

Confronting Racial Bias at Work

Challenges and Solutions for 21st Century Employment Discrimination



Confronting Racial Bias at Work

Challenges and Solutions for 21st Century
Employment Discrimination

November 2016

race forward 
THE CENTER FOR RACIAL JUSTICE INNOVATION

Table of Contents

1	Introduction
2	Key Research Findings
2	Key Recommendations
3	Part I: The Legislative and Judicial Origins of Title VII
4	I. Original Legislative Intent: Prospective Protection, Not Retrospective Action
5	II. Early Progress
7	III. Supreme Court and Disparate Impact: A National Articulation of Equity?
8	IV. The '80s and Beyond: Undermining Equity
10	Key Legislative and Court Moments for Title VII (1964-1991)
11	Anonymous Survey of Worker Advocates
15	Part II: Barriers Within the Legal/Administrative Anti-Discrimination System
16	How our Anti-Discrimination System Works in Theory
27	Part III: Profiles in Action — Strategies to Combat Discrimination and Promote Racial Equity
29	Profiles in Action I: Los Angeles Black Worker Center (California)
31	Profiles in Action II: NDWA Domestic Worker Bill of Rights (Massachusetts)
33	Profiles in Action III: The Laundry Workers Center and the B&H campaign (New York)
36	Part IV: Systemic Solutions and Recommendations for Racial Disparities in Employment Outcomes
36	What Makes a Solution “Systemic”?
38	Reactive Systemic Solutions
40	Proactive Systemic Solutions
40	Equity Pressures
41	Equity Incentives
42	Equity Mandates
43	Endnotes
46	Acknowledgements

Introduction

Racial justice is the systematic fair treatment of all people of color that results in equitable opportunities and outcomes for all.

— Race Forward

It has been more than 50 years since the passage of Title VII, our nation's major employment discrimination law. The original intention of this law was to prohibit employers from discriminating against workers on the basis of race, color, religion, sex, and national origin — including the hiring process, employment termination and virtually everything in between. As a high-profile section of the 1964 Civil Rights Act, Title VII played a key role in leading the nation out of an ugly era of intentional and often state-sanctioned racism. The law created and expanded the powers of the Equal Employment Opportunity Commission (EEOC) and, with the help of some supportive federal court decisions, initially led to measurable progress against racial and gender segregation. Various media reports and EEOC publications present evidence that Title VII and the EEOC continue to provide a measure of justice for workers of color in some hard-fought cases.

However, to those who champion racial justice in the United States, the overall record of largely reactive, oft-delayed, case-by-case enforcement continues to paint a disturbing picture. On its own, the legal and administrative structure of protection is ill-equipped to prevent the systemic discrimination that still persists. Racial disparities in employment outcomes are well known, from hiring to access to benefits to overrepresentation in low-paying

jobs to underrepresentation in high-paying jobs. Worker advocates and employment discrimination lawyers say that it is common for today's workers to experience any combination of the various forms of discrimination — explicit or coded, conscious or unconscious, intentional or unintentional — that skew employment results unfairly.

Confronting Racial Bias at Work: Challenges and Solutions for 21st Century Employment Discrimination provides readers with a bird's-eye view of the systemic barriers that too often stand between workers of color — at each stage of the Title VII system of protection — and the racial justice they deserve. For victims of intentional and unintentional forms of discrimination alike, it is a daunting reality that places too much burden on vulnerable workers to bring discrimination charges retroactively, through a slow and laborious process.

Title VII places on vulnerable workers an unrealistic and unjust burden of initiating EEOC investigations and enforcement. As conceived, traditionally appropriated, and enforced, Title VII has devoted few federal resources to proactively promoting, monitoring, and incentivizing the practices and policies that make a sustained positive impact on racially equitable outcomes. Instead, the enforcement rules and processes established by the law incentivize confidentiality (through pre-trial settlements

with employers) that, when combined with the inadequately resourced EEOC, can foster a lack of employer accountability and blunt the agency’s potential to make the necessary industry-wide impacts.

Based on analyses of the enforcement system, the perspectives of worker advocates in multiple industries, profiles of worker-organization campaigns to overcome the law’s shortcomings, and Race Forward’s racial equity framework, this *Confronting Racial Bias at Work* report provides recommendations for what workers of color and our nation most need now and in the future to get us to the goal of just employment. In short, we must not only strengthen and expand the protections provided by Title VII’s largely reactive, anti-discrimination system, but we must also build support, incentives, and mandates for proactive, race-conscious approaches to ensure racially equitable outcomes.

Confronting Racial Bias at Work includes the following information:

- **A review of the historical origins** of our insufficient system of anti-discrimination protection.
- **A survey of worker advocates** on the major challenges that the current system poses for workers of color.
- **Successful strategies** that worker organizations have pursued to protect workers from discrimination and promote racial equity.
- **Recommendations** on how to reform workplaces and enforcement institutions to enable systemic change on the issue of employment discrimination.

Above all else, *Confronting Racial Bias at Work* is a call to boldly re-think how we can proactively approach employment discrimination and share responsibility for producing the racially equitable outcomes in workplaces that result from a genuinely fair marketplace and society.

Key Research Findings

- Title VII created a largely *reactive* anti-discrimination system designed primarily to prohibit blatant, intentional discrimination against workers of color and other protected classes, and the under-resourced EEOC has devoted most of its resources to reactive enforcement.
- Many worker advocates across multiple industries report that intentional and unintentional racism as well as gender discrimination occur “frequently” or are a “daily reality.”
- The federal courts initially helped expand the reach of Title VII to more unintentional forms of discrimination, but have since undercut the potential impact of that “disparate impact” tool.
- In practice, our reactive legal and administrative systems of protection place major barriers and too much burden on individual workers to root out employment discrimination on a case-by-case level.
- Worker organizations have been forced to adopt alternate strategies to win local and/or state victories that expand anti-discrimination protections or promote racial equity.

Key Recommendations

A broad coalition of employment discrimination opponents must not only reinforce the reactive anti-discrimination system, but it must also shift the focus away from employer *intentions* to **advance proactive systemic solutions** that promote racially equitable outcomes. They can do this by:

- Increasing **equity pressures** that boost worker and/or consumer power and persuade employers and industries to “voluntarily” adopt racially equitable policies and practices
- Creating **government incentives** for business adoption of racial equity best practices that combat the influence and impact of unconscious and hidden biases
- Passing **equity mandates** that raise the floor of treatment for all workers to one of dignity and promote racially equitable outcomes

Part I:

The Legislative and Judicial Origins of Title VII

Title VII of the Civil Rights Act of 1964 was the product of congressional compromise between the liberal Democrats who drafted the bill and moderate Republicans whose votes were needed to overcome Southern Democrat opposition. These political negotiations limited the law's initial scope and focused federal government-initiated efforts on racist employers who had a "pattern or practice of resistance." These compromises make clear that the law was based principally on a narrow definition of discrimination as something overt and/or intentional, which, despite positive modifications, continues to plague Title VII today.

Although Title VII created a new federal agency called the Equal Employment Opportunity Commission (EEOC), these regulators were not sufficiently empowered or provided with the necessary resources to do their jobs effectively. In the early 1970s, subsequent amendments to the law and favorable Supreme Court developments expanded the definition of discrimination to incorporate not just discriminatory *intentions*, but also discriminatory *effects* or outcomes, and helped produce real employment gains for Black workers and women. However, in subsequent decades, conservative court rulings and disinvestment in the EEOC stalled this progress. Most importantly, the case-by-case approach that Title VII established was not structured to tackle the various forms of discrimination found in systemic racism or with a focus on group outcomes.

Northern Republican Amendments That Weakened *Title VII*

Section 706(g)

Back pay and equitable relief are only allowed when the court finds that an employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice."

Section 707(a)

The Attorney General would only initiate civil cases against employers where there was a "pattern or practice of resistance."

Section 703(h)

Established seniority systems would only be covered prospectively, not retrospectively.

Section 703(j)

No employer will be required to grant "preferential treatment" to workers of color because of existing racial imbalances.

In order to blunt the impact of the Civil Rights Act in the North, Republicans amended the bill so that the Attorney General would only initiate civil cases where there was a “pattern or practice of resistance to the full enjoyment” of equal opportunities for protected groups.

I. ORIGINAL LEGISLATIVE INTENT: PROSPECTIVE PROTECTION, NOT RETROSPECTIVE ACTION

To pass the Civil Rights Act in the Senate, Northern liberal Democrats could not rely on the Southern members of their party. They needed the support of moderate Republicans, traditionally reluctant to expand the power of the federal government.¹ Enough moderate Republicans were willing to support the bill, but only if government action focused on conscious, intentional discrimination in the South as opposed to the less overt discrimination in the North.

The moderate Republicans added a number of amendments to the bill. These amendments significantly weakened the proposed ability of the federal enforcers to take the initiative against employment discrimination, ensuring an incremental approach instead that left established systems of discrimination (like seniority systems) largely unchallenged. The amendments, for instance, modified the Title VII bill so that injunctions (such as back pay or equitable relief) would only be allowed when the court finds that an employer “has intentionally engaged in or is intentionally engaging in an unlawful employment practice.”² This focus on intentional discrimination is further illustrated through bill amendments that concerned “patterns or practices of resistance” to integration, established seniority systems, and affirmative action programs that weakened Title VII.

In order to blunt the impact of the Civil Rights Act in the North, Republicans amended the bill so that the Attorney General would only initiate civil cases where there was a “pattern or practice of resistance to the full enjoyment” of equal employment opportunities for protected groups.³ This section of Title VII does not refer

to a pattern or practice of “discrimination”; instead, it refers to a pattern or practice of “resistance.” During an era when many Southern governors were engaged in public displays of “massive resistance” to integration, this language was specifically chosen to single out Southern states that were actively resistant. Scholars consider this “pattern or practice” language as a “critical breakthrough” in negotiations with moderate Republicans, as it made clear that the United States would pursue redress only when discrimination was “a widespread and generally accepted practice...that could be easily documented.”⁴ Otherwise, as was the case in the North where there was no state-sanctioned “resistance” to integration efforts, the government “would have to wait for aggrieved individuals to file lawsuits to protect their civil rights.”⁵

Moderate Republicans added an amendment to the Civil Rights Act that exempted established seniority systems from coverage under Title VII.⁶ Many unions and businesses had practiced significant discrimination in the past, and only a few people of color were in senior positions. Moderate legislators feared that correcting for such past discrimination would require the dismantling of these systems in order to promote equity and representation. With the Republican-amended language, proponents of the bill could assure moderates that Title VII would be “prospective and not retrospective.”⁷ Senator Clifford Case and Senator Joseph Clark, floor managers of the bill in the Senate (and in favor of an even stronger bill than what ultimately passed), wrote a memo to convince their hesitant colleagues stating that “if a business has been discriminating in the past and as a result has an all-White

working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis."⁸

Clearly the discriminatory practices embedded in all-White corporations would be essentially unthreatened by Title VII, as there would be no obligation to correct for past discriminatory exclusion. In case there was any doubt on this point, moderate Republicans added another amendment, which states that "Nothing [in the bill] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer."⁹ In fact, in the aforementioned memo, Senators Clark and Case stated that employers would not be permitted "to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of White workers hired earlier."¹⁰ As a result, the effects of past discrimination could not only stand unchecked, but efforts by employers to affirmatively address past discrimination would be unlawful.

II. EARLY PROGRESS

Through Title VII, the Civil Rights Act of 1964 created the EEOC with the mission of eradicating discrimination in the workplace. However, due to the influence of Northern Republicans, the EEOC lacked the power to issue cease-and-desist orders that could take immediate effect against discriminatory employers or to take legal action in federal courts. Instead, the EEOC only had the authority to collect data and make recommendations to the Attorney General to file lawsuits where "patterns of resistance" were occurring or when individual workers filed claims against their employers.

From the beginning, however, the EEOC had the ability to measure and quantify progress toward equal employment. Its EEO-1 forms required businesses with 100 or more employees to provide detailed demographic data on staff and management — a census of sorts for worker

distributions by race, gender and national origin. Activists within the EEOC recognized the power of this data. Rutgers law professor Alfred W. Blumrosen, who assisted in organizing the EEOC and served as one of its early leaders, wrote in 1971:

“ Reports from government contractors indicating the racial and ethnic composition of the work force were “perhaps the most important tool in any program to eliminate employment discrimination. Here were lists of major employers excluding minorities in a massive way which outraged any reader of the statistics. And here were target lists of employers whose practices should be probed to determine whether the low - or zero - utilization of minorities was a result of discrimination. *Here at last was a basis for government-initiated programs which were not based on complaints and which could focus on possible potential discriminators effectively.*”¹¹ ”

However, the limitations on the powers of the EEOC kept the agency from making much use of this data.

As EEOC Chair Stephen Shulman said in 1967, “We’re out to kill an elephant with a fly gun.”¹² The inability of the agency to effectively bring suit left it up to the individual litigant to bear the burden of remedying employment discrimination. Or as another EEOC Chair, William H. Brown III, put it in 1971:

“ [T]he disadvantaged individual is told that in the pinch he must become a litigant, which is an expensive proposition and traditionally the prerogative of the rich. Thus minorities are locked out of the proffered remedy by the very condition that led to its creation, and the credibility of the Government's guarantees is accordingly diminished.”¹³ ”

The plight of early litigants is illustrated through the story of Earl Johnson, a Black man who was refused a job promotion because his employer, Seaboard Air Line Railroad, only hired White conductors. Although the EEOC found in his favor, the pre-court negotiations process (aka, “voluntary conciliation process”) — which was the only enforcement mechanism the EEOC had at its disposal at the time — was unsuccessful at reaching an agreement. Johnson spent the next four years before finding a law firm that would take

his case pro bono. Ultimately, Johnson never received the promotion, and he died during the litigation process.¹⁴ In light of this, it is easy to understand how “[s]even years of conciliation convinced Congress and the Commission that voluntary efforts to end discrimination had in large part been unsuccessful.”¹⁵

The challenges of enforcing Title VII through conciliation helped inform more nuanced ideas about the systemic nature of discrimination. In separate reports, the House Committee on Education and Labor as well as the Senate Committee on Labor and Public Welfare agreed that the 1964 Act needed significant revision and explicitly rejected the view that employment discrimination is “a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individuals or organization.”¹⁶ In contrast, both reports agreed that “[e]mployment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of ‘systems’ and ‘effects’ rather than simply intentional wrongs.”¹⁷ By 1971, it became clear that through experience with approaching discrimination in terms of intent, both houses of Congress learned that the problem of employment discrimination was actually much broader. In particular, Congress was recognizing that “prospective, not retrospective” legislation might not be sufficient, since the literature on employment discrimination was “replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, testing and validation requirements.”¹⁸

To attack discrimination on a more systemic level, both the House and the Senate agreed through the 1972 amendments to Title VII that the EEOC required additional enforcement powers, originally contemplated in 1964 before the moderate Republican amendments. While this did not include the power (which was opposed by the Nixon Administration) to issue cease-and-desist orders, the Act gave the EEOC authority to independently file suit against employers, unions, and employment agencies. Crucially, the Commission now had the power to file “pattern or practice” lawsuits – a key component of how the EEOC defines systemic discrimination. Still, while the 1972 Act gave the EEOC more power to root out discrimination, it retained its original language that only outlawed “intentional” discrimination.

Although the 1972 increase in EEOC powers was limited, it did inspire many within the Commission to reach for the vision articulated by Professor Blumrosen. In its 1973 annual report, the EEOC wrote:

“With the granting of enforcement powers to the EEOC, the entire nature of the Commission’s operations takes on a new perspective . . . The Commission will focus on cases involving respondents against whom a large number of charges have been filed so as to secure a restructuring of those employment policies and practices which affect the greatest number of people.”²⁰ ”

The newly created “National Programs Division” took as its purpose “to attack the most important employers

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ON SYSTEMIC DISCRIMINATION

Definition

Systemic discrimination involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area.

Examples of Systemic Practices Include:

- Discriminatory barriers in recruitment and hiring
- Discriminatorily restricted access to management trainee programs and to high level jobs
- Exclusion of qualified women from traditionally male dominated fields of work
- Compliance with customer preferences that result in discriminatory placement or assignments¹⁹

and unions in each industry responsible for institutional discrimination on the basis of race, sex, and national origin.”²¹ The strategy of this new division “was developed to resolve cases of major national significance,”²² and its highest priority was to target “dominant corporations and labor unions within each industry which had a large number of charges pending against them and a record of noncompliance with Title VII.”²³ On a case-by-case level, the EEOC’s strategy included negotiating settlements with not just monetary back-pay relief, but also broad “affirmative relief” such as a 1976 consent decree with United Airlines. According to the EEOC, the settlement “provided for aggressive movement of minorities and women into upper-level jobs ... [and] for retroactive company-wide seniority, which replaced a former departmental seniority system, to protect rights of minority and female workers transferring into more desirable jobs.”²⁴

The EEOC’s caseload expanded, and their ambitious agenda faced resource and staffing constraints during the 1970s and beyond. For example, 12 years after the aforementioned consent decree settled with United Airlines, the EEOC asked a federal court to hold the company in contempt for failing to hire enough blacks and women as pilots as stipulated. Nevertheless, the EEOC’s ability to initiate cases was a clear articulation of its expanded power to promote equitable employment practices. In addition, this expansion of vision for the EEOC came at a short-lived time when the Supreme Court was broadly interpreting Title VII protections to the benefit of workers.

III. SUPREME COURT AND DISPARATE IMPACT: A NATIONAL ARTICULATION OF EQUITY?

Although the text of the original 1964 Civil Rights Act explicitly outlawed only intentional discrimination, the Supreme Court saw the matter more broadly. In one of the most important developments in the history of employment discrimination law, in the 1972 case *Griggs v. Duke Power Co.*, the Court embraced the “disparate impact” theory, under which an employment practice could be found to violate the law even if a Title VII-covered employer had no intent to discriminate. The NAACP Legal Defense and Educational Fund (LDF) represented a group of Black employees who had been formally segregated by the company into the lowest paying department “where the highest-paid worker earned less than the lowest-paid employee in the other four departments where only Whites worked.”²⁶ After Title VII’s passage, the company announced new standards for hiring, promotion, and transfers that included a high school diploma or IQ test scores, that “effectively perpetuated the discriminatory policies that Duke Power had utilized prior to the enactment of Title VII.”²⁷

As the decision reads, “good intent or absence of discriminatory intent does not redeem employment procedures... Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation.” With the disparate impact theory that persists as a basis for individual lawsuits, the Supreme Court seemed to understand what both the Congress and Senate had by 1972: discrimination extends beyond the ill will of individual actors.

TWO TYPES OF PROHIBITED DISCRIMINATION

EEOC’s Definition of *Disparate Treatment*:

Title VII prohibits **intentional** discrimination based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their White counterparts. This is called “**disparate treatment**” discrimination.

EEOC’s Definition of *Disparate Impact*:

Title VII also prohibits employers from using neutral tests or selection procedures that have the **effect** of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not “job-related and consistent with business necessity.”²⁵

In explaining its decision, the Supreme Court stated that the objective of Title VII was “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of White employees over other employees.” According to the Court, the offer of equal employment opportunities needed to take into account the impact of employment practices on protected groups; otherwise, the offer would be the same as in the fable of the stork and the fox. In this fable, the fox offers the stork some milk in bowl that only the fox’s mouth can easily utilize. In return, the stork offers the fox some milk in a vase that the stork’s beak could fit into, but the fox’s mouth cannot. The Court applied this fable in the context of employment discrimination to say that “the posture and condition of the job seeker” must be taken into account in analyzing whether the provision of “equality of opportunity” is genuine. Using this test, the Supreme Court interpreted Title VII as prohibiting “not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.”

As many scholars have pointed out, this interpretation of the Civil Rights Act can be seen as a departure from the intent of Congress. Although the Act had specific provisions to protect seniority systems already in place, the Court ruled that “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.” This “disparate impact” theory of discrimination had developed over the years with the aid of the EEOC, private and government attorneys, academics and judges across the country.²⁸ Older, “motive-based” concepts of discrimination were found unacceptable by these scholars and lawyers because they “permitted the employer to insulate his employment practices from the social and economic problems that had arisen in society as a consequence of the pervasive pattern of discrimination and subordination of minorities.”²⁹ They believed that for Title VII to have a chance to address these problems, it needed the broadest possible construction, which meant that discrimination needed to be defined in terms of consequence.

In this context, the *Griggs* ruling broke new ground as an articulation of the need to move past the fight against

individual discrimination toward the broader promotion of equity. The Court found that Title VII compelled the nation to remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification,” and it was not enough to eradicate only *intentional* discrimination. To meet Congress’s objective “to achieve equality of employment opportunities,” proactive efforts would have to be made to “remove barriers that have operated in the past to favor an identifiable group of White employees over other employees.”

While the *Griggs* decision opened the gates to claims of discrimination in the absence of intent, and has no doubt led to the invalidation of some “facially neutral,” but discriminatory policies on case-by-case bases, continued racial disparities in virtually every employment sector, and advocates’ lack of faith in the system strongly suggest it has not lived up to its potential. As will be discussed later in *Confronting Racial Bias at Work*, the federal courts have often interpreted disparate impact theory in narrowing ways, and it is clear that our legal system of protection doesn’t consider evidence of gross racial disparities as presumptively discriminatory.

IV. THE ‘80S AND BEYOND: UNDERMINING EQUITY

The 1970s saw mixed support for promoting gender and race equity from the Nixon, Ford, and Carter administration-era EEOC; the 1980 election of Ronald Reagan and 1988 election of George H. W. Bush brought major retrenchment. Reagan typically took a position against affirmative action, claiming such practices constituted “reverse discrimination” and that employers would rationally hire the most qualified employees regardless of race. To accompany this rhetoric, the Reagan administration drastically reduced funding for civil rights enforcement agencies including the EEOC. The number of class-action lawsuits filed by the EEOC, designed to target institutional discrimination, fell from 1,106 in 1975 to just 51 in 1989.³⁰ During this time, the courts made class-action employment discrimination cases — particularly disparate impact cases — more difficult to win.

For example, in *Wards Cove Packing v. Atonio* (1989), the Supreme Court reversed an appeals court decision that declared an employer had the burden of proving its hiring practices were not discriminatory when low-wage workers of color presented evidence showing a high percentage of White employees in the higher-wage “skilled” positions, and a high percentage of workers of color in the “unskilled” positions. The 5:4 Supreme Court decision narrowed the disparate impact theory by requiring plaintiffs to identify a specific hiring practice responsible for the racial disparities. The appeals court decision had shifted the burden of proof to the employer, who would be required to prove a racial disparity was due to a “business necessity,” but the Supreme Court clarified that the burden lay with the workers to identify the specific hiring practice.

In 1990, the Democratic Party–controlled Congress sought to shift the burden of proof back to the employer and otherwise strengthen provisions of Title VII that empowered individuals to challenge systemic job discrimination. The 1990 Civil Rights Act aimed to make disparate impact claims easier to file and prove. These efforts were opposed by then president George H. W. Bush and the Attorney General serving under Bush, Dick Thornburgh, who characterized the Supreme Court’s weakening of disparate impact claims as “rooted in the Court’s opposition to racial quotas, a position that we share.”³¹ In explaining his position, and why he ultimately vetoed the 1990 Civil Rights Act, Bush said that quotas were “wrong [because] they violate the most basic principles of our civil rights traditions and the most basic principles of the promise of democracy.”³² Although Bush would later sign the 1991 Civil Rights Act, which included weaker, more ambiguous provisions around disparate impact claims, his remarks signaled a clear retreat from the federal government’s understanding of systemic discrimination and how to best combat it. In 1971, the high court considered contrasting disparate impact claims as necessary for Title VII’s implicit goal of rooting out systemic racism; in 1990, these same claims were characterized by at least two branches of the federal government as violating the basic principles of democracy.

Moreover, the Supreme Court has more recently made it more difficult to certify class actions for disparate impact claims (see, for example, the discussion of *Wal-Mart v. Dukes*

on page 20). Nonetheless, to this day, *some* individuals and groups can win Title VII cases even when employer practices are not based on “ill will” or “animus,” which is a significant, national legal acknowledgment of the systemic nature of discrimination.

But as described in Part II of *Confronting Racial Bias at Work*, the path for workers of color to secure justice from employment discrimination within the legal and administrative systems is filled with barriers that often make the journey long and difficult.

Key Legislative and Court Moments for Title VII (1964-1991)

-
- 1964** ● **CIVIL RIGHTS ACT OF 1964**
Title VII passed; prohibits employers from discriminating on the basis of race, color, religion, sex, and national origin, but focuses on intentional discrimination; creates EEOC but with limited power.
- 1972** ● **EQUAL OPPORTUNITY ACT AMENDS TITLE VII.**
Expands EEOC's power beyond investigating to independently filing suit against employers.
- 1972** ● Supreme Court *Griggs v. Duke Power* decision approves an expanded definition of discrimination, formally asserting that proof of discriminatory *intent* is not required (i.e., supports "disparate impact" theory).
- 1989** ● Supreme Court *Wards Cove Packing v. Atonio* decision narrows the disparate impact theory to a specific identifiable practice, and shifts the burden of proof to the employee.
- 1991** ● Civil Rights Act amendments overturn *Wards Cove* by shifting the burden of proof back on the employer to prove a "business necessity" in disparate impact cases, but placing limits on the damage amounts available to discriminated workers.

Anonymous Survey of Worker Advocates

(MARCH/APRIL 2016)

In the spring of 2016, Race Forward surveyed worker advocates across the country to determine what types of racial discrimination workers of color most typically experience (e.g., intentional vs. unintentional, explicit vs. coded, hiring vs. promotion opportunities), and to what extent they feel the law and EEOC provide effective protection. Given past expressions of frustration with the ineffectiveness of Title VII, we also asked where worker organizations' energies should be directed to proactively promote racial equity in the workplace. The aim was to solicit input from worker advocates who could speak with authority about broad employment discrimination trends in particular industries. **Some findings are presented here, and others are discussed where appropriate throughout the body of *Confronting Racial Bias at Work*.**

These Race Forward findings should not be considered nationally representative of all worker advocates in all sectors.³³ We largely centered our research gaze on the work experiences of women of color, who can be victims of race or gender discrimination — or a combination of the two — and

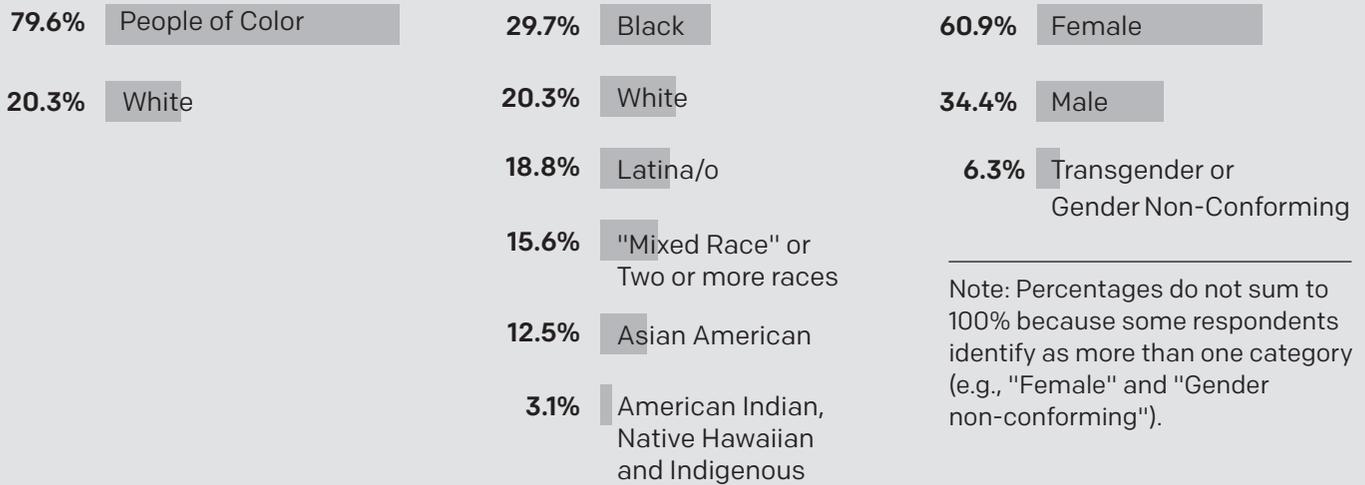
who continue to suffer from a considerable wage gap. Thus, our survey outreach focused primarily on those familiar with industries where women of color are disproportionately represented overall — particularly in lower-income positions — or where previous EEOC research found that there have been high rates of discrimination charges filed by these women.³⁴ Respondents typically worked as organizers, trainers, or call-center staff, and they were granted anonymity for both themselves and for their worker organizations in return for their responses.

Results from Race Forward's survey suggest that today's workers experience both explicit and coded racism and intentional or unintentional discrimination in workplaces across multiple industries. When asked about the frequency of such experiences across six types of explicit and/or intentional discrimination, an average of 42 percent of knowledgeable³⁵ respondents reported that a given type occurred frequently or even as a "daily reality." For the equivalent types of coded and/or unintentional discrimination, an average of 50 percent reported such so-called modern types of discrimination were similarly commonplace.

Our Survey Respondents at a Glance

- 64 respondents from 25 states
- 4 out of 5 were people of color

RACE AND GENDER IDENTITY



Note: Percentages do not sum to 100% because some respondents identify as more than one category (e.g., "Female" and "Gender non-conforming").

Note: Percentages may not sum to 100% due to rounding

MAJOR INDUSTRIES REPRESENTED*

Number of Respondents	Industry
13	Restaurant
13	Retail
10	Construction
10	Journalism
8	Education
7	Domestic Work
5	Nursing & Health Care
5	Hotel & Tourism

TYPES OF ORGANIZATIONS*

Number of Respondents	Industry
21	Unions (National Office or Locals)
18	National Advocacy Groups (including State/local Affiliates)
17	Local Workers Centers
8	Local Advocacy Group

*Note: Lists are not exhaustive.

Types of Discrimination Covered in Worker Advocate Survey

Note: *All* of these types of discrimination are (theoretically) prohibited by Title VII and the EEOC. While these two lists are not mutually exclusive (e.g., coded discrimination can be either intentional or unintentional), conventional wisdom among worker advocates is that the EEOC has an easier time enforcing discrimination that is explicit and/or intentional, rather than coded and/or unintentional (see "Intentional vs. Unintentional Discrimination on p. 20).

Explicit and/or Intentional Forms of Racism

- Explicit racial harassment
- Explicit sexual harassment or discrimination
- Intentional discrimination when hiring or assigning work roles
- Intentional discrimination when assigning work schedules
- Intentionally enforcing workplace rules more harshly
- Firing/retaliation for making discrimination complaints

Coded and/or Unintentional Forms of Racism

- Coded racial harassment or threats*
- Coded sexual harassment or discrimination
- Unintentional discrimination when hiring or assigning work roles
- Unintentional discrimination when assigning work schedules
- Unintentionally enforcing workplace rules more harshly
- Harassment complaints not treated seriously

*Coded racial harassment avoids the use of explicit slurs, substituting them instead with seemingly race-neutral terms that can disguise racial animus. It injects language that triggers racial stereotypes and other negative associations without the same risk of public condemnation and scrutiny that comes with explicit racism."

Types of Discrimination Covered in Worker Advocate Survey

EXPLICIT DISCRIMINATION

Percent of worker advocates reporting specific types of explicit and/or intentional discrimination as common in their industries (i.e., “frequent” or a “daily reality”):

48.3% Intentional discrimination during hiring or when work roles are assigned

44.1% Explicit sexual harassment or discrimination

41.7% Firing or retaliating against workers of color who have complained about discriminatory treatment

While our sample size is small, it is worth noting that the retail and restaurant industry advocates reported that explicit sexual harassment were very commonplace (10 of 15 respondents for each industry considering them as a frequent or daily reality), and six of seven domestic worker advocates considered racial harassment to be commonplace.

IMPLICIT DISCRIMINATION

Percent of worker advocates reporting specific types of coded and/or unintentional discrimination as common in their industries (i.e., “frequent” or a “daily reality”):

60.7% Hiring and assignment of work roles

53.6% Managers failing to take discrimination complaints seriously**^

48.2% Coded or unintentional discrimination in assigning work schedules*

*fueled particularly by retail worker advocates (12 of 14 respondents on complaints, and 9 of 12 on work schedules); also fueled by retail worker advocates (9 of 12 knowledgeable respondents)
 ^fueled particularly by construction worker advocates (7 of 9)

53.7 percent of worker advocates reported women of color commonly experience discrimination based on their combined identity (i.e., “frequent” or a “daily reality”). These experiences were particularly heightened within the construction, retail, domestic, and restaurant industries in comparison to education and journalism.

Part II:

Barriers within the Legal/Administrative Anti-Discrimination System

In theory, our system of federal protection for workers who have experienced racial discrimination in the workplace should operate fairly simply. The model process – similar to the example below – would provide compensation for the initiating worker(s) and, ultimately, broad proactive protection against discrimination for similarly situated workers in a given workplace. Ideally, individual cases can have positive ripple effects within an entire industry, or even across industries to the broader employment system. Again, in theory, this generally straightforward sequence of stages should be the case whether the discrimination was intentional or unintentional, and was the result of disparate treatment by managers or employers or the disparate impact of a facially neutral policy practiced by management.

In practice, however, many worker advocates, labor-side lawyers, and researchers report that victims of employment discrimination face major systemic barriers at each stage of the process. Securing justice can be a long and slow ordeal. It requires maintaining sustainable progress by establishing employment policies, and practices that foster racially equitable opportunities and outcomes for a given workplace, company, or industry.

The following discussion explores some of the major barriers that make our current system inhospitable to many workers of color.

How our Anti-Discrimination System Works in Theory



STAGE 1 – THE WORK EXPERIENCE

Woman of Color X **experiences racial discrimination** in being repeatedly passed over for promotion by less and/or equally qualified colleagues and new hires. She **lodges an internal complaint** with her employer, who denies that racial or gender discrimination had anything to do with the promotion decisions.



STAGE 2 – WORKER INITIATES TITLE VII CLAIM

Ms. X **files a formal charge** of discrimination with the EEOC office in her geographic region (online or in person), ideally with the advice and/or representation of a lawyer.



STAGE 3 – INITIAL EEOC INVESTIGATION

The **EEOC investigates** the charge by gathering information from both sides and its own data/records, if applicable. Based on its investigation, **the EEOC decides how involved it will get in the dispute**. For example, the EEOC might decide to close its investigation and involvement by officially notifying Ms. X that she has the “right to sue” her employer independently. Or the EEOC might determine that there is reason to believe discrimination occurred and decide to initiate confidential pre-court negotiations between the parties; and if those negotiations are not successful, it might decide to eventually file a lawsuit on behalf of Ms. X and other similarly situated women of color.



STAGE 4 – TITLE VII DISPUTE

Ms. X **makes her case against the employer** — perhaps as part of a larger class-action lawsuit, and possibly with the EEOC’s formal assistance — in pre-court negotiations or in a court of law with a civil jury.



STAGE 5 – TARGETED COMPENSATION AND IMPACT

The employer compensates Ms. X (and any others in a class action) financially for any lost wages and appropriate damages, **and promises employment-practice changes** to be monitored by the EEOC, federal courts, or a private administrator so that neither Ms. X nor any other person of color at the company experiences such discrimination in the future.



STAGE 6 – BROAD PROACTIVE PROTECTION

After hearing news about the decision, **other employers also change their policies** to protect their workers of color from discrimination (e.g., through EEOC outreach and/or education efforts).

SYSTEMIC BARRIERS DURING STAGE 1 (THE WORK EXPERIENCE)



Eligibility

Title VII does not protect all workers in the United States. For Title VII claims, employers are prohibited from discriminating against employees only if the **business/ workplace contains 15 or more employees.**

According to Bureau of Labor Statistics data, about 75 percent of typical U.S. businesses have 10 or fewer employees, which adds up to about 11 percent of our nation's workforce. Another 7 to 8 percent of U.S. workers work at businesses with 10 to 19 employees. According to a 2012 Bureau of Labor Statistics study, the average number of private employers has been declining because small businesses are not growing in size as they had in years past.³⁶

Critically, industries such as domestic work — which is disproportionately composed of women of color employed by private households — are almost entirely excluded from federal Title VII protection against racial and sexual harassment. Advocates in various states have successfully sought state or local “domestic worker bill(s) of rights” to lift the floor of protection for some workers, but many remain unprotected (see “Profiles in Action II: NDWA Domestic Worker Bill of Rights” in Part III of this report).

Title VII also excludes workers who have been hired and/or classified as “**independent contractors.**” The number of “independent contractors” has boomed in recent decades due to employers seeking to slash costs and limit the number of employees receiving full rights and benefits. According to a Department of Labor study from the year 2000, almost 30 percent of examined businesses mischaracterized employees as such to cut costs and minimize liability. A 2007 NYC study estimated that one in four construction workers was misclassified as an independent contractor or was simply paid under the table.

In addition to these longstanding issues, the most recent technology boom — the so-called “gig economy” — is likely presenting new problems for workers of color. For

example, the ride-hailing company Uber classifies its drivers as independent contractors, which allows it to avoid having to pay minimum wage or provide health insurance. Since Uber's method for rating drivers is based on its customer platform, drivers are extremely vulnerable to the racial biases and prejudices of Uber riders. If Uber drivers were employees, it would be illegal for them to be fired based on customers' discriminatory preferences. However, as the system stands now, workers cannot challenge Uber for this practice.

SYSTEMIC BARRIERS DURING STAGE 2 (WORKER INITIATES TITLE VII CLAIM)

Worker Vulnerability

Although the EEOC does have the power to initiate its own charges and investigations of covered employers, it lacks the financial resources and the clear political mandate to aggressively research and pursue racial equity in employment without running afoul of hostile congressional interference. Moreover, the heavy caseload of charges filed by workers makes the agency's use of its independent investigation power far rarer than a committed racial justice approach would demand.

Therefore, the current system for protected workers under Title VII relies on an individual's willingness to come forward and file a formal charge of discrimination with the EEOC against their employer. This is required by statute for any worker who wants to sue their employer for harassment or other Title VII-covered discriminatory treatment/impact. However, major barriers discourage workers from doing so.

Our survey suggests that some of these barriers for workers include insecurity about undocumented status, fear of legal consequences (51.9 percent of respondents considered this a “major barrier” to filing a formal claim or lawsuit), and fear that filing a claim will harm workers' prospects in the industry (45.6 percent). One California-based worker advocate for agricultural and seafood workers responded, “Among workers with visas, there is a real fear that bringing a legal claim will mean they are unable to return to the U.S. to work.” Six of seven

“ We have filed EEOC cases in the past, but having access to a lawyer is crucial. Thankfully we have a lawyer on staff who has taken the cases, but most people in the industry do not have access to legal counsel or a lawyer who can take on their case. ”

—Latino worker advocate, manufacturing industry (national nonprofit organization)



Finding a Lawyer

domestic worker advocates surveyed considered fear of legal consequences because of their undocumented status as a “major barrier.”

The concern about a worker’s prospects in the industry registered as a significant barrier across almost all of the industries we surveyed, including journalism³⁷ and education. The exception was in the construction industry, where more advocates listed career concerns as simply a “barrier” rather than as a “major barrier.”

Finally, a third of the survey respondents conveyed that the lack of workers’ knowledge regarding laws that prohibit discrimination and the slow pace of the legal and administrative processes to play out are “major barriers” for workers who would otherwise file a formal discrimination claim against their employers. “It is difficult to identify discrimination in the workplace since we have to interview workers to probe out any incidents that may have occurred,” wrote one Latino advocate for manufacturing workers nationwide. In explaining why “worker education” is key, he wrote, “Workers do not always voluntarily come forward when faced with racial [and/or] gender-based discrimination in the workplace, since [the law] is not common knowledge among the workforce.” Our survey results suggest that this sentiment is shared among restaurant worker advocates. All 12 of the advocates for that industry in our sample cited worker lack of awareness of the law as at least a barrier, with two-thirds of them labeling it a “major barrier.”

Anyone who has ever watched a television crime drama has heard fictional police officers say to a suspect, “You have the right to have an attorney present. If you cannot afford an attorney, one will be appointed to you.” However, because employment discrimination is a violation of *civil* law, and not criminal law, workers who want to bring discrimination claims against employers in court must pay upfront costs for their legal representation, or find a practitioner willing to take the risk that a big payday in court may never materialize. Understandably, for the vast majority of attorneys in private practice, the likelihood of winning a case, as well as the total monetary compensation for their client, must be considered.

Almost 40 percent of survey respondents considered “difficulty securing a lawyer” to be a major barrier to workers of color who want to file a formal Title VII charge against their employers. The number of worker advocates for the restaurant, retail, and domestic worker industries who reported feeling this way was approximately 60 percent, while only one in six education-worker advocates felt the same, and no journalism advocates reported this as a barrier.

According to the survey response of one Texas-based advocate for construction workers, Title VII — combined with “ineffectiveness” at the EEOC — “makes it almost impossible for most of the discrimination cases we see to go anywhere.” She explained that in order to get a private attorney to take a discrimination case filed by a low-wage

“ A big issue we have seen recently is the ‘forced arbitration clause’ in employee handbooks, and the ‘length of time’ that a case takes. Workers tend to get frustrated by how slow the process is. ”

—Latina worker advocate for restaurant and retail industries (worker center in California)

worker, “the discrimination needs to be absolutely explicit. [But the] sorts of cases that we see — and the vast majority of the workplace discrimination that we hear about — [are] fuzzier. It is too hard for workers to find recourse in those cases.”

As described in *Confronting Racial Bias at Work*, a variety of statutes and Supreme Court cases often make employment cases difficult to win, particularly if no evidence of intentionally discriminatory treatment is available. The federal courts make the prospect of taking employment discrimination claims unappealing for lawyers, particularly in cases involving lower-income workers and those working at smaller businesses unless multiple employees have all suffered similar treatment (see the statutory limits discussed in the Stage 5 section below).

Administrative Hurdle



Before a worker can pursue a lawsuit against his or her employer, they must file a discrimination charge and obtain a “**right to sue**” authorization from the EEOC. Congress requires workers to go through this step so that the agency can keep records on the number of charges being filed, can investigate the charges to decide if and to what extent its litigators will get involved in the case and, ultimately, to limit the number of cases that need to be settled in the federal court system. If the EEOC was adequately funded to enable it to investigate every charge filed by workers across the United States (an average of 90,000+ Title-VII charges per year from 2006–2015) and if

it had a history of efficiency, this step could be a good thing for workers. Unfortunately, the EEOC has rarely met either of those requirements, resulting in extreme delays for workers receiving justice.

In June 2015, the National Employment Lawyers Association — an organization of lawyers who exclusively or primarily represent employees in employment-discrimination cases — identified that the most frequent complaints about member interactions with the EEOC were delays and inconsistent policies.³⁸ Even by the EEOC’s own estimates, the average time to investigate and resolve a charge in 2015 was 10 months.³⁹

SYSTEMIC BARRIERS DURING STAGE 3 (INITIAL EEOC INVESTIGATION)

Barred from Filing a Lawsuit



Another method that employers deliberately use to limit worker rights has been the proliferation of **forced arbitration clauses** in employee contracts or handbook policies. Such HR-policy “fine print” requires workers to sign away their rights to sue their employers for discrimination in courts of law. Workers are forced to resolve disputes in a system that is supposedly independent, but is typically designed and paid for by employers. Research suggests outcomes for workers are worse with these arbitrators than federal court. Arbitration decisions are typically confidential, and unlike the courts, arbitrators don’t have “the authority to order injunctive

relief to remedy ongoing violations of the law.”⁴⁰ Although workers are never required to sign away their right to file a Title VII claim against an employer, a forced arbitration clause effectively means the workers must rely on the under-resourced EEOC to take up their claims in court on its own. Faced with tens of thousands of new claims each year, and the reality that well-heeled employers fight tooth-and-nail even in many cases of egregious discrimination, the chances are extremely slim that the EEOC will take up any individual claim – particularly where no smoking gun of explicit discrimination exists.

Intentional vs. Unintentional Discrimination

Results from worker advocates surveyed by Race Forward suggest there is much more confidence in the EEOC and courts providing effective protection against explicit, intentional discrimination than there is against coded and/or unintentional forms of discrimination. More than half of the survey respondents “strongly disagreed” or “disagreed” that the EEOC and/or court system are effective at protecting workers against coded racial harassment (58.7 percent), unintentional workplace discrimination in promotions, and work assignments (58.7 percent), and hiring (54.7 percent). The comparable figures for the explicit and/or intentional forms of harassment or discrimination were 34.4 percent for racial harassment, 48.3 percent for promotions/assignments, and 43.8 percent for hiring.

Although our sample of 64 worker advocates is not nationally representative, it’s clear that many advocates don’t consider the current system of protection an effective one, particularly against coded and/or unintentional racism. It’s also worth noting that our journalist advocates were the most consistent reporters of a gap in the current system’s effectiveness to protect against intentional versus unintentional discrimination.

Confidential Negotiated Settlements

Title VII - Section 706(b): “Nothing said or done during and as part of such informal endeavors may be made public by the Commission.”



To limit the number of cases before the federal judges,

the EEOC is statutorily required to try to negotiate settlements between employers and the employee(s). From the EEOC’s perspective, these settlements can lead to substantial financial relief to those affected by workplace discrimination. Conversely, the law also provides a shield of confidentiality to employers who settle at this pre-court stage. Unless the employer consents (which they rarely do), neither the employees nor the EEOC can speak about the terms of the settlement, and typically the employer needn’t make any admission of guilt.

This means it’s less likely that there will be a Stage 6 (“Broad Proactive Protection”) for workers experiencing similar discrimination at other workplaces. Unless the EEOC conducts robust monitoring of the behavioral terms of the settlement, which is difficult for the under-resourced agency, the employer might continue discriminating against its workers. This can result in back-to-back charges against employers who may calculate that fighting such cases is just a “cost of business.”

SYSTEMIC BARRIERS DURING STAGE 4 (TITLE VII DISPUTE)



Class-Action Certification

Class-action lawsuits are an important legal tool that allows lawyers to combine the cases of multiple workers together to combat discriminatory employment practices or conditions. Class actions are particularly important for lower-income workers whose cases are otherwise unlikely to generate enough monetary compensation to attract legal representation. However, the 2011 Supreme Court decision *Wal-Mart v. Dukes* has made it more difficult for discriminated workers to be certified as a class. Brought on behalf of thousands of women workers at the retail giant who are grossly under-represented in the management positions at hundreds of Wal-Mart stores across the nation, the majority opinion written by Justice Scalia threw cold water on this attempt to bring a comprehensive systemic discrimination claim.

“Rather than recognize that workplace structures could systematically disadvantage women workers relative to men,” wrote legal scholar Pauline Kim, the court’s majority “seemed to be looking for an explicit policy or a specific

bad actor, implicitly assuming that discrimination is always the product of discrete acts by identifiable decision-makers. This perspective does not recognize the possibility that discrimination may result from systemic factors, but sees class claims as merely the aggregation of a series of individual complaints that can only be joined together if the plaintiffs can point to an express policy or the involvement of the same supervisor.”⁴¹

By contrast, in 1998, female employees at Home Depot scored a legal victory against their employer when the consent decree for the *Butler v. Home Depot* class action case was filed in the 9th Federal Circuit. The women had been segregated overwhelmingly into the lower-paying cashier positions in comparison to the overwhelming representation of men in the sales positions that fed the company’s promotions ladder. Four years after the lawsuit was filed, the women had secured at least \$65 million in settlement funds and considerable non-monetary remedies. The women’s lawyers had successfully argued that Home Depot had discriminated by using stereotypes to make subjective assignment and promotion decisions (for example, the erroneous belief that women wouldn’t be interested or good at selling electrical or plumbing items).

Over the course of the decree, Home Depot had to incorporate “managing diversity” into the evaluation of its managers, provide access to product knowledge self-study courses and other training programs, document how many women were interested in the sales and management positions, institute an internal job preference process, and set hiring benchmarks that it would use its “best efforts”



to achieve. James Finberg, one of the lead attorneys for the workers, reports that the *Dukes* case “tells us we can’t bring that [*Butler*] case anymore,”⁴² because the Supreme Court now said that they could not assume those women workers share enough “commonality” to meet one of the requirements for class certification. Justice Scalia’s 5:4 majority opinion essentially required evidence of the subjective

decision-making for all prospective class members across the thousands of stores, or some type of smoking gun that Wal-Mart intended to discriminate against women by allowing the discretion to hiring managers.



Case Dismissed Before “Discovery”

In the last 10 years, the Supreme Court has made it much easier for judges to dismiss lawsuits alleging discrimination before workers and their lawyers have an opportunity to obtain evidence from the employer in the pre-trial stage known as “discovery.”

Historically, the Federal Rules of Civil Procedure had been interpreted in a way to promote access to justice. The rules have been seen as favoring the resolution of cases based on their merits as established through a trial. However, the Supreme Court has weakened this presumption in favor of other values such as judges’ ability to manage their caseloads and protecting defendants from costly litigation. This has proven burdensome for civil rights cases, especially when conservative judges are hearing those cases.

In 1957, the Supreme Court held that a plaintiff can successfully state a claim unless it appears “beyond doubt” that the plaintiff can establish “no set of facts” that would entitle her or him to relief, which was known as the Conley standard. Some 50 years later in *Bell Atlantic v. Twombly* (2007, 7:2 decision) and *Ashcroft v. Iqbal* (2009, 5:4 decision) – the Court radically revised this standard by introducing the “More Plausible Test.” Under this test, a judge is asked to use her own “judicial experience and common sense” to compare the plaintiff’s allegations of unlawful conduct to other, completely lawful explanations of the conduct in question.

Since the evaluation of whether cases get to trial is now subject to discretionary evaluation by individual judges, there is more room for bias. One illustration of this is a recent study by Raymond Brescia which not only shows that judges in general are dismissing more housing and employment cases, but also that dismissal rates by Republican-appointed judges have increased more than 20 percent.

'Stray Remarks': [The Court] ruled that referring to a Black adult male employee as "boy" did not establish discrimination, because "boy" was not preceded by the word "black," and because they were "ambiguous stray remarks not uttered in the context of the decisions at issue.'

A NEELA survey showed that, after the rulings in *Twombly* and *Iqbal*, 70 percent of employment discrimination lawyers have changed their approach to how they structure complaints. Of those who have changed their practice, 94 percent have had to include more factual allegations in these early pleadings, and 75 percent have had to respond to additional motions to dismiss from employers.

Employer Motions for Summary Judgment

Increasingly, a common hurdle in worker experiences when pursuing a case against their employer is a phenomenon called "summary judgment," which can suddenly end a case without a full trial. According to legal studies, 70 percent of cases brought under Title VII are dismissed at this phase, with some regions dismissing more than 80 percent of all cases.⁴³ Supreme Court decisions have made it easier for judges to grant a defendant's (employer's) request to dismiss a discrimination lawsuit or potential key evidence before a jury is ever formed. Summary judgments are a tool that courts use to cut their heavy caseloads, and in employment discrimination cases, they have taken many damaging forms, including the following:

- **"Stray remarks"**: One common type of evidence presented to establish an employer's discriminatory motivation is testimony about the employer's comments and remarks. Courts have moved toward considering such remarks irrelevant if they are "ambiguous" or if made outside the context in which the discriminatory decision took place. The exclusion of racist and bigoted remarks from consideration in employment discrimination cases creates a huge obstacle to obtaining redress.



In the 1989 case *Price Waterhouse v. Hopkins*, Justice O'Connor wrote that race and gender always play a role in employment decisions, and could take place in a "perfectly neutral and nondiscriminatory fashion." O'Connor went as far as to suggest that the Court need not be concerned with "stray remarks" or "statements by non-decision-makers, or statements by decision-makers unrelated to the decisional process itself," even if those remarks were discriminatory. Since O'Connor's ruling, the "stray remarks" doctrine has been applied by different circuits to limit or exclude relevant evidence. The grounds for such exclusion has included too much time passing between the remark and the decision reached (3 months), remarks by individuals not "principally responsible" for decision-making, and remarks that a judge, at his or her own discretion and without the assessment of a jury, deemed "insufficient" evidence of discrimination.

One of the most notorious examples of the "stray remarks" doctrine occurred in *Hithon v. Tyson Foods, Inc.* (2014). This case is unique both because the Eleventh Circuit twice ruled that referring to a Black adult male employee as "boy" did not establish discrimination, because "boy was not preceded by the word "black," and because they were "ambiguous stray remarks not uttered in the context of the decisions at issue." In both of these cases, the Circuit court was overruling the verdicts of racially diverse juries.⁴⁴

- **Discrimination based on "race+"**: While the EEOC has tried to make clear that Title VII protects workers against employment discrimination based on two or more of the five protected categories (race, color, sex,

religion or national origin), the federal courts have been much more skeptical of such claims. The type of evidence that federal courts tend to favor as admissible and persuasive are disadvantageous for women of color and transgender workers who, for example, may suffer discrimination based on stereotypes of or implicit biases against their racial or gender identity.

The Supreme Court has ruled that it is “especially relevant” if there is evidence that other individuals who were not of that protected status were treated differently by that employer. For instance, if a female worker can demonstrate that male workers were not subject to the same treatment, many courts will see this as strongly suggestive that discrimination has taken place.

There are two developments that make so-called “comparator” analyses difficult for workers alleging discrimination. First, many courts (such as the Eighth Circuit) are requiring plaintiffs to find suitable comparators to even establish a prima facie case of discrimination. Second, many courts are becoming restrictive in who they will consider as a comparator, such as the Tenth Circuit’s requirement that the comparator have the same supervisor, and the Eleventh Circuit’s ruling that the “quantity and quality” of the comparator’s misconduct must be “nearly identical” to the plaintiff’s, so that the court will not be in the role of second-guessing the employer’s “reasonable decisions.”

Comparator analyses are disadvantageous not only to those who are members of more than one “protected class,” such as a woman of color or transgender worker of color, but is also disadvantageous to those who work in highly segregated workplaces. For instance, if all workers in a particular office are women, then a plaintiff will have difficulty finding a comparator in the office who is treated differently because he is a man.

- **Defining “supervisor”:** Title VII explicitly bars the creation of a hostile work environment for those of a protected class. The Supreme Court has recently narrowed the definition of what constitutes a “supervisor.” Employers have a significantly greater liability for the behavior of “supervisors” than the behavior of

“co-workers.” This makes it more difficult to prevail on hostile work environment claims.

In the 2013 case *Vance v. Ball State University*, the Supreme Court ruled that the only individual who could be considered an employee’s supervisor was someone who could affect a significant change in employment status, such as hiring, firing, promotions or benefits. The Court rejected the definition of “supervisor” advocated by the EEOC, which included those who had the authority to “direct an employee’s daily work activities.”

- **Proving employer retaliation:** Title VII prohibits employers from retaliating against employees who complain about discrimination, and such charges have made up an increasing percentage of total charges before the EEOC (from 17.5% in 1995, to 24.7% in 2000, to 25.8% in 2005, to 31.0% in 2010, to 35.7% in 2015)⁴⁵. Indeed, employment discrimination lawyers report that undocumented workers prevail more often on such claims than on their original charge. For example, Dr. Naiel Nassar won a jury trial and Circuit Court decision on both his claim about discrimination based on his Arab ethnicity and Muslim religion (his supervisor had claimed he was not working hard enough and stated that “Middle Easterners are lazy”) and his “mixed-motive” retaliation claim (that found retaliation “was a motivating factor despite the hospital’s claim that he was not qualified for the clinic job”). But the U.S. Supreme Court issued a stinging defeat in 2013 that substantially raised the burden of proof on workers making retaliation claims. Instead of prohibiting employer decisions where retaliation was a “motivating factor,” Justice Anthony Kennedy’s majority opinion established that employees must prove that the employer wouldn’t have taken the action “but for” retaliation — in other words, there was no other rationale that a court agrees was plausible.⁴⁶

“ The EEOC doesn’t do a particularly good job tracking and publicly sharing the impact its non-monetary remedies have on racial outcomes at workplaces with court-approved negotiated settlements. ”

SYSTEMIC BARRIERS DURING STAGE 5 (TARGETED COMPENSATION AND IMPACT)

Compensation Limits

The 1991 Civil Rights Act amended Title VII by placing restrictions on the types and amount of damages that a worker can recover. When compensatory damages (e.g., for emotional pain, future pecuniary losses, or loss of enjoyment of life) and punitive damages are allowed,



the amount per employee was set according to the total number of employees at that company, as follows:

- \$50,000 for employers of 15 to 100 employees.
- \$100,000 for employers of 101 to 200 employees.
- \$200,000 for employers of 201 to 500 employees.
- \$300,000 for employers with 501 or more employees.

While workers who score hard-fought legal victories against the employers who fired them can typically win back pay, the Supreme Court’s 2002 *Hoffman Plastic Compounds v. National Labor Relations Board* decision placed a particular challenge to undocumented workers, because the ruling meant that such workers could not receive back pay or be reinstated after a discriminatory discharge. Although this particular case involved an individual worker named Jose Castro who was fired for organizing activities, the decision had a broader impact beyond the National

Labor Relations Act to other worker protections like Title VII. After this damaging decision, the EEOC stressed that “it is still illegal for employers to discriminate against undocumented workers.”⁴⁷ But once again, the conservative federal judiciary made it difficult for workers of color to receive justice.

Limited Assessment of Targeted Impact

When a worker of color scores a victory in court through a ruling or a court-approved negotiated settlement (called a “consent decree”), the remedies imposed can be both financial and non-monetary. The EEOC has a long record of securing court-approved, non-monetary conditions on employers, such as the following:

- Upgraded complaint procedures
- EEO postings and policies
- Required hiring/promotion
- Recruitment requirement
- Upgraded human resource policies
- Training programs for management and/or staff
- Recordkeeping requirements
- Progress and performance reports
- Internal and/or external monitors
- Successor obligations

However, the EEOC doesn’t do a particularly good job tracking and publicly sharing the impact those remedies have on racial outcomes at these employers’ companies, as confirmed by 37-year agency veteran Ron Edwards, Deputy Director of the EEOC’s Office of Research Information

and Planning. As long as federal judges don't hear EEOC complaints that an employer has fallen out of compliance with a consent decree, they play no role in monitoring and enforcing court-approved settlements.⁴⁸

In theory, the agency devotes staff to monitor compliance (external monitors are occasionally cited in the consent decrees), but Race Forward is not aware of any research covering this aspect of enforcement. To what extent do employers follow through on specific provisions of the settlements? Is the compliance rate worse or better on the provisions (employment practices) that have proven most effective in closing racial gaps? Do racial gaps typically close at the end of negotiated settlements (sometimes supervision lasts as long as 5 years), and if so, by how much?

SYSTEMIC BARRIERS DURING STAGE 6 (BROAD PROACTIVE PROTECTION)

Limited Assessment of Broad Impact Assessment and Education/Outreach Efforts

In theory, the EEOC's education and outreach function should play a crucial role in promoting workplace racial equity through systemic change — helping to highlight, articulate and spread best employment practices that positively impact racial outcomes to close racial gaps. The agency seeks to inform the public about workplace discrimination by doing the following:

- Issuing press releases heralding significant court-approved settlements against employers, and other courtroom victories
- Releasing “**guidances**” that clarify the law for workers and employers (For example, Title VII prohibits employers from asking about the criminal backgrounds of job applicants unless the background check is relevant to the specific position; it also prohibits discrimination on the basis of sexual orientation or gender identity.)
- Offering free trainings and reviewing best practices that support justice and equality in the workplace

While the EEOC's press releases typically detail both the amount of monetary damages secured via litigation as well

as any *non-monetary* conditions imposed upon an employer, information about the broader impact of any particular case on employment practices and racial outcomes at comparable workplaces is limited. The agency devotes few of its resources to assessing that broader impact of individual cases or the impact of its guidance and trainings.

Unfortunately for the EEOC and workers of color, the agency's powers with guidance are limited. As Donald Livingston — a former EEOC general counsel (June 1990 – June 1993) who subsequently represented employers in employment discrimination cases — testified for the U.S. Commission on Civil Rights (USCOCR):

“ The Guidance [on criminal background checks] is not authoritative in the way a law is authoritative. The Guidance is not a regulation. Indeed, the EEOC has no authority under Title VII to issue substantive regulations under Title VII. The Guidance is not binding, even on the EEOC, which is free to take inconsistent positions during its own investigations or in litigation when it sues employers (p.18). ”

Livingston successfully represented the Freeman Company in “the first case to test the EEOC's 2012 policy guidance on criminal and background checks” — a decision the Wall Street Journal labeled as a defeat of “one of the [EEOC's] most high-profile crusades.”⁴⁹

When asked about the potential impact of the criminal-background-check guidance, San Francisco EEOC District Director Bill Tamayo reflected that the EEOC's litigation efforts had experienced mixed success. Further testimony to the USCOCR revealed conflicting research depending on the source. Nick Fishman, cofounder of a screening firm used by employers, surveyed about 1000 U.S.-based employers and found that fewer than 5 percent reported excluding applicants based on a prior conviction. However, Glenn Martin, an advocate for the formerly incarcerated, “provided statistics showing disparate treatment of applicants based both on race and on prior convictions.” Moreover, employer-based surveys fail to capture the number of potential applicants who choose not to apply because the “prior conviction” question is on the application. A focus on *outcomes* would seek both a change in practices and a commitment to measuring progress on the closing of this gap.

To its credit, in December 2012, the EEOC prioritized underserved and vulnerable populations through education and outreach efforts. The agency looks to increased numbers of attendees and expanded partnerships to track impact. This annual tracking of “significant partnerships” is perhaps the most quantitative aspect of the EEOC’s measures.⁵⁰ This method, however, does not account for the actions that partners take to enforce EEO laws. The EEOC does not adequately define “significant partnerships” aside from the sectors and industries they represent (i.e., vulnerable workers, underserved communities, and small and new businesses). Though the agency targets areas of need and assists groups with free outreach materials and support, it remains unclear whether or not these partnerships have a positive and proactive impact on employers’ hiring decisions and ultimately whether racial outcomes do or do not change.

Despite these efforts — which mainly consist of targeted outreach, counting events and partnerships) — recent studies point to concerns about the impact of the EEOC’s educational outreach program. A 2014 evaluation study⁵¹ conducted by the Urban Institute (UI) revealed structural issues with the EEOC’s educational outreach program tied to decentralized operations and limited administrative capacity. According to the study, the “EEOC is not conducting meaningful analysis of outreach and education outcomes.” Of even greater concern, occupational segregation expert and Sociology Professor Donald Tomaskovic-Devey (University of Massachusetts, Amherst) argued in his written testimony at the agency’s 50th anniversary public meeting in July 2015 that “the EEOC’s educational function and case law may be promulgating useless or even harmful [employment] practices.”⁵² A more proactive system of anti-discrimination protection requires greater EEOC awareness of impactful employment-practices research as well as development of its methods to measure any changes in racial outcomes at workplaces exposed to its training and outreach.

EEOC educational-outreach program representatives told Race Forward that the agency mostly looks at qualitative indicators to determine impact, such as advocacy-group partnerships, small businesses, consulates, and the agency’s responsiveness to assist communities in times of crisis.

Currently, the EEOC has no substantive quantitative data that points to successful measures of its outreach programs that proactively promote racial equity in the workplace.

Conclusion

Title VII should operate fairly simply to provide relief and justice for victims of employment discrimination, and to prevent workplace discrimination in the first place. In practice, however, although hard-fought, concrete victories do occur, the system erects far too many barriers for workers of color to receive timely justice (or any justice for those excluded from the law). Very few resources are devoted to the preventative side, which is pursued largely as an afterthought, with little to no emphasis on measuring the impact of best practices and education efforts on racial *outcomes*.

Part III:

Profiles in Action — Strategies to Combat Discrimination and Promote Racial Equity

As previously discussed, Title VII's case-by-case system of administrative and legal protection against discrimination leaves millions of workers without effective protection against intentional and unintentional employer biases. While some brave workers have eventually received some measure of financial justice with the help of private attorneys and/or the EEOC's investigative and litigation teams, the many barriers faced no doubt deter many others from ever bringing a claim in the first place. An administrative and legal system of protection that should, in theory, work relatively simply often unravels in practice due to processes that favor businesses over workers. It's no surprise that many worker organizations direct their anti-discrimination and pro-equity efforts largely (or even entirely) away from Title VII.

In the absence of favorable Supreme Court reinterpretations of Title VII, and without hope of an immediate influx of resources to the EEOC to expand its enforcement or outreach/education functions, worker organizations have resorted to creative means to help protect workers and promote racial equity. The following three profiles are of worker organizations that have adopted different strategies to combat employment discrimination in the construction and domestic-worker industries. Each profile highlights how Title VII has fallen short in addressing racial discrimination in that industry and presents a new model for providing meaningful protections to workers of color. These stories from the Black Workers Center in Los Angeles, the National Domestic Workers Alliance's efforts in Massachusetts, and the Laundry Workers Center struggle in New York feature worker education/organizing, local and state policy victories, and other key priorities and lessons.

Profiles in Action I: Los Angeles Black Worker Center (California)

With a long history of working for racial and economic justice, the Los Angeles Black Worker Center (BWC) is at the center of some of the most powerful and innovative Black worker organizing in the country. Modeling work that combines mass mobilization, alliance building, and research, the BWC has done more to increase access to quality jobs and reduce Black unemployment than many thought possible. After landslide victories as an anchor organization for the Raise the Wage Coalition and the Los Angeles Coalition to End Wage Theft to secure \$15 minimum wage and new wage enforcement laws, the BWC is leveraging this momentum of city-based policy and enforcement provisions to create new standards for anti-discrimination protection throughout Los Angeles. The BWC and their membership base have partnered with unions, city enforcement agencies, and public works contractors to ensure Black workers, and all workers of color, have quality employment in large-scale job sites across the city.

The Problem

If you take a look at most well-paying job sites in L.A., you might notice a symptom of 21st-century employment discrimination that many cities across the U.S. face: a near absence of Black workers. Almost 50 percent of Black workers in L.A. County are unemployed or underemployed (making less than \$12 an hour). In sectors like the public construction industry, Black workers make up less than 3 percent of the workforce. Many Black workers are simply not included in the booming L.A. labor market.

“Our members not only face the historic legacy of White-only employment, but on top of that we have 21st-century ‘bad jobs’, where exploitation results in hyper-exclusion and entire industries that have zero Black representation,” remarks Lola Smallwood Cuevas, co-founder of the L.A. BWC.

The issue of exclusion came into stark relief in 1996 with the passage of California’s Prop 209, an anti-affirmative action law that prohibits preferential treatment on the basis of race or gender in public employment, public education, and contracting. Prop 209 had a chilling effect on public agencies taking or considering proactive

measures to hire and retain people of color. “Prop 209 took out what teeth were left in Title VII, so it basically makes the law invalid unless you can prove intent [to discriminate] and that bar is very, very high,” explains Cuevas. This has forced the BWC to take a creative approach to prevent hiring discrimination and secure well-paying jobs for Black workers in historically segregated industries like unionized construction.

Campaign Strategy

In 2014, the L.A. BWC launched a campaign to get Black workers hired for a large public works project, the Crenshaw/LAX Rail Line. This \$2.4 billion dollar construction project ran through the heart of the Crenshaw district, one of the last remaining Black neighborhoods in downtown, and had no Black workers on-site.

In partnership with local unions, the BWC pursued a diverse strategy in order to change this reality. The BWC workers pushed the L.A. County Metropolitan Transportation Authority (aka, the Metro) and their associated contractors to adopt a Project Labor Agreement (PLA) that addressed underrepresented workers in the construction industry.

The BWC coalition campaigned for meetings with Metro officials and attended hearings. They wanted Metro and its contractors to know the community had expectations for the project to hire Black workers. The hardest fight lay in pressuring Metro to include a diversity clause in the PLA. Under Prop 209, agencies can’t be mandated to include such language, so the BWC led a public awareness campaign to pressure the agency into forging a voluntary partnership that would pilot a new worker diversity program.

The BWC took what was left of affirmative action policy after Prop 209, expanded it and convinced Metro contractors to be accountable to the new agreement. Instead of the target goal for federally funded projects that suggest hiring 28 percent “minorities,” the BWC pushed for a more specific breakdown along racial categories. In the case of the Crenshaw LAX Rail Line, the BWC demanded that 25-percent Black worker participation be sourced from the predominately Black neighborhood where the project is based.

Outcomes

The BWC coalition successfully created a new model for joint-led enforcement in proactive, diverse hiring. The program included a community tracking and monitoring process to ensure compliance and accountability. As Cuevas explains, “we won what we call a ‘success team meeting,’ where workers, Metro reps and contractors review the utilization report, which includes in depth tracking of worker demographics for every stage of the project. So if we see that the numbers of Black workers are low we can strategize together on how to raise them.”

To ensure the information workers and employers review together is unbiased, the BWC created a Community Monitoring Protocol. The center trains unemployed volunteers in fieldwork, data collection and construction site safety before deploying them to pre-selected sites. The volunteers produce reports that the BWC and Metro review side by side with the agency’s own hiring statistics to see whether the PLA agreement is being upheld.

The results of this model are clear. Since this partnership launch, the Crenshaw/LAX Rail Line project has increased its Black worker participation from 0 percent to nearly 20 percent, coming close to its 25-percent goal. Although the Crenshaw/LAX Rail line project is not the only Metro project to be governed by the PLA, it is the only one that includes a community enforcement model. Black worker participation at other PLA Metro projects is less than half of that at the Crenshaw/LAX Rail line. These numbers reflect the importance of devoting resources to the enforcement of PLA agreements.

What Is Needed Now

The BWC recognizes that inability to scale up throughout the city limits the PLA and community enforcement model. Cuevas believes that finding a sustainable enforcement model to improve job quality and access for Black workers is a top priority. The newest campaign, End Employment Discrimination Now, hopes to build off the momentum of the Raise the Wage and End Wage Theft movements that won major victories in the city.

In the fall of 2015 the L.A. City Council voted to establish an Office of Labor Standards and Enforcement (OLSE) to assure the wage increase actually goes into effect. The City Attorney, however, did not imbue the office with rights and resources to strengthen anti-discrimination protections at the city level. Cuevas sees robust and vigorous enforcement at the local level as the best opportunity to protect workers against the greatest wage theft of all: outright exclusion from high-paying industries. When asked what is most needed to protect workers of color from discrimination, Cuevas said this:

“We need policy makers and decision makers who will make investments in enforcement. One of the things we are running up against in L.A. is making sure there are dollars in the budget to enforce the minimum wage and the wage theft policy, and the same is true for anti-discrimination protections. It is not enough to have it on the books; we need real money for enforcement and implementation to make these laws have impact on the lives of people in our community.”

EXAMPLES OF COMPETING FRAMES ON EMPLOYMENT DISCRIMINATION:

Meritocracy Myth Frame

An underrepresentation of workers of color is natural because there are not enough competent “non-white” workers in hiring pools or they don’t want to work hard to advance.

Racial Justice Frame

Racial segregation in hiring is not natural; rather, it is a result of biased hiring practices and is the ultimate form of wage theft – the complete exclusion of workers of color from high-paying industries. Proactive policies and enforcement that ensure access to high-paying jobs are critical to ending these illegal practices.



Profiles in Action II: NDWA Domestic Worker Bill of Rights (Massachusetts)

In 2014, Massachusetts signed their Domestic Workers Bill of Rights, expanding protections for the workers who care for what we value most: our home and loved ones. Following New York in 2010, California, Oregon, Hawaii, and Illinois passed similar bills providing a legal floor for a historically exploited and undervalued industry.

The National Domestic Workers Alliance, made up of over 50 domestic worker organizations from across the country, stands at the center of these victories. The Brazilian Immigrant Center, a NDWA anchor organization based in Boston, led a coalition of Massachusetts workers, employers and legislators to attain one of the strongest Domestic Workers Bill of Rights to date. Through nearly a decade of amplifying the voices of women of color and demanding dignity, fairness, and basic labor rights, NDWA and their partner network are finally seeing victories.

The Problem

It is no accident that the exclusion of domestic workers from basic employment protections coincides with a workforce of predominantly women of color and immigrant women. Breaking the political power of these

women has been an explicit agenda of employers and politicians since the 1930s. The Fair Labor Standards Act, which set a federal minimum wage, and the National Labor Relations Act, which guarantees collective bargaining, purposefully omitted domestic workers out of fear that the predominantly Black female workforce would gain too much economic and political influence. It took decades to win minimum wage and overtime for some, but not all, domestic workers, and no domestic worker has the right to unionize under federal law.

Title VII protections do not cover most domestic workers. The law excludes any worksite with fewer than 15 employees, a stipulation that affects an overwhelming number of workers laboring in private homes. For a workforce that is 95-percent women, 54-percent people of color, and 46-percent immigrants, the lack of protection from racial and gender discrimination is devastating. The list of challenges that domestic workers face is immense: many work without contracts, for long hours with no breaks, vacation or paid sick days. Many of these women are supporting children, and often they have no access to health care, workers compensation, or severance pay. Considering the lack of legal protections for the entire industry, it is impossible not to consider race and gender as part of that valuation.

Campaign Strategy

The organization that eventually became the Massachusetts Coalition for Domestic Workers began in the humble office of the Brazilian Immigrant Rights Center. For years, Executive Director Natalicia Tracy and her staff listened to domestic workers' experiences and calls for change. Tracy had been a domestic worker herself 20 years prior. She remembers the egregious conditions and lack of legal protection: "I was brought here as a domestic worker from Brazil and lived in horrible conditions for 2 years. I didn't speak the language and I didn't know anyone. I had to sleep on the porch. I was paid \$25 a week for 90 hours of work."

Inspired by New York's Domestic Workers Bill of Rights, Tracy and her staff formed a coalition of advocacy organizations. After polling workers on their primary concerns and vetting it with a lawyer, Tracy and the coalition approached Representative Michael Moran to sponsor the bill. It included minimum wage protections, overtime, paid vacation and the strongest protections from racial discrimination and sexual harassment any campaign had yet put forward.

Representative Moran conceded to sponsor the bill only after thousands of signatures from his district proved mass support for the issue. However, he had one condition: keep the fight out of mainstream media so they could avoid oppositional pressure.

Staying out of the spotlight, the coalition implemented an intensive grassroots outreach strategy that included training domestic workers as spokespeople and legislative advocates. Domestic workers across the state publicized the bill at community meetings and local libraries. Members made calls to house representatives and senators, naming this as an opportunity to break from a past of exclusionary law-making written to exploit women of color. The campaign quickly gained supporters. Tracy shared her own story at events with legislators and public community gatherings.

Mindful of potential opposition, the coalition forged a relationship with senior centers that had lobbied against the Domestic bill in California. The coalition educated these centers about the conditions of domestic workers and how providing a safer workplace is not at odds with their business. "We told them that with this bill they would

have workers that were healthy and committed and it wouldn't cost them any more than working with placement agencies," explains Tracy. By the time the bill reached the first legislative session, it held unstoppable support and almost no oppositional pressure.

Outcomes

Tracy described the final vote as "simply incredible." The bill became non-partisan as scores of Republicans joined the Democratic anchors to quickly forward the bill. Lawmakers even attached the state's controversial minimum wage bill in order to carry it through the senate into the house. In the final roll call, only two people in the house failed to support the bill. Every Senator voted yes.

In addition to providing rest periods, overtime, written contracts, breaks, workers compensation and maternity leave, the Massachusetts Domestic Workers Bill of Rights offered the strongest protections against discrimination available to domestic workers. The state's own enforcement agency, the Massachusetts Commission Against Discrimination, previously prohibited domestic workers from filing discrimination claims based on Title VII's exclusionary language. The new bill amended these stipulations, opening up the claims process for all domestic workers, even those who worked as sole employees. The bill also required the Executive Office for Labor and Workforce Development and the Attorney General to formulate a multilingual outreach program to educate workers and employers about their new rights and responsibilities.

What Is Needed Now

Despite the legislative victory, Tracy still sees a major barrier to domestic workers achieving deserved protections across the country. "Employers need to more actively be part of this fight. We can rally all we want, but if we can't get employers to buy in and change the culture and work with us, it will be a constant battle," she says. Bridging the gap between worker and employer will involve alliance-building and communications campaigns. Hand in Hand — a national network of domestic employers working to change the conversation from one of competition to mutuality — recognized the opportunity to leverage employer involvement. Hand in Hand and NDWA are modeling worker-led and employer-supported racial equity in every workplace.



Profiles in Action III: The Laundry Workers Center and the B&H campaign (New York)

“We are putting an example out there for other workers, and other immigrant workers, that anything is possible when you organize.” A sense of rising above the impossible is what Mahoma Lopez, co-director of the Laundry Workers Center (LWC), and the hundreds of retail and warehouse workers battling discrimination at the New York photo store chain B&H, have come to recognize in themselves.

Systematic discrimination, mistreatment and dangerous health conditions have impacted the lives of B&H workers for decades. According to advocates, these are common experiences. After years of positional segregation, physical injury and verbal insults, workers with the support of LWC are combining traditional organizing, consumer campaigns and legal protections to radically change the future of their work.

The Problem

Known as one of the largest independent photo retailers in the country, B&H’s reputation as an employer is pretty abysmal. The company first appeared in the legal system in 2007, when they took a 4.3 million dollar settlement in a

racial discrimination lawsuit filed by the EEOC on behalf of nearly 150 Latino workers. The workers charged B&H for systematically paying less, refusing to promote, and denying benefits to Latino workers. In addition, the case’s EEOC consent decree required the company to equalize wages between Latino and White employees, implement an anti-discrimination policy, undergo employer training, post labor standards around the worksite, and consent to EEOC monitoring for five years.

Despite the fiscal penalty and on-going enforcement, B&H received little pressure from outside or inside their company. Without an accompanying campaign to engage consumers or build the political power of workers, the lawsuit remained ineffective as the company kept up business as usual. “Some workers engaged lawsuits, and they received money but nothing changed because the company has so much money they don’t care. As soon as something happened at B&H, they offered money in an attempt to silence everything,” laments Lopez. Indiscretions continued, and in 2009, female workers sued B&H for paying less and denying promotions to women. In 2011, two Latino workers filed another racial discrimination lawsuit claiming an abusive work environment and an institutional refusal to promote Latinos.



In an Al Jazeera interview, CUNY professor Stephanie Luce described the ineffectiveness that legal protections and enforcement can have with dissolute (WC) employers:

“ Unfortunately, it is common that workplaces can be under investigation and then still be committing serious violations. It’s often that violators are violators in multiple arenas: They will be violating wage laws, discrimination laws and health and safety laws. For these companies, it’s basically their business model: They are succeeding by cutting corners and taking risks. ”

By 2015, the plight of B&H workers had arguably worsened. A staunch pattern of discriminatory hiring, separate bathrooms for White and Latino workers, routine verbal harassment, 16-hour days with few breaks, and a slew of health violations including asbestos exposure and no safety training around heavy equipment were some of the complaints.

In September 2014, two tractor-trailers adjacent to a B&H warehouse caught fire. In one of the most blatant displays of disregard for work safety, B&H refused to let the workers leave; instead, they forced everyone to pass through a metal detector in fear the workers would steal expensive equip-

ment as they fled. Shortly thereafter, workers pursued outside support. One worker, Raul Pedraza, reached out to Lopez and the Laundry Workers Center for assistance.

Campaign Strategy

Given B&H’s reputation, Lopez knew it would be a long process of recruitment, organizing training, and staying resolute in the face of fierce opposition. B&H workers were split among two work sites — the Brooklyn Navy Yard warehouse and the Bushwick warehouse — totaling nearly 250 workers.

The B&H workers went through LWC’s intensive leadership institute, where workers developed their political consciousness and practiced skills like recruitment, decision-making, legal protections and taking collective action. Workers began recruiting at the Bushwick warehouse but realized they would need both sites to build a strong enough campaign against B&H. By October 2015, the workers had recruited nearly 95 percent of workers to their cause. “We were one year on the ground, undercover. So much discipline, the managers say something, start yelling, or threatening, and part of the discipline is to not say anything. We didn’t want anyone fired, we needed everyone,” Lopez recalls.

After nearly eight months of preparation, the workers decided to clandestinely sign union cards with the United Steelworkers Union. Lopez describes the benefits of unionization: “Lawsuits help workers recover damages, but when you have a union, you have legal representation in case of discrimination, the union has to investigate the issue, you don’t have to keep quiet for five years because of a settlement and you can keep your job.” That same month, the workers delivered a demand letter to B&H that included a declaration of intent to unionize. The workers held a public rally, inviting press, faith leaders, union allies and other labor advocates. The workers defended their right to organize, warning the company that any retaliation would be met by public and legal scrutiny.

As the company waged an anti-union and retaliation campaign inside the warehouse, workers focused on building outside support. They held public rallies, and dozens of media outlets covered the stories. As part of their consumer-engagement strategy, LWC launched a social-media component, popularizing the hashtag #BHExposed, This resulted in an open letter from thousands of video and photography professionals calling on B&H to end discriminatory practices and grant workers their right to unionize.

Outcomes

On November 4th, 2015, workers voted to unionize with the United Steelworkers Union.

In February of 2016, the Department of Labor moved to sue B&H on the grounds of racial discrimination. The lawsuit threatens to pull more than \$46 million in federal contracts if the company does not fully address its discriminatory practices. Patricia A. Shiu, director of the Office of Federal Contract Compliance Programs, issued this statement: “Federal contractors’ workforces should reflect the diversity of the American people, the people who are ultimately footing the bill for the goods and services that contractors provide to the government.”

As of May 2016, contract negotiations were underway and included demands around equal pay, scheduling promotions, and improved health and safety conditions.

As workers negotiate their contracts and B&H faces pressure from the federal government, workers are reporting improved conditions. Retaliation and explicit forms of racial abuse have ceased or stalled. Workers remain vigilant as they reflect upon the past year and a half of committed efforts - rank and file organizing, consumer engagement, unionization and legal recourse.

Reflecting on where the greatest power lies to change the lives of workers, Lopez stays true to his tradition:

“ We have laws to protect the workers, but too often people don’t respect [those] laws. Laws are useful, we can use them as tools, but we cannot depend on them. If you want to see a victory, you need to bring a majority of workers together to win. ”

Part IV:

Systemic Solutions and Recommendations for Racial Disparities in Employment Outcomes

Confronting Racial Bias at Work has provided an overview of some of the key weaknesses and faults of our nation's major anti-discrimination law and the under-resourced federal agency charged with enforcing it. It has also highlighted the perspectives of diverse worker advocates who note that both intentional and unintentional forms of discrimination are commonplace in many workplaces and industries. In addition, we profiled some of the strategies and campaigns that local and regional worker organizations have undertaken to secure promising victories for discriminated workers in spite of legal and

administrative systems that too often require vulnerable workers to wage years-long, "case-by-case" legal struggles "after-the-fact." One thing that is abundantly clear is that worker victories for justice over systemic racism have been far too rare for at least the last four decades under our current Title VII system of anti-discrimination protection.

For unintentional forms of discrimination, in particular, courts have too often required workers or applicants to identify a specific employment practice that can be singularly blamed for racially disparate employment outcomes. And within that framework, employers find it

WHAT MAKES A SOLUTION "SYSTEMIC"?

Unlike individual and interpersonal-level solutions, systemic solutions in the employment context are not primarily concentrated on changing the behavior of particular individuals or healing workplace relationships. Nor are they focused on determining the intent of decision makers or others who produce racial disparities in the workplace. That is to say, systemic solutions move beyond prescriptions for one-time "sensitivity" or "diversity" trainings, beyond the removal of so-called "bad apples" in positions of power. Systemic solutions can be wide or narrow in scope, but typically they concentrate on formal policies and unwritten practices that shape racial outcomes in a workplace, its broader company where applicable, and even patterns in a particular employment industry at large. While such solutions may purposefully challenge societal stereotypes about workers of color in various fields, progress is not to be measured by changes in employer attitudes, but instead by employment outcomes.

Among other characteristics, systemic solutions to racial discrimination in employment typically

- Shift the focus from employer intentions to racial outcomes and impacts
- Interrupt policies, practices, and ideas that are seemingly "race-neutral," but are in fact discriminatory
- Involve the conscious consideration of impacts on different racial and ethnic groups
- Expand access and inclusion for functionally or formally excluded workers of color, including those with intersecting, underrepresented identities

relatively easy to excuse, rationalize, or otherwise justify discriminatory outcomes by citing other ostensibly performance-based factors or issues with allegedly inadequate “pipelines.” Given the shame attached to the word “racist,” employers are understandably looking to absolve themselves of blame in such cases.

When systemic racism is contested largely in a case-by-case, reactive manner, we miss countless opportunities to introduce and reinforce the best employment practices that can lead to racially equitable outcomes. The key problem with our current system of anti-discrimination is that it’s too focused on legal debates about who or what is primarily *at fault* for disparate racial outcomes. Instead, we should devote as much or more of our energy on what more we could all be doing on the front end to affirmatively produce more racially equitable outcomes. We should shift the focus to the essential role employers can and must play in our *collective responsibility* to create racially equitable workplaces and a racially equitable, broader employment system.

Such a pro-equity, rather than strictly anti-discrimination, approach can make a great impact, even in the absence of immediate support from the U.S. Congress. To that end,

we group the varied systemic solutions to employment discrimination into the following four categories that worker organizations, legal advocates, conscientious consumers, state and local policymakers, funders, and others can pursue based upon the highest local or regional needs and circumstances:

- **Reactive Systemic Solutions:** removing immediate barriers to justice within the current *reactive* Title VII legal/administrative system
Main arena: courts, EEOC, and Congress
- **Proactive Systemic Solutions:**
 - **Equity Pressures:** boosting or promoting worker and/or consumer power to advance proactive, racial equity policies and practices with “voluntary” employers/industries
Main arena: worker/consumer campaigns and negotiations, EEOC
 - **Equity Incentives:** creating government incentives for business adoption of racial equity best practices to combat unconscious and hidden biases
Main arena: all levels of government, EEOC

“ Where should worker organizations’ energies be focused to prevent racial discrimination against workers and/or to proactively promote racial equity in [the] workplace? ”

We received 51 responses from the above open-ended question in our Spring 2016 survey of worker advocates. A majority of responses called for more worker education or organizing, sometimes to raise more awareness of existing anti-discrimination rights within the reactive system, and more often to strengthen workers’ power to pressure employers to change employment practices and racial outcomes. Approximately 25% of respondents cited the need for organizations to push for better enforcement within the existing reactive system and/or for policy changes to promote racial equity. Here are some of the responses we received from these worker advocates:

Reactive Systemic Solutions

“We need the EEOC to do its job efficiently, transparently, and with an eye toward resolution, not simply closing a case. We need laws that acknowledge that racial harassment doesn’t need to be ‘severe and persistent’ in order to make people feel threatened at their jobs.”

— A White, gender-nonconforming advocate for nationwide retail workers

“[Focus] on raising awareness and taking time to create workshops and easy reads on this topic as an issue.”

Black male advocate for retail workers in New York

- o **Equity Mandates:** legally mandating best equitable employment practices, especially proactive and preventative measures that advance systemic equity
Main arena: all levels of government

Some of the solutions are more immediately applicable than others given the current political climate at the federal level (and some state levels). However, the idea here is not simply to present what is politically feasible. We seek to articulate not only what is immediately needed to reinforce our current system, but the solutions that will deliver the long-term restructured framework we need to secure racial equity.

While we argue that proactive systemic solutions will be essential to the achievement of racially equitable employment outcomes in the United States, we also realize that we need a well-functioning, reactive anti-discrimination system. But our existing, largely reactive system — as created by Title VII and implemented by the under-resourced EEOC — must be vastly improved with the adoption of several systemic solutions.

REACTIVE SYSTEMIC SOLUTIONS

As defined in the bulleted list above, these types of solutions will remove immediate barriers to justice within the current *reactive* Title VII legal/administrative system, with the main arena comprising courts, EEOC, and Congress. The main goals of these solutions are as follows:

- **To promote the inclusion** of various workers of color who are currently underserved or excluded by Title VII, federal and/or state policymakers can advance various systemic solutions. That includes Congress formally expanding Title VII protections by explicitly banning discrimination based on gender-identity/expression and sexual orientation (i.e., passing the Employment Non-Discrimination Act), and based on intersectional identities (e.g., a single discrimination claim brought by a black woman based on her *combined* race and gender, as opposed to requiring her to file a race claim and a gender claim) of more than one protected category. The status quo leaves the question of whether these groups are protected open to the EEOC's or federal judges' interpretations.

"We need to do more to punish the worst actors — those that repeatedly violate people's rights and the law, and simply pay fines, settle with gag agreements, or [where] the EEOC can't find enough blatant evidence to support a claim, . . . [and employers who] have the resources to drag out these cases when plaintiffs don't have jobs or money to fight lengthy lawsuits. . . . We need to put those companies on blast even more. There could be a publicly accessible database with claims, violations, and current pending suits for folks to be able to look through."

- Latina advocate for restaurant, retail, and domestic workers in Colorado

"[Energies should be focused on i]solated work place conditions where workers either have a real or perceived power dynamic."

- Latino advocate for restaurant workers in California

Equity Pressures

"Internal organizing is the strongest tool I've seen inside of a workplace. The legal process is usually slow and unreliable, so in general, it's more successful if you are able to organize workers together for a direct action (signing petition, march on the boss, picket, strike, etc.) for actual changes."

- Multiracial, gender-nonconforming advocate for nurses in California

"Because discrimination and exploitation go hand in hand in many industries, worker organizations should have a racial justice analysis specific to their industries and strategies based on that analysis. I think nail salons have specific issues because they are small businesses, and many owners are people of color [or immigrants] themselves . . . who have experienced discrimination and are passing it on."

- Latina advocate for nail salon workers in New York



Another inclusive upgrade would be explicitly banning discrimination based on immigration status under Title VII. Currently, national origin status serves as an inadequate proxy for immigration status. This makes it difficult to prove a discrimination claim if documented co-workers of the same national origin were not harassed or mistreated in the same way.

Finally, the vast majority of domestic workers are left uncovered by Title VII because they are not employed in businesses with at least 15 employees. Women of color are overrepresented in this industry, where they can be subjected to extensive sexual and/or racial harassment. They are also often excluded from overtime pay laws, which greatly contributes to occupational segregation in our employment system (e.g., the overrepresentation of women of color in poverty-wage occupations). State-mandated Bills of Rights for domestic workers can close part of this gap to help protect these workers, and raise the standard of pay, treatment, and expectations (see “**Profiles in Action II: NDWA Domestic Worker Bill of Rights (Massachusetts)**” earlier in this report and the “Equity Mandates” discussion below).

- To **expand access** to those the law ostensibly protects, we must increase funding for legal services for low-income workers of color and undocumented workers of color. In addition, to provide teeth to the protection against the “disparate impact” of so-called “race-neutral” policies on workers of color, Congress should clarify that disparity data alone can serve as a basis for such disparate impact claims (i.e., remove the “specific practice” requirement).

Moreover, as the National Employment Lawyers Association has championed for years, we must restore worker rights by limiting forced arbitration and/or raising the standards of fairness within the largely employer-controlled system of arbitration. And while we work to get Congress to act, federal agencies such as the Department of Labor can also pass rules granting more independent contractors “presumptive status” as employees in order to expand Title VII anti-discrimination protection to this growing set of workers.

“[Organizations should engage in c]oncerted activities to shut down production and services. Concerted activities to draw in community and protest against conditions to slow economy and affect business as usual.”

- Black male union-advocate for public sector workers in North Carolina

“[The focus should be on d]irect action in the workplace and union-organizing to protect workers who take collective action.”

- White female advocate for nurses in Washington

“[The] EEOC has made it possible for people of color to obtain employment; however, punitive work practices prevent [them] from moving up. [Organizations’] work should focus on [fostering] intentional promotions and movement of low-level workers to mid and upper levels of management.”

- Black female advocate for women workers in Wisconsin

Equity Mandates

“[Worker organizations should be m]aking livable wages and benefits a consistent part of racial justice claims in the workplace – even where no OPEN discrimination exists.”

- Black male advocate for health care workers in Connecticut

“[Focus energy on i]mmigration reform.”

- A multiracial advocate for farmworkers in Florida

“[Placing racial] hiring requirements [on employers].”

- Multi-state Latina worker-advocate for construction, waste, and recycling workers

PROACTIVE SYSTEMIC SOLUTIONS

Equity Pressures

As defined earlier, these types of solutions will boost or promote worker and/or consumer power to advance proactive, racial equity policies and practices with “voluntary” employers/industries. The main arena for this is worker/consumer campaigns negotiations, and the EEOC and the main goals are as follows:

- To **shift focus toward racial outcomes** and away from legal debates about employer intentions, journalists and researchers should investigate and report on the progress (or lack thereof) in racial employment outcomes at the completion of the EEOC’s multi-year consent decrees with employers. They can also measure, study, and share the relative impact of specific “injunctive relief” provisions in a sample of the EEOC’s negotiated settlements. This could include non-monetary remedies like requirements to proactively recruit applicants from people of color pools, to set hiring goals, and to incorporate more extensive record-keeping and external monitoring. Congress could greatly support this critical evaluation/impact research through grants and expanded resources to the research staff at the EEOC, so that the lessons learned from any such success stories can be shared widely.



The anti-discrimination causes of worker advocates and their consumer allies could benefit tremendously if the EEOC annually produced and publicized a list of industries with the most woeful records of per capita racial discrimination – by type of claim and for specific populations – and of industries and/or employers with the best record of racially equitable outcomes.



While the intentions of policymakers and certainly advocates behind the growing list of state and local “Ban the Box” policies are likely true, more research must be done to measure and publicize the effects, if any, of those policies on racial employment outcomes. Are formerly incarcerated, African-American and Latino persons benefiting from these restrictions on asking

job applicants if they have a criminal record, or is that true of only similarly situated White individuals? If these policies are not having a positive effect on racial outcomes in employment, we need the evaluation data and stories to pressure employers to go further to affirmatively create genuine opportunities for formerly incarcerated individuals.

- A proactive struggle against employment discrimination must also **challenge societal stereotypes** about workers of color, and the related myth of universal meritocracy. Just because individual initiative can help a handful of individuals overcome extreme obstacles and succeed, doesn’t mean that millions of people who are struggling have not shown initiative and hard work. Moreover, it doesn’t mean that the obstacles that disproportionately impact workers of color are just. In fact, they are unjust. Therefore we need journalist, researcher, and advocate investigations and presentations of workers’ stories that challenge myths about workers of colors “choosing” to remain in lower-income positions.

We must develop, use, and share mobile apps and social media efforts that inspire the public to communicate the importance of racial equity in employment. Such public input and pressure can push employers to voluntarily implement the best employment practices to improve racial outcomes. We must also continue to expand employer awareness of unconscious/implicit bias and its role in perpetuating systemic racism. Systemic solutions in this vein focus less on changing the implicit biases of specific individuals and decision makers in a workplace, and more on reforming that workplace’s policies and practices to remove the opportunities for implicit bias to operate, or to otherwise check its ability to influence key employment decisions.

- To further the above racial equity goals and others, proactive **supporters of racial equity in business could formally organize** to share and publicly commit to pro-equity principles and best practices. For example, on Women’s Equity Day in August 2016, the Obama Administration announced that 29 major employers – including Apple, CVS, Facebook, Target, and Visa – had newly committed to the “White House

Equal Pay Pledge,” bringing the total to more than 50 companies.⁵³ According to the White House, these pledged employers are “acknowledging the critical role businesses must play in reducing the national pay gap, committing to conducting an annual company-wide gender pay analysis across occupation, reviewing hiring and promotion processes and procedures to reduce unconscious bias and structural barriers, . . . [and] pledging to . . . identify and promote other best practices that will close the national wage gap to ensure fundamental fairness for all workers,” among other commitments. There’s no reason why the White House could not advance a similar and/or expanded Racial Equity Pledge with employers nationwide to build this movement. Similar efforts can be made at the state and/or local level of government for smaller businesses, and worker organizations already advance regional cohorts of “high-road” employers such as Restaurant Opportunities Center United’s RAISE (Restaurants Advancing Industry Standards in Employment) program, which facilitates the learning and sharing of equitable, best employment practices.⁵⁴

- To **expand access** to Title VII and knowledge about impermissible employment practices, Congress must provide extended resources to allow the EEOC to expand employer education and trainings on the best strategies and tactics for proactively combatting employment discrimination. Worker organizations also need resources to support joint efforts to develop and share principles that will raise awareness of and achieve racial equity in employment.
- To **promote inclusion**, we must expand awareness of multi-layered identities as well as an understanding that discrimination can occur at the intersections of race and gender, race and gender identity/expression, and race and national origin. For example, in June 2016, Race Forward’s Colorlines.com published a Special Report titled “How to Get Away With Harassing, Firing or Never Even Hiring a Trans Worker of Color,” which profiled the compounded challenges that transgender workers of color often face in the workplace.

PROACTIVE SYSTEMIC SOLUTIONS:

Equity Incentives

As defined earlier, these types of solutions will create government incentives for business adoption of racial equity best practices to combat unconscious and hidden biases. The main arena will be all levels of government, and the EEOC, and the main goals are as follows:

- Government can and must play a prominent role in **shifting our collective focus from reactive anti-discrimination protections to proactive systemic solutions** to prevent racial discrimination in the first place. By providing training resources on best employment practices, tax breaks, and other means of discrimination prevention, public servants and officials can provide incentives to employers who might not otherwise consciously devote time and energy to researching equitable employment practices. Ideally, Congress would provide the EEOC with additional resources to greatly expand and update its training and workshops on equity-driven decision-making practices. But in the meantime, the federal agency could promote an emphasis on impact and racial outcomes by devoting more of its educational and outreach resources to **evaluating the impact their proactive trainings have** on the employers who attend. For example, the EEOC could track and report on the number of trained businesses that have adopted more equitable practices for processing applications and recruiting people of color candidates both internally and externally.



It’s also critical that resources promoting equity-driven decision-making practices to employers do so with an institutional focus — that is, less concern for changing the intentions of any one or two individual decision-makers, and more for identifying and removing opportunities for unconscious bias to operate in both the short- and long-term. Moreover, in order for the EEOC and equivalent state agencies to be truly impactful, they must be vigilant in ensuring that the success of their workshops is measured by more than simply increasing numbers of attendees. It would

be better for the EEOC to train fewer employers, and devote remaining resources toward follow-up surveys and interviews on the implementation of covered best practices, or on the collection of other employment data to document any positive changes in racial outcomes that occur post-training. A good area to devote training resources would be in the industries with some of the widest racial disparities — in other words, where occupational segregation is the worst.

- To provide incentives to businesses to hire and retain workers of color at greater rates, federal, state, and local governments can **provide tax breaks or subsidies to businesses that employ targeted populations** such as the formerly incarcerated. One such program is the federal Work Opportunity Tax Credit (WOTC), first signed into law in 1996, and recently renewed through 2019. Employers can also receive tax credits under the WOTC for veterans, residents of federally designated empowerment zones, and Food Stamp recipients. It's important to note, however, that an employer who hires workers of any race or ethnicity that falls into one of these target group categories can be eligible for the WOTC. Therefore, to achieve the goal of closing the racial gaps in employment outcomes, the government must collect and assess the year-over-year racial makeup of comparable employers who do or do not make use of the tax credit.

Ideally, governments could provide tax breaks or subsidies for businesses that adopt specific best practices for promoting racial equity in hiring, retention, and promotion. Industries with particularly poor records on occupational segregation — such as the construction industry, with its persistent underrepresentation of women of color — could be given bidding preference for incorporating Racial Equity Impact Assessments (REIAs) into their employment decision-making process, or for attaining some sort of “Racially Equitable Business” certification.

PROACTIVE SYSTEMIC SOLUTIONS
Equity Mandates



As defined earlier, these types of solutions will legally mandate equitable employment best practices, especially proactive and preventative measures that advance systemic equity. All levels of government will be in this arena.

Beyond equity pressures and government incentives, another way to proactively promote racially equitable practices and outcomes is to pass legislation or other contractual agreements that require the adoption, implementation, and/or evaluation of the best employment practices. One example at the local level is to **incorporate the robust collection and monitoring of worker demographics** into project labor agreements and/or business license requirements. State and local governments could also **require annual reporting on equity indicators and goals** — for example, if race and gender disparities persist after three years, governments could mandate corrective actions. (See “Profiles in Action I: Los Angeles Black Worker Center,” earlier in this report, for a discussion of an effective neighborhood-based hiring requirement in a state with an anti-affirmative action statute.)



When the U.S. Congress can be persuaded to be more equity-minded, it could also **mandate “hiring goals” for businesses in industries with particularly large racial gaps in occupations, wages, and benefits**, as reported in EEOC data. Even in the face of Supreme Court anti-affirmative action rulings that have banned explicit quotas, the EEOC has successfully negotiated “hiring goals” with robust monitoring requirements into consent decrees with businesses that are facing discrimination charges in court. Congress would likely need to recalibrate the “disparate impact” standards by which businesses are judged. Occupational disparities that vary widely from the available pool of “qualified” applicants should be presumed to be at least partially the result of employment practices. Guidelines for appropriate remedies could be developed by EEOC staff, worker advocates, and business interests.



To promote inclusion, each state legislature can **pass a Worker Bill of Rights** in its jurisdiction to not only provide Title VII-style *reactive* protection as described above, but also to address other ways that excluded workers are systematically discriminated against by law. For example, in September 2016, California passed overtime protections for agricultural workers, who have been excluded from this aspect of the state’s wage standards for decades.



Endnotes

1. David B. Rodriguez and Barry R. Weingast, "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation," *University of Pennsylvania Law Review* Vol 151: 1417-1542, 2003.
2. Section 706(g), emphasis added.
3. Section 707(a).
4. Robert D. Loevy, *To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964*, p. 258.
5. *Ibid.*
6. Section 703(h)
7. Clark-Case memorandum, as quoted by Rodriguez and Weingast, p. 1514.
8. *Ibid.*
9. Section 703(j).
10. Clark-Case memorandum, as quoted by Rodriguez and Weingast, p. 1514.
11. Alfred W. Blumrosen, *Black Employment and the Law*, p. 68, emphasis added.
12. *Wall Street Journal*, April 12, 1967, at 1, col 6, as cited by Herbert Hill in "The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law," *Berkeley Journal of Employment & Labor Law* Vol. 2, Issue 1, Spring 1997. p. 32.
13. House hearing on equal employment opportunity enforcement procedures, cited by Herbert Hill in "The Equal Employment Opportunity Acts of 1964 and 1972," p. 31.
14. David Rosenbaum, "At Last a Weapon for the Commission," *NY Times*, 1972, as cited by Herbert Hill in "The Equal Employment Opportunity Acts of 1964 and 1972," p. 33.
15. Karen E. DeWitt, *Labor Report 1973*, as cited by Herbert Hill in "The Equal Employment Opportunity Acts of 1964 and 1972." p. 62.
16. U.S. House Committee on Education and Labor, "Report together with Minority and Separate Views on Equal Employment Opportunities Enforcement Act of 1971" (Report No. 92-238), 92nd Congress, 1st Session. June 2, 1971, p. 8. Same text is in U.S. Senate Committee on Labor and Public Welfare, "Report together with Individual Supplemental Views on Equal Employment Opportunities Enforcement Act of 1971" (Report No. 92-415), 92nd Congress, 1st Session, Oct 28, 1971, p. 5.
17. *Ibid.*
18. *Ibid.*
19. EEOC, "Systemic Discrimination," <https://www.eeoc.gov/eeoc/systemic/>.
20. EEOC Annual Report 1973, as cited by Herbert Hill Hill in "The Equal Employment Opportunity Acts of 1964 and 1972," p. 59.
21. Interview with David A. Copus, 1973, as cited by Herbert Hill in "The Equal Employment Opportunity Acts of 1964 and 1972," p. 62.

22. EEOC News Release, 1973, cited by Herbert Hill “The Equal Employment Opportunity Acts of 1964 and 1972,” p. 62.
23. Karen E. Dewitt, Labor Report 1973, cited by Herbert Hill “The Equal Employment Opportunity Acts of 1964 and 1972,” p. 61.
24. EEOC, “Focusing Enforcement Efforts on Systemic Discrimination,” <https://www.eeoc.gov/eeoc/history/35th/1970s/focusing.html>.
25. EEOC, “Employment Tests and Selection Procedures,” https://www.eeoc.gov/policy/docs/factemployment_procedures.html
26. LDF, “Landmark: Griggs v. Duke Power Co.,” <http://www.naacpldf.org/case/griggs-v-duke-power-co>.
27. Ibid.
28. Alfred W. Blumrosen, “Strangers in Paradise,” 70-71.
29. Ibid, p. 70.
30. Kevin Stainback and Donald Tomaskovic-Devey, Documenting Desegregation: Racial and Gender Segregation in Private-Sector Employment Since the Civil Rights Act, Russell Sage Foundation, New York. 2012, p. 158.
31. Attorney General Statement 1990, as cited by Neal Devins, in “Reagan Redux: Civil Rights Under Bush,” William & Mary Law School Scholarship Repository – Faculty Publications, Paper 429, p. 984, <http://scholarship.lawwm.edu/facpubs/429>.
32. Bush 1990 Remarks, 1990, as cited by Devins, p. 985.
33. The survey sample was primarily collected using a direct email, “snowball” sampling method of approximately 200 worker advocates/organizations rather than a random sampling method from a comprehensive list of such individuals. A total of 64 respondents completed the survey. For a more complete discussion of the methodology used and a download of our complete survey questions, please visit raceforward.org
34. See U.S. Employment Opportunity Commission, Women of Color: Their Employment in the Private Sector. Washington, D.C., July 2003, available at <https://www.eeoc.gov/eeoc/statistics/reports/womenofcolor/index.html>.
35. Across the 40 substantive questions in the survey, an average of 4.5 respondents chose “N/A: Don’t know” when given the choice, leaving an average of 59.5 “knowledgeable respondents” per question. Unless otherwise noted, figures cited in the body of this report are about knowledgeable respondents. For this particular set of six questions on explicit and/or intentional discrimination, an average of 4.8 respondents chose “N/A: Don’t know.”
36. Eleanor J. Choi and James R. Spletzer, “The declining average size of establishments: evidence and explanations,” <http://www.bls.gov/opub/mlr/2012/03/art4full.pdf>.
37. As one Asian American male advocate for New York-based Asian-American journalists told us: “[I]t’s in the culture of the American workplace. There are bureaucratic institutions in place designed to ‘protect’ employees, but the process of engaging in them precludes a lot of people from sufficiently raising the issues. Many of us are just resigned to navigating such types of discriminations. I think that the literal diversifying of workplaces, especially on the management level, will go a long way to redress some of these grievances.”
38. Joseph Dalia, “Memorandum to Clark Taylor – Re: Exchange Posts Re: EEOC Problems,” National Employment Lawyers Association (NELA) and The Employee Rights Advocacy Institute for Law & Policy, June 9, 2015, provided to Race Forward by NELA staff.
39. EEOC, “What You Can Expect After a Charge is Filed,” <https://www.eeoc.gov/employers/process.cfm>, accessed 5/4/16.
40. Carmen Comsti, “A Metamorphosis: How Forced Arbitration Arrived in the Workplace,” <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1466&context=bjell>.
41. Kim, Pauline. “Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC,” Washington University in St. Louis School of Law – Legal Studies Research Paper Series, Paper No. 15-04-01, April 2015, p.1150. Electronic copy available at: <http://ssrn.com/abstract=2611761>.
42. James Finberg, oral remarks, “Panel 2: Procedural Barriers to Discrimination Cases,” Hastings Law Journal Symposium – The Status of Antidiscrimination Law & Litigation, February 12, 2016, San Francisco.

43. Shannon McCaffrey and Bill Rankin, "Workers Who Cry Foul Seldom Get a Day in Court," *Atlanta-Journal Constitution*, Oct 18, 2013, citing a 2013 study by attorneys Amanda Farahany and Tanya McAdams of decisions on defendants' motions for summary judgment in the Northern District of Georgia 2011-12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326697.
44. See <http://www.naacpldf.org/case-issue/hithon-v-tyson-foods-inc>.
45. EEOC, "Charge Statistics FY 1997 Through FY 2015" and "Charge Statistics FY 1992 Through FY 1996," accessed 9/14/16 at <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> and <https://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm>.
46. For the full opinion of *University of Texas Southwestern Medical Center v. Nassar* - 570 U.S. __ (2013), see https://www.supremecourt.gov/opinions/12pdf/12-484_0759.pdf.
47. "EEOC Reaffirms Commitment to Protecting Undocumented Workers From Discrimination," <https://www.eeoc.gov/eeoc/newsroom/release/6-28-02.cfm>, accessed June 2, 2016.
48. Telephone interview with District of Columbia District Court Judge Ellen Huvelle, conducted 3/2/16.
49. See <https://www.akingump.com/en/lawyers-advisors/donald-r-livingston.html>; accessed June 2, 2016.
50. The EEOC documents these counts in its annual Performance Review Report (PAR). In 2015, the agency reported reaching over 300,000 people and its offices participated in over 3,700 no-cost educational, training, and outreach events. Representatives from the EEOC, including its current chair Jenny Yang, often cite an increased number of events and attendees as evidence of its impact through education and outreach.
51. Urban Institute, "Evaluation of EEOC's Outreach and Education," OIG Project Number 2014-03-OE, retrieved from <https://oig.eeoc.gov/eeoc-education-and-outreach-program-0>.
52. Donald Tomaskovic-Devey, "Written Testimony," EEOC at 50: Progress and Continuing Challenges at Eradicating Employment Discrimination, EEOC, Washington, D.C., July 1, 2015, available at: <https://www.eeoc.gov/eeoc/meetings/7-1-15/devey.cfm>.
53. Office of the Press Secretary, The White House, "Fact Sheet: White House Announces New Commitments to the Equal Pay Pledge," Statements & Releases, accessed at <https://www.whitehouse.gov/the-press-office/2016/08/26/fact-sheet-white-house-announces-new-commitments-equal-pay-pledge> on August 26, 2016.
54. For more information about RAISE, see <http://rocunited.org/our-work/high-road/raise/>.

Acknowledgements

Funding and Partner Organizations

Confronting Racial Bias at Work: Challenges and Solutions for 21st Century Employment Discrimination was made possible by the generous support of the following foundations:

W.K. Kellogg Foundation
NoVo Foundation
Embrey Family Foundation
Moriah Fund
Surdna Foundation

Race Forward would also like to thank the following representatives from the three organizations featured in this report:

Mahoma Lopez, Co-Executive Director, Laundry Workers Center
Lola Smallwood Cuevas, Co-Founder, Los Angeles Black Worker Center
Natalicia Tracy, Executive Director, Brazilian Immigrant Center

We also extend our appreciation to the following public servants at the Equal Employment Opportunity Commission (EEOC) who we interviewed during the research phase of this project:

Evangeline Hawthorne, National Outreach Coordinator
Ronald Edwards, Director, Program Research and Surveys Division
Michael Rojas, Outreach Program Coordinator, New York District Office
William R. Tamayo, District Director, San Francisco District Office

Research

Principal Investigator:

Dominique Apollon, Research Director

Supporting Research and Writing:

Tara L. Conley, Senior Research Associate
Julia Sebastian, Research Associate
Vishnu Sridharan, Research Consultant

Additional Research and Writing:

Terry Keleher, Thought Leadership and Practice Specialist
Yu-Hui (Amy) Lin, Research Consultant

Background Research:

Brittaney Carter, Goldman School MPP, Research Consultant
Jillian Medeiros Perez, former Senior Research Associate

Editing

Rinku Sen, Executive Director
Michell Speight, Director of Programs
Rebekah Spicuglia, Director of Strategic Communications & Public Engagement
Nikko Viquiera, Program Associate

Graphic Design

13 Milliseconds

Erin Zipper, Senior Graphic Design Manager

Development

Jai Dulani, Senior Development Manager

Aimee Walker, Director of Development

Copy Editing and Proofreading

Kathryn Duggan

Chaitali Sen

Executive Director

Rinku Sen

Advisors and Consultants

Many thanks to all those formal and informal advisors and consultants who contributed information, insights, and connections for portions and earlier phases of this project, including the individuals listed below. Any errors of fact or judgment found herein are that of the Principal Investigator.

Kylar Broadus, Senior Public Policy Counsel, National LGBTQ Task Force

Kathryn Abrams, Hirma Hill Kay Distinguished Professor of Law, UC Berkeley

Francis Calpotura, former Interim Managing Director, Race Forward

Terisa E. Chaw, Executive Director, National Employment Lawyers Association (NELA)

Kareem Crayton, Visiting Professor of Law, Vanderbilt Law School

Marisa Diaz, Ruth Chance Law Fellow, Equal Rights Advocates

Victor Goode, Associate Professor, CUNY School of Law

Fatima Graves, Vice President for Education and Employment, National Women's Law Center

Hosea H. Harvey, Associate Professor of Law, Temple University

Deepa Iyer, Senior Fellow at Center for Social Inclusion and Board Chair at Race Forward

Saru Jayaraman, Co-Founder & Co-Director, Restaurant Opportunities Center (ROC) United

Olatunde Johnson, Jerome B. Sherman Professor of Law, Columbia Law School

Matthew C. Koski, Program Director, NELA

Linda Hamilton Krieger, Professor of Law, William S. Richardson School of Law, University of Hawai'i at Mānoa

Ian Haney López, John H. Boalt Professor of Law, UC Berkeley

Jeremiah Lowery, Research and Policy Coordinator, Restaurant Opportunities Center of Washington, DC

William C. McNeill III, Senior Staff Attorney and Racial Equity Program Director, Legal Aid Society-Employment Law Center

ReNika Moore, former Director of the Economic Justice Group, NAACP Legal Defense & Educational Fund

Dorian T. Warren, Fellow at the Roosevelt Institute and former Board Member at Race Forward

Liz Watson, Senior Counsel and Director of Workplace Justice for Women, National Women's Law Center

Participants at our September 2012 convening on race and low-wage worker sectors:

Sean Basinski, Street Vendor Project

Dawn Chase, NAACP

Milly Hawk Daniel, PolicyLink

Hilary Klein, Make the Road New York (MRNY)

Fekak Mamdouh, Restaurant Opportunities Centers (ROC) United

Nadia Marin Molina, National Day Laborer Organizing Network (NDLON)

Jose Oliva, ROC United

Ai-jen Poo, National Domestic Workers Alliance

Maggie Priebe, Working America

Saket Soni, New Orleans Workers' Center for Racial Justice (NOWCRJ)

Valeria Treves, formerly of New Immigrant Community Empowerment (NICE)

Haeyoung Yoon, National Employment Law Project (NELP)

