

Executive Summary

Confronting Racial Bias at Work

Challenges and Solutions for 21st Century
Employment Discrimination
November 2016



Introduction

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

However, to those who champion racial justice in the United States, the overall record of largely reactive, oft-delayed, case-by-case enforcement continues to paint a disturbing picture. On its own, the legal and administrative structure of protection is ill-equipped to prevent the systemic discrimination that still persists. Racial disparities in employment outcomes are well known, from hiring to access to benefits to over-representation in low-paying jobs to under-representation in high-paying jobs. Worker advocates and employment discrimination lawyers report that it is common for today's workers to experience any combination of the various forms of discrimination – explicit or coded, conscious

or unconscious, intentional or unintentional – that skew employment results unfairly.

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

The report draws from academic research, interviews with discrimination lawyers and EEOC officials, and surveys of worker advocates. It also profiles three worker organizations that exemplify so many others that feel forced to pursue strategies other than Title VII to promote racial equity in their industries. *The Confronting Racial Bias at Work* report argues that we must not only reinforce the largely reactive anti-discrimination structure established by law so that it reaches more workers and protects them more effectively, we must also promote proactive systemic solutions to increase the pressures, incentives, and mandates for racially equitable outcomes in employment.

PART I The Legislative and Judicial Origins of Title VII

Part One of *Confronting Racial Bias* covers the legislative origins of the EEOC, the federal agency created by Title VII in the 1960s to protect workers against intentional discrimination. The law was not designed to remedy the legacy of explicit discrimination, nor was it meant to proactively dismantle the effects of systemic racism, intentional or not. Through amendments and favorable court decisions in the early 1970s, the EEOC’s powers were partially expanded, but never enough to take a proactive role to creating racially equitable outcomes.

Confronting Racial Bias at Work also shares results from a 2016 Race Forward survey of 64 worker advocates, primarily representing workers from the restaurant, retail, construction, education, and other industries where women of color are disproportionately represented (or where 2003 EEOC research found that there were high rates of discrimination charges filed by women of color). Our survey demonstrates that many advocates report discrimination is commonplace in various industries, whether it’s intentional or unintentional, explicit or coded.

PART II Barriers Within the Legal/Administrative Anti-Discrimination System

Part Two of *Confronting Racial Bias* describes the difference between how workers’ racial discrimination claims are supposed to operate in theory within our federal courts and bureaucracies, and the extremely challenging way that they operate in practice – particularly if the discrimination is not of an explicit or intentional variety. Millions of workers are excluded from protection against racial discrimination, or have lost their rights through forced arbitration clauses. Others have difficulty securing lawyers to represent them because the monetary rewards are low and the legal or administrative system slow. Women of color and transgender workers of color face judges who are skeptical of intersectional claims. Courts have made it increasingly difficult for workers to be certified as a class, and to challenge discriminatory outcomes unless they can point to a single employment practice as a culprit. And to the detriment of both reactive and proactive enforcement approaches, the EEOC doesn’t robustly measure or share the impact of its negotiated remedies with employers, nor of its educational and outreach efforts.

Anonymous Survey of Worker Advocates (March/April 2016)

MOST COMMONPLACE FORMS OF DISCRIMINATION

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



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



PART III

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

Part Three of *Confronting Racial Bias* profiles recent campaigns from three resourceful worker organizations that — in order to make significant progress challenging employment discrimination and promoting racially equitable outcomes — have felt forced to work largely outside of the slow and limited legal and administrative systems established by Title VII. The LA Black Workers Center has waged a local campaign to secure project labor agreements that addressed underrepresented workers in the construction industry. In Massachusetts, the National Domestic Workers Alliance was able to win passage of a Domestic Workers Bill of Rights that improves working conditions within this industry where women of color are overrepresented. The state law even allows these workers to file discrimination claims in the state system, even though Title VII prohibits them from doing so at the federal level. And in New York City, the Laundry Workers Center trained retail and warehouse workers, helping them unionize and launch a consumer campaign to improve working conditions.



SOME OF THE SYSTEMIC BARRIERS TO RACIAL JUSTICE WITHIN THE CURRENT TITLE VII SYSTEM ARE AS FOLLOWS:



Independent contractors and others excluded



Judges dismiss cases before “discovery”



Changes to class certification rules

Difficulty finding a lawyer



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

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

Stray remarks



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

Forced arbitration clauses



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

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

EEOC evaluation and outreach

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

PART IV

Systemic Solutions and Recommendations for Racial Disparities in Employment Outcomes

Part Four of *Confronting Racial Bias* presents systemic solutions and recommendations for what our nation needs now and in the future to secure fairness and racially equitable outcomes for workers of color. “Systemic” solutions move beyond prescriptions for one-time “sensitivity” or “diversity” trainings, and beyond the removal of so-called “bad apples” in positions of power. They concentrate on formal policies and unwritten practices, and are measured not by changes in employer attitudes, but instead by employment outcomes. We recommend reinforcing Title VII through the removal of existing barriers within the currently flawed, reactive system of anti-discrimination protection. But more importantly, we call for more proactive systemic solutions in three categories.

Equity pressures to boost worker and consumer power to advance the voluntary compliance of employers and industries, including:

- More news investigations and research on the racial outcomes of EEOC’s enforcement activities
- Developing, using, and sharing of mobile apps and social media to inspire the public’s involvement

Equity incentives to make it more advantageous for businesses to support racial equity, including:

- EEOC evaluating and sharing the impact of its proactive trainings with employers and others
- Tax breaks or subsidies for businesses who adopt best employment practices

Equity mandates that legally require the best equitable employment practices of more and more employers, including:

- Requiring “hiring goals” for businesses in industries with large racial gaps in employment outcomes
- Passing Workers Bill of Rights at state levels to expand specific protections for excluded workers

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

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

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

— Multiracial, gender-nonconforming advocate for nurses in California

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

— Black female advocate for women workers in Wisconsin

Key Findings

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



Key Recommendations

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

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

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Download a copy of the full report *Confronting Racial Bias at Work: Challenges and Solutions for 21st Century Employment Discrimination* by visiting raceforward.org/racialbiasatwork

