EMPLOYMENT DISCRIMINATION IN THE FIRM: DOES THE LEGAL SYSTEM PROVIDE REMEDIES FOR WOMEN AND MINORITY MEMBERS OF THE BAR?

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I. INTRODUCTION

It has been fifty years since the ratification of Title VII of the Civil Rights Act of 1964, and still a question remains as to whether legal professionals, primarily attorneys, have a rightful claim under Title VII against their employers for acts of employment discrimination. The case law in this area is sparse; this is partly because of the reluctance of attorneys to speak out against discriminating employers (in avoidance of professional ridicule and blackballing) and partly because of the tremendous failure rates of these kinds of cases in court. Rarely do they survive a motion for summary judgment, and those cases not dismissed as frivolous are often settled.

I argue that there are two major reasons why the law does not appear to provide much tolerance for employment discrimination or harassment suits by attorneys. First, discrimination and harassment are both hard to prove, especially in law firms where the risk of losing one’s job constantly looms over the heads of the associates. Discriminatory patterns, often tracked through hiring and firing, are almost impossible to find in law firms because of the extremely high turnover rates. This, in turn, makes it almost impossible to differentiate between those being pushed out of a job discriminatorily, and those being pushed out for permissible reasons—for example because they are unproductive.

Second, attorneys are likely to suffer a large amount of backlash for reporting discrimination claims. Often an attorney who files a charge is considered a complainer, and since many legal communities are small, the reputation of a trouble-making attorney will travel fast. This may result in an attorney being blackballed from the legal community (particularly law

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firms), even if the discriminatory allegations are found to be true.

In spite of the bad track record with employment discrimination cases, a few high profile cases brought by attorneys against their legal employers have forced these employers to take certain measures to prevent and handle problems incident to increasing diversity within the workplace. Corporate clients, which are more often hit with these kinds of cases, have also begun to pressure corporate law firms to increase diversity. Undoubtedly, this newly sparked enthusiasm in legal environment diversity is long overdue. The questions still remain as to whether the court system is sympathetic enough to attorney diversity issues, and whether a change in the application of Title VII to these issues is in sight. Furthermore, where the court system fails in these areas, are legal employers doing enough to prevent discrimination and harassment in the workplace?

This article will confront these questions by providing an analysis of employment discrimination and harassment in legal workplaces, focusing on law firms. Part II provides an overview of employment discrimination law particularly in the context of legal employers. Part III summarizes employment discrimination cases brought against legal employers. The primary discussion will focus on Title VII of the Civil Rights Act of 1964, although state employment discrimination laws will be mentioned. Parts IV and V theorize why Title VII claims are generally unsuccessful against legal employers. Part VI suggests ways that legal employers can prevent employment discrimination or harassment claims, and explores the ways in which law firms have incorporated these suggestions into their infrastructures. Part VII concludes the article.

II. A SYNOPSIS OF EMPLOYMENT DISCRIMINATION LAW

A. Title VII of the Civil Rights Act of 1964

As the grandfather of federal employment discrimination law, Title VII was created to prohibit all employers covered under the Act from discriminating on the basis of race, color, religion, sex, or national origin. This includes discrimination done in the form of hiring, firing, application collection, or compensation practices or any other areas related to the terms and conditions of employment. Title VII's main purpose is to prevent employers from classifying employees in such a way that would deprive them of employment opportunities. Title VII was created by Congress "to

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remov[e] ... artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.\textsuperscript{3} To that end, it limits employees' use of the statute so that they cannot bring race or gender claims simply to thwart all employer decision-making. Title VII not only applies to disparate treatment of employees based on a protected classification, but to disparate impact cases as well.\textsuperscript{4}

Additionally, before filing a Title VII case, the plaintiff must file a charge with the Equal Employment Opportunity Commission (EEOC).\textsuperscript{5} This administrative agency often will decide whether or not a complaint is legitimate.\textsuperscript{6} The EEOC enforces Title VII and has the authority to investigate employment discrimination and sexual harassment complaints,\textsuperscript{7} and subject them to adjudication if indeed a valid complaint is found. The EEOC only has jurisdiction over complaints made against employers of more than fifteen persons, since it must adhere to Title VII's definition of an employer.\textsuperscript{8}

To qualify as an employer under Title VII, one must be a "person engaged in an industry affecting commerce who has fifteen or more employees ... but ... does not include (1) the United States, a corporation wholly owned by the [g]overnment ... or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation ... "\textsuperscript{9} Under the Act, a "person" for the purposes of the statute can include "individuals ... labor unions, partnerships, associations, corporations, legal representatives ... trusts, [and] `unincorporated organizations ... ."\textsuperscript{10} With respect to legal employers, Title VII applies unless the attorney is a government lawyer or works for a tax-exempt private membership organization.\textsuperscript{11}


\textsuperscript{4} See generally Griggs v. Duke Power Co., 401 U.S. 424, 432-33 (1971) (holding that Title VII requires the elimination of employment practices that operated to exclude African Americans and were not directly related to job performance, notwithstanding the employer's lack of discriminatory intent). Disparate impact cases cover those situations where an employer's facially neutral employment policy has a discriminatory impact on a protected class. This article will only discuss employment discrimination by legal employers in the context of individual disparate treatment of attorneys, and not disparate impact.

\textsuperscript{5} See generally 42 U.S.C.A. § 2000e-5 (granting enforcement authority of Title VII to the EEOC).

\textsuperscript{6} See id. at § 2000e-5(6) (providing EEOC with power to determine if a complaint provides reasonable cause to file suit).


\textsuperscript{8} 42 U.S.C.A. § 2000e(b) (2002).

\textsuperscript{9} Id.

\textsuperscript{10} 42 U.S.C.A. § 2000e(a).

\textsuperscript{11} See 42 U.S.C. § 2000e(b) (applying the definition of employer under Title VII to all organizations except the government or tax-exempt organizations).
1. Common Law Treatment of Discrimination Cases Against Legal Employers Under Title VII

To win a Title VII claim, the plaintiff first must establish a prima facie case that: 1) the plaintiff is a member of a protected class; 2) the discrimination occurred during some sort of protected activity (i.e., terms or conditions of employment); 3) the employer took an adverse action against the plaintiff. Only after the plaintiff establishes a prima facie case does the burden of production shift to the employer to prove there was a legitimate nondiscriminatory reason for the action. Once the defendant has offered a legitimate nondiscriminatory reason, the presumption of discrimination that is created after the plaintiff proves the prima facie case is lifted. To win the case, the plaintiff then must prove that the employer's reason is pretextual. Texas Department of Community Affairs v. Burdine expanded the McDonnell-Douglas rule in holding that the three prong rule only shifts the burden of production of proof to the defendant, not the burden of persuasion. The pretext prong is used by the plaintiff to meet his or her burden of persuasion so that the ultimate proof of unlawful discrimination lies with the plaintiff.

While these three prongs (prima facie case, nondiscriminatory reason, and pretext) suffice for cases where the only evidence is circumstantial, the Supreme Court expanded the McDonnell-Douglas/Burdine Rule for mixed-motive cases that do involve direct evidence in Price Waterhouse v. Hopkins. In a mixed-motive case, the defendant-employer admits that race or sex played a factor in the decision-making process, but can assert an affirmative defense to discrimination by showing that there was a nondiscriminatory basis for the action as well. The affirmative defense is only established, however, if the employer can prove that it would have

12. See Wright v. Wolpoff & Abramson, 2000 U.S. App. LEXIS 2936 at *2 (4th Cir. 2000) (per curiam) (granting summary judgment to the employer because of the plaintiff's failure to prove the third prong of the Title VII prima facie case).
13. McDonnell Douglas Corp., 411 U.S. at 802 (holding that when a prima facie case for discrimination is found and a non-discriminatory reason is given, the plaintiff shall have a fair opportunity to prove this reason is pretextual).
14. Id. at 802-03 (concluding that the defendant's assertion of a legitimate nondiscriminatory reason suffices to discharge the plaintiff's proof of discrimination).
15. Id.
18. Burdine, 450 U.S. at 253.
19. 490 U.S. 228, 242 (1989) (creating an affirmative defense to discrimination if nondiscriminatory factors were considered along with gender).
20. Id. at 246.
made the same decision even if sex or race was not a factor.\textsuperscript{21} Courts have differed as to when to apply \textit{McDonnell-Douglas/Burdine} and when to apply \textit{Price Waterhouse}. While the plaintiff is generally allowed to choose, many plaintiffs argue both theories in their cases. After viewing the evidence when a motion for summary judgment or a motion to set aside the verdict has been filed, the court then decides which theory has merit.\textsuperscript{22} The Supreme Court drew the line as to which standard (\textit{Price Waterhouse} or \textit{McDonnell-Douglas}) to use by distinguishing between direct and circumstantial evidence.\textsuperscript{23} Although this was the distinguishing factor for the plurality in \textit{Price Waterhouse}, Justice O'Connor in her concurring opinion apparently disagreed and believed that all Title VII cases required a showing of direct evidence.\textsuperscript{24}

The \textit{Price Waterhouse} and \textit{McDonnell-Douglas/Burdine} tests both have been used in the individual disparate treatment context. Title VII also covers discrimination through disparate impact and systemic disparate treatment, neither of which are the focus of this article.

2. Sexual Harassment Treatment Under Title VII

While discrimination has always been somewhat of a concern under Title VII, a growing problem in the legal community is sexual harassment. The EEOC defines it as unwelcome sexual advances or conduct when: 1) submission to such conduct is explicitly or implicitly made a term or condition of employment; or 2) submission to or rejection of such conduct is used as the basis for employment decisions; or 3) such conduct has the purpose or effect of unreasonably interfering with the employee's work performance or it creates an intimidating, hostile, or offensive working environment.\textsuperscript{25} Sexual harassment cases, although they can be brought under Title VII, are not explicitly named in Title VII.\textsuperscript{26} However, the Supreme Court made it very clear in 1998 through its treatment of the issue

\textsuperscript{21} \textit{Id.} at 242.

\textsuperscript{22} See Fuller v. Phipps, 67 F.3d 1137, 1142 n.2 (4th Cir. 1995) (noting that a judge after evaluating the evidence can determine whether the case is a pretext or a mixed motive case when a plaintiff has not classified the case at the outset).

\textsuperscript{23} The distinction mainly comes from combining the plurality's opinion and Justice O'Connor's concurring opinion in \textit{Price Waterhouse v. Hopkins}, 490 U.S. 228 (1989). The plurality inferred that Congress intended Title VII to allow circumstantial evidence to prove unlawful discrimination. \textit{Id.} at 241. Justice O'Connor disagreed, concluding that Title VII only allowed for direct evidence of discrimination to prove the plaintiff's case. \textit{Id.} at 270 (O'Connor, J., concurring). The O'Connor opinion has generally been regarded as the holding of this case. See Fuller v. Phipps, 67 F.3d at 1142-43 (citing O'Connor's plurality opinion as precedent).

\textsuperscript{24} \textit{Price Waterhouse}, 490 U.S. at 270.

\textsuperscript{25} Eyres, \textit{supra} note 7, at 40.

\textsuperscript{26} \textit{Id.} at 39.
in *Faragher v. City of Boca Raton,*27 *Oncale v. Sundowner Offshore Services, Inc.*,28 and *Burlington Industries, Inc. v. Ellerth,*29 that sexual harassment is a problem that will be eradicated under federal civil rights laws. The purpose of these laws is to deter employee harassment by making employers vicariously liable for their employees’ acts. By doing so, the laws encourage employers to take responsibility for their employees’ actions by developing programs that will allow for harassment-free work environments. Unlike discrimination suits in which the discriminating act itself is the focus of the law suit, harassment suits focus instead on the employer’s response to the harassment, and not the harassment itself. Yet because both ultimately deal with some sort of classification, both can be brought under federal and state civil rights laws.

B. Section 1981

Section 1981 of Title 42 of the U.S. Code is a discrimination statute created to prevent unlawful discrimination in distributing contracts. The statute provides that “[a]ll persons ... shall have the same right ... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....”30 The terms “make and enforce contracts” include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”31 Section 1981 gives groups protected under Title VII the ability to engage in contracts, an area that has historically discouraged minorities and women from embarking upon several employment opportunities.32 By allowing all individuals the opportunity to engage in contracts, this statute functions to prevent employers from using contract law as a pretext for unlawful discrimination.

Although section 1981 can be used to prevent discrimination in all areas where contracting is done (for example, in housing discrimination or in contractor bids), the application of the rule to employment contracts is

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27. 524 U.S. 775, 807 (1998) (holding that employers are held vicariously liable for failing to prevent sex harassment by their employees).
29. 524 U.S. 742, 765 (1998) (holding that an employer is vicariously liable for a harassing environment but if no tangible action of employment is affected by the harassment then the employer can use this as an affirmative defense to mitigate liability).
32. See generally Bradwell v. Ill., 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) (commenting that one reason why women cannot practice law is because of the inability for married women to make contracts without their husband’s consent).
obvious. For instance, if a Hispanic employee is fired and believes that the motive was discrimination, he or she could simultaneously bring a Title VII claim and hence go through the *McDonnell-Douglas/Burdine* burdens of proof, and bring a section 1981 claim by first proving that the employment was contracted (not at-will), and then proving unlawful discrimination.

C. **State Employment Laws and Administrative Agencies**

Almost every state in the country has adopted its own laws to deal with employment discrimination and harassment. To enforce these laws, the states have created administrative agencies to deal swiftly with employment complaints. Many of the state discrimination laws closely mirror Title VII and ADEA. As with Title VII, the implications of sexual harassment laws in these statutes are implicit and enforced through the common law. Some states, however, have included in these laws explicit language deterring sexual harassment. Still other states enforce sexual harassment policies purely through state common law and state human rights organizations, like the Pennsylvania Human Rights Commission or the Alaska State Commission for Human Rights.

33. See infra notes 33 and 34.

34. See, e.g., CONN. GEN. STAT. § 46a-100 (2003) (authorizing the Connecticut Commission on Human Rights and Opportunities to deal with discrimination); FLA. STAT. ANN. § 760.04-07 (West 2003) (authorizing and empowering the Florida Commission on Human Relations).

35. The following state statutes prohibit sexual harassment implicitly: ALASKA STAT. § 18.80.220 (Michie 2002); CAL. GOV'T CODE § 12940 (West 2003); FLA. STAT. ANN. § 760.01 (West 2003); HAW. REV. STAT. § 378-2 (2003); IDAHO CODE § 67-5901 (Michie 2003); IOWA CODE ANN. § 216.6 (West 2003); KAN. STAT. ANN. § 44-1001 (2002); KY. REV. STAT. ANN. § 344.040 (Banks-Baldwin); MASS. GEN. LAWS ch. 151B § 4 (2003); MD. ANN. CODE art. 49B, § 16 (2003); ME. REV. STAT. ANN. tit. 5, § 4572 (West 2003); MICH. COMP. LAWS § 37.220.2 (2003); MINN. STAT. § 363A.08 (2003); MO. ANN. STAT. § 213.055 (West 2003); N.D. CENT. CODE § 14-02.4-01 (2003); N.J. STAT. ANN. § 10:5-12 (West 2003); N.Y. EXEC. LAW § 296 (McKinney 2003); OHIO REV. CODE ANN. § 4112.02 (West 2003); 43 PA. CONS. STAT. § 951 (2003); TENN. CODE ANN. § 4-21-101(a)(3) (2003); TEX. LAB. CODE ANN. § 21.051 (Vernon 2003); WASH. REV. CODE § 49.60.180 (2004).

36. The following statutes explicitly prohibit sexual harassment: ALASKA STAT. § 23,10.440 (Michie 2002); CAL. LAB. CODE § 3208.4 (2003); ILL. COMP. STAT. § 5/2-102(D) (West 2004); ME. REV. STAT. ANN. tit. 26, § 807 (West 2002); WIS. STAT. § 111.36(1)(b) (2003).

37. See, e.g., 43 PA. CONS. STAT. § 959 (2003) (outlining the procedures for filing a complaint with the Pennsylvania Human Rights Commission (PHRC)); ALASKA STAT. § 18.80.100 (Michie 2002) (describing the procedure for filing a complaint with the Alaska State Commission for Human Rights (ASCHR)).
III. CASES AGAINST LEGAL EMPLOYERS UNDER TITLE VII

A. Racial Discrimination Suits

It is necessary first to evaluate the law suits that have made the legal profession turn more of an ear towards discrimination and harassment within the legal work environment. One of the least progressive types of suits have been those involving racial discrimination. As with most Title VII suits, racial discrimination suits particularly against legal employers, are vulnerable to failure at summary judgment. But there are a few suits that have gone to both the trial level and to the appellate level.

One of the most progressive suits of its time involving an attorney suing his employer-law firm is the D.C. Circuit case of Mungin v. Katten Muchin & Zavis. Larry Mungin was a lateral hire to Katten, Muchin & Zavis' (KMZ's) Washington, D.C. office, supposedly as a bankruptcy attorney (although there was only one bankruptcy partner and one bankruptcy associate in this office). As a double Harvard graduate, a sixth-year associate, and an African-American, Mungin was a desirable recruit, although it is questionable whether he was able to bring business to KMZ during his lateral move. Mungin's basic Title VII claims revolved around alleged promises for partnership made during his offer negotiations which were not fulfilled, disparate treatment between the salaries of Mungin and other sixth-year associates, disparate treatment in the kind of work that was offered to Mungin, and the denial of a wage increase. These employment decisions, according to Mungin, were made because of his race. Mungin claimed that while he was only originally offered $91,000 for the job, other sixth-year associates at KMZ made between $95,000 and $102,000. Furthermore, Mungin claimed that he was given sub-standard work, was denied the partnership considerations allegedly promised to him and was precluded from meeting key contacts in the Finance and Reorganization Department, the department responsible for the Bankruptcy Group.

Various factors eventually led to Mungin's departure from the firm. The managing partners of the D.C. office left the firm, leaving Mungin as the only bankruptcy attorney in the D.C. office. Mungin, severely disappointed by the firm's suggestion to move him to the New York office

38. 116 F.3d 1549 (D.C. Cir. 1997).
39. Id. at 1551.
40. Id.
41. Id. at 1554.
42. Id. at 1551, 1554.
43. Id. at 1551.
44. Id.
45. Id. at 1552.
(where there was no bankruptcy practice) instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, instead of the Chicago office, left the firm fully armed with severance pay. He then filed a Title VII charge of constructive discharge and racial discrimination with the Equal Employment Opportunity Commission, which was denied. Thereafter, KMZ officially offered Mungin the opportunity to transfer to the Chicago, New York, or Los Angeles offices, all of which Mungin declined whereupon he filed the suit in question.

Despite the fact that the EEOC refused to pursue Mungin’s claim, the district court found that Mungin met the McDonnell-Douglas/Burdine standard for unlawful discrimination. The district court held that Mungin had provided enough evidence to prove constructive discharge. The jury awarded Mungin a total of 2.5 million dollars in compensatory and punitive damages.

But the D.C. Circuit disagreed. The court focused on whether Mungin had met the burden of persuasion. It held that once both sides have met their burdens of production, and a full trial has been held, the McDonnell-Douglas/Burdine standard drops out of the equation. Using this standard, the court concluded that Mungin had not met the ultimate burden of persuasion, that he was not unlawfully discriminated against in his salary, work assignments, and partnership decisions. It found that Mungin never proved that the employment decisions were made because of his race, and the numerical comparison between his salary and the salary of other sixth-year associates was unpersuasive since he compared himself with “homegrown associates,” rather than laterals like himself. The court found that Mungin did not present any evidence that would rebut KMZ’s nondiscriminatory, legitimate reasons for the actions taken. The D.C. Circuit’s decision in Mungin rested mainly on Mungin’s inability to meet the pretext prong. Mungin was unable to show that he was treated

46. Id.
47. Id. at 1553.
48. Id.
49. Id.
50. Id. at 1550.
51. Id. at 1558.
52. Id. at 1550.
53. Id. at 1554.
54. Id.
55. Id.
56. Id.
57. Id. at 1557.
58. Id.
59. Id.
60. Id.
61. Id. at 1556.
differently from white associates simply because of his race. The court ruled that the jury lacked sufficient evidence to have made a reasonable finding of unlawful discrimination.

The D.C. Circuit's decision is peculiar in one major respect. The question of whether the evidence cumulatively reveals unlawful discrimination (and hence the area of pretext) is a question of fact reserved for the jury. Courts are usually reluctant to overturn a jury verdict, and usually when it is done, it is the trial judge who does so by granting judgment as a matter of law. The fact that the trial judge in this case thought that the evidence was compelling enough to find unlawful discrimination by a preponderance of the evidence, makes it odd that the appellate court disagreed. To overturn the verdict, the appellate court must have found that the decision was clearly erroneous, a very high standard of review. Admittedly, the evidence on the record appeared to have a lot of flaws. But it brings up a question which the Supreme Court has not been able to resolve in Title VII cases: what kind of evidence and how much evidence is considered enough to meet the burden of persuasion? In any event, the Mungin case was significant in that it was one of the few cases in which a Title VII case against a law firm not only went to trial, but was actually decided by a jury in favor of the employee.

While the Mungin case actually made it to trial, it is more likely that Title VII cases, especially those brought against law firms, fail at summary judgment. One example, also in the D.C. Circuit, is Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, where plaintiff's counsel may have caused the case to falter. Here, the district court found that the plaintiff's pleadings were severely deficient, and the case turned more on the inadequacies of the attorney in meeting his pleading deadlines, rather than the actual merits of the case. The D.C. Circuit upheld the district court's right to refuse time extensions for the plaintiff. Another such example is Wilson v. Legal Assistance of South Dakota, where a Native American lawyer filed a section 1981 claim of racial discrimination against a law firm that she believed delayed her job interview because of her race.

62. Id. at 1558.
63. Id.
65. See, e.g., Winarto v. Toshiba Am. Elec. Components, Inc., 274 F.3d 1276, 1283 (9th Cir. 2001) (concluding that a trial court that overturns a jury verdict can do so only if "under governing law, there can be but one reasonable conclusion as to the verdict").
66. Burrell, 125 F.3d at 1394.
68. Id. at 147-49.
69. Id. at 151.
70. 669 F.2d 562 (8th Cir. 1982).
Here, the district court found, and the Eighth Circuit agreed, that the plaintiff failed to meet her prima facie case because she was invited to interview for the position long before the suit began, but turned it down due to speculations about discrimination. In *Wright v. Wolpoff & Ambramson*, the court held that the plaintiff could not meet his prima facie case of discrimination because there was no evidence that an adverse employment decision was made.

In carefully evaluating the aforementioned cases, one will find that in most of them the plaintiff failed at summary judgment because of an inability to meet the burden of production necessary for the prima facie case, or judgment as a matter of law was entered in favor of the defendant because the plaintiff failed to meet the ultimate burden of persuasion through pretextual evidence after the defense had submitted a nondiscriminatory legitimate reason for the employment decision. This strengthens the argument that racial discrimination claims under Title VII fail simply because of the difficulty of meeting the standards of proof.

**B. Sexual Harassment and Discrimination Cases Under Title VII**

Both corporations and legal employers have experienced an increase in reported incidents of sexual harassment. Claims against legal employers have been brought to the forefront of harassment cases as more employees have been willing to file suits. There are two basic issues in every sexual harassment case: 1) did any sexual harassment occur; and 2) if sexual harassment is proven, who may be held liable? It appears that the primary objective of these cases is not to deter wrongdoers, but to promote harassment-free workplaces. Legal employers in these cases are treated in the same fashion as corporations.

One would believe that sexual harassment cases would be easier to prove than run-of-the-mill discrimination cases for several reasons. First, it appears that a sexual harassment charge is easier to prove. The definition of sexual harassment requires that there is unwanted physical or verbal sexual conduct made in the work environment. Second, the sexual harassment does not have to be brought to the employer's attention in order

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71. *Id.* at 564.
73. *Id.* at *2-*3.
74. In fact, the number of EEOC sexual harassment complaints filed by men alone has quadrupled within the past decade to the point where they account for 13.6 percent of all complaints. *See Eyres, supra* note 7, at 40.
75. *Id.*
for the employer to be held vicariously liable.\textsuperscript{77} The unwanted sexual conduct must be both objectively and subjectively offensive.\textsuperscript{78} To make out a prima facie case of harassment, the harassing conduct must substantially affect a term, condition, or privilege of employment.\textsuperscript{79} While proving these things is no easy task, the burden-shifting ping-pong match that exists for proving discrimination is simply not required for sexual harassment cases. At the same time, because the case deals with terms of employment, a case can be made under Title VII.\textsuperscript{80}

When there is only circumstantial evidence, sexual discrimination cases are treated the same as racial discrimination cases, in that they use the \textit{McDonnell-Douglas/Burdine} standard.\textsuperscript{81} In these cases, just as in other Title VII cases, direct evidence of discrimination is required to make out a mixed-motive case under \textit{Price Waterhouse}. Many of the sexual discrimination suits have been brought against law firms for discriminatory hiring practices, or partnership/promotion decisions.\textsuperscript{82} Yet sexual discrimination also has had the devastating result among lawyers of forcing women to leave the law completely.\textsuperscript{83}

One example of such a discrimination case was the famous \textit{Ezold v. Wolf, Block, Schorr \& Solis-Cohen}.\textsuperscript{84} Ezold sued Wolf, Block for sexual discrimination after being denied partnership.\textsuperscript{85} She also alleged that she was constructively discharged.\textsuperscript{86} The court found otherwise; while they agreed with the district court that the plaintiff had met her prima facie case, they disagreed that the defendant's legitimate nondiscriminatory reason for the decision was pretextual.\textsuperscript{87} The court rejected the district court's intrusion into the firm's partnership decisions\textsuperscript{88} and found that Ezold failed to prove that the Wolf, Block decision to deny partnership because of her lack of analytical abilities was pretextual.\textsuperscript{89} This is despite the fact that the court acknowledged that most of those attorneys who evaluated Ezold were

\begin{thebibliography}{99}
\item 78. Faragher, 524 U.S. at 787.
\item 79. Howard v. Dep't of Air Force, 877 F.2d 952, 955 (Fed. Cir. 1989).
\item 81. See Ezold v. Wolf, Block, Schorr \& Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) (using the Title VII standard in evaluating a sex discrimination claim).
\item 82. See \textit{id.} (holding that a rejection of the plaintiff from partnership did not result in unlawful discrimination).
\item 84. 983 F.2d 509.
\item 85. \textit{Id.} at 512.
\item 86. \textit{Id.}
\item 87. \textit{Id.} at 547.
\item 88. \textit{Id.} at 527.
\item 89. \textit{Id.} at 530.
\end{thebibliography}
basing their opinions on hearsay and not on a direct working relationship with Ezold. The Ezold case is another prime example of a sexual discrimination case that failed because of lack of proof, a common problem in Title VII cases.

For the most part, sexual harassment and discrimination cases do not have a higher probability of getting past summary judgment when compared to racial discrimination cases. Failures under summary judgment occur for several reasons. Those already discussed include the failure to make out a prima facie case and the failure to meet the ultimate burden of persuasion, but summary judgment can also be granted if the plaintiff fails to submit a timely charge to a state agency or the EEOC before bringing suit. Like racial discrimination cases, without direct evidence, sexual discrimination cases are often tossed out for insufficient evidence. The insufficient evidence cases have sometimes spawned from the idea still embraced by some courts that women are not interested in certain positions or jobs simply because they are not traditionally conducive to being held by women. But this theory completely ignores the fact that in many aspects employers have contributed to creating these images of who women should be and what jobs they are "fit" for.

Because of the treatment of sexual discrimination cases in courts, it is questionable whether law firms have learned their lessons from these suits. It has been reported that at the same time the sexual discrimination suit Hishon v. King & Spalding was argued before the Supreme Court, King & Spalding held a swimsuit competition which awarded the winner of the competition a full-time offer with the firm. The competition was originally planned as a wet t-shirt contest, but this idea was scrapped after

90. Id. at 527.
91. See generally Schwaller v. Squire Sanders & Dempsey, 249 A.D.2d 195, 196 (N.Y. App. Div. 1998) (finding that the New York Supreme Court erred in not granting summary judgment in favor of the defendants when the plaintiff used non-probative pretextual evidence to meet the burden of persuasion).
93. Schultz, supra note 83, at 1756.
94. Id. Schultz argues:

By assuming that women form stable job aspirations before they begin working, courts have missed the ways in which employers contribute to creating women workers in their images of who 'women' are supposed to be. Judges have placed beyond the law's reach the structural features of the workplace that gender jobs and people, and disempower women from aspiring to higher-paying nontraditional employment.

96. Schultz, supra note 83, at 1835 n.333.
complaints were made about the contest.97 These sorts of attitudes by law firms are only fueled by the courts' treatment of sexual discrimination suits.

Sexual harassment cases, on the other hand, are different. For one, as mentioned previously, the rules of proof for sexual harassment are different.98 One reason for this difference may be that in sexual harassment cases it is more likely that there is direct evidence. Unlike discriminatory animus which is usually based on subjective factors, harassment is usually noticeable and objective. It requires actual physical occurrences, improper gestures, or words.99 Because of this, sexual harassment cases have a better chance of succeeding past summary judgment.

One example of a sexual harassment suit getting past a motion to dismiss is Ravinskas v. Karalekas,100 which involved the interpretation of the District of Columbia Human Rights Act (DCHRA).101 The defendant firm in that case tried to dismiss the plaintiff's sexual harassment claim by interpreting the DCHRA as disallowing suits against sole proprietorships.102 The court held that since Title VII expressly includes sole proprietorships as employers, the DCHRA, which was modeled after Title VII, also allows sole proprietorships to be sued under its Act.103

But even with the greater success rate for sexual harassment cases against legal employers, they may still have difficulties surpassing summary judgment. In Ballen-Steir v. Hahn & Hessen,104 a New York appellate court upheld a motion to dismiss a female partner's sexual harassment claim because the harassment involved acts that occurred while she was a partner.105 The New York City Human Rights Law, like Title VII, only allows for adverse employment actions to be protected under the Act, and since partners of law firms are not considered employees, they cannot bring claims for adverse employment actions under this statute.106 The court did find that the plaintiff could bring suit for those harassment activities that occurred while the plaintiff was an associate.107

97. Id.
98. Eyres, supra note 7, at 40, 42.
99. Id. at 42.
102. Id. at 979.
103. Id. at 980.
105. Id. at 422.
106. Id.
107. Id.
IV. A General Theory for Why Title VII Claims Against Legal Employers Lose on Summary Judgment

Title VII suits are rarely won against non-legal employers, but the track record is worse for legal employers.\(^{108}\) Despite the dramatic increase in multiculturalism in American society, women and minorities still are severely underrepresented in law firms and in the legal profession as a whole.\(^{109}\) For instance, despite the increasing number of women who go to law school and enter the profession,\(^{110}\) women are still underrepresented as law firm partners.\(^{111}\) Although some of this has to do with the fact that many women leave firms before reaching the partnership level in pursuit of marriage and parenthood,\(^{112}\) it is very likely that some of these statistics are

108. See supra Part III (providing an overview of discrimination cases against legal employers).

109. See Dimitra Kessenides, Race and the Law: Raising the Bar, JD JUNGLE, Oct./Nov. 2003, at 50, available at http://www.jdjungle.com/magazine.cfm?INC=inc_article.cfm&article=50812&template=0. Kessenides interviewed Dennis Archer, president of the American Bar Association. After grading the legal field’s commitment to diversity at a four on a scale of 1 to 10, Mr. Archer stated that:

There are 1,049,000 lawyers who are licensed to practice law in the U.S. Less than 14 percent are lawyers of color. Just adding up Hispanics and African Americans in this country you get 25 percent of the population. From a historic point of view, when you consider that we were discriminated against ... you begin to appreciate why we are so underrepresented in the profession.

110. In 2001, it was projected that 48% of all law students were women and that 29% of all licensed attorneys were women. Jacquelyn H. Slotkin, Should I Have Learned to Cook? Interviews with Women Lawyers Juggling Multiple Roles, 13 HASTINGS WOMEN’S L.J., 147, 148 (2002). The EEOC has reported that the number of women receiving law degrees has increased from 33% in 1982 to 48.3% in 2002. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DIVERSITY IN LAW FIRMS (2003), available at http://www.eeoc.gov/stats/reports/diversitylaw/. While the number of women law students has increased, state laws curtailing affirmative action programs in law schools have led to a decrease in the number of minorities in law firms, particularly in Texas where you have “an exponential growth in Hispanics coupled with a decline in law school admissions.” Michael D. Goldhaber, Minorities Surge at Big Law Firms: Asian-Americans, especially, swell ranks; Hispanics and blacks also up, THE NAT’L L.J., Dec. 14, 1998, available at http://www.ruf.rice.edu/~cسا/text/APAlaw.html (quoting Dan Perez, a director of the Hispanic National Bar Association). While the recent University of Michigan Law School decision has for the time being reaffirmed the survival of affirmative action programs in law schools, it is uncertain how this decision will affect law school admissions in states like Texas and California, where affirmative action programs have been met with scrupulous rejection. See, e.g., Grutter v. Bollinger, 123 S.Ct. 2325 (2003) (upholding the use of race as a positive factor in law school admissions programs).

111. Slotkin, supra note 110, at 151.

112. See id. at 152 (acknowledging that many women leave the firm because of familial role conflicts).
a result of sex discrimination. In relation to minorities in law firms in 1998, four major law firms in metropolitan cities reported having no minority associates, while three major law firms had no minority partners.\textsuperscript{113} Because of this, Title VII suits against law firms have become more prevalent, particularly as women and minority attorneys and law students gain the nerve to challenge the status quo.\textsuperscript{114} A wave of suits against law firms took place between the 1960s and 1990s, most of which were filed by individual law students and attorneys, but also by law school career placement offices that had experienced discriminatory recruitment practices by law firms while helping law students search for jobs.\textsuperscript{115}

Title VII suits are rarely successful against any employer, let alone legal employers. One of the reasons for the failure rate of Title VII claims stems from the standard of proof imposed upon plaintiffs. In \textit{McDonnell-Douglas Corp. v. Green},\textsuperscript{116} the Supreme Court held that in order for plaintiffs to sustain a claim for employment discrimination under Title VII, they must first establish a prima facie case of discrimination by showing: 1) that they are a minority; 2) that they applied for a job for which they were qualified and for which the employer was seeking applications; 3) that despite their qualifications they were rejected; and 4) after rejection, the position remained open and the employer continued to seek others of the same qualifications.\textsuperscript{117} Once the plaintiff establishes a prima facie case, the defendant must provide a legitimate non-discriminatory reason for the defendant's conduct.\textsuperscript{118} The burden then shifts to the plaintiff to prove that the defendant's reasons are pretextual.\textsuperscript{119}

The burdens of proof under Title VII only add to the difficulty in proving discrimination. The problem for plaintiffs in Title VII cases often arises in proving the prima facie case. Title VII was not created to guarantee a job to all minorities regardless of qualifications. Instead, it only requires a "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."\textsuperscript{120} The Act was created to eliminate racial or sexual discrimination of all kinds, no matter

\textsuperscript{113} Goldhaber, \textit{supra} note 110.


\textsuperscript{115} \textit{id.} at 551.

\textsuperscript{116} 411 U.S. 792.

\textsuperscript{117} \textit{id.} at 802.

\textsuperscript{118} \textit{id.}

\textsuperscript{119} \textit{id.} at 804.

\textsuperscript{120} \textit{id.} at 801 (citing \textit{Griggs v. Duke Power Co.}, 401 U.S. 424, 431 (1971)).
how subtle.\textsuperscript{121} So why then are so many discrimination cases thrown out on summary judgment?

The answer lies in the difficulty of proving that management decisions were race- or sex-motivated. This stems first from the difficulty in proving the first prong of the burden of proof, the prima facie case. Without evidence of a pattern of discriminatory employment practices, the employee will have a difficult time creating a prima facie case for employment discrimination. For example, an African-American associate who is denied a promotion to partnership must show more than that he is African-American and was denied the promotion, he must also prove that he was qualified for the promotion, and that the firm continued to seek associates of that level of qualification. Often the plaintiff's case still will not be meritorious unless the person chosen for the job is less qualified and of a different race or sex.

The second problem in proving race or sex motivations lies in the second prong of the burden of proof. If the employer asserts a non-discriminatory reason then the plaintiff has the burden of proving that this reason was pretextual. In other words, it is not enough that the prima facie case is established; the presumption of discrimination fails when an employer establishes a "legitimate" reason for the decision. The legitimate reason prong of the test makes proving an employment discrimination claim difficult. This is perhaps the only way to prove that the decision was not completely race- or sex-motivated. If even one legitimate non-discriminatory purpose is found, then the employer has met its burden, even if sex or race was the main factor or possibly the only factor in the decision-making. This leads to employers who cover their discriminatory decisions by coming up with "legitimate" excuses for having made the decision. Particularly where litigation is threatened, employers could provide cover-ups for the decision by digging deep into the plaintiff's personnel files to find anything, especially miniscule slip-ups, that would create a legitimate reason for the decision.

For this reason, the Supreme Court created the third prong, allowing the plaintiff to provide proof that the employer's reasons are pretextual.\textsuperscript{122} But the third prong tends to create a third hurdle in establishing race or sex motivations because it is difficult to meet. An employer does not waive a red banner saying that it discriminates. A discriminatory decision is often subjective, and a subjective decision is almost impossible to prove unless it is revealed to testifying witnesses. Because of this, employees who may have been victims of discrimination have a hard time proving it.

The high burden of proof contributes to the decreased amount of Title

\textsuperscript{121} Id. at 801.
\textsuperscript{122} Id. at 804.
VII claims against all employers and not just legal employers. Yet Title VII claims are not only less likely to be filed against legal employers, but are also less successful than claims against non-legal employers. What accounts for the difference if the burden of proof is the same?

While a high burden of proof is one of the main difficulties in winning a Title VII case against a legal employer, another reason for such difficulty peculiar to this type of scenario stems from the difficulty of determining whether an attorney is an employee. Generally, law firm partners are not considered employees, so that if there is discrimination against another partner, that partner cannot file a Title VII suit.\textsuperscript{2} Attorneys with other titles run into the same problems when bringing discrimination suits.\textsuperscript{3} While high burdens of proof and the difficulty in determining if an attorney is an employee are general reasons the courts have explored as to the lack of success for Title VII suits against legal employers, there are other theories that have yet to be explored.

V. ALTERNATIVE THEORIES AS TO WHY TITLE VII CLAIMS AGAINST LEGAL EMPLOYERS FAIL BEFORE A SUIT IS EVEN FILED

A. Lack of Proof as the Cause of Failure of Title VII Claims

One theory for the difference in treatment lies in the minimum amount of proof against discriminatory legal employers. Because of the difficulty in finding direct evidence of discrimination which would allow for a mixed-motive case, or enough circumstantial evidence to prove unlawful discrimination under \textit{McDonnell-Douglas/Burdine}, most cases for discrimination fail at summary judgment. This is only heightened in the case of the legal profession, where the increased stress levels of the profession, particularly for young attorneys, often make it difficult to discern whether an associate is being discriminated against because of an immutable characteristic, or because he or she cannot cut it in the profession.

Here is a typical scenario: Sarah, a newly hired associate at ABC Law Firm, was the only female hired by the firm this year. Six months into the job, Sarah has done very little besides document reviews and making copies. Her male first-year colleagues have all written their first briefs or contracts. A few of her male counterparts have even argued motions in


\textsuperscript{3} See generally Montgomery v. Lobman, Carnahan, Batt & Angelle, 729 So. 2d 1075, 1077-79 (La. Ct. App. 1999) (analyzing whether the plaintiff, a director of an attorney professional corporation, was considered an employee for the purpose of the Louisiana Employment Discrimination Law).
court. On the surface it appears that Sarah is being given lowly assignments merely because she is a woman, which of course is discriminatory under Title VII. But the fact that she has less prestigious assignments is probably not enough direct evidence to prove mixed-motive discrimination, or enough circumstantial evidence to prove unlawful discrimination, particularly if the employer articulates a legitimate non-discriminatory reason for the employment decision. The above scenario would probably create enough circumstantial evidence for a prima facie case. It is easy to see, however, how the employer can articulate a non-discriminatory reason and meet the second prong here. For instance, perhaps Sarah’s supervising partner simply believes she is not ready for more difficult assignments, or Sarah’s department is lacking in case loads, or Sarah’s supervisor simply does not like her, not because she is a woman, but because she is unproductive.

It soon becomes clear that the line of whether an act is discriminatory is hard to define. Prejudice is legal; it is only when prejudice of a protected class influences employment decisions that it becomes illegal. In the world of law, particularly in law firms, associates come and go, many within their first five years of being at the firm. To prove that this is attributed to discrimination is difficult enough in cases against corporations which have higher retention rates; all the more so to prove it in law firms where only the strongest and most diligent persons make it to partner status. Therefore, many attorneys may refuse to file suit against a legal employer simply because of the added difficulty in finding proof of discrimination.

B. Retaliation and Backlash by the Legal Community

The second theory why Title VII cases are rarely brought against legal employers is because of the enormous amount of backlash plaintiffs face within the legal community. An attorney who files suit against his or her law firm may come across a certain amount of snubbing in the legal community. The local bar associations, to which every attorney in the region belongs, provide social interactions amongst attorneys during which news of discrimination allegations may spread like wildfire. If a plaintiff loses, which is most often the case, finding a job in the same legal community is going to be extremely difficult. These sorts of suits are embarrassing, both to the law firm, where good reputations are required for client-building, and for the plaintiff-attorney who suffers from burned bridges made during the battle. This leads most attorneys to simply leave the firm rather than report the discrimination to a civil rights organization or sue.

Attorneys have more of an incentive to leave the firm rather than reporting discrimination claims because of the importance of attorney
reputations in the legal community. The importance of attorney reputation creates a reluctance in attorneys to come forward and thus may account for the difference in the amount of discrimination suits brought against legal employers. The life of an attorney is competitive. This is particularly true for young associates, who are constantly in a battle to prove themselves in the profession and distinguish themselves from their peers. Because local bar associations are so insular, individual lawyers' reputations are extremely fragile. An attorney who makes a discrimination claim can be seen as a troublemaker, and may face blackballing in the legal community as retaliation for making a claim.\textsuperscript{125} Since an attorney can only practice in the state where he or she is admitted, a scarred reputation in the legal community is devastating to the blackballed attorney, who then will have a difficult time getting a job within that state. This makes filing a discrimination claim riskier for an attorney than for an ordinary corporate employee where the professional community is larger; thus it is easier to find work in the corporate community despite a discrimination claim. Attorneys depend on their reputations not only to get a job, but also to remain in good standing with the courts (after all, judges are lawyers and members of the Bar as well) and with their clients. The risk of damaging those reputations, and thus severely handicapping one's livelihood as an attorney, is not often a risk one is willing to take. Therefore, even if there is blatant proof of discrimination, the attorney may seek to leave the job behind rather than file suit.

Retaliation for filing discrimination/harassment claims under Title VII is a separate cause of action completely.\textsuperscript{126} Title VII only covers retaliation by the defendant-employer. In the cases of legal employers, however, the retaliation may not come from the legal employer, but from the surrounding legal community. The situation is further exacerbated where the plaintiff-attorney is a young associate just starting out in the Bar and the defendant-employer is a prestigious law firm whose decision-makers are powerful attorneys with long-standing reputations. It is not hard to believe that many members of the Bar will side with the employer when an attorney brings discrimination/harassment allegations. This gives plaintiff-attorneys even more of a reason to not report the discrimination/harassment claims.

\textsuperscript{125} See, e.g., Eyres, \textit{supra} note 7, at 39-40 (describing how retaliation for sexual harassment claims has increased in law offices, leading to a decrease in harassment complaints).

\textsuperscript{126} Id. at 45.
C. Law Firm Atmospheres As a Barrier to Title VII Reporting

Are law firm atmospheres conducive to reporting harassment and discrimination claims? Minorities and women are still underrepresented in positions of power, and that includes key positions in today’s law firms. Because of this, a lot of women and minorities enter the firm without feeling the support and mentoring possibilities that are made available to Caucasian male colleagues. This creates inevitable tensions, and often leads to hostile work environments in an atmosphere that is often already highly competitive. But is the problem actually related to race or sex?

Discrimination is often something that is easily masked, and law firms are not known for their endearing hospitality. The associate hazing process at big firms gives law students nightmares. So how does one distinguish between ordinary associate hazing and actual sex or racial discrimination? How can one tell if the associate is being treated differently because of a lack of ability perceived by supervising partners, or whether they are being treated differently because of a classification? For instance, a female associate who only takes assignments that are given to her and never seeks any on her own, would not have a sexual discrimination claim against the firm simply because male associates who are go-getters and jump at the chance to go above and beyond, get better assignments.

Additionally, the hostility of law firm environments in general sometimes blurs the line between hazing and discrimination. Consider the Asian female associate who has no trouble receiving assignments. But she receives too many assignments, nearly twice the amount of work as the non-minority associates that are in her year of practice and in her department. Although she complains to her supervising attorney about the amount of work, she is told that if she wants to keep her job then she will have to take on the tasks given to her. Is the firm trying to force the associate out because of her race? Or is she simply being hazed by a ruthless supervisor? The problem with this sort of treatment is obvious. The cut-throat atmosphere in the firm helps the partners get the work that they need from the associates which will help them make the profits that they want. But because this reality is simply “the way of the firm,” the work atmosphere can create a breeding ground of masked discrimination. Associates who are new in their careers are often too afraid to report these claims for the fear of being branded as the lawyer who just could not cut it. So instead, there is often an exodus from the firm after the first few years of practice, or an avoidance of firm practice altogether. Associates who have had enough of the hostility of big firm practice move to smaller firms, go into public sector practice or professorship, or leave the practice of law

127. Slotkin, supra note 110, at 149, 151.
behind altogether.\textsuperscript{128} This gives associates who feel discriminated against the opportunity to leave the firm environment behind without jeopardizing their reputations in the legal community. However, this exodus is not specific to associates who have experienced discrimination. Each year big law firms lose associates for reasons completely unrelated to any protected class, simply because of the inherently competitive atmosphere of a law firm. For women, firm life simply is not conducive to family life. The low number of women who are partners at large firms and are married with children makes this obvious.\textsuperscript{129} So when has an associate's treatment crossed the line from ordinary associate hazing to unlawful discrimination? The answer is often unclear, resulting in arduousness in proving discrimination claims against large law firms.

VI. LAW FIRM REMEDIES TO ALLEVIATE DISCRIMINATION

Although a lot of Title VII cases do not pass summary judgment, the increase of cases against law firms have caused many firms to create remedies meant to prevent discrimination, and to make their atmospheres more attractive for minorities and women by increasing diversity.\textsuperscript{130} The following are a few suggestions of possible remedies used and not used by firms in addressing these issues.

A. The Creation of Human Resources Departments

One way of preventing workplace discrimination and harassment is to hire human resources (HR) professionals who are required to address the concerns of legal personnel. This allows attorneys who have employment concerns to address them with persons who are not attorneys, and therefore alleviate hesitations caused by fear of retaliatory employment decisions. For this very reason, HR departments within law firms would be more

\textsuperscript{128} Despite the fact that small firms have the reputation of having more hospitable atmospheres than large firms, the EEOC has recently determined that minority lawyers are more likely to associate with large firms, particularly top 100 firms in the top ten legal markets. U.S. \textit{EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, supra} note 110.

\textsuperscript{129} Although 30\% of all lawyers are women, only 11\% of that thirty are partners in the country's 250 largest firms. Slotkin, \textit{supra} note 110, at 151. Very few of those women have children. \textit{Id.} at 152.

\textsuperscript{130} Generally, the diversity of law firms increases with the diversity in that law firm's city. In 1998, it was reported that San Francisco, Miami, and New York were the most diverse cities; therefore it was no surprise that in that year San Francisco's Graham & James, L.L.P. had the highest number of Asian-American partners (18) and Miami's Steel Hector & Davis L.L.P. had the highest number of Hispanic partners (18). \textit{See} Goldhaber, \textit{supra} note 110. Washington D.C.'s Covington & Burling ranked highest for Black partners as a percentage of all partners (5\%). \textit{Id.} New York appeared to be the exception in that two New York firms were reported in 1998 to have no minority partners. \textit{Id.}
beneficial if they were not composed of attorneys. HR professionals could perform internal investigations of complaints, and should have the power to make punitive employment decisions based on their findings. Preventive measures concerning applicant flow data and diversity sensitivity training could be run through the department, synonymous to the functions of personnel departments in corporations.

One firm that has created a HR department in its two big offices in San Francisco and New York is Thelen Reid & Priest, LLP. The San Francisco office, in particular, has two HR managers who work independently from the Attorney Recruiting Manager, with their own HR administrative staff. In other words, they have a complete HR department that is detached from the legal environment of the firm.

B. Diversity Committees

Many firms have begun to organize diversity committees composed of attorneys recruited to evaluate firm atmospheres. These committees, which are often composed of partners as well as associates, create plans for the recruitment of new attorneys as well as evaluate proposals to the general partners as to part-time positions, associate work hours and promotional opportunities. An effective diversity committee is one whose proposals are valued and honestly considered by the partners, leading to the reason why it is imperative to have more partners than associates on the committee. Committees that are created only for appearance’s sake are ineffective and a waste of time.

In order to increase the power of diversity committees, two firms have decided to make partners financially accountable for not bringing in diverse candidates. In the late 90s, the co-head of St. Louis-based Bryan Cave, L.L.P. decided to include the diversity question in an annual self-evaluation form that determines a partner’s annual draw. Denver-based Holland & Hart, L.L.P. also included the diversity question in their semi-annual compensation assessment forms. The idea was taken from two of the firm’s clients, Sears and Xerox, who had similar evaluations for their top

134. Id.
135. Id.
136. Id.
executives.\textsuperscript{137} Despite this stride for diversity, the results of the evaluation forms have not manifested themselves in diversity numbers.\textsuperscript{138} While Bryan Cave's number of minority attorneys increased from 19 of 498 in 1997 to 53 of 553 in 2001, the number of minority partners at the firm only increased from 6 of 221 in 1997 to 9 of 231 in 2001.\textsuperscript{139} Holland & Hart has had even slower progress with the number of minority associates only increasing from 6.25 percent in 1996 to 6.85 percent in 2001 and for partners, 1 of 113 in 1997 and 2 of 126 in 2001.\textsuperscript{140} Holland & Hart blames the lack of success on a depletion of minority recruits in the Denver area.\textsuperscript{141} While progress has been slow in both firms, the inclusion of the diversity question in partner evaluation forms represents one of the more innovative ideas used by diversity committees to increase minority recruitment at law firms.

C. Diversity Managers

Some firms have hired full-time diversity managers to prevent and manage Title VII concerns in the law firm.\textsuperscript{142} Their duties can include recruitment procedures, associate counseling, and report-creation for diversity statistical data.\textsuperscript{143} The move to firm diversity managers has only been heightened by the increased pressure by firm clientele to increase diversity among their ranks.\textsuperscript{144} Sullivan & Cromwell's diversity manager, Kandance Weems-Norris, commented in an article that she had "handled questions from clients who want numbers and statistics and a narrative [about minority associates and partners]."\textsuperscript{145} In-house law departments, whose corporations have established diversity programs to defend Title VII suits, have continued to put pressure on law firms to increase diversity, hoping that by doing so they will increase the available number of minority

\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
lawyers in their departments.\textsuperscript{146}

A full-time diversity manager is more desirable and may be more effective than a part-time manager, since a lawyer whose time is split between his or her work and the diversity project is more likely to consider the diversity project as a lesser priority. What is not suggested is that diversity decisions be placed solely in the hands of recruitment personnel, who may have limited managerial discretion and are more likely to be administrative personnel than actual attorneys.

\textbf{D. Affirmative Action Policies}

A law firm cannot establish a voluntary affirmative action policy unless it formally acknowledges at the outset that women and minorities have historically been underrepresented in the firm.\textsuperscript{147} The problem here is apparent; few firms are willing to admit historical under-representation. Many corporations have embraced affirmative action policies because, in order to accept government contracts, they have had to meet EEO requirements.\textsuperscript{148} Many law firms, because of their small employee sizes and thus inapplicability to Title VII, do not have the same incentive; nevertheless, as firm clients, these corporations have begun to enforce the diversity issue within particular firms.\textsuperscript{149}

Every firm should have some sort of a diversity policy, which means more than a one-line "equal opportunity employer" message pasted in recruitment materials. The policy should outline application procedures, methods for recruiting more diverse candidates (for instance, recruiting from historically black law schools or seeking female laterals), and formal


\textsuperscript{147} \textit{See}, e.g., \textit{Women In the Law – Outside Counsel Deborah Weinstein: Promoting Diversity in Law Firms and Corporate Legal Departments}, Eckert Seamans Cherin & Mellot, L.L.C., at http://www.escm.com/new/art/dw0201.html (last visited Mar. 1, 2004) (explaining how a firm cannot engage in affirmative action unless it establishes a voluntary affirmative action program, but in order to establish the program, it must admit to past minority underrepresentation).

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.}
policies for promotion evaluation and partnership decision-making so that associates are fully aware of the firm's employment decision-making process.

E. Harassment and Diversity Sensitivity Training

Many corporations have resorted to the use of sensitivity training to accommodate the pressures of dealing with increasingly diverse workforces. Law firms, like corporations, are provided access to consultants that can conduct harassment and/or diversity sensitivity training. For example, the Texas-based consulting firm of Employment Practices Solutions, Inc. provides harassment sensitivity training and deals with human resources management issues specifically for law firms.150

As in most corporations where a network of policies and personnel are enacted to relay the employer's zero tolerance policies of sexual harassment, legal employers should do their part in developing these types of policies. Here, creating a paper policy is not enough. Zero tolerance policies should be implemented, enforced, and constantly reinforced by requiring all employees (including partners) to participate in sensitivity training and posting zero tolerance policies throughout the employment facility. Attorneys should be aware of a designated person to whom they can report harassment claims internally, and the employer should encourage mediations between the offender and victim. Punitive decision policies should also be put in place to deter offenders from harassing employees.

VII. CONCLUSION

Whatever the reasons for discrimination and harassment, attorneys in law firms should not be precluded from receiving chastisement for proven discrimination. The fact that there appears to be an increase in these claims against law firms, even if the suits eventually fail at trial or summary judgment, should raise red flags to firms that they should create adequate diversity policies and create internal prevention methods against discrimination. Diverse environments should be desired for all work atmospheres, and law firms should embrace this attitude and strive to increase diversity amongst their ranks. Use of HR departments, diversity managers, diversity committees, affirmative action policies and harassment/diversity sensitivity training will help to level the playing field

at most law firms and create environments that are welcoming to all genders and races.