

TITLE VII AT FIFTY YEARS: A SYMPOSIUM

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The UNLV William S. Boyd School of Law hosted the 8th Annual Colloquium on Current Scholarship in Labor and Employment Law on September 27 and 28, 2013 in Las Vegas, Nevada. The Colloquium provided an opportunity for labor and employment law scholars to present works-in-progress and receive feedback from their colleagues in the field.¹

Participants discussed developments in labor and employment law in the workplace law landscape of Las Vegas. Las Vegas is considered to be a global playground, but this image obscures the hard work and difficult issues that exist “behind the curtain.”² With one of the highest percentages of union-represented workers in the country,³ Las Vegas is one of the last union towns in the United States. This is a paradox because Nevada is a “right to work” state, a state that guarantees to employees the “right” not to join a union.⁴ Colloquium attendees learned about the impact that the Culinary Workers Union has had on the Las Vegas hospitality industry and the Las Vegas community. Professor Ruben Garcia moderated a panel discussion with members of the union at a dinner at the union hall on Friday, September 27, 2013.

The Colloquium also presented a number of panels on issues surrounding the law of collective bargaining as well as law related to the employment relationship in non-union workplaces. Some of the panels included: *A Labor History and Pedagogy: Protecting Employee Voice and Rights to Organize; Reforming Work and Labor Law; Politics at Work: Dissent, Tenure and Judicial Roles; Empirical Perspectives on Employee Privacy, Safety and Employment Law; Work Law, Employment Status, Class and Gender; Employee Benefits and Detriments; and At-Will, Class and the Regulation of Employee Capital.*

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¹ *8th Annual Colloquium on Current Scholarship in Labor and Employment Law*, UNLV WILLIAM S. BOYD SCH. OF L., <http://law.unlv.edu/LaborLaw2013> (last visited May 13, 2014).

² *See id.*

³ Nicholas Riccardi, *Right-to-Work Nevada a Rare Bright Spot for Labor*, AP (Dec. 17, 2012, 3:25 AM), <http://bigstory.ap.org/article/right-work-nevada-rare-bright-spot-labor>.

⁴ *Id.*

The Colloquium was unique also because of the approaching 50th Anniversary of the Civil Rights Act of 1964.⁵ Title VII of the Civil Rights Act, which forbids discrimination in employment based on race, color, national origin, religion, and sex, was enacted on July 2, 1964.⁶ In many ways, Las Vegas represents the past and future of anti-discrimination law. Casinos located on the famous Las Vegas Strip were strictly segregated until 1960; before 1960, even famous black entertainers such as Sammy Davis Jr. could not stay in a Strip hotel.⁷ Blacks in Las Vegas lived in the segregated West Las Vegas, where the Moulin Rouge Hotel, Las Vegas's first racially integrated hotel and casino, opened on May 24, 1955.⁸ Many black and white celebrities visited and performed at the Moulin Rouge, including, among others, Lena Horne, Duke Ellington, Harry Belafonte, Jack Benny and Frank Sinatra.⁹

Although it was open for only about six months, the Moulin Rouge's popularity led to the desegregation of casinos on the Las Vegas Strip.¹⁰ In 1960, at the threat of a march to desegregate the casinos on the Strip, the Nevada governor brokered a meeting of hotel owners, state and local officials, and local black leaders that resulted in an agreement that the Strip hotels would desegregate.¹¹

Las Vegas, and more broadly, the casino industry in Nevada, is also an important center for studying and understanding issues of gender. I often tell those who ask about my research that the Las Vegas Strip is my laboratory because of the unique overlap of employment and gender issues presented by the casino hotels.¹²

For example, many outsiders find the regulation and control of the costuming and hiring of Las Vegas cocktail servers troubling, and arguably contrary to the dictates of Title VII's sex discrimination prohibition. I agree, but the issue is more complicated than many suggest. Casino jobs offer to many women living in Las Vegas middle class salaries, benefits, and lifestyles unheard of for hospitality or other blue-collar workers in many cities. There is a

⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

⁶ 42 U.S.C. §§2000e to 2000e-17 (2012).

⁷ Michael Lyle, *Black Community Pushed to End Racial Discrimination in Las Vegas*, LAS VEGAS REV. J. (Feb. 15, 2014, 9:36 PM), <http://www.reviewjournal.com/news/black-community-pushed-end-racial-discrimination-las-vegas>.

⁸ John Przybys, *Moulin Rouge's Brief, Shining Moment to Shine Once More*, LAS VEGAS REV. J. (May 19, 2013, 12:53 AM), <http://www.reviewjournal.com/entertainment/arts-culture/moulin-rouges-brief-shining-moment-shine-once-more>.

⁹ *On This Date: May 29, 2003 The Closed Moulin Rouge Caught Fire*, LAS VEGAS 360 (May 29, 2013), <http://www.lasvegas360.com/2634/moulin-rouge/>.

¹⁰ *Id.*

¹¹ Claytee White, *The March that Never Happened: Desegregating the Las Vegas Strip*, 5 NEV. L.J. 71, 82 (2004).

¹² See generally Ann C. McGinley, *Masculinity, Labor and Sexual Power*, 93 BOSTON U. L. REV. 795 (2013); Ann C. McGinley, *Trouble in Sin City: Protecting Sexy Workers' Civil Rights*, 23 STANFORD L. & POL'Y REV. 253 (2012); Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229 (2007); Ann C. McGinley, *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER, L. & POL'Y 257 (2007) [hereinafter McGinley, *Babes and Beefcake*]; Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65 (2006).

serious question as to whether as a matter of policy the law should interfere with the employee's choice to work in those positions and to adhere to the employers' sexy dress codes, especially in the unionized casinos.

On the other hand, in *Jespersen v. Harrah's Operating Co., Inc.*,¹³ a case about a female bartender in Reno, Nevada who was fired for refusing to wear makeup, the Ninth Circuit concluded in an *en banc* decision that the casino's gender-based dress code did not violate the prohibition against gender discrimination in Title VII.¹⁴ But the case may be even more important for its dicta than for its holding. While holding for the casino, a majority of the *en banc* court stated that it would be illegal for the employer to use dress codes that unreasonably sex-stereotype the individual.¹⁵ It seems from this language that the employer who seeks to sexualize female cocktail servers would have to prove that female sexuality is a bona fide occupational qualification ("BFOQ") for the job.¹⁶ Given that the BFOQ is a very narrow exception to Title VII, there is a serious question as to whether a casino employer could prove a BFOQ defense if sued for hiring only women, or only women with a particular sexy look, or for demanding that their female employees wear sexy costumes.¹⁷ The dicta in *Jespersen*, then, is intriguing because it raises the question of whether it would be permissible for a casino owner to regulate female employee dress in a way that sex stereotypes the women. Given the importance and prominence of the female cocktail server in the Las Vegas casino industry, this language should not be taken lightly.

Jespersen led to an important symposium at Duke Law School on performing gender in the workplace,¹⁸ to many other articles on gender and work,¹⁹ and to a study that I conducted with Professors Tracey George of Vanderbilt and Mitu Gulati of Duke of how the Las Vegas courts, employment lawyers, casino managers and women who work in the casinos reacted to the decision.²⁰ It is just one example of the importance of Nevada to the anti-discrimination laws. The unique combination of labor issues presented by the heavily unionized workforce and the gender issues present in the casino industry make Nevada and Las Vegas in particular an important locale for studying labor and employment law, especially Title VII law.

Many of the panels at the Colloquium dealt with the law of Title VII and other anti-discrimination law statutes. Panels on anti-discrimination law included: *Identity and Discrimination Models*; *Disability Law After the ADAAA*; *Anti-discrimination and the Equal Opportunity Principle*; *Labor Concepts in Anti-discrimination Law in the Changing Economic Environment*; *Comparative Labor, Employment and Anti-discrimination Law*; *Proving Employment Discrimination in the 21st Century*; *Analyzing the Intersection of*

¹³ *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

¹⁴ *Id.*

¹⁵ *Id.* at 1111–13.

¹⁶ See McGinley, *Babes and Beefcake*, *supra* note 12.

¹⁷ *Id.*

¹⁸ *Groundbreaking Symposium Explores Trends in Employment Discrimination*, DUKE LAW (Oct. 12, 2006), <http://law.duke.edu/features/2006/makeuppromo/>.

¹⁹ 14 DUKE J. GENDER L. & POL'Y 1–560 (2007).

²⁰ Tracey E. George et al., *The New Old Legal Realism*, 105 NW. L. REV. 689 (2011).

Work and Family Law; and *Examining the 2012-2013 Supreme Court Decisions*.

To commemorate the 50th Anniversary of Title VII, at the Colloquium, I moderated a lunch panel entitled *Title VII at its 50th Anniversary and its Importance to Labor and Work Law* where Professors Vicki Schultz of Yale Law School and Tanya Hernandez of Fordham Law School discussed the past and future of Title VII and its relationship to other employment law issues. Professor Schultz discussed, "Rationalizing the Workplace: Title VII's Lasting Contribution after 50 Years." Professor Hernandez examined, "The Judicial Understanding of Unconscious Racism in Employment Discrimination Cases: A Tale of the 'Good, the Bad and the Ugly.'" ²¹

This issue of the *Nevada Law Journal* publishes a selection of the papers presented at the Colloquium and other papers submitted for a symposium issue on Title VII to commemorate the 50th Anniversary of Title VII. Given the importance of the anti-discrimination law in Nevada in particular and to the rest of the U.S., I am honored to write this introduction to the Title VII symposium. While the casinos in Nevada were desegregated before the passage of the Civil Rights Act, there is no question that the federal law enabled the hiring and promotion of many women and persons of color in the industry. It is particularly fitting that this *Nevada Law Journal* issue include as well a mini-symposium on Nevada law on the 150th anniversary of Nevada's statehood. ²²

The articles selected for the symposium on Title VII have an interesting scope, both procedurally and substantively. They range from the undue prevalence of summary judgment grants to defendants in Title VII cases to the Supreme Court's recent case limiting the procedure for bringing a retaliation claim under Title VII, from the importance of the National Labor Relations Board to the enforcement of Title VII principles to the Equal Employment Opportunity Commission's interpretation of the disparate impact cause of action to forbid employers from automatically refusing to hire employees with arrest or conviction records. They focus on procedure and substance, disparate treatment and disparate impact models of discrimination, models of proving causation in Title VII cases, retaliation, the Equal Employment Opportunity Commission's procedures, the National Labor Relations Board's recent decisions interpreting provisions of the National Labor Relations Act that complement remedies for Title VII protected classes in non-unionized workplaces, how bullying and harassment interact in workplaces, and the question of whether diversity is a justification for color- and race-based decision making in workplaces. A number propose statutory amendments and/or new federal law, including amendments to Title VII, to bolster the rights of employees to benefit from the anti-retaliation provisions, a proposal that we continue strengthening the NLRA, and a proposal that would add a federal anti-bullying statute to complement Title VII.

²¹ The tradition of awarding the Paul Steven Miller Scholarship Award to a member of the labor and employment law professoriate continued. Past honorees include Professors Michael J. Zimmer and Charles Sullivan. This year's awardee was Professor Marley Weiss of the University of Maryland, Francis King Carey School of Law.

²² See Jeffrey W. Stempel, *Symposium: Nevada Law at 150*, 14 NEV. L.J. 831 (2014).

In *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*,²³ Theresa Beiner continues her scholarship on the intersection of employment discrimination and summary judgment. She explains that employment discrimination scholars have lamented the frequency with which courts grant summary judgment in employment discrimination cases, and criticizes *Torgerson v. City of Rochester*,²⁴ an Eighth Circuit case that explains that there is no discrimination law exception to the rules on summary judgment.

Professor Beiner demonstrates through statistics and anecdotal evidence, that courts, instead of treating employment discrimination cases as exceptions to summary judgment, actually ignore the difficulty of demonstrating intent without a fact hearing, and grant summary judgment when there are significant factual disputes. Unlike other types of federal cases where courts refuse to grant summary judgment because of issues of intent, in Title VII cases, courts often ignore the thorny issue of intent and usurp the role of the fact finder.

In essence, Professor Beiner agrees and disagrees with *Torgerson*. She agrees that there is no “special rule” about employment discrimination cases and summary judgment. But, she disagrees with the courts’ application of this general principle. She argues that, in reality, courts bend over backwards in employment discrimination cases to grant summary judgment even though if they were to apply the rules and principles regarding genuine issues of material fact and the difficulty of proving intent neutrally there would be far fewer summary judgments of employment discrimination cases.

Professor Beiner argues that federal courts are biased toward defendants in employment discrimination cases. Beiner cites statistical proof that demonstrates that when acting as fact finders, trial judges find for plaintiffs in employment discrimination cases much less frequently than juries do.²⁵ Furthermore, she points to former federal Judge Nancy Gertner’s claim that judges, while believing that they are unbiased, are actually biased in favor of defendants. This occurs, according to Gertner, because judges do not see the strongest cases and they write detailed opinions when granting summary judgment, thereby creating the impression that all employment discrimination cases are frivolous.²⁶ Moreover, Beiner notes that Gertner states that during judicial training for federal judges, the trainer instructed the judges on “how to get rid of” employment discrimination cases.²⁷ She concludes that courts should be more cautious about granting summary judgment in employment discrimination cases, especially because of our knowledge of unconscious biases, some evidence that judges, like other human beings, are subject to these biases, and the difficulty of determining intent from a dry, paper record.²⁸

Like Beiner, Professor Mike Zimmer criticizes the judicial lack of forbearance when it comes to Title VII cases. While Beiner disagrees with the lower

²³ Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673 (2014).

²⁴ *Torgerson v. City of Rochester*, 643 F. 3d 1031, 1031 (8th Cir. 2011).

²⁵ Beiner, *supra* note 23 at 694–95 nn.147–54 and accompanying text.

²⁶ *Id.* at 697 nn.160–62 and accompanying text.

²⁷ *Id.* at n.163 and accompanying text.

²⁸ *Id.* at 704.

courts for their hair-trigger decisions to grant summary judgment, Zimmer condemns the United States Supreme Court for its willingness to ignore the plain text of Title VII in order to avoid an excess of retaliation cases in the federal courts and frivolous lawsuits. Zimmer, in *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*,²⁹ argues that it is time for Congress to pass a Civil Rights Restoration Act. He criticizes the Supreme Court's recent jurisprudence, which he believes is contrary to the text and the spirit of the 1991 Civil Rights Act. In *Nassar*, the Court concluded that the "motivating factor" test is inapplicable to prove "mixed motives" in cases brought under Title VII that allege retaliation for opposing illegal practices or participating in legal processes to redress a Title VII violation.

42 USC Sec. 2000e-2(m) states: "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice even though other factors also motivated the practice."³⁰

Once the plaintiff proves that an illegal consideration motivated an employment practice, the burden of persuasion shifts to the defendant to prove by a preponderance of the evidence that it would have "taken the same action in the absence of the impermissible motivating factor."³¹

These provisions were added to the statute in the 1991 Civil Rights Act ("CRA of 1991") where the Congress partially overruled the holding of *Price Waterhouse v. Hopkins*.³² The CRA of 1991 makes clear that once an employee establishes that an unlawful reason is a motivating factor for the adverse employment action, the plaintiff has established a violation.³³ At this point, the employer may respond by proving that it would have taken the same action even if it had not been motivated by the illegal factor.³⁴ If the employer can prove that it would have taken the same action, it can reduce the plaintiff's remedies to some types of injunctive relief and attorney's fees.

In retaliation claims, the illegal action is for the employer to retaliate against the employee for opposing illegal discrimination or for participation in a process that investigates, or prosecutes illegal discrimination. Thus, Professor Zimmer notes, retaliation is an "unlawful employment action" that is referred to under Section 2000e-2(m). Therefore, he concludes that the language of the statute permits plaintiffs to prove unlawful retaliation by using the motivating factor test, which is considered to require lesser proof than the but for test. The obvious result of *Nassar*, Zimmer explains, is to make it more difficult for plaintiffs to prove retaliation claims against their employers.³⁵

²⁹ Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*, 14 NEV. L.J. 705 (2014).

³⁰ 42 U.S.C. § 2000e-2(m) (2012).

³¹ 42 U.S.C. § 2000e-5(l)(2)(B).

³² 42 U.S.C. § 2000e-2(m) (overruling *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), by setting forth the applicable standards for "mixed motive" cases).

³³ *Id.*

³⁴ 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

³⁵ Zimmer, *supra* note 29 at 705 n.5 and accompanying text.

Professor Zimmer argues that rather than adhering to the text of the statute, the Supreme Court “slices and dices” the language of the statute, constructs its own language that replaces that of the statute by differentiating between “status discrimination” and “retaliation” and, therefore, misinterprets the statute.³⁶ Given that many members of the majority favor using plain language for statutory interpretation, Professor Zimmer queries why the Supreme Court ignored the plain language of Title VII, and substituted its own language for that of Congress. He notes that the current majority of the Supreme Court is hostile to Title VII cases and he explains that in the *Nassar* decision itself the Court focused on the increase in retaliation claims and on their concern about frivolous lawsuits.³⁷ Thus, he suggests, as Professor Beiner does in her article, that the courts’ jurisprudence is swayed by its misplaced concerns about the prevalence and strength of Title VII suits brought before the courts. Zimmer concludes that Congress, not the Supreme Court, should make the decision, and he urges Congress to amend the Act to permit proof of retaliation by using the motivating factor test.

In *Lessons from the Dolphins/Richie Incognito Saga*,³⁸ Kerri Lynn Stone examines the gendered and racial elements of the well-publicized dispute between Jonathan Martin, the Miami Dolphins NFL football team’s starting right tackle and his teammate, Richie Incognito. Martin, an African American man who graduated from Stanford, accused Incognito, a white man, of bullying him, and using racial epithets when talking to him. Martin walked out on the team and checked himself into a psychiatric facility. The first reaction in the news media seemed to be surprise that a 312-pound pro-football player who is 6’5” tall could be bullied by another. Professor Stone argues that Title VII is not necessarily capable of dealing with all race- and gender-based discriminatory treatment. In fact, the courts require a showing that an “adverse employment action” occurred or that harassment rose to the level of severe or pervasive. As a result, much invisible and “de minimus” discriminatory behavior will escape scrutiny under Title VII.³⁹ Stone demonstrates, however, that much of this behavior can be extremely harmful as was the behavior that was directed at Jonathan Martin. She proposes that a federal bullying statute be enacted to complement Title VII.⁴⁰

Stone uses Title VII analysis to consider the popular reaction to Martin’s behavior. For example, in hostile work environment cases based on sex, the plaintiff must prove that the alleged illegal behavior was unwelcome. Often courts will conclude that the plaintiff demonstrated that she welcomed the behavior by engaging in sexually-based joking or other similar behavior.⁴¹ Jonathan Martin went along with his teammates and responded to the ridicule and racially derogatory terms by using those terms himself. For some, this par-

³⁶ *Id.* at 713 nn.45–46 and accompanying text.

³⁷ *Id.* at 719 nn.73–76 and accompanying text.

³⁸ Kerri Lynn Stone, *Lessons from the Dolphins/Richie Incognito Saga*, 14 NEV. L.J. 723 (2014).

³⁹ See Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

⁴⁰ Stone, *supra* note 37 at 727 nn.26–31 and accompanying text.

⁴¹ See, e.g., *Beard v. Flying J, Inc.*, 266 F.3d 792, 798 (8th Cir. 2001); *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 966 (8th Cir. 1999).

icipation was confusing, but Stone argues that it does not signify that he welcomed the behavior.⁴² Instead, it shows that, like women alleging sexually hostile environments, Martin was trying to fit in by adopting the behavior that was directed at him.⁴³

To me, it was odd that the media invariably described the Martin case as exclusively about race. Because the relationship occurred between two male football players, the media was blind to the very clear gendered implications of the Martin-Incognito relationship. Masculinities theory demonstrates that masculine behavior is not a natural result of the physical manifestation of the male body. Instead, it is a society's judgment of how men should act.⁴⁴ Martin, by being too "soft" or, in his own words, "a pussy," was ridiculed by his teammates.⁴⁵ This ridicule served as a means of competition among the teammates to prove their own masculinity and to attempt to toughen up Martin so that he would conform to group norms of masculinity. This is clear gender discrimination, but many courts and commentators would not see the gender discrimination because the behavior occurred in an all-male, tough environment. We expect men who play football to be the most masculine men of all, and therefore, we conclude that the behavior is just "hazing" or "roughhousing" and that it has nothing to do with illegal harassment based on gender. This conclusion, however, merely refuses to see the harm that men can do to other men when they attempt to prove their own masculinity and demand that others adhere to their standards.

Professor Michael Z. Green, in *How the NLRB's Light Still Shines on Anti-Discrimination Law Fifty Years After Title VII*,⁴⁶ examines the "[u]nlikely impact of the National Labor Relations Board ("NLRB" or "Board") on anti-discrimination law principles used to protect employees."⁴⁷ Like Professor Stone, Green suggests that another statute (in his case, the NLRA, and in hers a proposed federal anti-bullying statute) can be useful in supplementing the rights and remedies established in Title VII. Green contends that the NLRB plays an important role in enforcing anti-discrimination law principles. That role has been more pronounced during the Obama administration, whose Board has dealt with issues surrounding the right to concerted behavior granted by Section 7 of the National Labor Relations Act ("NLRA") and its enforcement provision, Section 8(a)(1), which makes it an unfair labor practice for an employer to interfere with the employees' rights to concerted action.⁴⁸

The interesting point is that until recently many employers were unaware that the NLRA protects employees even in non-union workplaces.⁴⁹ Given the decline of unionism in the U.S. workforce and the inability of Title VII to address certain issues through agency action of the Equal Employment Oppor-

⁴² Stone, *supra* note 37 at 734 n.70 and accompanying text.

⁴³ *Id.* at 746–47 nn.146–54 and accompanying text.

⁴⁴ See Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326, 337 (2013).

⁴⁵ Stone, *supra* note 37 at 750 n.173 and accompanying text.

⁴⁶ Michael Z. Green, *How the NLRB's Light Still Shines on Anti-discrimination Law Fifty Years After Title VII*, 14 NEV. L.J. 754 (2014).

⁴⁷ *Id.* at 754 nn.3–4 and accompanying text.

⁴⁸ *Id.* at 756–61.

⁴⁹ *Id.* at 767 n.105 and accompanying text.

tunity Commission (“EEOC”), or through legislative change, Green argues, the protections provided by NLRB decisions are particularly important to protect against illegal discrimination in the workplace.⁵⁰ The Obama administration’s NLRB has held that it is illegal for employers to enforce policies against non-unionized employees that prohibit them from discussing salaries or other confidential information, that prohibit disparagement of the employer, and that limit certain communications on social media.⁵¹ It has also held that limitations on employees’ use of class actions in arbitrations violates the Act.⁵² Green concludes that it is crucial for those concerned about the rights of employees protected by the anti-discrimination statutes to oppose the recent efforts to defang the NLRB because the Board not only protects concerted activity generally, but also protects speech and other concerted activity engaged in by employees who are trying to resist an employer’s discriminatory policies.⁵³

Professor Tammy Pettinato, in *Defying “Common Sense?”: The Legitimacy of Applying Title VII to Employer Criminal Records Policies*,⁵⁴ examines the use of Title VII disparate impact theory to challenge employer policies that limit hiring of persons with convictions and arrest records. Given that arrests and convictions disproportionately affect the communities of black and Latino men, Pettinato explains that disparate impact, which makes it illegal for an employer to use hiring or employment policies that create a disparate impact on a protected group if the employer cannot prove that the policy is job-related to the specific job in question and consistent with business necessity,⁵⁵ is a particularly appropriate tool for examining the employer’s reasons for refusing to hire an individual.⁵⁶ She posits that Latino and black men constitute two-thirds of the prison population in the U.S.,⁵⁷ and argues that it is harmful to society if we permit employers to render whole groups of society unemployable without making individual determinations.⁵⁸ Pettinato gets this point right. Michelle Alexander, in *The New Jim Crow*, ably demonstrates that black and Latino working class and poor communities have been subject to extreme police behavior bordering on military action as a result of the “War on Drugs.”⁵⁹ “Stop and Frisk” tactics predominate in these neighborhoods, leading inevitably to a disproportionate number of arrests and convictions of young blacks and Latinos, even though drug use in the white community is approximately equal

⁵⁰ *Id.* at n. 756 nn.13–14 and accompanying text.

⁵¹ For more information on NLRB position on social media policies, see generally Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L. J. 75 (2012).

⁵² Green, *supra* note 45 at 756 n.13 and accompanying text.

⁵³ One example of recent efforts to limit the NLRB’s power is the case currently before the Supreme Court that seeks to overturn President Obama’s recess appointments to the Board. *See* Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013), *cert granted sub nom*, NLRB v. Noel Canning, 133 S.Ct. 2861 (2013).

⁵⁴ Tammy R. Pettinato, *Defying “Common Sense?”: The Legitimacy of Applying Title VII to Employer Criminal Records Policies*, 14 NEV. L.J. 770 (2014).

⁵⁵ 42 U.S.C. § 2000e-2 (k) (2012).

⁵⁶ Pettinato, *supra* note 53 at 776, 776 n.47.

⁵⁷ *Id.* at 770 n.5 and accompanying text.

⁵⁸ *Id.* at 778.

⁵⁹ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4–8 (2010).

to that in black and Latino communities.⁶⁰ Moreover, the “no tolerance” movement in the schools has also led to criminalization of behavior by minority boys that many see as a pipeline to the prison system.⁶¹

Pettinato explains that in 2012 the EEOC promulgated an enforcement guidance that encourages employers to rely less on bright-line exclusionary policies and more on individualized assessments of applicants and employees.⁶² These assessments do not discourage the use of criminal records to make hiring and other employment decisions, but urge individual determinations that take into account multiple factors, including the facts or circumstances of the offense, the number of offenses, the individual’s age at time of conviction, evidence that the individual performed the same type of work after release without incident, the length and consistency of the individual’s employment history, etc.⁶³

Pettinato then explains that even though the new guidance is a version of a previous EEOC policy, there has been substantial negative reaction to the guidance.⁶⁴ One prominent reaction came from a group of nine state attorneys general who made various arguments against the policy.⁶⁵ Pettinato addresses all of the criticisms of the attorneys general, ultimately demonstrating that their opposition is largely groundless.⁶⁶ She concludes that the letter of the attorneys general constitutes an indirect attack on the legitimacy of the EEOC and on the disparate impact theory of discrimination, and argues that Congress, not the EEOC, would be the appropriate recipient of the letter because the EEOC is properly enforcing Title VII law through its adherence to the guidance.⁶⁷

In *Misconstruing Notice in EEOC Administrative Processing & Conciliation*,⁶⁸ Angela Morrison argues that federal courts are misapplying the EEOC’s notice requirements in the administrative processing and conciliation of employee charges of discrimination against employers. Morrison explains that federal courts have recently dismissed cases brought in federal court by the EEOC on the basis that during the administrative procedures when the charge was before the EEOC there was insufficient notice to the employer.⁶⁹ Morrison argues that the purposes and effect of notice differ during the EEOC process and civil litigation, and, therefore, defendants should not be permitted to claim in subsequent civil litigation an affirmative defense of lack of notice during the administrative proceedings.⁷⁰

⁶⁰ *Id.* at 191.

⁶¹ *Id.* at 11.

⁶² See EEOC ENFORCEMENT GUIDANCE, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 8 (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

⁶³ Pettinato, *supra* note 53 at 773 n.18 and accompanying text.

⁶⁴ *Id.* at 771–72 n.11 and accompanying text.

⁶⁵ *Id.* at 772 n.12 and accompanying text.

⁶⁶ *Id.* at 775–84 nn.43–90 and accompanying text.

⁶⁷ *Id.* at 784.

⁶⁸ Angela D. Morrison, *Misconstruing Notice in EEOC Administrative Processing & Conciliation*, 14 NEV. L.J. 785 (2014).

⁶⁹ *Id.* at 786 n.3 and accompanying text.

⁷⁰ *Id.* at 779, 776–77 nn.45–51 and accompanying text.

To understand Morrison's arguments, one must examine the differences between the power and authority of the EEOC in its administrative role during the charge processing phase and the role of the EEOC as a plaintiff in civil litigation brought subsequent to filing and investigation of a charge. When an individual files a charge with the EEOC, the EEOC investigates the charge. In doing so, it sends notice to the employer of the charge. At this point, the EEOC is acting as a neutral investigator whose ultimate purpose is to attempt to conciliate the claim. In this process, the purpose is to notify the defendant employer to begin its own investigation and to preserve records that may become relevant further on during the administrative process and, if it occurs, subsequent litigation.⁷¹ After the EEOC conducts the investigation, which includes the right to subpoena documents from the employer, the EEOC engages in an evaluation of the substance of the charge as well as an attempt to conciliate the charge. If and when the conciliation fails, the EEOC must notify the employer of its failure. At this point, while most charging parties must find an attorney to further prosecute their claims in state or federal court, the EEOC selects a number of cases to litigate on behalf of a class or an individual in court. It is in response to the EEOC's filing of a complaint in federal court that Morrison tells us that employers have recently asserted an affirmative defense or have filed motions to dismiss the Commission's complaint based on inadequate notice in the claims processing stage at the EEOC. Courts are split on the merits of this practice, but many, according to Morrison, are confused about the difference between the purposes of the notice in both fora.⁷²

Morrison argues that it is important to understand the different purposes of the EEOC processes and civil litigation. While civil litigation may result in an adjudication of liability against the employer, the EEOC investigation and conciliation process merely gives the employer the opportunity voluntarily to conciliate the claim.⁷³ Thus, she argues that the due process concerns for each forum differ significantly. As there is no risk of adjudication or liability as a result of the EEOC processes, there are fewer due process concerns. Moreover, the EEOC's determination of whether or not probable cause exists has no preclusive effect on subsequent litigation. In contrast, at the litigation stage where the EEOC serves as the plaintiff, notice to the employer is crucial because there will be a final judgment, and potential liability as a result of the civil litigation.

Professor Kingsley Browne, in *Title VII and Diversity*,⁷⁴ argues that even though the United States Supreme Court sanctioned the use of affirmative action for remedial purposes in *United Steelworkers v. Weber*⁷⁵ and *Johnson v. Transportation Agency, Santa Clara County*,⁷⁶ the Supreme Court would likely

⁷¹ *Id.* at 789–90 nn.25–34 and accompanying text.

⁷² *Id.* at 792–94.

⁷³ *Id.* at 794–95.

⁷⁴ Kingsley Browne, *Title VII and Diversity*, 14 NEV. L.J. 806 (2014).

⁷⁵ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979) (holding that a program between the union and the employer to permit 50 percent of the slots in a training program to go to black employees was permissible given the union's failure to permit blacks entry into job training programs in the past).

⁷⁶ *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (permitting affirmative action in a gender case where gender was one of many factors considered and there were no women of

not find that diversity is a legitimate reason for taking race (and perhaps, gender) into account in hiring or promotion decisions.⁷⁷ Browne employs a color-blind approach and questions diversity as a justification for using race-based decision-making under Title VII. In doing so, he argues from the plain language of Title VII, and states that after *Johnson*, corporations have shifted from a remedial approach to affirmative action to a forward-looking “instrumental rationale” that corporations name “diversity.”⁷⁸ He notes that corporations have concluded that diversity is good for business, but he disputes that argument, stating that the studies are mixed, at best, in demonstrating that diversity actually enhances business.⁷⁹ In fact, he argues that the support for diversity is really a type of a “customer preference” argument, which traditionally the courts have rejected as a basis for taking one’s protected characteristics into account.⁸⁰ He properly notes that Congress did not provide the bona fide occupational qualification (“BFOQ”) exception for race, and that even for sex, the BFOQ exception is a narrow one, one with which the diversity rationale would not fit comfortably. He concludes by arguing that Congress would have to amend the statute to permit diversity as a justification for racial or gender preferences in employment decisions, and even if it did, a diversity rationale may violate the equal protection clause of the United States Constitution.⁸¹

These articles present a rich array of topics and treatment of important Title VII issues. There is no question that Title VII has worked exceedingly well in many respects. There are many more women in professional and managerial positions than ever before. Persons of color are beginning to move up in professions and businesses. But in many ways Title VII has moved slowly. It has moved forward, but on a number of occasions the United States Supreme Court has contracted the interpretation of the statute, moving it backwards. Frequently, in response to the Court’s contraction of Title VII rights, Congress has intervened to overturn the limiting interpretations of the Supreme Court. This is a slow, and time-consuming process. I hope that in the next fifty years Title VII will continue to move forward to protect workers’ rights without the backward movements, to prevent discrimination and to make whole those who have suffered from discrimination. Only if the statute is permitted to soar, and the courts reject the temptation to restrict the meaning of Title VII, will it be an instrument of equality that will live up to its promise fifty years ago.

nearly 400 in the skilled trade job category to which a woman was promoted over the male plaintiff).

⁷⁷ Browne, *supra* note 73 at 817.

⁷⁸ *Id.* at 813–14 nn.48–49 and accompanying text.

⁷⁹ *Id.* at 815–17 nn.54–67 and accompanying text.

⁸⁰ *Id.* at 817 n.70 and accompanying text.

⁸¹ *Id.* at 830 n.160 and accompanying text.