

DIVERSITY INITIATIVES IN THE WORKPLACE: THE IMPORTANCE OF FURTHERING THE EFFORTS OF TITLE VII

By Daniela M. de la Piedra*

Over the years, diversity has become an important issue in the workforce. While affirmative action programs originally targeted practices in the recruitment, hiring, and retention of female and minority applicants,¹ diversity initiatives today benefit all employees by fostering an appreciation and understanding of diverse backgrounds, which results in happier workers and greater productivity and profit for the employer.

This article explores the need for, and the legality of, employer diversity initiatives in the private sector, and ways in which private employers may protect themselves against reverse discrimination suits in the implementation of these programs. In the discussion, this article examines the history of inclusion and diversity in the American workplace, as well as Supreme Court jurisprudence on diversity and affirmative action in educational settings and in the workforce. In making recommendations, this article makes the case for diversity initiatives and suggests ways in which a company may educate its employees about the importance of inclusion in the workplace, and subsequently, how employers can translate that awareness into effectively diversifying their workforce.

HISTORY OF DIVERSITY

EXECUTIVE ORDERS AND TITLE VII

Until the 1960s the majority of Americans lived in government-sanctioned segregation that permeated schools, restaurants, and the workplace. The federal government outlawed segregation in public spaces through the landmark Civil Rights Act (“the Act”) of 1964, with Title VII of the Act cementing past attempts at fairness and inclusion in the workplace.² These previous attempts at change and equality had been developing for decades. In 1941, President Roosevelt signed Executive Order 8802 to reaffirm the country’s anti-discrimination policy, prohibiting discrimination in the defense industry or government on the basis of race, creed, color, or national origin.³ The Executive Order called for the full and equitable participation of all workers. This was the first presidential action taken to prevent employment discrimination; however, it fell short of effectuating change since it failed to establish an enforcement authority for the government. Seven years later, President Truman issued Executive Order 9981, which established the President’s Committee on Equality of Treatment and Opportunity in the Armed Services to oversee and effectuate changes necessary to end discrimination within the armed forces on the basis of race, color, religion, or national origin.⁴ Although Executive Order 9981 did not specifically mandate desegregation of the armed forces, a few days after issuing the order President Truman explained at a press con-

ference that the intent of the order was to desegregate the military branch.⁵

The Civil Rights Movement led to the passage of Title VII, which prohibits employers from discriminating against employees on the basis of race, color, religion, sex, and national origin with respect to a person’s compensation, terms, conditions, or privileges of employment.⁶ The purpose of Title VII is to achieve equal employment opportunities for participants in the workforce by eliminating historical and artificial barriers that operated against disadvantaged groups in the past.⁷ Notably, Title VII was not meant to allow or require employers to provide preferential treatment to achieve the goals of the statute. Combined with a growing societal sense of social and moral obligation, however, the civil rights laws sparked interest in workplace diversity programs and initiatives around the country.⁸

SUPREME COURT JURISPRUDENCE SUPPORTS DIVERSITY INITIATIVES IN THE WORKPLACE

The Supreme Court first addressed Title VII and the use of voluntary race-conscious affirmative action plans in the workplace in *United Steelworkers of America v. Weber*.⁹ The Court decided whether Title VII forbade private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that granted racial preferences in the petitioner’s plan by reserving half of the openings in the newly created in-plant training programs for blacks.¹⁰

The Court found that the affirmative action plan in *Weber* had been voluntarily entered into by the employer and the union through a collective bargaining agreement.¹¹ The plan was designed to eliminate racial disparities in the petitioner’s almost all-white craft-work forces. The Court held that Title VII did not prohibit all private and voluntary race-conscious affirmative action plans and explained that the plan in question worked toward the same goals as Title VII—to help place blacks on equal footing with whites in the workforce.¹² The Court clarified that §703 (j) of the Act states only that nothing in Title VII may be interpreted to *require*, as opposed to *permit*, an employer to grant preferential treatment. Subsequently, the Court concluded that Congress did not intend to forbid all affirmative action pro-

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grams.¹³

The *Weber* Court provided important guidance for future diversity plans. The Court asserted that a plan is lawful if: (1) the purpose of the plan is to eliminate the racial imbalance in a particular workforce; (2) the plan does not unnecessarily trammel the interests of the white employees; and (3) the plan is a temporary measure, lasting until racial imbalance is rectified.¹⁴

In *Johnson v. Transportation Agency of Santa Clara*, the Court further clarified the legality of race and gender-conscious decision-making processes in a job promotion situation.¹⁵ Petitioner Paul Johnson brought an action against his employer when, pursuant to its affirmative action plan, the employer overlooked Johnson to promote a female employee, Diane Joyce. The Court ultimately held that the employer did not violate Title VII when it took Joyce's sex into account in its decision to promote Joyce instead of Johnson.¹⁶

The employer's affirmative action program was formed to address the recognized small percentage of women and minority employees that were placed in management, professional, and technical positions. The employer felt that a plain prohibition of discrimination was not enough to remedy the effects of previous discriminatory practices, and would not help to place disabled persons, women, and people of color on equal footing with others as an affirmative action plan would.¹⁷ The plan did not have quotas, but it allowed the consideration of gender and ethnicity to enter the evaluation of qualified candidates for positions where those groups were underrepresented. This was done in order to reach the goal of a work force composition that reflected that of the area labor force.¹⁸ Consequently, the Court found that the affirmative action was lawful because the plan was well thought out; it sought to remedy a past wrong; it did not unnecessarily trammel the rights of others; and it had reasonable built-in bench marks by which to evaluate the progress and necessity of the plan.¹⁹

In addition to allowing affirmative action programs in employment, the Supreme Court has recognized the value of diversity and its use as a tool to remedy underrepresentation of certain classes. In *Grutter v. Bollinger*, the Court found that the University of Michigan Law School's race-plus diversity plan to be holistic, narrowly-tailored, and temporary, and thus constitutional.²⁰ The law school did not have quotas, and the race of an applicant was one of numerous factors taken into consideration in admission decisions, which themselves were individualized and flexible.²¹

The Court in *Grutter* explained that by increasing the diversity of the school, the diversity plan had substantial benefits such as promoting cross-racial understanding, breaking down stereotypes, and contributing to a more engaging and enlightening classroom discussion.²² The Court emphasized the importance of diversity by noting that the benefits are real and that major businesses in the United States have acknowledged that the only

way to gain the skills to succeed in a global market is to have diverse employees with different cultures, opinions, and ideas.²³

AFFIRMATIVE ACTION VS. DIVERSITY INITIATIVE

Although affirmative action programs and diversity initiatives address diversity in the workplace, they do so through different approaches. Title VII does not require an employer to affirmatively address racial, gender, or other class imbalances in the workplace. Therefore, based on the anti-discrimination law alone, an employer is not in violation of Title VII for merely

failing to address inclusion. By contrast, affirmative action programs are mandatory for employers, forcing employers to meet certain standards to level the playing field and to balance the representation of diverse groups in the workplace.²⁴

Affirmative action programs often have a remedial purpose based on past historical discrimination or disadvantages experienced by a certain class. Contractors who work with the government, for example, are expressly prohibited from discriminating on the basis of protected traits and sometimes are also required to implement affirmative action programs to increase the participation of women and minorities.²⁵

Unlike affirmative action, however, diversity plans are voluntary and are meant to have the long-term benefit of increased productivity and profit.²⁶ In addition to government and employer-imposed diversity initiatives, clients of companies may also play a role in forcing an employer to address its diversity strengths and weaknesses. For instance, some clients require contractual provisions mandating certain levels of diversity for teams that will work on specific issues. Clients demand this type of service because they recognize the strength and business-sense of diversity, which in turn forces employers to evaluate their progress and maintenance of diversity goals and achievements.²⁷

Affirmative action programs and diversity plans are often confused as being the same thing, but in fact the two programs have different origins and varying goals. Affirmative action programs are imposed on employers by the government and have a narrow focus on race and gender, and the hiring process from an established applicant pool. Alternatively, a diversity plan is self-imposed by the employer and addresses ways in which to expand the applicant pool to all underrepresented communities, as well as to address other aspects and components of the workplace environment.

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THE RELEVANCE OF DIVERSITY TO BUSINESSES TODAY

Diversity initiatives address multiple issues that employers face in dealing with employees, clients, and business in general. First, diversity initiatives help the employer's business look more like society at large. Due to societal factors, minorities and women continue to be disproportionately underrepresented in most fields, reducing their experience and benefits in the workplace.²⁸ These initiatives recognize this disparity and target a more diverse group of potential applicants which the employer would not otherwise be aware of. Additionally, the recognition of employees' varying qualities of experience in the workplace makes it possible for employers to provide additional support to these groups.

Second, employers have realized that diversity affects the bottom line.²⁹ By bringing in a diverse group of employees, an employer has a heterogeneous pool of talent from which to obtain novel ideas and solutions. This asset in turn leads to unique outcomes that more effectively solve a client's needs and lead to greater profits. This aspect of diversity initiatives also addresses the changing demographics of customers and markets.³⁰ Employers must keep up with new markets and cultures in order to develop and maintain a business advantage in their field.

Third, diversity initiatives help employees to learn about their differences, and to understand and respect each other inside and outside of the workplace.³¹ An increased sense of connect-edness and camaraderie reduces conflicts and increases satisfaction levels, which result in more effective and higher quality productivity. Finally, diversity initiatives not only increase revenue, but they can also reduce costs.³² By effectively managing diversity, attracting great talent, reducing turnover, and preventing lawsuits, a company can save a substantial amount of money.

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Management consultant John P. Fernandez, conducted research on various companies to explore the real effects and benefits that flow from a company's commitment to diversity.³³ Fernandez's research shows that the best way for an employer to fulfill their clients' needs is by maintaining a diverse group of employees. For example, in order to be successful, a company must identify a market segment's needs, preferences, and expectations. The most effective way to achieve this is through research and analysis by people who share common characteristics with the market segment being targeted. To that end, the Good-year Tire & Rubber Company conducted research on women's needs on the road and subsequently developed tires that better addressed women's focus on safety.³⁴ Similarly, the Cadillac Motor Car Division of General Motors Corporation developed a luxury model car for women based on results from various focus

groups.³⁵ The key members of the team – engineers, finance, and marketing managers – were all female.³⁶

Fernandez also points to the severe effect on profits that can occur when there is a failed attempt to achieve a cultural understanding. For example, when a car-rental company in Hong Kong tried to promote itself by giving away green hats, the promotion failed because it had neglected the cultural meaning of the hats: in Chinese superstition, when a man wears a green hat, this means that his wife is cheating on him. Similarly, a Spanish language version of the Microsoft Word application inadvertently provided a series of offensive synonyms for ethnic groups. In both circumstances, had these companies used more diverse teams working in these markets and on these issues, those scenarios could have been avoided, along with their embarrassment and reduced profits.³⁷

GUIDANCE ON LAWFUL AND UNLAWFUL "DIVERSITY" PRACTICES

Beyond the foundation for the roots of diversity initiatives and the need for diversity awareness, implementation, and management, one must look at the structure within which businesses may develop these initiatives. The Supreme Court's guidance on diversity within educational settings proves instructive for addressing similar issues in the workplace. Additionally, the lower courts have also issued instructive opinions. Employers should examine and evaluate the diversity needs of their organizations, and then should seek to develop programs that fit those needs within the confines of the law.

DIVERSITY INITIATIVES FOUND LAWFUL

Federal courts have had the opportunity to examine and rule on diversity initiatives by employers, and provide additional guidance on what constitutes a lawful plan. In deciding whether an employer has violated Title VII by instituting a diversity initiative, courts look at factors such as the right of an employer to diversify its workforce, the potential needs and benefits of diversity, and the plan's consistency with Title VII objectives.

The U.S. District Court for the Eastern District of Pennsylvania has dealt with the right of an employer to develop a diversity initiative, explaining that proof of such an initiative, on its own, is not enough to prove reverse discrimination. In *Donaldson v. Exelon*, the plaintiffs, a group of older white men, alleged discrimination based on age and race, asserting that "diversity" within the company was equivalent to discrimination against older white men, such as themselves.³⁸ The plaintiffs sought to certify the class, but the court denied such a certification citing a failure of the plaintiffs to point to a particular shared injury.³⁹ Although the class did not get past the classification hurdle, the court went on to explain that an employer's diversity program, on its own, is not enough proof of discrimination, and that such diversity plans are generally lawful.⁴⁰ Citing *Grutter*, the court discussed an employer's right to be concerned with, and address, diversity in the workplace, and that an employer's decision to diversify is in fact a smart business decision that correlates with change in the global market.⁴¹

In *Peterson v. Hewlett-Packard*, the Ninth Circuit found that the employer's diversity initiative, comprised of hanging up "diversity posters" displaying employees who were black, Latino, and homosexual did not violate Title VII.⁴² Additionally, the court in *Peterson* found that the employer was not required to accommodate Peterson who, in response to the "diversity posters", exhibited Biblical scripture condemning homosexuality which, though in his cubicle, was large enough to be legible from adjacent corridor.⁴³ The court reasoned that efforts to eradicate discrimination against homosexuals or other groups in the workplace are consistent with, and work toward the goals of, Title VII.⁴⁴ A campaign that devotes special attention to the prejudice surrounding homosexuality in order to increase tolerance and respect is not unlawful.⁴⁵ Furthermore, the employer in this case had taken special care to develop the diversity initiative at a three-day conference and subsequent planning meetings that were attended by many employees.⁴⁶

The court in *Peterson* held that the employer lawfully terminated Peterson because his religious passages created a hostile and intolerant work environment in violation of the company's anti-harassment policy, and because Peterson failed to remove the passages that the company regarded as demeaning and degrading.⁴⁷ Although complete harmony is not a goal of Title VII, the court held that the statute does not require employers to accept or accommodate employee discomfort that manifests itself in demeaning behavior toward others.⁴⁸ Unlike Peterson's aggressive passages, the employer's diversity poster series did not attack anyone based on class membership, and instead fostered tolerance and inclusion.⁴⁹

In *Moranski v. General Motors*, the Seventh Circuit examined the legality of affinity groups created in the workplace of a private employer.⁵⁰ General Motors ("GM") created the opportunity to start affinity groups as an effort to support employees from diverse backgrounds and to improve company performance.⁵¹ The Affinity Program Guidelines however, did not recognize entities that shared only a common interest or activity, or groups that were organized around a religious purpose.⁵² When the plaintiff submitted an application for the "GM Christian Employee Network," the company denied him Affinity Program status. Shortly thereafter, the plaintiff filed a suit alleging that GM had committed unlawful religious discrimination against him when it rejected his application.⁵³

The Seventh Circuit held that the employer's denial of recognition for a Christian affinity group did not constitute religious discrimination in violation of Title VII.⁵⁴ The court acknowledged that while some companies recognize affinity groups that are organized on the basis of religion, an employer may lawfully prohibit the recognition of any religious groups in its workplace.⁵⁵ The court found that GM did not violate Title

VII because GM would also have rejected the application if the plaintiff had been of a different religion, as the plaintiff would fail to establish a prima facie case of discrimination because he would not have been able to show that, all other things being equal, a person of a different religion was treated differently.⁵⁶ The Affinity Group Guidelines, a voluntary program designed by the employer over the years, treated all employees with a religious position equally, and was thereby in accordance with Title VII. The company did not recognize as an Affinity Group any group organized around a religious position.⁵⁷

Courts such as the Seventh Circuit have ruled that recruiting from minority communities and expanding the pool of candidates and applicants is lawful.⁵⁸ Similar to *Grutter*, the Seventh Circuit in *Mlynczak v. Boldman* pointed to the fact that the employer did not set quotas, and that once the applicant pool was set, the employer did not make a decision to hire an applicant based on his or her minority status.⁵⁹ The court also emphasized that to increase diversity, an employer may lawfully use an open, nationwide, and competitive application process as opposed to one restricted to internal candidates, especially if internal employees are themselves not diverse.⁶⁰

DIVERSITY INITIATIVES AND PRACTICES FOUND UNLAWFUL

In addition to providing clarifications on what employers can lawfully do to diversify their workforce, courts have issued opinions that help employers understand which actions may be illegal even in the name of diversity and inclusion. Although an employer may have good reason to diversify, it must comply with Title VII at all times.

The Fifth Circuit in *Clements v. Fitzgerald's Mississippi* held that an employer cannot fire an employee to replace him with a "diverse" employee who has less experience.⁶¹ The court in *Clements* found that where a manager made comments that an employee was boring and bland, told others that he wanted to diversify the workplace, fired the employee despite a contractual obligation not to, and subsequently replaced the employee with a less qualified person for the sake of diversity, there was circumstantial evidence of racial discrimination.⁶² The court in this case made it clear that an employer cannot discharge a qualified employee and replace him or her with a less qualified person only for the purpose of diversifying the company, especially if there is a contractual obligation to continue the employment of the original employee.⁶³

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cusses, an employer may not add diverse applicants haphazardly into the hiring process.⁶⁴ The plaintiff in *Rudin v. Lincoln Land Community College* filed a suit for discrimination on the basis of race and sex due to the employer's failure to hire her for an instructor position.⁶⁵ The person selected for the position, Paul Hudson, a black male, was screened out by the hiring team and therefore was not selected for an interview. However, when the list of interviewees reached the Equal Employment Opportunity Officer, she added Hudson back onto the list.⁶⁶ After the interviews, the plaintiff was ranked second highest and Hudson was ranked second from the bottom.⁶⁷ Due to various and contradictory explanations, it is not clear who in the company received the interview scores and when these were received, but the employer ultimately hired Hudson instead of the plaintiff.⁶⁸

The *Rudin* court found that the addition of Hudson into the interview pool combined with other facts and circumstances in this case, constituted circumstantial evidence of racial discrimination.⁶⁹ Hudson was effectively allowed to bypass the first elimination round because of his race. The court also found it probative that the employer failed to follow its own internal procedure in the hiring process, stating that the employer's systematic abandonment of its hiring procedures was circumstantial evidence of discrimination.⁷⁰ The Seventh Circuit also noted that an employer's failure to follow its own hiring procedures could constitute pretext evidence for unlawful discrimination.⁷¹ Additionally, the court explained that administrative pressure to hire a "diverse" candidate is not a legitimate, non-discriminatory reason to hire a candidate over another more qualified candidate.⁷²

RECOMMENDATIONS: USING DIVERSITY TO COMBAT DISCRIMINATION IN THE WORKFORCE AND TO KEEP UP WITH THE GLOBAL MARKETPLACE OF IDEAS, CULTURES, AND PEOPLE

As evidenced by the various courts that have ruled on employers' diversity plans and initiatives, there is a good amount of guidance for employers to rely on in developing their own lawful initiatives. Employers who wish to diversify their workforce can begin their efforts by expanding their candidate pool to target non-traditional communities while keeping in mind that they cannot subsequently give preference to minority applicants in the hiring process. Employers may also promote diversity and inclusion within their workplace through various initiatives, and are not obligated by law to tolerate offensive resistance and reactions to their diversity programs and plans, since this type of behavior contradicts the very purpose of the employer's diversity programs. Lastly, an employer has a right to design its own diversity initiative, but it must be well thought out and it must include a type of evaluation system to assess progress.

At the same time, employers must be mindful of giving un-

merited preference to minority groups, and should refrain from ignoring their own internal procedures in order to increase diversity. Employers have a right to diversify their workforce in order to keep up with today's global market; however, they may not "unnecessarily trammel" on the rights of other employees.⁷³ Addressing diversity needs within a company is an important step toward creating an efficient and profitable company. Businesses should work on helping their current workforce reach full potential before raising the diversity of employees. A company could become more efficient at attracting and hiring traditionally underrepresented groups of people, but if the company's culture is not conducive to retaining minority employees, all efforts at attracting diverse candidates are wasted when turnover is high and uncontrollable.

In Fernandez's research, he found that many employees do not understand what diversity really is or why it is important for anyone to focus on it.⁷⁴ This provides the starting point for an employer who wishes to develop and implement a diversity program. The company should survey the staff to see where they stand on the issue of diversity, and what their attitudes about diversity are. Once the company has evaluated what its starting point is, it can begin to develop an appropriate plan for its workplace.

To effectively educate and raise awareness about diversity, employers need to first have the right leadership to pave the way. This leadership, whether it is the board of directors or managing supervisors, needs to reflect the makeup of the company or the makeup the company aims to achieve. This will not only legitimize the company's commitment to diversity, but it will also allow the company to invent a better diversity plan devised by a diverse group of people with real life experience. If companies start instituting diversity at the top levels, this will set the precedent for lower level positions, and there will be a trickle-down effect throughout the company.⁷⁵ Additionally, the inclusion of women, people of color, and other minority groups on committees, is important. However, the education of diversity cannot be assigned solely to diversity committees, nor should these be given the full responsibility of developing and implementing a company's diversity plan.⁷⁶

Employers should implement diversity training in a variety of ways. Employers could provide a safe space for dialogue, either formal or informal, to raise awareness and foster an under-

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standing of how different people experience the workplace and what employees' needs are in order for them to reach their full potential in the workplace. Employers should also put more effort into including those people who are less likely to attend social

events, such as women and people of color. Employers should find out why certain people generally choose not to attend certain social events, and should use that feedback to organize different events that evoke a greater sense of belonging in

these underrepresented groups.⁷⁷

Another way to build support for employees in a company is to create affinity groups that center around a particular trait, whether it is gender, race, or disability. Many times, these groups will be formed by employees themselves, but it is important for a company to show support, whether it be through funding, resources, or simply by creating a safe space for these groups to meet. Affinity groups are important for traditionally underrepresented groups as it gives these groups a chance to share experiences, seek and give advice, and build camaraderie.⁷⁸

Along with the creation of affinity groups, employers should develop mentoring programs. Mentors can provide fellow employees with guidance and advice, as well as a better understanding of the company's culture, which will raise employees' awareness of the language and rules of the workplace, and will empower them to achieve better results in their work.⁷⁹

A company must not only provide support to its diverse staff, but must also provide support and training to the company as a whole in order to create an environment that is truly understanding, knowledgeable, and accepting. Employers should provide ongoing communication to stress their commitment to diversity needs, and the implementation of diversity programs. Training should also be provided to management so they can learn how to manage diversity effectively—increase the applicant pool, reduce turnover, increase satisfaction and retention – and how to measure results and progress.⁸⁰ Furthermore, companies should work to make diversity less of a foreign concept by making it a part of other trainings sponsored by the employer. The understanding of diversity is a transferable skill set, and should be included and reinforced in trainings across the board to increase cross-cultural understanding and to help employees work more effectively with each other in different settings of a workplace.

Once a company has addressed its internal diversity needs, it is ready to develop programs and initiatives to target underrepresented groups as potential candidates and employees. In order to increase diversity within a company, the company will need to attract new and talented people, and there are various ways by which an employer can achieve this. Employers may choose to develop a partnership with schools or establish an internship

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program that focuses on recruiting people from underrepresented groups.⁸¹ The hope is that through these programs, the company will increase its candidate pool and will do so with candidates that are groomed for the company early on, before graduating from college. Employers may also gain additional exposure by participating in career fairs targeted at the various traditionally underrepresented groups. In many instances, employers need to promote themselves, and *they* must go to the diverse candidates rather than the other way around. Similarly, companies can also consider marketing themselves by partnering with other organizations and sponsoring events that focus on diversity issues.⁸² This will not only stress the company's commitment to diversity, but it can also attract less traditional candidates that may not have been exposed to the company otherwise.

Another effective way for an employer to demonstrate its commitment to diversity is by using diverse suppliers.⁸³ An employer's support of another workplace that is diverse can make the employer more efficient and thus a better choice for its business. Additionally, if an employer can show that it works with diverse groups, it is more likely to better understand the importance of diversity and how to manage it in its own workplace.

CONCLUSION

Diversity is a critical concept that is important for businesses' bottom lines, employees' productivity, and clients' satisfaction. The Supreme Court has recognized the importance of diversity in educational settings as well as in corporate America. Clients themselves are beginning to demand that diverse teams work on their issues or cases. To be successful in today's competitive global market, with innovative ideas, cross-cultural awareness, and enhanced productivity, businesses need to educate themselves on diversity – how to address it, increase it, and manage it. Diversity is no longer an option, but rather a necessity.

ENDNOTES

* Daniela de la Piedra is currently completing her third year of law school at American University Washington College of Law ("WCL"), and has served as a board member for both the Latina/o Law Student Association and the Journal of Gender, Social Policy & the Law at WCL.

¹ See *infra* Supreme Court Jurisprudence Supports Diversity Initiatives in the Workplace (differentiating between affirmative action and voluntary programs).

² Civil Rights Act of 1964, 42 U.S.C. § 2000e.

³ Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943).

⁴ Exec. Order No. 9981, 3 C.F.R. 722 (1942-1948), *reprinted as amended in* 5 U.S.C. § 171.

⁵ See *Desegregation of the Armed Forces: Chronology*, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/whistlestop/>

[study_collections/desegregation/large/index.php?action=chronology](http://www.trumanlibrary.org/whistlestop/study_collections/desegregation/large/index.php?action=chronology) (last visited Mar. 9, 2008).

⁶ Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2006).

⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 (1971) (explaining that Title VII proscribes practices, tests, and procedures that are facially neutral but discriminate based on a protected trait such as race).

⁸ See Kate McCormick, *The Evolution of Workplace Diversity*, HOUS. LAW. 12 (Mar./Apr. 2007) available at http://www.thehoustonlawyer.com/aa_mar07/page10.htm.

⁹ *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

¹⁰ *United Steelworkers* 443 U.S. at 199 (explaining that during the first year of the affirmative action program, the employer selected thirteen craft trainees, which included seven black trainees and six white trainees). The most senior black in the program had less seniority than many whites who were not accepted

ENDNOTES CONTINUED

into the program, one of them being Brian Weber, who sued the employer alleging that the affirmative action program racially discriminated against him in violation of Title VII. *Id.* at 201.

¹¹ *Id.* at 201.

¹² *Id.* at 208.

¹³ *Id.* at 205-06.

¹⁴ *Id.* at 208-09.

¹⁵ *Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616 (1987).

¹⁶ *Id.* 619-20.

¹⁷ *Id.* at 620-21.

¹⁸ *Id.* at 621-22.

¹⁹ *Id.* at 634-39.

²⁰ *Grutter v. Bollinger*, 539 U.S. 306, 334-35 (2003).

²¹ *Compare id.*, with *Gratz v. Bollinger*, 539 U.S. 244, 269-70 (2003) (finding that an admissions plan that assigns a certain number of admissions points to all underrepresented minority applicants is unlawful and unconstitutional).

²² *Grutter*, 539 U.S. at 330.

²³ *Id.*

²⁴ See McCormick, *supra* note 8, at 13.

²⁵ Exec. Order No. 11246, 41 C.F.R. 60.

²⁶ See McCormick, *supra* note 8, at 13.

²⁷ See Robert Duncan, Partner, Hogan & Hartson, Remarks at a Conference by American University, Washington College of Law and the Seventh Annual Meeting of the Dean's Diversity Council: Revisiting the Law School Diversity Imperative: Access and Definition (Nov. 8, 2007).

²⁸ While women tend to be underrepresented in many fields, there are gendered fields and jobs such as nursing and teaching that have a higher concentration of female employees and thus an underrepresentation of male employees. However, this paper will focus on historically discriminated groups that continue to show a general need for support.

²⁹ See Jon A. Gier & Holly R. Lake, *Meeting the Diversity Challenge: Race and Gender-Conscious Decisions in Recruiting*, PRACTICING LAW INSTITUTE, LITIGATION & ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 827, 829 (Oct. 2007).

³⁰ See Executive Diversity Services, *Business Case*, <http://www.executivediversity.com/case/index.htm> (last visited Mar. 9, 2008).

³¹ See McCormick, *supra* note 8, at 11.

³² See Executive Diversity Services, *supra* note 30.

³³ See John P. Fernandez, *RACE, GENDER, AND RHETORIC* (McGraw-Hill 1999).

³⁴ Fernandez *supra* note 33, at 225.

³⁵ Fernandez *supra* note 33, at 226-27.

³⁶ Fernandez *supra* note 33, at 226-27.

³⁷ Fernandez *supra* note 33, at 220.

³⁸ *Donaldson v. Exelon Corp.*, No. 05-1542, slip op., at 1-2 (E.D. Pa. Sept. 14, 2006).

³⁹ *Id.* at *9

⁴⁰ *Id.* at *12

⁴¹ *Donaldson*, 2006 U.S. Dist. No. 05-1542 at 3.

⁴² *Peterson v. Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2004)

⁴³ *Id.* at 601-02, 608 (finding that the managers and Peterson were unable to resolve the issue -- Peterson offered to remove the passages, which violently referred to putting homosexuals to death, only if in turn the employer took down the "Gay" poster, but asserted he would keep his passages posted if the poster was not removed) Subsequently, the employer gave Peterson time off with pay to reconsider his position, however, when Peterson returned to work he reposted the passages, which led to his termination for insubordination.

⁴⁴ *Peterson*, 358 F.3d at 603.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 605.

⁴⁸ *Id.* at 607-08.

⁴⁹ *Id.* at 604-05.

⁵⁰ *Moranski v. Gen. Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).

⁵¹ *Id.* at 538-39

⁵² *Id.*

⁵³ *Id.* at 539.

⁵⁴ *Id.* at 538.

⁵⁵ *Id.* at 541

⁵⁶ *Moranski*, 433 F.3d at 540.

⁵⁷ *Id.* at 542, n.3 (noting that federal employers have different obligations; the First Amendment prohibits them from excluding all subject matter concerning religion from a forum for speech.)

⁵⁸ See generally *Mlynczak v. Boldman*, 442 F.3d 1050 (7th Cir. 2006).

⁵⁹ *Id.* at 1054. But see *Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616 (1987) (taking sex into account in a promotion decision because the employer had an affirmative action program in place that was meant to remedy the employer's past discriminatory acts).

⁶⁰ *Mlynczak*, 442 F.3d at 1059.

⁶¹ *Clements v. Fitzgerald's Miss., Inc.*, 128 Fed. Appx. 351 (5th Cir. 2005).

⁶² *Clements*, 128 Fed. Appx. at 352-53.

⁶³ *Id.*

⁶⁴ *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005).

⁶⁵ *Rudin*, 420 F.3d at 715.

⁶⁶ *Id.* at 716.

⁶⁷ *Id.* at 717.

⁶⁸ *Id.* at 717-18.

⁶⁹ *Id.* at 721 (noting that the employer did not argue that it was engaging in affirmative action to remedy past discrimination on the part of the institution). It seems that the employer's act of inserting a candidate back into the applicant pool *may* have been lawful if the employer had been trying to remedy past discriminatory acts.

⁷⁰ *Rudin*, 420 F.3d at 723.

⁷¹ *Id.* at 727 (citing *Giacometto v. Amax Zinc Co., Inc.*, 954 F.2d 424, 427 (7th Cir. 1992)).

⁷² *Id.* at 722.

⁷³ *Weber*, 443 U.S. at 208.

⁷⁴ See FERNANDEZ, *supra* note 33, at 204-11.

⁷⁵ See Tannette Johnson-Elie, *Opportunities, Powerful Woman Hopes to Empower Others*, MILWAUKEE J. SENTINEL, Nov. 14, 2007, at D1 available at <http://www.jsonline.com/story/index.aspx?id=685903>.

⁷⁶ See ABA Commission on Women in the Profession, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 38 (2006) (suggesting ways to address high turnover rates of women of color in law firms).

⁷⁷ ABA Commission, *supra* note 70, at 39.

⁷⁸ See ABA Commission, *supra* note 70, at 39; see generally FERNANDEZ, *supra* note 29, at 212-213.

⁷⁹ See Sharon E. Jones, *The Real Deal: Success Strategies for Minority Partners and Associates*, PRACTICING LAW INSTITUTE, LITIGATION & ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 747, 752 (Dec. 2007).

⁸⁰ See Executive Diversity Services, *supra* note 30.

⁸¹ See FERNANDEZ, *supra* note 33, at 213.

⁸² See FERNANDEZ, *supra* note 33, at 213.

⁸³ See FERNANDEZ, *supra* note 33, at 214.