

Reinforcing Title VII with Zero Tolerance Rules

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I. INTRODUCTION

Employment discrimination remains a difficult and stubborn workplace problem for both employees and employers. Some of this wrongful conduct reminds us of terrible historical events. For example, in one case black workers reported being compared to slaves and monkeys.¹ In another case, black workers complained about repetitive racial slurs, acts of intimidation, and assaults with bats.² One Florida case included complaints from black workers about a hangman's noose, prominently displayed in the company's stockroom where it remained for many years.³ A black worker was told that the noose was used to hang blacks.⁴

These cases, along with equally offensive acts of sexual harassment, remind us that American workers retain a strong taste for discrimination.⁵ Discrimination is occurring at every level, from the shop floor to the boardroom.⁶ Despite the extensive array of laws prohibiting discriminatory employment practices, discrimination remains a fixture in the workplace. This reality humiliates employee victims and exposes employers to liability. This liability, in part, forces employers to consider ways of limiting discriminatory behavior in the workplace. Many employers have decided that the costs and harm associated with discrimination can be controlled by zero tolerance rules.

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1. See *Walker v. Thompson*, 214 F.3d 615, 619 (5th Cir. 2000) (detailing racial slurs aimed at African-American employee).

2. See *Race Harassment Suit Against Louisiana Car Dealership Settled for \$200K*, Lab. L. Rep.-Empl. Prac. Guide (CCH) at 3 (Sept. 7, 2000) (summarizing racially hostile work environment that led to suit).

3. See *Race Harassment Suit Settled for \$249K Against Florida Citrus Grower*, Lab. L. Rep.-Empl. Prac. Guide (CCH) at 1 (Nov. 16, 2000) (detailing supervisor and coworker discriminatory actions).

4. *Id.* at 7; see also Fred Tasker, *Nooses as Racial Threats Still a 'Disturbing' Reality Bigotry, 1991 Law Prompts a Rapid Rise in Lawsuits*, MIAMI HERALD, Mar. 2, 2001, at 1A (noting EEOC acting on and investigating dozens of employment noose cases across country).

5. See *White v. N.H. Dep't of Corr.*, 221 F.3d 254, 258 (1st Cir. 2000) (describing how female employee was subjected to sexual jokes, pornographic magazines, and descriptions of sexual experiences); *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 59 (2d Cir. 1998) (recounting male co-worker's sexual comments to female worker, touching her breast, and exposing his genitals).

6. See Courtland Milloy, *Texaco Taps a Deep Well of Racism*, WASH. POST, Nov. 10, 1996, at B1 (documenting discriminatory employment behavior of Texaco executives).

Along with these rules, employers often provide education and training about Title VII of the Civil Rights Act of 1964 (Title VII), and the employer's expectations with respect to workplace behavior. Employers often discharge violators of zero tolerance rules on the first offense.

Critics of zero tolerance rules argue that such severe punishment can disregard employees' job expectations and interests, particularly in a unionized setting where the employer needs "just cause" to discharge an employee.⁷ They also argue that such policies can polarize the workplace and deny employees their statutory remedies.⁸ Further, they argue that the education and training that normally accompany such rules are not effective in changing workplace behavior.⁹

The basic premise of this article is that regulation, public or private, can affect workplace behavior. This article evaluates the potential of private regulation, that is, zero tolerance rules to deter and reduce workplace discrimination. Part II traces the evolution of equal employment laws from Reconstruction to Title VII and argues that Title VII has failed to achieve its deterrence and compensation goals. The statute's preoccupation with intent proof requirements, its stringent procedural burdens on employees, and its limited remedial potential give discrimination victims only partial remediation. Moreover, although courts have interpreted the statute to permit narrow forms of affirmative action, it does not assure fair treatment at the outset. As such, the statute has had only a limited effect on workplace culture.

While statutory prohibitions remain the foundation of workplace equality,¹⁰ the task of promoting or achieving fair treatment cannot be left to the law alone. Part III looks at zero tolerance rules as a complement to Title VII. It shows the operation of such rules in a variety of labor and employment contexts, and argues that such work rules have helped establish workplace

7. See Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, Or Has the Media?*, 8 TEMP. POL. & CIV. RTS. L. REV. 351, 373 (1999) (noting risk of zero tolerance rules punishing employees for trivial conduct); see also Robert Perkovich & Anita M. Rowe, "What Part of 'Zero' Don't You Understand?": *The Arbitration of Sexual Harassment Discipline and "Zero Tolerance" Policies*, 36 WILLAMETTE L. REV. 749, 780-81 (2000) (describing implementation of broad and stringent zero tolerance policies). Perkovich and Rowe highlight that employers have adopted harassment policies so broad as to affect all workers in order to qualify for the two-prong affirmative defense to a harassment claim, despite the Supreme Court linking the affirmative defense to a claim for supervisory harassment only. Perkovich & Rowe, *supra*, at 777-80.

8. See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3, 41-44 (2001) (noting anti-discrimination training geared towards fulfilling affirmative defense requirement often produce counter-productive effects).

9. *Id.* at 31-44 (recounting several studies and anecdotal evidence of negative effects of discrimination training programs); see also Ken May, *Workplace Violence Programs Described at High Security Workplace*, 38 Gov't Empl. Rel. Rep. (BNA), No. 1879, at 1085 (Sept. 26, 2000) (suggesting underreporting as possible effect of zero tolerance policies because workers view discharge as too harsh).

10. *But see* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 263-66 (1992) (arguing antidiscrimination laws foreclose opportunity to disadvantaged employees).

culture on issues such as stealing, drug and alcohol abuse, fighting or violence, and sleeping on the job.

Part IV looks at the proliferation of zero tolerance rules regulating the behavior employment discrimination laws prohibit. It considers the interests of employees in not being subjected to arbitrary discipline, particularly when they are protected by contract, and argues that such rules can help create a fair treatment culture and inculcate the values incorporated in employment discrimination laws.¹¹ It argues further that an employee's first priority or expectation is fair treatment, rather than compensation for abusive treatment; this is consistent with Title VII's goals.¹²

II. TITLE VII'S FAILURE

Employment discrimination laws have failed to effectively confront the difficult problems of racism and sexism as barriers to equal employment opportunity. In enacting Title VII, Congress did not create a structure that guaranteed equal opportunity for all workers. In fact, Title VII permits discrimination.¹³ These realities led to a history of tortured interpretation that

11. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (endorsing employer action to curb discrimination).

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

Id. (citations omitted); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1619 (1991) (observing transformation in public attitude toward racial discrimination in decade after Title VII's passage); see also Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 311-12 (1996) (explaining notion that speech regulation teaches public acceptable attitudes towards racism and sexism).

12. See *Ellerth*, 524 U.S. at 764 (noting deterring discrimination top priority of Title VII). The Supreme Court has also advocated this view by deciding that avoiding discrimination is a top priority of Title VII. *Id.* at 764.

13. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253-54 (1964) (prior to 1972 amendment). Title VII never attempted to eradicate all discrimination from the workplace because it does not apply to all employers. *Id.* at 253-54 (defining employers); see also 42 U.S.C. § 20003(b) (1988) (continuing to define employer according to subsequent amendments). In 1964, Congress limited coverage to employers with one hundred, seventy-five, fifty, and twenty-five employees respectively for years one through four, with twenty-five employees controlling thereafter. 78 Stat. at 253-54 (listing requirements for employer status under Act). Ironically, Congress was excluded, as were state and local governments. *Id.* at 253 (stating explicitly United States excluded from employer status). In 1972, Congress expanded coverage to employers with fifteen or more employees. Equal Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972). The 1991 Civil Rights Act expanded coverage to Congress, previously exempt state employees, and American employees abroad. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 117, 105 Stat. 1071, 1080 (1991) (expanding coverage to Congress); § 321, 105 Stat. at 1097-98 (encompassing previously exempt state

included the use of affirmative action in Title VII to account for historical discrimination and combat discriminatory practices that continue to this day.¹⁴ But such interpretation also bred resentment and opposition from white workers, which in some ways impeded popular support for equal opportunity.¹⁵

Direct confrontation of discrimination through express statutory provisions that provide for absolute prohibition of harmful workplace bias would have been preferable, but given Congress's most recent amendments to discrimination laws, legislatively unattainable.¹⁶ Also needed are proof and remediation vehicles that give discrimination victims a reasonable chance of success in court. Now, however, there is little chance of changing the proof structure that currently favors employers.¹⁷ More liberal provisions for damages would also advance the statute's deterrence and remediation goals.¹⁸ Issues of proof and remedy were vetted, however, in 1991 when Congress

employees); § 109, 105 Stat. at 1077-78 (including American employees abroad). Further, the Supreme Court has interpreted the statute to permit some discrimination. For example, in *Price Waterhouse v. Hopkins*, the Court ruled that an employer does not violate the statute simply because it is proven that illegal considerations played a role in its decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding employer avoids liability if preponderance of evidence shows same result without discriminatory motivation). The Civil Rights Act of 1991 modified the *Price Waterhouse* rules, but still tolerates some level of discrimination. The 1991 amendments provide for a violation if illegal conduct was the motivating force for the decision. See § 107, 105 Stat. at 1075. Thus, even if it is shown that discrimination played "a" role, an employer would not violate the law unless discrimination was the controlling reason for the decision. *Id.*

14. 42 U.S.C. § 2000e-5(g) (providing court-ordered affirmative action remedy for intentional unlawful employment practice). Despite the drafters' use of the term "affirmative action" in the statute, the Court has never interpreted this provision as providing a basis for race- or gender-based employment preferences. 42 U.S.C. § 2000e-5(g). Moreover, Title VII fails to expressly prohibit any consideration of an employee's race, color, religion, sex, or national origin in employment decisions. 42 U.S.C. § 2000e-2(a). Instead, the statute only prohibits discrimination "because of" the above-listed characteristics. *Id.*

15. See BRIAN K. FAIR, NOTES OF A RACIAL CASTE BABY 158 (1997) (citing argument against affirmative action as depriving white males of equal opportunity).

16. § 107, 105 Stat. at 1075-75 (amending Civil Rights Act of 1964). Congress confronted this issue in 1991 when it expanded and strengthened Title VII, but in doing so decided against a strict liability rule for employers who consider and rely on "any" prohibited consideration in addition to using legitimate concerns in making adverse employment decisions. See § 107, 105 Stat. at 1075-76 (allowing discrimination if employer proves same decision made in absence of discrimination).

17. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 534-35 (1993) (Souter, J., dissenting) (characterizing proof scheme, requiring direct evidence of discriminatory intent, as unfair to Title VII plaintiffs); see also *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 143 (2000) (applying, *arguendo*, Title VII framework, which places on plaintiff ultimate burden of proving intentional discrimination); *Hicks*, 509 U.S. at 511, 524 (refusing to change plaintiffs' ultimate burden of persuasion for Title VII cases). Title VII requires proof of discriminatory intent and the Supreme Court has repeatedly insisted that employees provide more than circumstantial proof that an employer was motivated by impermissible considerations. *Hicks*, 509 U.S. at 534-35 (Souter, J., dissenting) (characterizing direct evidence requirement for discrimination and employer's false nondiscriminatory excuse as "pretext-plus").

18. 42 U.S.C. § 1981(a)(1) (limiting recovery to intentional employment discrimination). In the Civil Rights Act of 1991, Congress provided a limited right of recovery to Title VII discrimination victims that was subject to various caps and other exclusions. 42 U.S.C. § 1981(b) (listing determination of punitive damages and exclusions and limitations on compensatory damages). These new damages provisions represent an expansion of statutory relief and therefore highlight the old and continuing determination that the suffering of discrimination victims has little value. *Id.*

amended Title VII and it is therefore doubtful that Congress will revisit these issues in the near future.¹⁹

Despite a growing perception that civil rights laws have created a landscape of equal opportunity, federal policymakers have not succeeded in drafting prescriptive, proof, remedial, and enforcement provisions in ways that would make equal opportunity achievable. Moreover, the evidence suggests that this was not even an objective policymakers were trying to achieve.²⁰ Policymakers favoring civil rights had to accommodate the interests of employers who were generally antagonistic to the compensatory and redistributive goals of equal employment laws.²¹ Their compromises weakened the resulting rules both with respect to what they prohibited and how they punished violators.²² The result of these legislative compromises is that discrimination in the workplace has thrived because the statutes tolerate a degree of abuse despite their declarations of equality.²³

19. See Civil Rights Standards Restoration Act, S. 1776, 103d Cong. (1993); H.R. 3680, 103d Cong. (1993) (responding legislatively to *Hicks*). Attempts to overturn post-1991 Supreme Court decisions narrowly interpreting the statute have had limited congressional support. The Civil Rights Standards Restoration Act, for example, was a failed attempt at overruling the Court's decision in *Hicks*, which undervalued an employee's circumstantial proof in discriminatory treatment litigation. H.R. 3680, 103d Cong. (1993).

20. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 350-52 (1977) (examining legislative purpose for preserving seniority systems under Title VII).

21. *Id.* at 352-53 (revealing Title VII critics wanted to protect seniority systems). In fact, Congress prioritized for insulation seniority systems, which are especially effective at perpetuating the disparity of opportunity between white and non-white workers. *Id.* at 353 (noting seniority system "inevitably tends to perpetuate . . . effects of pre-Act discrimination"); see also 42 U.S.C. § 2000e-2(h) (providing for proof of intent to challenge seniority systems).

Notwithstanding any other provision of this chapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .").

42 U.S.C. § 2000e-2(h).

22. See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) (concluding § 1981 claim requires proof of discriminatory intent); *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) (holding plaintiff must prove discriminatory purpose for Fourteenth Amendment equal protection claim). Like Title VII, other employment discrimination laws also impose stringent proof requirements and significant limitations on recovery. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 391 (requiring proof of intent to discriminate); *Washington*, 426 U.S. at 242 (demanding showing of discriminatory purpose); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990) (noting only back pay available under Title VII prior to 1991 amendments); *Bruno v. W. Elec. Co.*, 829 F.2d 957, 967 (10th Cir. 1987) (concluding punitive damages not available under ADEA). Although § 1981 provided for compensatory and punitive damages, it did not prohibit sexual discrimination and harassment, thereby leaving an entire class of individuals to the limited remedial provisions of Title VII before the 1991 Amendments. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 424, 427 (7th Cir. 1989) (compensating sexual harassment victim under Title VII, equitable in nature).

23. See *EEOC Settles Racial Harassment Suit Against Car Dealerships*, Lab. L. Rep.-Empl. Prac. Guide (CCH) at 2-3 (Feb. 15, 2001) (reflecting doubling of race bias charges filed with EEOC in past decade). Recent lawsuits and settlements involving massive sums of money attest to the continuing vitality of discriminatory employment practices. See *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 688-89, 702 (N.D. Ga.

A. *The Evolution of Equal Employment Rules*

Although the Constitution and Congress declared general racial equality in the late 1800s, it was not until 1944 that the Supreme Court prescribed, albeit in a limited way, equal treatment of private sector workers.²⁴ In 1935 when sweeping labor legislation was enacted in the form of the National Labor Relations Act (NLRA),²⁵ no textual provision prohibiting race discrimination was included.²⁶ Moreover, the failure to require equal treatment in our labor laws was not an oversight. Civil Rights organizations had lobbied hard for the inclusion of such provisions to no avail.²⁷

The absence of limitations on racially oppressive workplace conduct ensured the unavailability of opportunity or protection for black workers under the NLRA. In *Steele v. Louisville & Nashville Railroad*,²⁸ the Supreme Court grafted a rule of equality onto the Railway Labor Act (RLA) and this served as the foundation for some equal treatment of workers in a unionized setting.²⁹ The *Steele* Court declared that blacks facing workplace discrimination are entitled to fair, impartial and good faith treatment by their union representatives.³⁰ Such a judicial response to the problem, however, was not an effective antidote for widespread racial abuses in the workplace.³¹

The *Steele* doctrine did not adequately respond to the breadth and severity of the problem of workplace bias. The doctrine of fair representation was neither a significant vehicle for addressing unfair treatment, nor was it capable of granting effective relief to discrimination victims. Rather than attacking discrimination at its source, the rule of fair representation sought to protect union prerogatives as well as relieve black workers from arbitrary and harmful

2001) (approving \$192.5 million settlement for class of African-American Coca-Cola employees); Bill Miller & David A. Vise, *U.S. Settles Job Bias Case; A Record \$508 Million Is Due Women in USIA Dispute*, WASH. POST, Mar. 23, 2000, at A1 (reporting huge settlement in gender bias suit).

24. U.S. CONST. amend. XIII, § 1 (abolishing slavery); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202-03 (1944) (holding under Railway Labor Act union representatives must represent black members fairly, without discrimination).

25. National Labor Relations Act, Pub. L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (codified as amended at U.S.C. §§ 151-69 (1994)).

26. See Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 HOUS. L. REV. 823, 851-52 (2000) (discussing resistance against inclusion of antidiscrimination provisions in NLRA).

27. See *id.* at 851-52 (describing black leaders' failed efforts to convince Congress to include racial discrimination prohibitions in NLRA).

28. 323 U.S. 192 (1944).

29. Railway Labor Act, Pub. L. No. 69-257, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (1994)). The RLA's limited duty of fair representation only addressed union representation misconduct. ch. 347, 44 Stat. at 577-78 (defining employees and their entitlement to representation in disputes). The issue of employer discrimination was still essentially unaddressed in the private sector. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (reviewing RLA fair representation requirement and imposing duty on unions to act reasonably).

30. See *Steele*, 323 U.S. at 202-03.

31. See *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46 (1979) (holding employees limited to damages compensating injury in breach of fair representation claims).

decision-making.³² Moreover, the rule's remedial framework could not effectively deter future violations.³³

Saddling victims of discrimination with the difficult burden of proving unfair treatment created no real chance of equal treatment and opportunity. In order to prevail, an employee had to prove, presuming they had the resources to sue, that the union ignored a meritorious grievance or processed a meritorious grievance in a perfunctory fashion.³⁴ If the practical and legal hurdles of such a regime were cleared, the best the employee could hope for was narrow job related relief.³⁵ A union that breached its duty of fair representation generally did not jeopardize its status as exclusive representative.³⁶ Because the duty of fair representation was weak and applied only to union actors, Congress was forced to respond to ongoing discriminatory practices by unions and employers two decades later.

B. Title VII of the 1964 Civil Rights Act

In the areas of labor and employment law, it took a century following emancipation before bias in the private sector workplace was specifically confronted on a national level. Constitutionalized equality after emancipation and reconstruction civil rights laws failed to expressly prohibit all discriminatory employment practices and establish a basis for equality.³⁷ This failure, in part, permitted the Supreme Court to interpret these laws as *not*

32. See *Sipes*, 386 U.S. at 177-78 (placing fair representation rule in its historical union context).

33. Indeed, breach of the duty may expose union to a limited amount of damages and a finding by the National Labor Relations Board that an Unfair Labor Practice was committed. See *Miranda Fuel Co.*, 140 N.L.R.B. 181, 190-91 (1962), *enforcement denied*, NLRB v. *Miranda Fuel Co., Inc.*, 326 F.2d 172 (2d Cir. 1962) (denying enforcement because discrimination unrelated to union membership). Notwithstanding the Second Circuit's denial of enforcement, the Board could only award loss of pay due to loss of seniority and back pay. *Miranda Fuel Co.*, 140 N.L.R.B. at 191 (referencing remedy from original decision and order in 125 N.L.R.B. 454, 457 (1959)).

34. See *Sipes*, 386 U.S. at 191 (prohibiting unions from arbitrarily dismissing or addressing valid grievances in untimely manner); see also *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (holding union breaches fair representation duty only for discriminatory, bad faith or arbitrary conduct).

35. See *Int'l Bhd. of Elec. Workers*, 442 U.S. at 51-52 (precluding punitive damage award for duty of fair representation breach).

36. The NLRB and Courts of Appeal have left open the issue of whether unions that breach their duty of fair representation should be stripped of their status as exclusive bargaining representatives. See, e.g., *Bell & Howell Co. v. NLRB*, 598 F.2d 136, 148 (D.C. Cir. 1979), *cert. denied*, 442 U.S. 942 (1979) (concluding challenge to union's sex discrimination appropriate in unfair labor practice proceeding); *NLRB v. Mansion House Ctr. Mgmt. Corp.*, 473 F.2d 471, 473 (8th Cir. 1973) (holding Board must withhold certification from discriminating union); *Handy Andy, Inc.*, 228 N.L.R.B. 447, 448 (1977) (overruling *Bekins Moving & Storage Co.* by holding employees must make challenge in unfair labor practice, not certification proceeding); *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138, 139 (1974) (refusing to certify union with discriminatory membership policy).

37. See U.S. CONST. amend. XIII, § 1 (abolishing slavery as employment practice); U.S. CONST. amend. XIV, § 1 (providing all persons equal protection of laws). Congress intended the Civil Rights Act of 1866 to breathe life into these constitutional amendments. Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

prohibiting some forms of discrimination.³⁸ Later regulation of employment relations during the New Deal intentionally omitted blacks as a protected class.³⁹ And, the Supreme Court's "regulatory foray" into this area in the *Steele* case had a very limited impact on workplace bias.⁴⁰

It was not until the 1960s, that Congress specifically addressed private sector bias in the field of employment. But, the express prohibitions that appeared in the Civil Rights Act of 1964 have been unsuccessful in eliminating bias.⁴¹ For example, the text of Title VII has, in some cases, been more effective in preserving and perpetuating racial disparities than in breaking down barriers to workplace equality.⁴²

Ironically, some of Title VII's potent provisions protect the interests and advantages of white workers.⁴³ This is a telling reality because Title VII was enacted to protect black workers' interests.⁴⁴ For example, the textual provisions on seniority make clear that seniority systems are immunized and in order to challenge them, one must satisfy the heavy burden of proving intentional discrimination.⁴⁵ Congress recognized that seniority systems allocated significant discriminatory advantages to white workers, which could serve as a continuing barrier to workplace opportunities for blacks.⁴⁶ Nonetheless, Congress made clear that seniority rules were carved out for

38. See *Hodges v. United States*, 203 U.S. 1, 14-15 (1906) (holding federal civil rights laws cannot protect black workers from private discrimination); *Civil Rights Cases*, 109 U.S. 3, 32 (1883) (stating "mere discriminations . . . not regarded as badges or [as] slavery"); *Slaughter House Cases*, 83 U.S. 36, 78-81 (1872) (explaining Fourteenth Amendment protects against discrimination by state action, not private discrimination).

39. See *Plass*, *supra* note 26, at 851-52 (discussing civil rights groups' failed attempts to include provisions prohibiting racial discrimination in NLRA).

40. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944) (interpreting RLA as obligating unions to represent all employees fairly, irrespective of race).

41. See *generally* Civil Rights Act of 1964, 78 Stat. 253, Pub. L. No. 88-352 (codified as amended at 42 U.S.C. §§ 2000e et. seq.).

42. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 352-53 (1977) (interpreting Section 703(h) of Title VII as protecting seniority policies that perpetuated discrimination).

43. *Id.* (preserving seniority systems under Title VII notwithstanding Congressional recognition of negative effect on black subordination); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (finding Title VII protects blacks and whites).

44. See Cong. Rec. S. Mar. 30, 1964 at 6547.

The Negro is the principal victim of discrimination in employment Discrimination affects the kind of jobs Negroes can get. Generally it is the lower paid and less desirable jobs which are filled by Negroes The shameful fact is that educated Negroes often are denied the chance to get jobs for which they are trained and qualified Even within their professions non whites earn much less than white people. It is a depressing fact that a Negro with four years of college can expect to earn less in his lifetime than a white man who quit school after the eighth grade. In fact, Negro college graduates have only half the lifetime earnings of white college graduates.

Id.

45. See 42 U.S.C. § 2000e-2(h) (describing seniority system immunity under Title VII).

46. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 352-53 (1977) (noting Congress's awareness of results flowing from immunizing seniority systems).

special protection while making Title VII less forceful in prohibiting and punishing racism.⁴⁷

Title VII is less than clear on the question of banning workplace bias. The statute prohibits discrimination “because of” race, sex and other characteristics.⁴⁸ This vague provision has given courts the discretion to conclude that some amount of discriminatory conduct is tolerable.⁴⁹ By permitting certain levels of discrimination, the statute sends the wrong signals about our national goal of equality. Battles over the statute’s intent requirements have detracted from Title VII’s goals and have limited the realization of equal treatment.⁵⁰ Ambivalence in the statute’s text permitted employers to adopt facially neutral practices with harmful consequences for equal opportunity.

As a practical matter, Title VII’s drafters could not legislate strict liability for all discriminatory conduct. The resulting compromise included barriers to equal opportunity such as intent requirements and accommodated subtle, creative and sophisticated discriminatory schemes.⁵¹ From Title VII’s inception, congressional toleration for stringent intent proof requirements has been a major barrier to equal employment opportunity.⁵²

Title VII’s declaration of equality attempted to confront overt racial practices. By the time the statute was enacted, however, employers and unions had already begun modifying their behavior to avoid the statute’s intent

47. See 42 U.S.C. § 2000e-2(h) (allowing different treatment based on seniority or merit, but not based on intention to discriminate). Notably, Title VII did not provide that mere reliance by an entity on any impermissible consideration would result in liability, thereby setting a zero tolerance standard for workplace bias. *Id.*

48. See 42 U.S.C. § 2000e-2(a)(1).

49. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989) (holding Title VII violation occurs when employer decisively relies on prohibited characteristics). *But see* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075-76 (1991) (adjusting *Price Waterhouse* standards). The new standards provide limited relief to discrimination victims when an employer makes a decision relying on both permissible and impermissible factors. *Id.*

50. See *Wards Cove Packing v. Atonio*, 490 U.S. 642, 656-57 (1989), *superseded by statute as stated in Smith v. City of Jackson*, 125 S. Ct. 1536 (2005) (unifying proof requirements for unfair treatment and disparate impact cases). This case made it more difficult to rely exclusively on statistical disparities to prove disparate impact discrimination. *Wards Cove Packing* remained good law until Congress overturned it as part of the Civil Rights Act of 1991.

51. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 518-19 (1983) (explaining employer intent only important if intent discriminatory). A black employee was not entitled to judgment as a matter of law notwithstanding the fact that the Court held that he made out a prima facie case and also proved that the employer’s explanation for discharging him was a lie. *Id.* at 509. Rather, the Court required the plaintiff to further prove that his employer was lying to cover up the discriminatory animus that drove the employment decision. *Id.* at 511; *see also* *Cal. Brewers Ass’n v. Bryant*, 444 U.S. 598, 609-11 (1980) (holding temporary/permanent employee classification fits within seniority system and therefore lawful under Title VII). Notably, in *Bryant*, no black worker had ever attained permanent employee status in the brewing industry due to failure to work forty-five weeks in one calendar year. *Bryant*, 444 U.S. at 611-12 (Marshall, J., dissenting).

52. See *supra* note 17 and accompanying text (discussing heavy intent proof burdens foreclose success rate on employment discrimination claims). Although widely recognized as daunting, Congress did not modify the discrimination victim’s stringent burden of proof when it amended Title VII in 1991.

requirement.⁵³ Recognizing that motive is elusive to proof, workplace discriminators adopted schemes designed to stymie equal opportunity, which, in some cases perpetuated workplace apartheid.⁵⁴ The statute was undermined by schemes such as educational requirements, job testing, and seniority rules that were facially neutral but served as major barriers to equal treatment.⁵⁵

By 1971, facially neutral but discriminatory practices were so pervasive and destructive to Title VII's goals that the Court, in response, grafted impact theory onto the statute.⁵⁶ Although lawmakers intended Title VII to specifically confront workplace racism, the law's textual mandates were not capable of keeping up with evolving unequal employment practices. Employers and unions had perpetuated discriminatory work environments by the time the Court announced that Title VII also prohibited practices fair in form but discriminatory in effect. This new rule, which attacked behavior that caused discriminatory consequences, held great potential for equal opportunity. In theory, such a statutory interpretation could force employers to examine their workplaces to determine whether conscious or unconscious racism was a barrier to equal access. But the discriminatory impact model has faced many challenges since its creation.⁵⁷

At first, the impact model had teeth because it mandated that racially exclusionary practices be justified by business needs.⁵⁸ In forcing employers to prove that facially neutral decision-making with adverse consequences was necessary as a business matter, the statute was capable of rooting out racism in

53. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (giving example of employer adding additional barriers after Title VII). Within five years of Title VII's enactment the Supreme Court had to create an impact theory to deal with employer practices that were fair in form but discriminatory in effect. *Id.* at 431.

54. See *Wards Cove Packing*, 490 U.S. at 662 (Blackmun, J., dissenting) (characterizing salmon industry in *Wards Cove Packing* as "overt and institutionalized discrimination"); *Griggs*, 401 U.S. at 427-28 (describing employer policies relegating black employees to "outside" coal handling jobs). *Wards Cove Packing* and *Griggs* both provide examples of employer hiring, transfer, and promotion practices that created a stratified workforce in which white workers held all of the desirable jobs while minority workers were assigned the less desirable positions. In *Griggs*, whites occupied all of the inside positions at the Dam River Steam Station while the black workers were assigned to the labor department by official company policy until 1965 and through various educational and testing prerequisites thereafter. *Griggs*, 401 U.S. at 427. Similarly, in *Wards Cove Packing*, minority workers held cannery jobs in the salmon cannery, which paid less than the noncannery jobs predominated by white workers. *Wards Cove Packing*, 490 U.S. at 647. Moreover, the segregation of nonwhite cannery workers from white noncannery workers in housing and dining facilities led Justice Stevens to compare the racial and ethnic stratification in the Alaska salmon industry to a plantation economy. *Id.* at 663 (Stevens, J., dissenting).

55. See *Griggs*, 401 U.S. at 431-32 (describing intelligence tests and educational requirements employer used); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 352 (1977) (noting legality of seniority systems under Title VII).

56. See *Griggs*, 401 U.S. at 431 (describing Congress's solution to discriminatory hiring practices).

57. See Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 144 (1998) (noting critics' attacks on impact theory as promoting quota hiring and affirmative action).

58. *Griggs*, 401 U.S. at 431 (stating racially exclusionary employment practices prohibited unless necessary to business).

its latent form. Confronted with a worthy adversary in impact theory, opponents to Title VII reverted to quota rhetoric.⁵⁹ Employers charged that statutorily mandated proof of business needs was an unjustifiably high and elusive burden.⁶⁰ Further, critics argued, the only real way employers could avoid liability under such a regime was simply to get the numbers right.⁶¹ Employers contended that the impact theory required them to hire protected employees in proportional numbers to avoid being hauled into court simply because statistical racial or gender disparities happened to exist in their workforce.⁶²

By 1989, the embattled impact theory had met its most formidable opponent—the Supreme Court. In *Wards Cove Packing v. Atonio*,⁶³ the Court virtually wrote impact theory out of the statute by ruling that Title VII plaintiffs must prove more than statistical disparities and employers are not required to prove business necessity.⁶⁴ As such, the same body that created this potent mechanism for confronting racism in its subtle or unconscious form and for breaking down barriers to opportunity later destroyed it. This gutting of Title VII was possible because Congress did not draft the statute in a manner that allowed it to operate as a complete barrier to discrimination. Impact theory was then held in abeyance as civil rights activists tried to convince Congress and the President that the Court's *Wards Cove* decision nullified an effective dimension of the law.

The unrelenting challenges to impact theory highlight some of the indifference to discrimination and a key weakness of Title VII. Although impact theory does not require quotas, and the relief possibilities for impact violations are rather narrow,⁶⁵ employers did not welcome its forced self-examination. However, resistance to self-assessment is diminishing because employers now have an incentive to change. The current employer emphasis on self-regulation through zero tolerance programs signals such a change even if it is motivated primarily by a desire to reduce litigation costs and damages.

59. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989 (1988) (applying disparate impact analysis to subjective and objective employment practices). The defendant employer argued that employment decision-making grounded in subjective criteria should not be subjected to disparate impact analysis because employers would be unable to defend such suits by validating the practice or showing its job relatedness, and therefore revert to quotas. *Id.*

60. *Id.* at 991-92 (summarizing employer view on impossibility of eliminating and expense of defending subjective selection criteria).

61. *Id.* at 992 (agreeing focus on statistics risks “inappropriate prophylactic measures”).

62. *Id.* at 991-92 (expressing employer concern in adhering to Title VII).

63. 490 U.S. 642 (1989).

64. *Id.* at 656-57, 660 (clarifying proof standards for plaintiffs and defendants in disparate impact cases). The Court held merely showing a racial imbalance, without proof that the imbalance resulted from a particular employment practice, is insufficient for Title VII plaintiff's prima facie case. *Id.* at 656-57. Further, the Court clarified that the employer's burden under the legitimate business justification defense is a burden of production, not persuasion. *Id.* at 660.

65. See 42 U.S.C. § 2000e-2(k) (1991) (outlining burden of proof required in disparate impact cases).

As noted earlier, Title VII's weaknesses include its limited coverage, weak prohibitions, and tolerance for discrimination.⁶⁶ It has also been hampered by stringent proof requirements⁶⁷ and ineffective remedial provisions.⁶⁸ Most of these weaknesses were not eliminated in 1991 when Title VII was amended. In fact, the biggest barrier to proving discrimination—proving discriminatory intent—remains a basic requirement.⁶⁹ Consequently, although the 1991 amendments to Title VII have increased employees' damages prospects, their chances of collecting compensatory or punitive damages remain elusive. Additionally, affirmative action, which can operate as a guarantee of equality under the statute has not been codified by Congress.⁷⁰

C. Affirmative Action

Although the term "affirmative action" appears in Title VII, that phrase was not intended as a source of preferential treatment of particular groups.⁷¹ Moreover, the use of affirmative action for preferential treatment originated in an executive order rather than Title VII.⁷² In Title VII, Congress did not

66. See *supra* Part I.B (addressing Title VII's creation, strengths, and weaknesses).

67. See *supra* notes 17, 50-52, and accompanying text (describing significant barriers plaintiffs face to prove their cases). The Supreme Court interpreted the statute as requiring proof of intent in an arena where discrimination is subtle and sophisticated, and direct evidence of discriminatory intent is generally unavailable. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 522-24 (1993) (holding proof required in sensitive discrimination cases same as other ultimate questions of fact). Thus, the Court found a *prima facie* case for discrimination plus proof that the employer's defense was a lie insufficient to prove intentional discrimination. *Id.* In fact, a court may still find "record evidence" suggesting a nondiscriminatory motive. *Id.* at 523. This very oppressive structure requires that the plaintiff further prove that the employer was lying to cover up discriminatory behavior. *Id.* at 535-36 (Souter, J., dissenting) (reciting burden of proof majority puts on plaintiffs). But see *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (inferring discriminatory intent from plaintiff disproving employer's explanation). The *Reeves* Court reminded lower courts that indirect and circumstantial evidence do have value in Title VII litigation. *Id.*

68. See Civil Rights Act of 1964, Pub. L. No. 88-362, 78 Stat. 253 (codified as amended in scattered sections of 42 U.S.C.). Title VII was not designed initially to make discrimination victims whole. *Id.* at 255-57 (prohibiting employment discrimination, but not providing remedy to victims). When Congress amended the statute in 1991, however, it added compensatory and punitive damages provisions. See Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981(a) (2005). However, exclusions and limitations apply to awards of compensatory or punitive relief. Civil Rights Act of 1991 § 102(b); 42 U.S.C. § 1981(b).

69. See 42 U.S.C. § 2000e-2(K).

70. See 42 U.S.C. § 2000e-5(g)(1) (providing affirmative action as court imposed remedy).

71. See *id.* This provision provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, . . . or any other equitable relief as the court deems appropriate.

Id.; see *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 519-20 (1986) (describing Congress's concern for Title VII passage rather than outlawing race-conscious affirmative action).

72. See Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (ordering contractors to take affirmative action to ensure employment of minority applicants). President John F. Kennedy is credited with initiating affirmative action as a preferential mechanism for remedying civil rights abuses.

specifically grant employers the freedom to award historically disadvantaged workers opportunities as compensation for past wrongs. Although Congress prioritized employer prerogatives that could perpetuate racial stratification on the job, such as a seniority system, it did not extend those prerogatives to programs that could guarantee historically disadvantaged workers more favorable treatment than white workers.⁷³ Consequently, Title VII did not establish a national policy authorizing employers to do whatever is necessary and fair to address workplace disparities wrought by discrimination.

The absence of a statutory mandate made progressive employer practices that benefited minorities and women the subject of much confusion and debate. Grave racial and gender disparities and ensuing Title VII lawsuits resulted in employers adopting and courts approving policies that actually opened otherwise closed employment opportunities.⁷⁴ But since preferential schemes were not expressly sanctioned by Title VII, doubts soon surfaced about their legality and duration.⁷⁵ These doubts evolved into regular legal challenges that have interrupted and curtailed the potential benefits of such schemes.

Affirmative action became a part of employment jurisprudence through judicial action because Congress did not legislate it as a mandatory or discretionary remedial device to create opportunities for minorities and women. Like the fair representation doctrine and impact theory, the Supreme Court grafted affirmative action onto Title VII as a means of dealing with the enduring and harmful barriers the statute failed to dismantle.

In the 1960s, the case for equal employment opportunity was grounded in the country's need to address the history of racial subordination. This required that the legal rules being fashioned to create employment equality be malleable. The courts needed interpretive flexibility not only to prohibit discrimination, deter future occurrences, and provide compensation to victims, but also to accommodate existing debility caused by continuing practices of exclusion. The use of preferential programs was one tool capable of realizing equal opportunity. Such schemes, however, have not gained congressional endorsement and continue to face constitutional challenges and the prospect of being terminated one day.⁷⁶

73. See *supra* notes 20-21, 43-47, and accompanying text (discussing reasons underlying Title VII's protection of seniority systems).

74. See, e.g., *Local 93, Int'l Ass'n of Firefighters*, 478 U.S. at 521 (holding voluntary agreements for race-conscious remedial measures allowed under Title VII); *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 444-45 (1986) (holding membership goal and preference to nonwhites lawful under 42 U.S.C. 2000e-5(g) and race-conscious relief appropriate); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208-09 (1979) (concluding private, bargained-for affirmative action plan within private sector's discretion under Title VII).

75. See *Johnson v. Transp. Agency*, 480 U.S. 616, 657-71 (1987) (Scalia, J., dissenting) (arguing affirmative action violates Title VII and advocating for overruling *Weber*).

76. See *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (rejecting challenge to affirmative action admissions program grounded in diversity). When Title VII was last amended, in 1991, Congress again failed

Although workplace bias is still widespread, there is now little public support for affirmative action programs. Societal guilt for racial employment disparities is at an all-time low.⁷⁷ Most people are not convinced that unassailable evils of slavery, segregation, and widespread discrimination against minorities and women justify special consideration for them.⁷⁸ In fact, many people are not convinced that discrimination is widespread or serious.⁷⁹ These beliefs are exemplified by a federal judge's conclusion that "[Title VII] unquestionably has served to deter, if not entirely eradicate, the pernicious practice of discrimination in employment decisions."⁸⁰

Americans are not persuaded to support preferential programs even though statistics show dramatic income disparities between whites and minorities that cannot be fully explained by factors other than racism.⁸¹ In addition, there is little resonance with the contention that being white comes with inherent privileges.⁸² Thus, although employment discrimination laws have not eliminated discriminatory workplace practices, programs that do guarantee minorities and women employment opportunities remain vulnerable.

Courts have interpreted Title VII as flexible enough to accommodate

to make any clear statements about affirmative action. See Civil Rights Act of 1991, Pub. L. 102-166, § 116, 105 Stat. 1071, 1079 (1991). The amendment states, "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." *Id.* Unfortunately, employment affirmative action law has been whatever the Supreme Court says it is. See Harry T. Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713, 742-55 (1980) (criticizing reliance on legislative history to conclude Title VII permits affirmative action). Even though Title VII is silent on the issue, Justice Brennan argued that affirmative action is permissible under Title VII because it is a remedy for past wrongs. *Id.* at 744-52; see also *Weber*, 443 U.S. at 201-06 (examining Title VII legislative history to determine validity of affirmative action program).

77. See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 2 (2002) (noting affirmative action more controversial today than ever, and has little public support).

78. *Id.* at 54-56 (addressing negative public attitudes towards affirmative action)

79. See *Perception of Workplace Bias Varies, Survey Finds*, 940 Fair Empl. Prac. (BNA) 18 (Jan. 31, 2002). "Ninety-four percent of white respondents believe such employment practices as hiring, promotion, and salaries are fair to all workers. Yet only half of African-American workers believe they are treated fairly." *Id.*; see also Anne Lawton, *The Meritocracy Myth and the Illusion Of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590 (2000) (describing cultural assumptions: (1) discrimination aberrational and (2) merit alone determines job success).

80. See *Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994). Subtle and sophisticated discrimination combined with tangible minority achievement convinces many that employment discrimination is rare.

81. See WILLIAM A. DARITY, JR. & SAMUEL L. MYERS, JR., PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945 39-58, 108 (1998) (criticizing arguments that inequality between black and white workers not linked to discrimination and racism).

82. See David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 925, 947-56 (1996) (discussing whiteness as privilege generally and persistence of racial discrimination despite decrease in overt racism); see also Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1713-14 (1993) (investigating relationship between race and property, concluding whiteness valued as property). The result is that white workers grow increasingly detached from the reality of discrimination and feel neither fault nor responsibility for the plight of minority and women workers.

affirmative action because of its equality goals.⁸³ This accommodation produced tangible gains for minorities and women, but failed to confront, and may have exacerbated some discriminatory thinking and practices.⁸⁴ As such, legal prescriptions alone have been ineffective in achieving the national goal of equal employment opportunity, and scholarly proposals for change have not been effective in reworking the law.⁸⁵ The use of affirmative action as a tool for achieving Title VII's goals remains in crisis.⁸⁶ Ironically, this crisis is, in part, due to the passage of many civil rights laws declaring that our nation is

83. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 641-42 (1987) (concluding voluntary affirmative action program to attain balanced workforce consistent with Title VII); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 445, 445 n.25 (1986) (holding Title VII allows race-conscious remedies for non-victims, where appropriate, to dissipate discrimination); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206-08 (1979) (noting Congress did not intend preclusion of private race-conscious preferences).

84. See *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547, 1550, 1557 (3d Cir. 1996) (holding non-remedial affirmative action plan constituted employment discrimination against white woman). Many white workers, like Taxman, believing they were adversely affected by affirmative action programs have sued their employers alleging reverse discrimination. *Id.* at 1552 (charging employment discrimination based on non-remedial affirmative action plan). Employers and employees have complained that consent and court-ordered decrees that mandate greater job opportunities for minorities constitute impermissible quotas. See *United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (upholding one-for-one quota in promotions because flexible, effective, and temporary remedy); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 581-83 (1984) (holding invalid court-ordered decree modifying city's seniority system for race-conscious remedy). Supreme Court Justices have similarly complained about employer attempts to assist minorities who have not been discriminated against by their particular employer. See *Johnson*, 480 U.S. at 657-77 (Scalia, J., dissenting) (opposing majority conclusion promoting proportional representation of race and gender in workplace).

85. Despite the abundance of proposals identifying Title VII's weaknesses, the Supreme Court continues to narrowly interpret the statute. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) (requiring plaintiff to disprove employer's defense and show intent to hide prohibited discriminatory conduct); see also *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153-54 (2000) (reaffirming *Hicks* but noting possibility of finding for employee based on pretext proof). Commentators have consistently pointed out that the continuing focus on proving discriminatory intent makes the statute unworkable. See David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination for "High Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 98-100 (1998) (suggesting high-level jobs with subjective performance evaluations will decrease likelihood of proving intentional discrimination). Proving intentional discrimination under the current law is more difficult in high-level jobs because courts will probably not second guess a law firm's decision to elevate someone to partner. *Id.* at 100; Deana A. Pollard, *Unconscious Bias and Self Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 932 (1999) (arguing current legal regime focused on intentional bias inadequate to address increasingly common unconscious discrimination); Elizabeth E. Theran, "Free to Be Arbitrary and Capricious": *Weight-Based Discrimination and the Logic of American Anti-discrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113, 193-95 (2001) (noting inadequacies of civil rights laws and focus on blameworthy conduct rather than recourse vehicles); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 480-81 (1995) (concluding Title VII unsuited to challenge societal forces limiting black employment opportunities).

86. See Charles R. Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) (describing affirmative action as "under siege"). Any attempt to set aside opportunities on racial or gender grounds is subject to legal challenge and must survive the most searching judicial scrutiny. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (imposing strict scrutiny to any racial classification or race-based legislation). But see *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (upholding preferential program for law school admissions); *Petit v. City of Chicago*, 352 F.3d 1111, 1114, 1117-18 (7th Cir. 2003) (relying on *Grutter* principles to uphold preferential promotion program favoring minority police officers).

one of equals irrespective of race.⁸⁷ Widespread prohibition of employment discrimination supports the conclusion that the formal equality announced in our constitutional amendments and statutes has created an environment of equal opportunity.⁸⁸ This belief has weakened support for affirmative action programs and has made them vulnerable to criticism that they promote unconstitutional preferential treatment for women and minorities.⁸⁹

Preferential treatment in the form of job training, job offers, promotions or other workplace benefits truly provide opportunities for minorities. Awarding opportunities to qualified individuals because of historical or continuing workplace disparities helps minorities transcend existing barriers to achievement. From 1964 to the present, however, Congress has been unable to issue any clear statements about affirmative action in labor and employment

87. Beginning in the 1960s, Congress passed a variety of equal rights initiatives that included equal employment opportunity provisions such as Title VII of the 1964 Civil Rights Act, 78 Stat. 253 (1964), *amended by* 42 U.S.C. § 2000e et seq. (1988), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071; Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-633a (2000); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), *amended by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Equal Pay Act, 29 U.S.C. § 206(d) (2005). These statutory provisions complement narrow preexisting prohibitions against employment discrimination such as § 1981, § 1983, and the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST., amend. XIV, § 1; 42 U.S.C. § 1981; 42 U.S.C. § 1983. Executive orders to stem abuse by federal employers, defense industries and federal contractors also prohibit employment discrimination. *See* Exec. Order No. 11,246, 30 Fed. Reg. 12319, 12935 (Sept. 24, 1965) (requiring federal contractors to hire minorities and treat them fairly); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (prohibiting discriminatory hiring by federal contractors).

88. *See* DARITY & MYERS, *supra* note 81, at 43 (stating passage and enforcement of civil rights laws credited with reducing income gap between races).

89. *See* ROBERT J. WEISS, WE WANT JOBS 235-40 (1997) (tracing various arguments asserted in controversy surrounding affirmative action). Affirmative Action programs fueled a debate about whether Title VII was intended to guarantee minorities jobs or simply to remove certain barriers to employment opportunity. *See* David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171, 182 (1992) (contrasting equal opportunity—removal of barriers—with equal result—government alteration of result). The statute prohibits hiring by quotas or because of race, and these provisions support the contention that the law's function is limited to removing barriers. *See* Civil Rights Act of 1964, Pub. L. 88-352 § 703(j), 78 Stat. 257 (codified as amended at 42 U.S.C. § 2000e-2 (j)).

Nothing contained in this title 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 or 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.

Id. § 703(j) (prior to 1991 amendments); *see also* § 703(l), (codified as amended at 42 U.S.C. § 2000e-2(l)).

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment, or promotion, to adjust scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

§ 703(l), 42 U.S.C. § 2000e-2(l) (1991).

regulations.⁹⁰

Due to the fact that non-remedial affirmative action in employment was created by the Supreme Court, it remains vulnerable to interpretive elimination by the Court.⁹¹ The Court's recent decision to approve some preferential treatment in the academic arena, as in *Grutter v. Bollinger*,⁹² does not guarantee a similar ruling in the employment context.⁹³ As such, other equality tools such as zero tolerance programs are important complements to Title VII.

III. THE ZERO TOLERANCE OPTION

Major reform in the way employers respond to discrimination requires more than legal prescriptions, it requires voluntary employer cooperation and participation. To this end, zero tolerance policies seem to be particularly useful. Employers have adopted such policies for a variety of serious workplace misconduct such as theft,⁹⁴ use of illegal drugs,⁹⁵ sexual harassment,⁹⁶ and fighting or workplace violence.⁹⁷

Because workplace discrimination qualifies as a very serious offense, it is

90. Affirmative action was a very controversial issue when Congress amended Title VII in 1991. Democrats fought hard to codify the affirmative action models that the Supreme Court had approved, while Republicans insisted that the statute not address or resolve that issue. See 137 U.S. CONG. REC. S15233 (daily ed. Oct. 25, 1991) (statement of Sen. Kennedy). Senator Kennedy stated "the bill is intended not to change the law regarding what constitutes lawful affirmative action and what constitutes impermissible reverse discrimination." *Id.* However, Senator Hatch stated that the bill "expresses neither Congressional approval nor disapproval of any judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements including *Weber*, *Johnson*, *Local 78*, and *Paradise* Supreme Court decisions." 137 U.S. CONG. REC. S15315 (daily ed. Oct. 29, 1991) (statement of Sen. Hatch). In the end, the statute provided that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." § 116, 105 Stat. at 1079.

91. 42 U.S.C. 2000e-5(g)(1) (2005) (granting courts discretion to order affirmative action as remedy for intentional discrimination only).

92. 539 U.S. 306 (2003).

93. See 539 U.S. at 343-44 (approving law school's race-conscious admissions scheme on diversity grounds).

94. See *Akrabawi v. Carnes Co.*, 152 F.3d 688, 692 (7th Cir. 1998) (noting company's zero tolerance policy for various infractions, including theft).

95. See *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1218 (10th Cir. 2000) (adhering to zero tolerance policy toward illegal drugs). In this case, the employer's policy stated:

The possession, use, manufacture, distribution, or sale of illegal or medically authorized controlled drugs off Company premises that adversely affects the employees (sic) work performance, their own or others' safety at work, or the Company's regard or reputation in the community is prohibited. . . .
Violation of this policy is considered a serious infraction and will result in disciplinary action.

Id.

96. See *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 852 (7th Cir. 2001) (discussing United's zero tolerance policy for sexual harassment).

97. See Simon J. Nadel, *U.S. Postal Service Striving to Prevent Workplace Violence*, 37 GOV'T EMPL. REL. REP. (BNA) 833 (July 12, 1999) (outlining United States Postal Service's multi-front plan for curbing workplace violence).

well suited for zero tolerance treatment. The possible benefits of a zero tolerance policy, as shown by the Denny's Restaurant example, militate in favor of its adoption.⁹⁸ Employers need incentives to change the way they deal with workplace bias issues because of worker resistance to changes in the status quo. Zero tolerance policies need to be responsive to the gravity of the misconduct and consistently enforced in order to rid the workplace of the prohibited behavior and to avoid discrimination claims.⁹⁹ Conduct such as theft, fighting and drug use are often a prime targets for zero tolerance sanctions.¹⁰⁰ Increasingly, sexual and racial harassment have been subject to zero tolerance treatment.¹⁰¹ Under these policies, punishment is swift and absolute, often resulting in discharge after the first offense.¹⁰²

Zero tolerance policies are helping make discrimination as socially unacceptable as stealing and fighting on the job. Workplace culture can be transformed if employees are notified that they cannot engage in discriminatory conduct and would be subjected to disciplinary action or termination if they do. Any alternative approach of employer indifference or toleration for discrimination would be quite harmful. Consider the effects of an employer strategy where management condones discriminatory conduct and protects, defends, and retains employees who engage in prohibited employment practices.

The case of *Becker v. Ulster County*,¹⁰³ exemplifies the consequence of

98. See Anne Faircloth, *Guess Who's Coming to Denny's; and Shoney's*, FORTUNE, Aug. 3, 1998, at 108 (noting change in Denny's commitment to diversity). At one point, Denny's Restaurant was synonymous with racism, but soon became the second best company for minority workers because of its no-nonsense antidiscrimination policies and diversity programs.

99. See *Davis v. Visteon Sys. & Local 907 of the Int'l Union of Elec. Workers*, 2001 U.S. Dist. LEXIS 22829, at *18-20 (S.D. Ind. Dec. 14, 2001); see also *Clark v. Runyon*, 218 F.3d 915, 916, 918 (11th Cir. 2000) (rejecting discrimination claim because plaintiff failed to prove uneven treatment). The employer in *Clark* also had a zero tolerance policy for workplace violence that the court found Clark violated, thereby making her unique. *Id.* at 918.

100. See *supra* notes 94, 95, 97, and accompanying text (examining examples of theft, drug use and fighting zero tolerance policies).

101. See Cynthia Fair, Note, *Burlington Indus. v. Ellerth and Faragher v. City of Boca Raton: A Step in the Wrong Direction?*, 9 B.U. PUB. INT. L.J. 409, 425-26 (2000) (discussing use of zero tolerance policies as management device to deter sexual harassment incidents); see also Susan Estrich, *Sex At Work*, 43 STAN. L. REV. 813, 844-45 (1991) (noting employer implementation of tough zero tolerance rules for drugs but not sexual harassment). By treating sexual harassment as less of an offense, the employer signals its acceptance of such conduct. *Id.* at 845.

102. See *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1218-19 (10th Cir. 2000) (indicating employee discharged after company learned of arrest and no contest plea on possession charge); *Hearn v. Bd. of Pub. Educ.*, 191 F.3d 1329, 1330 (11th Cir. 1999) (discussing teacher's discharge after refusing drug test when police found marijuana in her car); *Wilder v. GL Bus Lines, No. 99 Civ. 9992*, 2000 WL 95975 at *3 (S.D.N.Y. July 11, 2000) (recounting termination of bus driver under zero tolerance drug policy after testing positive for marijuana); *Smith v. Zero Defects, Inc.*, 980 P.2d 545, 546 (Idaho 1999) (describing termination of employee after random drug test revealed amphetamines in her urine); *Chicago Firefighters Union Local No. 2 v. City of Chicago*, 751 N.E.2d 1169, 1171 (Ill. App. Ct. 2001) (explaining firefighter discharge after videotape showed them consuming alcohol before going on fire calls).

103. 167 F. Supp. 2d 549 (N.D.N.Y. 2001).

inadequate anti-discrimination policies. In this case, a female employee, Becker, complained that her co-worker, Bruce Broadhead, had “pinned [her] against the wall, groped her breasts and thighs, attempted to force his hands down her pants, exposed himself and demanded sexual intercourse.”¹⁰⁴ When Becker complained about this assault, she was not permitted to call the police, she was not allowed time off to obtain a protective order against Broadhead, and she was told that Broadhead would not be terminated unless he was criminally prosecuted.¹⁰⁵ Subsequently, the employer decided that Becker had violated its attendance policy after she failed to report to work on a shift for which she was given short notice.¹⁰⁶ For this infraction she was fired, although she had told her boss that she would be unable to work because she could not find a babysitter on such short notice.¹⁰⁷

In another case, employee Nanette Davis complained about her boss Jim Bryan’s “off-color and sexual jokes and innuendo, and frequent invasion of her privacy concerning her marital affairs and sexual relationship with her husband.”¹⁰⁸ She also alleged Bryan made verbal and sexual advances to her.¹⁰⁹ Although several employees corroborated some of Davis’ claims, Bryan was simply told to take a week off with pay to “cool off.”¹¹⁰ The company then refused to tell Davis what actions it was taking, and refused to structure Davis’s work to separate her from Bryan.¹¹¹ This approach harms employee-victims and exposes employers to lawsuits and money judgments.

If employers fail to adopt and enforce zero tolerance policies for discriminatory practices, one of the most effective enforcement tools will be lost. Ultimately, a persistence of pervasive and severe workplace bias will result. Employers cannot afford to continue defending and settling discrimination lawsuits for staggering sums in both the private and public sectors. Moreover, class action lawsuits and large settlements are not attractive options. Suits and hundred-million dollar settlements, such as in the Texaco, Microsoft, and Coca-Cola cases harm the corporate bottom line, goodwill and image.¹¹²

104. *Id.* at 551.

105. *Id.* at 551-52.

106. *Id.* at 552.

107. *Becker*, 167 F. Supp. 2d at 552.

108. *Davis v. United States Steel Corp.*, 779 F.2d 209, 210 (4th Cir. 1985).

109. *Id.*

110. *Id.* at 210-11.

111. *Id.* at 211; *see also* *Stalnaker v. Kmart Corp.*, 950 F. Supp. 1091, 1094-95 (D. Kan. 1996) (describing how employee filed retaliation claim contending mistreatment after sexual harassment complaint). Female cadets at the Air Force Academy have lodged similar complaints against the Academy, alleging they were reprimanded for reporting rape incidents. *Panel to Review Air Force’s Response to Sex Allegations*, MIAMI HERALD, Feb. 17, 2003, at 3A.

112. *See* Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 1999, at 205 (discussing settlement of Texaco race discrimination case for 175 million dollars); Kyle Parks, *Florida Lawyer to Up Ante in Microsoft Suit*, ST. PETERSBURG TIMES, Jan. 3, 2001, at 1A (describing plaintiffs’ demand for over one billion

The Texaco case highlights a key barrier to the implementation of zero tolerance policies: the attitude of top executives.¹¹³ When senior executives operate with a taste for discrimination, workplace bias is fostered rather than controlled.¹¹⁴ And even in environments where top management opposes discrimination, workplace bias can flourish. Consider the case of Microsoft, where chief executive Bill Gates has demonstrated his commitment to helping the disadvantaged. Gates has pledged one billion dollars for minority scholarships over the next twenty years, a decision that clearly signals his personal commitment to remedying minority disadvantage.¹¹⁵ Such sensitivity to minority issues is most likely a force that helps set the culture and rules governing discrimination at Microsoft. It is therefore no surprise that discrimination and diversity issues are addressed at Microsoft.

The challenge however, is to get all workers, including supervisors and managers, to support a company's goal of providing a bias-free work environment. Given the desire to avoid being faced with costly discrimination lawsuits, employers now have more incentive to adopt zero tolerance policies and many already have.¹¹⁶ And many employers have targeted sexual harassment for zero tolerance treatment because of the deterrence and defense benefits such rules provide.¹¹⁷ But in addition to limiting liability, employers must concern themselves with the potential of such rules to chill legitimate workplace behavior or create unnecessary tensions in the workforce. Employers must also remain sensitive to employees' job expectations and, in the case of unionized employees, the disciplinary restrictions in the collective bargaining contract.

dollars in damages from Microsoft); 14 Lab. Rel. Wk., No. 46 at 1313 (Nov. 23, 2000) (noting discrimination settlement against Coca-Cola for 92.5 million dollars).

113. See Labich, *supra* note 112, at 205 (describing corporate executives as key offenders).

114. See Labich, *supra* note 112, at 205. The work environment at Texaco was so conducive to racism that a white employee had stopped in front of a black employee's office and stated "Jesus Christ, I never thought I'd live to see the day when a black woman had an office at Texaco." *Id.*

115. Jeff Archer, *Microsoft Founder Offers College Aid to Minorities*, EDUC. WK., Sept. 22, 1999, at 3. Ironically this commitment has been described as a self-serving attempt to sell more computers. See Clarence Page, *Bridging the Gap with Bill Gates*, MENTOR, Sept. 19, 1999, at 23. In fact, at least one commentary called Gates' philanthropy racist for excluding whites. See http://www.adversity.net/gates_minorities.htm (last visited Aug. 3, 2005). But Gates has shown his commitment to assisting minorities in many other ways. For example, Microsoft is one of several companies supporting affirmative action and opposing the Bush administration's stance on the issue before the Supreme Court. *Groups Backs Race Admissions*, MIAMI HERALD, Feb. 18, 2003, at 3A (describing critical response of over 300 organizations to Bush administration's stance on affirmative action).

116. See JIM ADAMSON ET AL., *THE DENNY'S STORY* 47-49 (2000) (explaining how consent decree forbidding discrimination transformed company's practices).

117. See Fair, *supra* note 101, at 425-26 (recommending zero tolerance in order to avoid vicarious liability).

A. The Tradition of Zero Tolerance

Zero tolerance policies are well established and accepted in the collective bargaining context.¹¹⁸ The concept is therefore very familiar to labor arbitrators who are charged with interpreting and enforcing such provisions when employers adopt them as workplace rules.¹¹⁹ As zero tolerance rules spread in the employment area, judges, as well as arbitrators, will be called upon to make judgments about such policies. A random sampling of cases show that judges are very deferential to company decisions grounded in zero tolerance rules, particularly in cases where no collective bargaining agreement is present.¹²⁰

For example, in *Allen v. Allied Plan Maintenance Co.*,¹²¹ a broad definition of theft—unauthorized use of a photocopier—provided the basis for a company decision to terminate an employee and served as its defense against the employee’s breach of contract and conspiracy claims.¹²² The discharge was upheld by an arbitrator and the court sustained the discharge at trial on a motion for summary judgment.¹²³

Judges have been very deferential to employers’ decisions to discharge for theft. In one case, the court ruled that an employee was properly discharged for theft because he falsely reported on his time sheet that he attended a safety meeting.¹²⁴ In another case, the court accepted an employer’s explanation that a salesperson was discharged “for eating a handful of candy from an open bag he found in another area of the store and then putting the bag back where he found it.”¹²⁵ Finally, in *Stalter v. Wal-Mart Stores, Inc.*,¹²⁶ an employee was fired for stealing a handful of taco chips from an open bag on a countertop in the store’s break room.¹²⁷

As in the theft area, judges are also deferential to management’s disciplinary

118. See *infra* note 119 (giving examples of arbitrators’ evaluation of zero tolerance policies).

119. See *Tamko Roofing Prod., Inc. v. United Steel Workers of Am., Local 10711*, 2000 U.S. Dist. LEXIS 21856, at *11-12 (N.D. Ala. 2000), *rev’d in part, vacated in part*, 265 F.3d 1064 (11th Cir. 2001) (upholding arbitrator award reinstating employee discharged for racial harassment because of harassment policy’s under inclusive application); *Chicago Firefighters Union Local No. 2 v. City of Chicago*, 751 N.E.2d 1169, 1172 (Ill. App. Ct. 2001) (noting arbitrator reinstated firefighters drinking alcohol on job because untimely discipline under collective bargaining agreement). Arbitrators are thus forced to reconcile their traditional notions of industrial or workplace justice with zero tolerance rules that discipline for discriminatory conduct labor arbitrators did not specialize in addressing.

120. See *Allen v. Allied Plan Maint. Co.*, 636 F. Supp. 1090, 1095-98 (M.D. Tenn. 1986).

121. 636 F. Supp. 1090 (M.D. Tenn. 1986).

122. *Id.* at 1091-92.

123. *Id.*

124. See *Kurincic v. Stein, Inc.*, 30 Fed. Appx. 420, 423 (6th Cir. 2002) (explaining discharge for theft). The employee in *Kurincic* signed into safety meeting, but did not attend. *Id.* The employer discharged him for “falsely claiming compensation to which he was not entitled” because the time sheet was used by the payroll department to determine compensation. *Id.*

125. See *Williams v. Comm’r of Labor*, 692 N.Y.S.2d 504, 505 (N.Y. 1999).

126. 195 F.3d 285 (7th Cir. 1999).

127. *Id.* at 287-88.

choices in drug cases. In *Pernice v. City of Chicago*,¹²⁸ a long-time city employee was terminated for drug possession under the city's personnel policies.¹²⁹ Although the possession was not a job-related incident and the employee claimed he had a drug addiction that qualified as a disability, his termination was upheld by the court.¹³⁰ In *Rose v. Uniroyal Goodrich Tire Co.*,¹³¹ the company's zero tolerance drug policy provided the basis for terminating an employee who the company discovered was arrested at his home for drug possession.¹³² The employee filed tort and contract claims alleging wrongful discharge and asked the court to exclude evidence of his no-contest plea.¹³³ He also contended that the employer could not rely on information about his arrest for possession because that information had been expunged.¹³⁴

Rejecting all of the employee's contentions, the court held that it would be inappropriate "to allow an employee plaintiff to affirmatively prevent an employer from presenting the very evidence used as a basis for its termination decision. Such a result would unfairly hogtie the employer and lead the jury to believe that the employee's termination was groundless."¹³⁵ With respect to expunged material, the court ruled that an employer could present that information if it relied on it prior to expungement.¹³⁶ The court noted that courts are not "super personnel department[s]" and the policies that support suppression of no-contest pleas and expunged material in the civil and criminal contexts are inapplicable in an employment dispute where the affected employee is the plaintiff.¹³⁷

Likewise, in *Stockett v. Muncie Indiana Transit System*,¹³⁸ the employer's zero tolerance substance abuse policy served as the basis for terminating a bus driver because the policy provided for discharge on the first offense.¹³⁹ In this case, the employee's red eyes and calm demeanor during an investigative interview about a sexual harassment complaint served as the basis for believing he used drugs, particularly since the company received an anonymous tip that

128. 237 F.3d 783 (7th Cir. 2001).

129. *Id.* at 784.

130. *Id.* at 784-85, 787-88 (outlining claim and resolution).

131. 219 F.3d 1216 (10th Cir. 2000).

132. *Id.* at 1218.

133. *See id.* at 1219. The court noted that "Mr. Rose pled nolo contendere to a misdemeanor charge of possession of marijuana, and the felony charges against him were dropped." *Id.* at 1218. Rule 410 of the Federal Rules of Evidence provides that no contest pleas are inadmissible against a defendant in a civil or criminal proceeding. *Id.* at 1219.

134. *Id.* at 1221. Oklahoma law provided that employers could not consider expunged arrest or conviction records for purposes of employment. *Id.*

135. *Rose*, 219 F.3d at 1220.

136. *Id.* at 1221.

137. *Id.* at 1220-21.

138. 221 F.3d 997 (7th Cir. 2000).

139. *Id.* at 999.

the employee smoked crack.¹⁴⁰ A drug test indicated drug use and the employee was terminated.¹⁴¹ The employer was able to sustain the discharge despite the employee's claim that his testing and discharge were motivated by race discrimination because a similarly situated white employee was treated differently.¹⁴²

Another infraction courts agree employers can take seriously is dishonesty. In *Akrabawi v. Carnes Co.*,¹⁴³ the company refused to grant a promotion to an employee on the premise that he misrepresented his educational credentials.¹⁴⁴ The company contended "that it ha[d] a 'zero tolerance' policy toward dishonesty and that it ha[d], in the past, fired employees for fraud, falsifying records, and theft."¹⁴⁵ The company stood on that policy in defending a national origin discrimination claim, arguing that discrepancies about the employee's college degree provided a sufficient justification for its decision to award a position to someone else.¹⁴⁶

Another case depicting the seriousness with which employers treat dishonesty is *Delli Santi v. CNA Insurance Companies*.¹⁴⁷ In *Delli Santi*, the employee was discharged for falsifying her expense reports even though she had thirty-six years of service with the company.¹⁴⁸ The company argued that it was concerned about the employee's gas purchases for her company car and this triggered an investigation.¹⁴⁹ The investigation revealed that gas expenses were inflated and therefore the employee had falsified her expense account.¹⁵⁰ This dishonesty, the company argued, was a sufficient basis for termination despite substantial evidence that the employee was being singled out for discipline because she complained about discrimination.¹⁵¹

Sleeping on the job has also served as a sufficient basis for terminating an employee on the first offense. In *Jones v. Provena St. Joseph Medical Center*,¹⁵² a certified nursing assistant was discharged under her employer's zero tolerance no sleeping policy after she was observed sleeping while sitting

140. *Id.* at 999-1000.

141. *Id.* at 1000.

142. *See Stockett*, 221 F.3d at 999 (reasoning drug policy not adverse employment action Title VII designed to prevent).

143. 152 F.3d 688 (7th Cir. 1998).

144. *Id.* at 691-92 (describing discrepancy between education verification from abroad and employee's interview).

145. *Id.* at 692.

146. *Id.*

147. *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192 (3d Cir. 1996).

148. *Id.* at 196.

149. *Id.*

150. *Id.*

151. *Delli Santi*, 88 F.3d at 196. *Delli Santi* offered substantial circumstantial evidence that she was retaliated against and singled out for investigation and discipline over an infraction that the company did not take seriously. *Id.*

152. No. 00-1286, slip op. (7th Cir. Oct. 3, 2000).

with a patient.¹⁵³ The court agreed that sleeping is a legitimate basis for discharge.¹⁵⁴ In *Cartwright v. Lockheed Martin Utility Services, Inc.*,¹⁵⁵ the employer's zero tolerance no sleeping policy was also held to form a sufficient basis for terminating an employee.¹⁵⁶

Fighting or workplace violence is also regarded as a serious offense by employers and judges, thereby warranting severe discipline, up to and including discharge. In *Davis v. Visteon Systems*,¹⁵⁷ a wife was discharged for striking her husband on the job.¹⁵⁸ In another case, a postal employee was fired for threatening her co-workers with bodily harm.¹⁵⁹ The court found that the threat of violence was a legitimate nondiscriminatory reason for the employer's decision.¹⁶⁰ The same result was reached in *Bateman v. United States Postal Service*,¹⁶¹ and *Sherman v. Runyon*.¹⁶²

The preceding cases demonstrate that employer regulation coupled with strong support from the judiciary establishes standards of conduct for employees. The ramifications of serious workplace infractions, imposed from both employer and court decisions, teach employees that certain types of behavior are unacceptable. These lessons create a culture and promote conformity with workplace policies, thereby causing unacceptable behavior to become aberrational. Even without specific knowledge of regulations, most employees know their employers consider stealing, fighting, and drug use serious misconduct for which they could be fired. Zero tolerance rules for discriminatory conduct could establish and foster a similar culture.

IV. ZERO TOLERANCE FOR DISCRIMINATION

In the area of sexual harassment, zero tolerance policies have become widespread.¹⁶³ In *Burlington Industries v. Ellerth*,¹⁶⁴ the Supreme Court held that a personnel policy prohibiting sexual harassment could form the basis for an employer's affirmative defense in cases where a supervisor has not taken

153. *Jones v. Rovena St. Joseph Med. Ctr.*, No. 00-1286, slip op. at 2 (7th Cir. Oct. 3, 2000).

154. *Id.* at 7 (declining opportunity to second-guess employer's policy).

155. No. 00-6671, slip op. (6th Cir. July 3, 2002).

156. *Cartwright v. Lockheed Martin Util. Servs.*, No. 00-6671, slip op. at 14-17 (6th Cir. Jul. 3, 2002).

157. No. NA 00-1330C H/K, slip op. (S.D. Ind. Dec. 14, 2001).

158. *Davis v. Visteon Sys.*, No. NA 00-1330C H/K, slip op. at 9-10 (S.D. Ind. Dec. 14, 2001).

159. *Clark v. Runyon*, 218 F.3d 915, 917 (8th Cir. 2000).

160. *Id.* at 919 (rejecting discrimination claim).

161. 151 F. Supp. 2d 1131 (N.D. Cal. 2001).

162. *Bateman v. UPS*, 151 F. Supp. 2d 1131, 1135-36, 1144 (N.D. Cal. 2001) (granting summary judgment for employer who dismissed employee for fighting with another employee); *Sherman v. Runyon*, 235 F.3d 406, 408-09 (8th Cir. 2000) (affirming dismissal of employee for violence and threats at work as nondiscriminatory).

163. See Fair, *supra* note 101, at 425-26 (explaining zero tolerance policies as employer's means of avoiding vicarious liability).

164. 524 U.S. 742 (1998).

tangible employment action against an employee.¹⁶⁵ Along with a companion case *Faragher v. City of Boca Raton*,¹⁶⁶ the Court delineated the two types of harassment cases an employee may file and the ways employers may protect or defend themselves.¹⁶⁷ The Court decided that an employer scheme that prevented or promptly corrected incidents of sexual harassment would advance the deterrence goals of the statute (Title VII).¹⁶⁸ Therefore, to prove an employer liable, the employee must participate in available preventive or corrective processes or at least not unreasonably fail to take advantage of them.¹⁶⁹ This insulation from liability, achieved through the adoption of zero tolerance rules, has created a major incentive for employers who might otherwise not have been proactive in this area.

A large percentage of the workers covered by Title VII are not covered by collective bargaining contracts. With respect to unrepresented employees, employers have greater disciplinary discretion when enforcing their zero tolerance discrimination policies. Union challenges to disciplinary decisions present a tougher hurdle for employers because employers cannot expect arbitrators to be as deferential to management choices as judges are.¹⁷⁰

Many lower courts have demonstrated that they will support employers' disciplinary choices over an arbitrator's judgment when employees engage in discriminatory conduct, but that support is not universal. For example, in *Tamko Roofing Products v. United Steel Workers of America, Local 10711*,¹⁷¹ the court upheld the employer's decision to discharge a white employee who had made a racially offensive remark to a black employee of another company.¹⁷² The court prioritized the company's zero tolerance harassment policy and disciplinary prerogative over an arbitrator's determination that the employee was wrongfully terminated under the collective bargaining

165. *Id.* at 765 (allowing affirmative defense to vicarious liability claim based on existence of anti-harassment policy).

166. 524 U.S. 775 (1998).

167. See *Farragher*, 524 U.S. at 789-90 (delineating same). The Court held in both cases that an employer has an affirmative defense to hostile environment claims where no tangible employment action is taken; *Ellerth*, 524 U.S. at 764-65 (recognizing hostile environment and discriminatory employment action with tangible results). *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

168. See *Ellerth*, 524 U.S. at 765. The elements of an employer's defense are: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

169. See *id.*

170. See *Rose v. Uniroyal Goodrich Tire Co.*, 219 F.3d 1216, 1220-21 (declaring judges not "super personnel department[s]").

171. 2000 U.S. Dist. LEXIS 21856 (N.D. Ala. 2000), *rev'd in part, vacated in part*, 265 F.3d 1064 (11th Cir. 2001).

172. *Tamko Roofing Prod. v. United Steel Workers of Am., Local 10711*, 2000 U.S. Dist. LEXIS 21856, at *24-25 (N.D. Ala. 2000), *rev'd in part, vacated in part*, 265 F.3d 1064 (11th Cir. 2001) (granting summary judgment to employer that discharged employee and overruling arbitrator award).

contract.¹⁷³ The court rejected the arbitrator's narrow interpretation of the employer's harassment policy and his reinstatement of the employee, finding it violative of a well-established public policy against racial harassment.¹⁷⁴ The court decided to utilize the rarely used public policy exception to enforcing an arbitrator's award on the premise that reinstating the employee under the circumstances would frustrate the employer's attempt to further Title VII's goal of ridding the workplace of discriminatory conduct.¹⁷⁵

Other courts have vacated arbitration awards finding that they violate public policy embodied in antidiscrimination laws. Many sexual harassment dischargees have been reinstated by arbitrators only to find the arbitral award set aside by a court.¹⁷⁶ Courts have rejected technical interpretations of companies' zero tolerance rules or the collective bargaining contract to frustrate employers' attempts to rid the workplace of discrimination.¹⁷⁷

In another case, the arbitrator determined that although a male employee had repeatedly engaged in serious sexual harassment in violation of company policy, he should be reinstated because discharge was too severe a penalty.¹⁷⁸ In vacating the award, the district judge found that

[T]he inevitable consequence of the arbitrator's award reinstating [the employee] would be to "compel his female coworkers to submit to his sexual harassment (conduct of which he has been repeatedly adjudicated) as a condition of their employment" and would permit his sexual harassment to threaten to perpetuate a hostile, intimidating and offensive work environment.¹⁷⁹

The court in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*,¹⁸⁰ reached a similar conclusion in another sexual

173. *Id.*

174. *Id.* at *23-25. Because the employer's policy did not expressly include non-employees as covered individuals, the arbitrator ruled that it would be inequitable to extend the rule to individuals other than those specifically mentioned in the policy. *Id.* at *11-12.

175. *Id.* at *23 (announcing § 1981 law established "national policy forbidding racial discrimination and harassment in the workplace"). The public policy exception in the Eleventh Circuit has two elements: "(1) law and legal precedents establishing a well-defined and dominant public policy, and (2) violation of the public policy by an employee while performing his duties as an employee." *Id.* at *22. The court also found it "equally clear" that the employee had violated public policy with his remark. *Id.* at *24-25.

176. *United Transp. Union v. Burlington N. R.R. Co.*, 864 F. Supp. 138, 142 (D. Or. 1994) (reversing arbitrator's reinstatement award to employee based on public policy exception rationale).

177. *Id.* (noting employer obligation to keep workplace free of sexual harassment and applying public policy exception).

178. *See* *Newsday v. Long Island Typographical Union*, 915 F.2d 840, 843 (2d Cir. 1990) (recounting facts of arbitration procedure and result).

179. *See id.* (examining procedural history, including Judge Glasser's remarks).

180. 969 F.2d 1436 (3d Cir. 1992).

harassment case.¹⁸¹ In this case, the arbitrator determined that the employer had not properly investigated an allegation of sexual harassment and, therefore, the employer did not have sufficient cause to discharge the accused employee.¹⁸² The arbitrator refused to address whether sexual harassment had occurred, yet he decided that reinstatement was proper.¹⁸³ The court found the arbitrator's decision was biased in favor of the accused male employee, insensitive to the female victim and violative of public policy.¹⁸⁴

Not all courts, however, have been deferential to the disciplinary decisions of employers concerning violations of their sexual harassment policies.¹⁸⁵ Additionally, the Supreme Court has reaffirmed an arbitrator's broad powers and discretion to say what discipline is appropriate.¹⁸⁶ Recently, the Court emphasized in *Eastern Associated Coal Corp. v. United Mine Workers, District 17*,¹⁸⁷ that courts called upon to vacate awards on public policy grounds must ask whether the award violates public policy, not whether the employee's conduct violates public policy.¹⁸⁸

In *Eastern*, the company sought to discharge an employee twice for violating the company's drug abuse policy, but in both instances, the arbitrators returned the employee to work with some discipline.¹⁸⁹ Although the employee was not driving when he tested positive for marijuana and therefore was not subject to the Department of Transportation regulations addressing substance abuse while driving, the company argued that the employee's reinstatement was contrary to public policy.¹⁹⁰ In upholding the arbitrator's decision to reinstate, the Court found that neither Congress nor the Department of Transportation passed a rule requiring the discharge of a drug user.¹⁹¹ Relevant regulations only evidenced a policy of possible discipline or rehabilitation as settled on by the parties to the collective bargaining agreement.¹⁹² The arbitrator's award was therefore

181. *Id.* at 1438 (affirming district court's determination that arbitrator's award violated public policy).

182. *See id.* at 1440.

183. *See id.*

184. *See Stroehmann*, 969 F.2d at 1446 (summarizing holdings and affirming lower court).

185. *See Weber Aircraft, Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821, 823 (5th Cir. 2001) (reinstating award of suspension without pay, thereby setting aside employer's termination for harassment); *see also Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971, 972 (4th Cir. 1999) (overturning discharge for harassment violation by reinstating arbitral award of suspension without pay).

186. *See E. Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (reasoning arbitrator's award parties bargained for only set aside in rare instances).

187. 531 U.S. 57 (2000).

188. *Id.* at 62-63 (framing correct issue).

189. *Id.* at 60 (recounting facts leading to suit). The employee was a truck driver subject to Department of Transportation regulations providing for testing and discipline of drivers who operate vehicles under the influence of drugs. *Id.* The regulations also included rehabilitation options or other remedial action in lieu of discharge. *Id.* at 64-65.

190. *Id.* at 61 (noting employer's contention).

191. *See E. Assoc. Coal Corp.*, 531 U.S. at 67 (hesitating to make public policy inference beyond that of Congress and DOT in transportation area).

192. *Id.* at 64-66 (revealing regulations contain no mandate against suspension or other discipline short of

consistent with the regulatory regime, permitting some discipline for the first violation and increased discipline for the second.¹⁹³ Because it is the arbitrator's construction of "just cause" that the parties bargained for, both they and the courts must honor that decision unless it can be shown that reinstatement violates some explicit, well defined, and dominant public policy.¹⁹⁴

The *Eastern* decision presents a real challenge for employers because antidiscrimination laws neither instruct nor require employers to take specific disciplinary action against workers engaged in prohibited conduct. Employers will thus be unable to cite public policies mandating discipline or discharge for prohibited conduct. Moreover, unions will not agree on harsh disciplinary schedules in employer-promulgated zero tolerance harassment policies. Arbitrators will therefore not be boxed in on penalty decisions by the contract or the law, thereby retaining flexibility to determine the appropriate discipline. While this arbitral discretion limits judicial authority to vacate on public policy grounds, it does not necessarily impair Title VII's goal of eliminating discrimination in the workplace. Although arbitrators could render awards insensitive to Title VII's goals and yet retain the insulation of the narrow public policy exception, as discussed *infra*, that will likely not happen.

Although arbitrators are generally not governed by public law, they are sensitive to the mandates of antidiscrimination laws when deciding whether a discharge is appropriate. For example, in *Ohio Department of Public Safety & Ohio Civil Service Employees Ass'n, AFSCME, Local 11*,¹⁹⁵ an employee was discharged for sexual harassment and grieved his discharge through arbitration. The employee made offensive and unwelcome comments to a female employee. For example, the grievant told the female employee that she "must wear her husband out" because they have four children.¹⁹⁶ He also told her that the baby she breast-fed was "one lucky baby" and that "if [he] got latched on, [he would] never get off."¹⁹⁷ The harassment culminated in the employee pulling on her sweater to get a better view of her breast.¹⁹⁸

The arbitrator decided that the grievant's conduct created an actionable sexual harassment hostile environment claim and concluded that the company had sufficient cause to discharge the employee because of his sexual harassment.¹⁹⁹ In reaching his decision, the arbitrator acknowledged that

discharge).

193. *E. Assoc. Coal Corp.*, 531 U.S. at 64.

194. *Id.* at 67 (rejecting use of public policy exception to arbitrator's decision).

195. 119 Lab. Arb. Rep. (CCH) 1050 (2003) (Brookins, Arb.).

196. *Id.* at 1051 (quoting employee's sexual comments to another employee).

197. *Id.* (outlining harassing and inappropriate comments).

198. *Id.* (describing physical harassment). Additional allegations included "daily unwelcome and offensive sexual comments, innuendos, and facial expressions." *Id.*

199. *Ohio Dep't of Safety*, 119 Lab. Arb. Rep. (CCH) at 1055-56 (2003) (Brookins, Arb.) (noting arbitrator's decision). The arbitrator concluded, "[c]onduct that creates actionable hostile environment sexual

arbitrators try to comply with the requirements of antidiscrimination law. The arbitrator noted that although the “just cause” provision controls, he still followed “the general guidelines and structure of federal law so that the opinion and award are not repugnant to that law.”²⁰⁰

Even arbitrators who disagree with a company’s discharge decision show a propensity to follow federal law. In another arbitration, a hospital employee was discharged for sexual harassment after he asked a patient’s mother for her name, phone number, and about her marital status.²⁰¹ The woman also accused the employee of visiting her home unannounced.²⁰² In reaching his decision to reinstate the grievant, the arbitrator considered and discussed the law on sexual harassment. The arbitrator considered the Supreme Court decisions in *Meritor Savings Bank v. Vinson*,²⁰³ and *Harris v. Forklift Systems*,²⁰⁴ along with the Equal Employment Opportunity Commission (EEOC) guidelines, and determined that the grievant’s conduct did not satisfy the legal standard for sexual harassment.²⁰⁵

Similarly in *Mr. Q’s Enterprise & ITPEU*,²⁰⁶ the arbitrator returned the grievant to work, finding that a single racial slur is not harassment.²⁰⁷ The *Port of Seattle & Teamsters, Local 117*²⁰⁸ also shows this tendency.²⁰⁹ The arbitrator found that the grievant was not given the company’s sexual harassment policy, he was not afforded harassment training, and he was not notified that he could be fired for a single, minor incident.²¹⁰ The arbitrator returned the grievant to work, finding that it would be unfair to subject the grievant to rules that were more stringent than those developed by the law.²¹¹

These cases demonstrate that arbitral awards reinstating employees fired for discriminatory behavior will not likely frustrate Title VII’s goals, which employers help to further with zero tolerance rules. In fact, arbitral consideration and reliance on the law places a good check on employer

harassment must be gender-based, of a sexual nature, pervasive, sufficiently intense to adversely affect the victims [sic] ability to perform her job, offensive, and unwelcome.” *Id.* at 1055. The arbitrator found that the grievant’s behavior satisfied all of these elements. *Id.* at 1056.

200. *Id.* at 1053 (highlighting conformity with federal law).

201. See *In re Univ. Med. Ctr.*, 115 Lab. Arb. Rep. (CCH) 1225, 1225, 1227 (2001) (Baroni, Arb.).

202. *Id.* at 1227 (relaying incident details in complainant’s own words).

203. 477 U.S. 57 (1986).

204. 510 U.S. 17 (1993).

205. *In re Univ. Med. Ctr.*, 115 Lab. Arb. Rep. (CCH) at 1228-29. The arbitrator noted that the grievant never asked for sexual favors, there was no “physical conduct of a sexual nature,” and his conduct was not frequent, severe, humiliating, threatening, hostile or abusive. *Id.* at 1229.

206. See 116 Lab. Arb. Rep. (CCH) 1304 (2002) (White, Arb.).

207. *Id.* at 1312 (agreeing with Union’s observation).

208. 2003 WL 23350921 (Snow, Arb.).

209. *Port of Seattle*, 2003 WL 23350921 (Snow, Arb.) (reinstating employee because single incident with customer not sexual harassment).

210. *Id.*

211. *Id.* The arbitrator discussed the legal requirements for sexual harassment as articulated by Congress, the judiciary, and the EEOC. *Id.*

overreaction without sacrificing the interests of harassment victims. Hopefully, employers will use the experience from the unionized setting to inform their decision-making about nonunion employees who violate zero tolerance harassment rules.

V. CONCLUSION

Because the Supreme Court has increasingly lodged antidiscrimination enforcement responsibilities with employers and arbitrators, employment discrimination laws will become more dependent on the extent to which employers take these laws seriously by implementing and enforcing personnel policies that declare discrimination intolerable. By themselves, employment laws cannot guarantee equality. Moreover, it does not make economic sense for employers to continue paying large settlements and judgments for Title VII violations. It makes more sense for employers to self-examine and voluntarily root out workplace bias. Years of consistent enforcement of antidiscrimination rules will coerce a change in employee attitude, thereby promoting bias free workplaces.

Employment discrimination continues to thrive, in part, because of the absence of zero tolerance policies on this issue. The Supreme Court, through recognizing an employer's affirmative defense to Title VII claims, has given employers a great economic incentive for policing and punishing employees who engage in discriminatory behavior. But zero tolerance need not mean discharge on the first offense regardless of the nature or severity of the conduct. The reinforcement of arbitral finality in *Eastern* will protect unionized workers from arbitrary dismissal without frustrating the policies or goals of antidiscrimination laws.

At the same time, employers must remain sensitive to the reality that antidiscrimination laws do not prohibit or seek to eliminate all insensitive workplace conduct. As such, employers should be wary of policies that provide for harsh discipline or discharge on the first offense even when the misconduct is not grave. In unionized settings, employers have ceded some power and disciplinary prerogatives have been limited by contractual just-cause provisions. Unionized employees are protected by the requirement that discipline be "just" or "reasonable" and thereby comply with collective bargaining promises.

Traditional labor laws have given arbitrators the final say on contract interpretation including the propriety of discipline under just-cause clauses.²¹²

212. See *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62 (2000) (concluding arbitration creature of contract). Thus, labor arbitration law has evolved out of the collective bargaining contract that typifies unionized environments. The Supreme Court has developed a body of law to govern arbitration by interpreting the National Labor Relations Act and its amendments. The Court interpreted Section 301 of the Labor Management Relations Act as authorizing federal courts to enforce agreements to

Although the empowerment of arbitrators was not originally designed to cover statutory employment issues such as racial discrimination or sexual harassment,²¹³ the Supreme Court has chosen to insulate arbitral awards deciding these issues.²¹⁴ Thus, even though an arbitrator's award may sometimes conflict with Title VII's goals, employers will find it extremely difficult to avoid their contractual bargain with unilaterally implemented rules designed to further Title VII's goals.²¹⁵

Because an arbitrator's interpretation may conflict with an employer's initiative that can further Title VII's goal of deterrence, employers will be forced to more carefully consider the requirements of Title VII and the interests of employees before making discharge decisions. In the case of unionized employees, arbitration is a good check on employer power because although not controlled by Title VII, arbitrators are generally sensitive to the dictates of antidiscrimination law when deciding the propriety of discharge decisions.²¹⁶ As such, arbitral awards will tend not to frustrate the goals of Title VII while protecting contractual limitations on discharge.

arbitrate. See *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (holding federal policy dictates courts enforce arbitration agreements to achieve industrial peace). A few years later, the Court decided the *Steelworkers Trilogy*, establishing the arbitrator's broad authority, his freedom to make errors, and the obligation of courts to defer to his award. *United Steelworkers of Am. v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 596, 597 (1960) (holding courts must enforce arbitral awards that draw their essence from the contract); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960) (holding courts should defer to arbitrators because of arbitrators' special competence); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (holding courts cannot evaluate merits of grievances).

213. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 56 (1974) (explaining arbitrator's special competence best suited to contractual disputes—not Title VII claims); see also Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981(c) (amending Title VII as to jury trials for complaining party).

214. See *E. Assoc. Coal Corp.*, 531 U.S. at 62 (noting court may not overturn authorized arbitrator's decision).

215. Indeed, the historical reluctance to let arbitrators resolve Title VII disputes is eroding. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (recognizing that agreeing to arbitrate may waive statutory remedy for age discrimination claim); see also *Wright v. Universal Marine Serv. Corp.*, 525 U.S. 70, 80 (1998) (suggesting union may waive right to judicial forum if waiver clear and unmistakable in agreement).

216. See *In re Univ. Med. Ctr.*, 115 Lab. Arb. Rep. (CCH) 1225 (2001) (Baroni, Arb.) (evaluating grievant's conduct under existing case law); *In re Mr. Q's Enter.*, 116 Lab. Arb. Rep. (CCH) 1304 (2002) (White, Arb.) (addressing same).