employees to shun co-worker who filed a sexual harassment charge did not constitute illegal retaliation).

195. See, e.g., *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455-56 (11th Cir. 1998) (finding retaliation discrimination because Ms. Wideman received a pay cut, was refused a promotion even though she was qualified for the position and was subjected to negative statements because she filed an EEOC claim); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 990 (10th Cir. 1996) (holding that forging an employee's bonus check constitutes an adverse action).

196. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339, 346 (1997) (holding that a former employee who filed a charge of discrimination on the basis of race could bring a retaliation suit when the former employer later provided a negative job reference).

197. See, e.g., *Glover v. S. Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (finding that a "[a] straightforward reading of [Section 704's] unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected against punitive employer action").



charge of discrimination.<sup>198</sup> Employees may also be protected for engaging in protest activities, but not to the extent that the protest qualifies for insubordination or disruptive behavior at work.<sup>199</sup> An employee who refuses to participate in a discriminatory act may also be protected.<sup>200</sup>

The numbers of retaliation charges filed with the EEOC are likely to continue increasing:

Employees who engage in these protected activities create an almost inherently antagonistic relationship with their employer. The employee will naturally tend to construe any subsequent adverse employment action as being retaliatory. And sometimes it is easy for lower level supervisors to react negatively when confronted with what they regard as a meritless claim of discrimination.<sup>201</sup>

In fact, in many cases, a plaintiff's claim of discrimination will be dismissed, but the employer will still be found guilty of retaliation.<sup>202</sup> Therefore, even if the substantive claims of discrimination lack merit, employers must remain cautious when employees are engaging in protected activities. Because this is an increasingly popular Title VII claim, it is likely that the courts will further refine concepts of actionable retaliation in the years to come.

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198. See, e.g., *Miller v. Washington Workplace, Inc.*, 298 F. Supp. 2d 364, 376 (E.D. Va. 2004) (“[A]n employer may not retaliate against an employee for participating in an ongoing investigation or proceeding under Title VII.”); *but cf.* *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (declining to extend the protections of Title VII’s anti-retaliation provision to an employee who participated in an internal, in-house investigation when that investigation was not linked to an EEOC investigation).

199. See, e.g., *Matima v. Celli*, 228 F.3d 68 (2d Cir. 2000). The *Matima* court found that: The law protects employees . . . in the making of informal protests of discrimination, ‘including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of co-workers who have filed formal charges.’ . . . [But Title VII] ‘does not constitute a license for employees to engage in physical violence in order to protest discrimination.’

*Id.* at 78–79 (internal citations omitted).

200. See, e.g., *EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998). The HBE case involved a situation where “[h]otel officials intentionally discriminated against [the employee] and discharged him because of his race and then discharged [the personnel director] for objecting to that decision as illegal.” *Id.* at 556. The HBE court found that Title VII’s anti-retaliation provision protected the manager who refused to carry out a racially motivated termination of another employee. See *id.* (“Deliberately restricting the opportunities of individuals on the basis of their race and punishing others for opposing that policy violates the law. Such action is misconduct that should be deterred and punished.”).

201. THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 157 (2001).

202. *Id.*

EMPLOYMENT DISCRIMINATION IN THE 21ST CENTURY:  
2000 STATISTICS: WHERE ARE WE TODAY?

Although sex-based wage discrimination has been illegal since 1963 (with the passage of the Equal Pay Act), a wage gap still exists in all forms and levels of employment.<sup>203</sup> “In May 2000, the Census Bureau released data showing that in 1998, the median earnings for women age 25 or older who worked full time, year round, were just \$26,711, while their male counterparts’ median earnings were \$36,679.”<sup>204</sup> African American men faced a 75% wage gap compared to white men in 1998.<sup>205</sup> African American women, Hispanic men and Hispanic women each had 63, 62, and 53% wage gaps, respectively, when compared to white men.<sup>206</sup> The wage disparity extends to the highest corporate offices; “the 9.4 million men who hold full-time executive, administrative or managerial positions earned \$17,000 more than the 7.1 million women at the same level.”<sup>207</sup> In addition, “because women senior executives are still the exception rather than the rule, corporate leaders like Heidi Miller at priceline.com and Betsy Holden at Kraft Foods make headlines just by getting top jobs.”<sup>208</sup> Perhaps most notably, jobs that are predominantly held by women are frequently undervalued.<sup>209</sup> “Gas station attendants, for example, earn more on average than child care workers.”<sup>210</sup>

Minority and female representation at the top levels of corporate management has improved, but not by much. As of March 31, 1999, a study by Catalyst revealed that women comprised only 11.9% of corporate officers in the nation’s 500 largest companies.<sup>211</sup> “In 1999, women held just 11.1% of Fortune 500 board seats. Eight-four percent of For-

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203. See Lichtman, *The Glass Ceiling: Lifted or Shattered?*, EEOC STORY, *supra* note 20, at 18.

204. See *id.* In 1963, the year the Equal Pay Act became law, women earned fifty-nine cents for every dollar earned by a male counterpart. *Id.* By 1998, women were still earning only seventy-three cents per dollar. *Id.*

205. See *id.*

206. See *id.*

207. *Id.*

208. *Id.* Some argue “that the wage gap results not from discrimination, but rather from women’s choice to move in and out of a workforce to care for children and other family members.” *Id.* Others, such as the Independent Women’s Forum, “often claim that women themselves perpetuate the wage gap by simply choosing to take jobs with lower pay, less pressure, and fewer opportunities for advancement.” *Id.*

209. *Id.* at 18–19.

210. *Id.* at 19.

211. *Id.* at 18. Note that this was a 37% increase since 1995. *Id.*

tune 500 companies had at least one woman director, but just 39 percent had two or more.”<sup>212</sup>

### *The Future Workforce*

The U.S. population is becoming larger and more diverse. One study estimated that the population of the U.S. will grow to approximately 394 million people in 2050, an increase largely attributable to immigration.<sup>213</sup> If that estimate is correct, the population of this country will have doubled in just over fifty years.<sup>214</sup>

According to 1995–2005 census projections studying growth trends, the Asian population in this country is predicted to grow the fastest, followed by the Hispanic population.<sup>215</sup> Another census study predicted that “[b]y 2050, 75 percent of the population would be White; 15 percent Black; 1 percent American Indian, Eskimo and Aleut; and 9 percent Asian and Pacific Islander.”<sup>216</sup> The white, non-hispanic<sup>217</sup> population of this country is predicted to be the slowest growing group.<sup>218</sup> “The Hispanic-origin population would increase to 25 percent, and the non-Hispanic White population would decline to 53 percent” of the population group classified as “White.”<sup>219</sup> The study further predicted that

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212. *Id.* Although fewer charges of discrimination have been filed with the EEOC against large corporations as they “make diversity part of business and not just compliance,” more than half of the nearly 80,000 discrimination charges the agency receives annually are against small and mid-sized companies. Nancy Montwieler, *Dominguez Lauds Federal Contractors as ‘Pivotal’ in Attaining EEO, Diversity Goals*, 155 DAILY LAB. REP. (BNA), B-1 (2004), available at <http://www.pubs.bna.com/ip/BNA/dlr.nsf/is/a0a9j3m4y8>.

213. JENNIFER CHEESEMAN DAY, U.S. BUREAU OF THE CENSUS, PUB. NO. 25-1130, CURRENT POPULATION REPORTS, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050, at 5 (1996), available at <http://www.census.gov/prod/1/pop/p25-1130/p251130a.pdf>. Day writes that “[t]he U.S. population is projected to top 300 million shortly after 2010, 350 million around 2030, and approach 400 million by 2050 . . .” *Id.* at 7.

214. Approximately 263 million people lived in the U.S. in 1995. *See id.* at 5.

215. Montwieler, *supra* note 212.

216. DAY, *supra* note 213, at 13.

217. One court defined “‘Hispanic’ [as] all persons designating themselves to be of Mexican, Puerto Rican, Cuban, Latin American or Spanish descent.” *Ulloa v. City of Philadelphia*, 95 F.R.D. 109, 113 (E.D. Pa. 1982).

218. *See* PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, PUB. NO. PPL-47, POPULATION PROJECTIONS FOR STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2025, at 1 (1996), available at <http://www.census.gov/population/www/projections/ppl47.html>.

219. DAY, *supra* note 213, at 13.

“[a]dditional increases in the total White population after 2034 would be due entirely to growth in the number of White Hispanics.”<sup>220</sup>

The growing Hispanic population in this country will likely pose future employment challenges.<sup>221</sup> Thus, although issues of race have historically involved African Americans, the increasing number of Hispanic immigrants promises a shift in the nature of employment discrimination charges filed.

“English-only” rules are frequently cited example of discriminatory practices disfavoring Hispanic immigrants.<sup>222</sup> To address the issue, in 2002, the EEOC issued guidelines warning employers that English-only policies must be carefully tailored to specific job requirements.<sup>223</sup> The EEOC believed that “such rules are rarely justified based on workplace requirements and there is a concern that they have a chilling effect on workforce diversity. Non-English speakers might feel inferior, isolated and intimidated if forced to speak only English where it is not based on job need.”<sup>224</sup>

As the U.S. population shifts, employment trends will likely shift as well. For example, “[i]f there is deep-seated ethnic segregation, it clearly extends to the American workplace.”<sup>225</sup> The California labor market evidences the current presence of “ethnic niches” in that State’s workforce.<sup>226</sup> There, “Mexican immigrants are employed overwhelmingly as gardeners and domestics, in apparel and furniture manufacturing, and as cooks and food preparers. Koreans open small businesses. Filipinos be-

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220. *Id.* at 14. Another study noted that Whites are currently the minority in Hawaii and New Mexico, while the states of California, Nevada, Texas, Maryland and New Jersey “are also predicted to become ‘majority minority’ states, entities where no one ethnic group remains the majority.” Booth, *supra* note 187.

221. Currently, Hispanic men and women occupy the lowest-paying jobs and face the largest wage gaps (compared to white male workers). See EEOC STORY, *supra* note 20, at 18. Some suggest that the recent immigration of Hispanics explains their high level of poverty. See, e.g., NEWS BATCH, *supra* note 76. (“The substantially lower wage rate reflects the high proportion of Hispanics who are immigrants in entry level and agricultural jobs.”).

222. One commentator noted that “[w]ith large numbers of immigrants arriving from Latin America, and segregating in barrios, there is also evidence of lingering language problems.” Booth, *supra* note 187. The issue, of course, is not unique to Hispanics. See Judy Olian, *English-Only Rule May Discriminate: Firms Must Taylor Job to Guideline, Not Require Exclusivity*, THE DETROIT NEWS, Apr. 9, 2003, available at <http://www.detnews.com/2003/business/0304/09/f04-132176>. “Between 1990 and 2000, census data show that the proportion of Americans with a primary language other than English rose from 14 percent to 20 percent.” *Id.*

223. *Id.*

224. *Id.* (“Shared language is often essential to worker collaboration, team building, smooth operations, and customer service. In some cases, language difficulties or differences impair performance or safety.”).

225. Booth, *supra* note 187.

226. See *id.*

come nurses and medical technicians. African Americans work in government jobs, an important niche that is increasingly being challenged by Hispanics who want in.”<sup>227</sup> But the segregation in the labor market does not necessarily result from discriminatory hiring practices. “Because jobs are often a matter of whom one knows, the niches [are] enduring and remarkably resistant to outsiders.”<sup>228</sup>

Many employers are becoming increasingly prepared to deal with the issues involved in an increasingly diverse workforce.

[W]e’ve come a long way since the [EEOC] came into existence. And what I’ve noticed, particularly is how its influenced the attitude of more progressive employers, that they seek to be recognized for their diversity practices and they recognize that this is good business, so I think changing attitudes by that kind of a positive effort is going to be more effective in the long run than the remedial action of having to bring lawsuits . . . [.] [B]ut for me the most positive achievement is that when I talk to some of the best companies in the country today, they re [sic] very proud of their record on diversity and they make that a core value of their work environment and they ve [sic] learned that its good business . . . .<sup>229</sup>

This statement reflects the growing perception that workplace diversity is not just legally correct or morally correct, but also serves to enhance the overall quality of the workforce.

*Allegations of Employment Discrimination and  
Their Impact on the Federal Court System*

The Federal Courts are becoming increasingly burdened by charges of employment discrimination. “The rate at which new fair employment cases are being filed in Federal court has increased steadily since the enactment of the Civil Rights Act of 1991, now seems to be leveling off, but is nonetheless an increasing proportion of the workload of the Federal courts.”<sup>230</sup> For example, in 1998, a total of 252,994 new civil cases

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227. *Id.*

228. *Id.*

229. Interview with Horace Deets, Executive Director, American Association of Retired Persons, EEOC 2000 Oral History Project, at <http://www.eeoc.gov/abouteeoc/35th/voices/deets.html> (n.d.) [hereinafter Horace Deets].

230. RICHARD T. SEYMOUR, AM. BAR ASS’N SECTION OF LABOR AND EMPLOYMENT, TRENDS IN EMPLOYMENT DISCRIMINATION LAW, at 1 (Mar. 24, 1999), available at <http://www.bna.com/bnabooks/ababna/eo/99/eo09.pdf>.

were filed in Federal courts.<sup>231</sup> New civil cases alleging employment discrimination comprised one out of every 10.8 civil filings, or 9.2% of all new civil filings in Federal court.<sup>232</sup> “Federal-question EEO cases are 14.4% of all Federal-question cases, or one in every 6.9 cases. Only prisoner petitions are a larger proportion of civil or Federal-question filings.”<sup>233</sup>

The following are the number of employment discrimination cases filed across the country in federal court:

<u>12 Months Preceding June 30 of</u>	<u>Number of Employment Discrimination Cases Filed</u>
1988	8,563
1989	8,993
1990	8,413
1991	8,140
1992 (12 mos. to 9/30/92)	10,771
1993 (12 mos. to 12/31/93)	13,650
1994 (12 mos. to 9/30/94)	15,965
1995 (12 mos. to 9/30/95)	19,059
1996 (12 mos. to 12/31/96)	23,037
1997 (12 mos. to 12/31/97)	24,174
1998 (12 mos. to 12/31/98)	23,299 <sup>234</sup>

In recent decades, employment discrimination case law reveals a trend. Many of the more recent decisions address the anti-discrimination policies and discrimination reporting procedures adopted by employers.<sup>235</sup> Procedures and policies that follow guidelines set forth by the courts may provide employers an affirmative defense against charges of

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. The two cases that led this trend are *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998):

In *Ellerth* and *Faragher*, the Court changed the landscape of harassment law, holding that employers are strictly liable under Title VII when supervisors demand sexual favors in return for obtaining improvements, or avoiding significant detriments, in their employment, if the supervisor backs up his or her threat by taking some action that only the employer can take. All other harassment by supervisors with direct (or successively higher) authority over the plaintiff is to be analyzed as a hostile-environment case in which employers are automatically liable for actionable conduct unless they establish an affirmative defense.

SEYMOUR, *supra* note 230, at 43.

discrimination.<sup>236</sup> The courts are not providing employers with an easy “out” in cases involving employment discrimination, but instead seek to best further the objectives behind Title VII, which are to *prevent*, rather than simply remedy discrimination.<sup>237</sup>

*First*, the Court clearly wants to get rid of cases in which there was not much offensive conduct, and reserve Title VII for cases in which the conduct is sufficiently extreme to affect the terms and conditions of employment. *Second*, the Court wants employers to have the strongest possible incentive—avoiding strict liability—to eliminate supervisory *quid pro quo* harassment. *Third*, the Court is giving employers the strongest possible incentive for developing, implementing, and communicating an internal system for preventing supervisory harassment and curing any violations of the policy. *Fourth*, the Court is giving applicants and employees the strongest possible incentive to use the employer’s internal complaint procedure, as a means of letting employers know of problems early so that they can be stopped early.<sup>238</sup>

Beginning in the 1990s and continuing into the present, federal courts have focused on refining the parameters of “adequate” anti-discrimination policies and reporting procedures required for an affirmative defense to be available to the employer.<sup>239</sup> For example, recent court cases have addressed effective communication of anti-discrimination

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236. One source offered the following “practice suggestion” for employers:

The reasonableness of the plaintiff’s failure to complain will be pivotal in many cases. An employer will be in a much better situation to defend itself if it has taken active measures to make it easy for employees to complain, to ensure that all complaints are logged in and that higher-level officials routinely check to ensure that they are handled promptly and thoroughly, to ensure that there will be no retaliation against complainants for making a good-faith complaint, to ensure that no information about the complaint or the complainant will be disseminated except as necessary to investigate the complaint and take any necessary remedial action, to ensure safeguards adequate to guarantee that the employer’s policy is followed as rigorously for key managers as for other employees, and to ensure that these safeguards are communicated in advance to all employees. The more managers do to communicate—by example as well as by word—the message that harassing behavior is taken seriously, the stronger a defense the employer will have.

*Id.* at 44.

237. See, e.g., *Fall v. Indiana Univ. Bd. of Trs.*, 12 F. Supp. 2d 870, 880–84 (N.D. Ind. 1998) (“[T]he primary objective of Title VII is not to provide redress for harassed employees, but to avoid the harm in the first place. . . . Thus, the affirmative defense requires employers to prove that they exercised reasonable care not only to promptly *correct* any sexually harassing behavior, but also to *prevent* such behavior from occurring.”).

238. SEYMOUR, *supra* note 230, at 48.

239. *Lancaster v. Sheffler Enters.*, 19 F. Supp. 2d 1000, 1003–04 (W.D. Mo. 1998); *Nuri v. PRC, Inc.*, 13 F. Supp. 2d 1296, 1305–08 (M.D. Ala. 1998).

policies to employees,<sup>240</sup> finding specifically that merely requiring an employee to sign an anti-discrimination policy does not constitute reasonable care.<sup>241</sup> Federal courts have also focused on the employees' reasonableness in failing to utilize internal reporting procedures,<sup>242</sup> while scrutinizing the adequacy of the employer's response to discrimination complaints.<sup>243</sup>

240. See, e.g., *Nuri*, 13 F. Supp. 2d at 1305–08. In *Nuri*, the court found that although the defendant-employer had an anti-discrimination policy in place, the defendant had not adequately communicated the terms of this policy to its employees and was therefore not entitled to an affirmative defense. *Id.* at 1305. “Because having its employees be aware of the policy is so crucial to having a policy that is effective, and based on the evidence presented at trial, it is seriously doubtful that PRC could be said to have ‘exercised reasonable care to prevent and correct promptly any sexually harassing behavior.’” *Id.* at 1308.

241. See, e.g., *Lancaster*, 19 F. Supp. 2d at 1003 (holding that the mere fact that employer had a sexual harassment policy was insufficient to qualify for application of the affirmative defense when there was little evidence that employer tried to prevent harassment). “Simply forcing all new employees to sign a policy does not constitute ‘reasonable care.’ The employer must take reasonable steps in preventing, correcting and enforcing the policy. . . . Reasonableness requires more than issuing a policy.” *Id.*

242. See *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1364–66 (11th Cir. 1999); *Indest v. Freeman Decorating Inc.*, 164 F.3d 258, 265 (5th Cir. 1999); *Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999); *Greene v. Dalton*, 164 F.3d 671, 674 (D.C. Cir. 1999); *Hafford v. Seidner*, 183 F.3d 506, 513 (6th Cir. 1999); *Van Steenburgh v. The Rival Co.*, 171 F.3d 1155 (8th Cir. 1999), 1160; *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 889 (8th Cir. 1998); *Webb v. Cardiothoracic Surgery Assoc. of N. Texas, P.A.*, 139 F.3d 532, 539 (5th Cir. 1998); *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 541–42 (10th Cir. 1998); *Sconce v. Tandy Corp.*, 9 F. Supp. 2d 773, 778 (W.D. Ky. 1998). In *Greene*, for example, the court held that the Navy had the burden of showing “not merely that Greene inexcusably delayed reporting the alleged rape . . . but that, as a matter of law, a reasonable person in Greene’s place would have come forward early enough to prevent Clause’s harassment from becoming ‘severe or pervasive.’” 164 F.2d at 675.

It is possible that, in the not too distant future, there will be a need for specialized labor courts to accommodate the increasing numbers of employment discrimination charges filed. Statistics reveal that employment discrimination claims comprise an increasing percentage of the already heavy federal court workload. We have already seen a trend toward using mediation and arbitration to resolve disputes. Because employment discrimination claims show no signs of abatement, even with the use of extrajudicial forms of dispute resolution, there may be a need to find alternate methods to alleviate the burden increasing numbers of employment discrimination cases place on our federal court system.

243. See *Wilson*, 164 F.3d at 543; *Montero v. AGCO Corp.*, 19 F. Supp. 2d 1143, 1145 (E.D. Cal. 1998); *Marsicano v. Am. Soc’y of Safety Eng’rs*, No. 91-C-7819, 1998 WL 603128, at \*3 (N.D. Ill. Sept 4, 1998). For example, the *Wilson* court found the discrimination reporting procedures implemented by the employer to be inadequate:

In our view, the record supports a finding that the policy was deficient in several respects. We note in particular evidence that although the policy provides a mechanism for bypassing a harassing supervisor by reporting the harassment to the Director of Personnel, the Director’s office is located in a separate facility and is not accessible during the evening or weekend hours when many employees and students are on the various campuses. In addition, while the final portion of the procedure does not provide that it is the responsibility of supervisors to report “formal complaints” within their area of control to the Director of Civil Rights, the policy does not define what constitutes a “formal com-



The benefits of this trend are two-fold: (1) by providing employers clear guidance on how to execute anti-discrimination policies and internally remedying potential discrimination through reporting procedures, courts provide employers with a “recipe” to avoid discrimination litigation; and (2) the burdens on the federal court system will likely dissipate when successfully implemented anti-discrimination policies and reporting programs are in place. Therefore, Title VII gives courts the power to regulate workplace environments and the relationships between employees, but court opinions focusing on the internal policies and procedures implemented by employers are a way to guide employers back toward self-regulation. The courts will always be available to remedy discrimination, but only when an employer fails to adequately regulate their own workplace environment.<sup>244</sup>

#### CONCLUSION

*We have come far.* The Equal Employment Opportunity Commission Chair, Cari Dominguez, recently reported that charges against the biggest corporations have decreased as they “make diversity part of business and not just compliance.”<sup>245</sup> But signs that the fight for equal opportunity in the workplace is not over persist.<sup>246</sup> Moreover, concerns have been expressed that the passions that once drove the civil rights movement have ebbed,<sup>247</sup> which will translate into less active enforcement and achievement of equality in the workforce.

The significance of Title VII lies not just in the legislated mechanisms created to monitor discrimination in the workplace, but also in the radical changes to the American work environment inspired by the policies underlying that legislation. Notwithstanding Title VII’s successful

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plaint” as opposed to an informal one. Nor does the policy provide instruction on the responsibilities, if any, of a supervisor who learns of an incident of harassment through informal means. Indeed, TJC contends neither the Campus Police Supervisor, Mr. Weber, or his Assistant Supervisor, Mr. Read, had any obligation under its policy to report the incident to the Director of Civil Rights because Ms. Wilson did not make a “formal complaint” to the Campus Police.

164 F.3d at 541 (footnote omitted).

244. “According to some estimates, nine out of every ten companies now have sexual harassment policies.” Lens, *supra* note 45, at 515 n.95 (citing CNN Morning News (CNN television broadcast), June 26, 1998).

245. Montwieler, *supra* note 212.

246. See KATZ & KABAT, *supra* note 177.

247. See, e.g., Tom Perez, *The Civil Rights Act 40 Years Later: Is the Glass Half Full or Half Empty?* (July 2, 2004), at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=106855> (Mr. Perez is a former attorney with the Civil Rights Division of the Justice Department).

modification of hiring, promotion, and termination practices of employers in this country, Title VII has also drastically shifted notions about generally acceptable versus unacceptable conduct toward co-workers.<sup>248</sup> Thus, in addition to modified workplace protocol has come an even more radical shift: Title VII has not just changed the face of the American workforce, but the minds of that workforce as well.<sup>249</sup> As we have become a more culturally diverse society, we have also worked to develop cultural sensitivity.

Title VII mandated workplace integration forty years ago, but today's employers no longer resist integration. They self-police many of their own employment practices and implement anti-discrimination and equal employment hiring policies as a matter of course. Hiring statistics from the past forty years evidence the positive effect of this trend—minority representation and advancement in employment is consistently improving. In addition, employers are becoming increasingly vigilant about investigating and punishing incidents of discrimination. Title VII may have provided employers with the initiative for internal change, but a rather remarkable shift has occurred nonetheless. Diversity is now viewed not simply as a way to avoid litigation, but more importantly, as a means to improve the quality of the overall workforce. A diverse employment environment is now widely considered to be a positive asset—a seemingly inconceivable perception just a short generation ago.

*We still have far to go.* This Article surveyed the progress made towards eradicating employment practices discriminatorily predicated upon the race, sex, religion or national origin of employees during the past forty years. Unfortunately, the roots of discrimination run deep. Although this overview recounts significant victories toward securing equal employment opportunities for Americans, this nation has endured a long history of minority oppression. No simple cure exists to heal the wounds of past discrimination. In the face of our historically pervasive discriminatory practices, it is simply naïve to assume that racial, ethnic, gender and religious tolerance will prevail in less than one generation.

We are a diverse society, and that diversity must continue to be addressed. Every one of us comes with our own set of biases and prejudices based on the circumstances in which we have been raised. “Since the Civil Rights Acts of the 1960[s], we have been struggling against the perceptions and attitudes about Blacks and others of color forged during

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248. Lens, *supra* note 45, at 513–14

249. Alfred W. Blumrosen & Ruth G. Blumrosen, *Intentional Job Discrimination—New Tools for Our Oldest Problem*, 37 U. MICH. J.L. REFORM 681, 682 (2004).

our long history of slavery and subordination.”<sup>250</sup> Similar perceptions persist today. We still have employment discrimination “because we are a multiracial, multiethnic society determined to preserve those cultural and ethnic identities.”<sup>251</sup> In addition, a diverse society necessitates discrimination laws. As long as immutable differences exist among people in this country, employment discrimination will likely exist as well. And as the work environment improves for those minority groups that have historically suffered oppression, it is important that we not become complacent toward the rights of other minorities groups in need of Title VII protection.

A key component in the fight against discrimination is education. The high-profile sexual harassment cases in the 1990s demonstrated the remarkable impact that public awareness can have on the frequency with which incidents of discrimination are reported. But fear of backlash remains. A recent article, for example, commented on the stigma still attached to coming forward with allegations of sexual harassment: “Although women today may have more support and legal recourse for filing sexual harassment complaints than 30 years ago, they don’t speak up as often as one might expect because of a fear of losing their job and other negative consequences, according to Kimberly Schneider, an assistant professor of psychology at Illinois State University.”<sup>252</sup> Schneider reports that many women remain silent out of fear of retaliation— “[r]esearch indicates that *less than 10 percent of women* in an organization who say they have experienced harassment say they reported it or talked to a supervisor.”<sup>253</sup> The fact that the number of retaliation charges filed with the EEOC has increased so dramatically in recent decades suggests that these fears may be well-founded.

The increased number of discrimination charges filed with the EEOC after the September 11th terrorist attacks further exemplify the consistent need to address issues of employment discrimination. External forces—wars and terrorist attacks being the most obvious exam-

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250. *Id.*

251. EEOC STORY, *supra* note 20, at 13. The effect of immutable characteristics cannot be denied. “When it is possible to tell from a distance that a person you see is of a different race, sex, or ethnicity . . . [l]ike with anything else that you see, the mind adjusts. It notes the difference and assimilates and reacts according to the viewer’s mind-set, the product of life experience and training.” *Id.*

252. Philbin, *supra* note 150 (emphasis added).

253. *Id.* “[A] study into the link between organizational climate and reporting of sexual harassment she conducted in 1997 confirmed what Conrad and Ranger already knew. ‘How seriously a person feels they would be taken,’ Schneider says, ‘is a good predictor of whether or not an incident will be reported.’” *Id.*

ples—continue to spur discriminatory animus in this country. Immediately after September 11th, the EEOC warned employers against taking retaliatory actions against those of Middle Eastern descent or Islamic faith.<sup>254</sup> The swift response of the EEOC provides an excellent example of the federal commitment to continue monitoring potentially discriminatory employment practices. At the same time, however, anecdotes of retaliatory actions taken against Middle Eastern and Islamic employees after the attacks—regardless of the EEOC warning and the threat of Title VII litigation—demonstrate that the ideals of workplace tolerance have yet to be fully realized.

Today there are far fewer accounts of overtly discriminatory employment practices than forty years ago. This can be seen simply through the reduced number of cases turning upon direct evidence of discrimination. Instead, circumstantial evidence is widely used to prove more subtle—or even unconscious—discriminatory employment practices. Much of the past twenty years has been devoted to refining methods of proof that are more suited to deal with the evolving nature of employment discrimination. In the upcoming years, the current tools that have operated largely to eliminate the more overt forms of discrimination will truly be tested, as issues involving more subtle forms of discrimination are certain to dominate Title VII jurisprudence.

Statistics reveal that the American workforce is becoming increasingly more diversified.<sup>255</sup> This reality poses a very clear challenge towards securing a workforce of truly equal employment opportunities. Part of the impetus for Title VII was to create employment environments better able to accommodate and shift toward diversification.<sup>256</sup> Thus, the current challenge to the permanent relevancy of Title VII is not limited to its ability to address the historically entrenched and pervasive employment discrimination concerns that arose during the 1960s. Instead, the hope is that Title VII legislation provides an analytical and procedural framework that will stretch far into the future to deal with the new challenges that will inevitably threaten to undermine our progress towards equality.

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254. Press Release, Sept. 14, 2001, *supra* note 178.

255. REPORT ON AMERICAN WORKFORCE, *supra* note 188.

256. Horace Deets, *supra* note 229.