Chapter 5

Race and Color Discrimination

Learning Objectives

By the time you finish this chapter, you should be able to:

LO1 Discuss and give details on the history of race discrimination and civil rights in the United States.

LO2 Explain the relevance of the history of civil rights to present-day workplace race discrimination issues.

LO3 Set forth the findings of several recent studies on race inequalities.

LO4 Identify several ways that race and color discrimination are manifested in the workplace.

LO5 Explain why national origin issues have recently been included under race discrimination claims by the EEOC.

LO6 Discuss the three Reconstruction Civil Rights Acts and what they address.

LO7 Give the legal requirements courts use for proving a case of race discrimination, and the employer's defense.

LO8 Describe ways in which an employer can avoid potential liability for race and color discrimination.

Opening Scenarios

SCENARIO 1

1 Scenario

An Asian employee who was routinely working about 16 hours of overtime per week sues for race discrimination when her overtime hours decrease because of the use of floating employees who make overtime unnecessary. Does she win? Explain.

SCENARIO 2

2 Scenario

A black female employee is terminated during a downsizing at her place of employment. The decision was made to terminate the two worst employees, and she was one of them. The employer had not told the employee of her poor performance nor given her any negative feedback during evaluations to enable her to assess her performance and govern herself accordingly. In fact, there were specific orders not to give her any negative feedback. The employee sues for racial discrimination, alleging it was a violation of Title VII for the employer not to give her appropriate negative feedback during evaluations to prevent her from being put in the position of being terminated. Does the employee win? Why? Why not?

SCENARIO 3

3 Scenario

An employer has a "no-beard" policy, which applies across the board to all employees. A black employee tells the employer he cannot shave without getting severe facial bumps from ingrown hairs. The employer replies that the policy is without exception and the employee must comply. The employee refuses and is later terminated. The employee brings suit under Title VII on the basis of race discrimination. Does he win? Why? Why not?

Statutory Basis

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color. . .or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color. . .[Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a).]

Note: Not a semester goes by that white students do not ask: "Which term should we use: 'black' or 'African American'?" They are unsure which term to use for fear of offending. You may have noticed that the terms are used interchangeably throughout the text. If in doubt, simply ask. This is particularly important for managers and supervisors, as it indicates a respect for the employee's feelings. Even if you do not ask, our experience has been that it rarely matters and most blacks are not offended by the choice of one or the other.

Surprised?

LO1 LO3 LO4

Race is the first of the prohibited categories in Title VII, the main reason for passage of the law, and it remains, even today, a factor in the lives of many employees. Despite the fact that we can point to the fact that for the first time in history one of the two presumptive presidential candidates is an African American (Democratic Senator Barack Obama, who may even be president by the time you read this), as

is the Secretary of State, Condeleeza Rice (the second African American to hold the post), and Oprah Winfrey tops the Forbes list of the wealthiest Americans, it matters more than most readers of this text (primarily because of their age and experience)—and society at large—may realize. So much so that it might surprise you to discover the following:

- Research shows employers would rather hire a white man who had served time in prison than a black man who had not.
- When researchers sent out identical resumes for jobs listed in the newspaper, with the only difference being the names of the applicants, those with "ethnic" names like Jamal or Lakiesha received 50 percent fewer callbacks for jobs than the identical résumés with traditionally white names like Megan or Brad. This remained true even when the "ethnic" applicants were given zip codes which indicated that the applicant lived in an area of higher socioeconomic status.
- In addition to visual profiling, researchers have found linguistic profiling—African Americans who leave messages in response to ads often never receive return calls, while whites almost always do.
- A black man with a college degree makes 30 percent less than a similarly situated white man.
- An employee shooting rampage at a major U.S. defense contractor's Mississippi plant in July 2004 "wasn't all that unexpected" because the white employee had repeatedly threatened to kill black co-workers. Six were murdered and eight injured. All but one of the murdered workers were black.
- For Halloween 2007, Julie Myers, head of Immigration and Customs Enforcement for the Department of Homeland Security, hosted a Halloween fundraising party for a federal government charity at which a white man came dressed in a striped prison outfit with dreadlocks and wearing skin-darkening makeup. Not only did Myers host the party, but she was on a panel of judges who praised the prisoner costume for "originality." Myers later apologized, saying the outfit was "inappropriate and offensive" and that she "deeply regretted" what happened. Similarly, a white judge in Louisiana wore blackface makeup, handcuffs, and a jail jumpsuit at a Halloween party as a "joke." His brother-in-law, the host, was dressed as Buckwheat. Students in several colleges and universities also have done such things.
- During oral arguments in the *Lopez v. Gonzales*[1] and *Toledo-Flores v. United States*[2] cases that could impact thousands of immigrants, U.S. Supreme Court Justice Antonin Scalia made a reference to one of the parties in a case, a Mexican who had been deported back to his country, as someone unlikely to keep from drinking tequila on the chance he could return to the United States.[3]
- In the 2004 elections in Alabama, voters voted to keep the Alabama constitution's language that says "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race."

- A black Reuters employee received an e-mail from his white supervisor, David Flynn, who routinely called the employee "my n——" in their work areas, which depicted an electronically altered photo of the employee with a noose around his neck, braids in his hair, and a large penis.
- At Charapp Ford South, a car dealership near Pittsburgh, two black employees who complained about constant racial harassment in the workplace allegedly found a document that suggested "ten ways to kill" African Americans. When they complained, a manager told them that "people [around here] wanted to see blacks washing cars, not selling them."
- A temp agency used code words to supply Jamestown Container Co. and Whiting Door Mfg. Co. with the white male employees they requested, denying placements to minorities and women.
- A congressionally commissioned study by the Institute of Medicine found that "bias, prejudice, and stereotyping on the part of health care providers" contributes to African Americans being less likely than whites to receive appropriate heart medication, coronary artery bypass surgery, and kidney transplants, as well as being more likely to receive a lower quality of basic clinical services such as intensive care.
- Nearly half of white Bostonians surveyed said that African Americans and Hispanics are less intelligent than whites and that African Americans are harder to get along with than other ethnic groups.
- A five-year, seven-volume study by the Russell Sage Foundation found that "racial stereotypes and attitudes heavily influenced the labor market, with blacks landing at the very bottom."
- A 2006 survey of new recruits and minority firefighters at the Los Angeles Fire Department found that 87 of them had either experienced or were aware of discrimination and that hazing and discrimination are rampant. In one case, a black firefighter said white firefighters mixed dog food into his spaghetti dinner. After reporting it, he experienced verbal slurs and insults by firefighters "barking like dogs."
- In DeKalb County, GA, three white and one black employee sued for race discrimination. The black employee alleged he was terminated because he refused to discriminate against white managers when he was told to withhold information from white employees so they would appear incompetent. The white employees alleged they were replaced with black employees in an effort to create a "darker administration" to reflect DeKalb's racial makeup.
- Florida lawmaker Ralph Arza resigned in November 2006 after he was charged with retaliating against, and tampering with, a witness (both felonies) in connection with leaving obscenity-filled messages and a racial slur about the black Miami-Dade school superintendent on a colleague's voice mail.
- In May 2007, EEOC settled a case in which supervisors routinely used "egregious" ethnic slurs for African Americans, Hispanics, and Asians and said things like "it should not be against the law to shoot Mexican men, women and

children or to shoot African Americans and Chinese people," and "If I had my way I'd gas them [referring to African American employees] like Hitler did the Jews."[4]

Unfortunately, there are many more items that could be added to this list. We gave you this sampling of wide-ranging race-related news items so that you can see how much race is still a factor of life in the United States and in how many ways it can be manifested—including by people like U.S. Supreme Court justices, state legislators, and judges. If any of this surprises you, you are not alone. A 2004 Gallup poll found that 76 percent of whites, *including 9 out of 10 under 30* (emphasis added because our experience shows most students think it is only older people who discriminate) thought African Americans were now being treated fairly or somewhat fairly, compared to only 38 percent of African Americans who thought so.

You can see what a problem this finding would present in the workplace. Much of the race discrimination now occurring in the workplace is not as overt as it was before Title VII (see Exhibit 5.1, "Classified Ads, 1961"), but it is still very much a factor in employment. (See Exhibits 5.2, "Equal Income?" and 5.7, "EEOC's Revised Rule Guidance.") And, as you can also see from some of the items in our sampling, race discrimination in the workplace does not occur in a vacuum. It is part of a much larger picture of race-based discrimination in the greater society.

Working to get future managers and supervisors to see this larger picture is a big part of what this chapter is about. The more you can see the bigger picture, the less likely you are to be a part of unnecessary claims of workplace race discrimination. That is why we can't simply tell you the law and leave it at that. The law has been in place for over 40 years and race discrimination claims are still very much a part of Title VII. They have risen every decade since the law was passed and still account for over one-third of the EEOC's total claims filed. What we are seeing as the Title VII system is still being fine-tuned through litigation, legislation, and regulatory efforts is that supervisors and managers often do not recognize race discrimination or its effects when they occur. That is because as this work is being done through the legislative and judicial process, we have often neglected to do our part of the equation in eradicating discrimination. We don't want that to happen to you. We want to provide you with a good basic background in the area of race discrimination so you can have the tools you need to be able to keep liability from attaching to your employer for unnecessary workplace discrimination.

LO5

When someone says the word "race," what do you think of? Chances are, most of us think of black or white. We find ourselves at a rather interesting juncture regarding race claims at this point in time. For virtually the entire time Title VII has been in existence, race has been almost exclusively about African Americans and whites, with discrimination against other groups considered primarily under the national origin category. (See Exhibits 5.3, "EEOC's Revised Race/National Origin Guidance," and 5.4, "Hispanic: Race or National Origin—and Who Is

Exhibit 5.1 *Classified Ads, 1961*

The exhibit below, adapted from an actual newspaper classified ad section from 1961, is typical of want ads found in newspapers before Title VII was passed in 1964. For publication purposes, names and phone numbers have been omitted. It is now illegal to advertise for males, females, or racial groups.

Male Help Wanted

SOUTH ATLANTA
PERMANENT position for 2 young men 18-35, must be ambitious, high school graduate, and neat appearing. $85 week guaranteed, plus bonus. Opportunity to earn in excess of $100 per week. Must have desire to advance with company. For interview call…

ATTN YOUNG MEN
18-25, SINGLE, free to travel, New York and Florida, returns for clearing house for publishers. New car, transportation furnished. Expense account to start. Salary plus commission. We train you. Apply…

10 BOYS
14 OR OVER. Must be neat in appearance to work this summer. Salary 75 cent per hour. Will be supervised by trained student counselor. Apply…

MAN experienced in selling and familiar with the laundry and dry cleaning business needed to sell top brands of supplies to laundries and dry cleaning plants. This is an excellent opportunity for a man who is willing to work for proper rewards. Salary and comm. Reply to…

EXPERIENCED dairy man to work in modern dairy in Florida. Must be married, sober, and reliable. Salary $60 per week for 6 days with uniform, lights and water—furnished. Excellent house. Write…

SALESMEN
THIS corporation provides its salesmen with a substantial weekly drawing account. New men are thoroughly trained in the field with emphasis directed toward high-executive income bracket. Men experienced in securities, encyclopedias, and other intangibles who can stand rigid investigation, are dependable, and own late-model car. Reply to…

Situations Wanted, Female 24

SECRETARY—RECEPTIONIST (experienced). Ex-Spanish teacher desires diversified permanent position. Responsible, personable, like people, unencumbered. Can travel.

EXPERIENCED executive secretary with college degree, top skills, currently employed—seeks better position with opportunity for advancement and good salary.

SECRETARY desires typing at home, evenings, and weekends.

COLORED EMPLOYMENT

Help Wanted Male, Colored 26

CURB BOYS
DAY or night shift. No experience necessary. Good tips. Apply in person only.

HOUSEMAN, chauffeur. Must be experienced. Recent references, driver's license, health card required. Must be sober, reliable. Write…

RESTAURANT COOK
FOR frying and dinner cooking. Age 22-35. Must be sober, dependable and well-experienced. Salary $250-$275 for good man. Apply…

SOBER, experienced service station porter. No Sundays. Top pay.

PART-TIME lawn and yard maintenance man.

EXP service station porter, 6-day wk. Good sal.

KITCHEN porters, also ware washers. Apply…

Situations Wanted, Male, Col. 28

YOUNG man wants job. Short order and plain cooking, experienced.

Help Wanted, Female, Col. 29

MAID, free to travel with family, $35 to $50 week. Free room and board.

LAUNDRY MARKER—Experienced. 40 hours—pay hourly basis.

SHIRT girl. Experienced.

SHIRT girl, Experienced. Good pay. Good hours. Apply in person.

WAITRESS, experienced, for lunch counter. Over 40. Call…

Situation Wanted, Female, Col. 31

COOK-MAID (experienced)—desires Monday, Wednesday, Friday. References and health card.

MAID wants 5 days week. References.

GIRL WANTS 5 DAYS

MAID wants 5 days work. Will live-in.

MID-TEEN girl desires maid or office work.

Exhibit 5.2 *Equal Income?*

According to 2006 U.S. Census data:

> Asian Americans had higher personal income than any other racial demographic except holders of graduate degrees. Whites with advanced degrees had the highest median income. African Americans earned 22 percent less than whites. Hispanics/Latinos had the lowest overall median income, with 28.51 percent less than whites and 35 percent less than Asian Americans.

Source: U.S. Census Bureau, http://www.pubdb3.census.gov/macro/032006/perinc/new03_000.htm.

According to WCBS radio:

> U.S. Census data indicate that Queens, NY, is the only U.S. county of 65,000 or more residents where the median income of African Americans is greater than that of whites. Black median income was $51,000, while white median income was $50,900. Asian American income was nearly $53,000, while Hispanic income was $44,000. Across the river in Manhattan, the situation is quite different, with the largest gap of any other large county in the country, white median income was $86,000 and African American income was $28,000.

Source: "Median Income for Blacks Greater Than Whites in Queens," October 2, 2006, http://www.wcbs880.com/pages/95386.php?contentType=4&contentId=215916.

Included?") The long and extensive history leading up to the passage of the Civil Rights Act and the court interpretations of it afterward bear this out.

But things are changing and race is being used differently than it had been. For instance, on April 16, 2007, Virginia Tech University senior Cho Seung-Hui shot and killed 32 people and wounded 25 others on the university campus. It was a while before police could identify the gunman. Three days later, the *Atlanta Journal and Constitution* ran a headline: "Tragedy strikes; then race enters the picture." Seung-Hui was born in Korea but was a permanent resident of the United States. According to the article, the first official identification of the Virginia Tech gunman was of his race and gender: "we do know that he was an Asian male," the university president said. It surprised us to see race (rather than national origin) used in this context. However, especially since the events of September 11, 2001, with its resulting backlash against Middle Easterners, and the simultaneous growing visible presence of Hispanics, Southeast Asians, and other ethnicities in this country, it is clear that there is a trend that we should address.

While our previous editions reflected the situation existing at the time they were published, in this edition we are expanding the race chapter to include discrimination against people other than the traditional groups of black and white. Keep in mind that we always addressed workplace discrimination on the basis of ethnicity or national origin; it was simply dealt with in a separate chapter because that is the way the law generally handled it. With this edition, there will continue to be a separate chapter on national origin discrimination, as the issues called

Exhibit 5.3 *EEOC's Revised Race/National Origin Guidance*

New forms of discrimination are emerging. With a growing number of interracial marriages and families and increased immigration, racial demographics of the workforce have changed and the issue of race discrimination in America is multidimensional. Over the years, EEOC has received an increasing number of race and color discrimination charges that allege multiple or intersecting prohibited bases such as age, disability, gender, national origin, and religion.

Source: http://eeoc.gov/initiatives/e-race/why_e-race.html.

upon in such cases have their own history and legal interpretation to which attention must be given. However, in keeping with the changing times and our rapidly changing American demographics, we also will address other ethnicities in this chapter.

In expanding our race coverage, however, it is important that we preserve the history and background of the Civil Rights Act of 1964 so that the law can continue to be understood in its proper context; that is, the context of slavery, Jim Crow, and the fight for civil rights (and the lingering effects of each) in which it occurred. It is important that we not marginalize what has been, and continues to be, a long-standing, persistent, and maddeningly stubborn issue in this country: discrimination against African Americans (see Exhibit 5.5, "Reality of Intentional Job Discrimination"). This is not a value judgment as to the relative importance of discrimination against one group versus another. Rather, it is a recognition of the long, tortuous, and lingering history and impact of traditional notions of race discrimination under our unique history and the role that the fight for equality and civil rights for African Americans has played in all groups now expecting to be treated equally. The expanded notion of race will not neglect either the important basis for the law that birthed the legislation in the first place, or the present day effects that continue to persist.

In taking the approach we now do in this sixth edition, we want to recognize that the willingness of other groups to exercise their rights under the law by using the race category rather than, or in addition to, the national origin category is a trend we see, note, and here reflect. EEOC also has seen this trend and, in part because of it, launched a new initiative called E-RACE (Eradicating Racism and Colorism from Employment) intended to address these changes. (See Exhibit 5.6, "EEOC's E-RACE Initiative.") As part of their revised Compliance Manual, issued in 2006, EEOC outlined the differences between the categories of race, color, and national origin. (See Exhibits 5.7, "EEOC's Revised Race Guidance"; 5.8, "EEOC's National Origin Guidance"; and 5.11, "EEOC's Color Guidance.") EEOC noted that the Civil Rights Act did not define race (it was understood at the time of the passage of the law given our country's history and the recent and painful civil rights activity leading up to passage of the law, to include African Americans and whites), but in light of recent trends, EEOC undertook to bring

Exhibit 5.4 *Hispanic: Race or National Origin—and Who Is Included?*

Ever wonder where racial categories come from? In this interesting exhibit, you get to see (1) how a court addresses certain groups being left out of a definition of Hispanic (note especially footnote 1) and (2) how the government comes up with racial classifications and how they find their way into the mainstream. The first is an excerpt from a discrimination case; the second is a document from the U.S. Census Bureau about how Asians will be added to the minimum categories and how Hispanics will be classified in the census. While reading the document and noting all the effort and energy given to this issue, ponder the necessity of having such classifications at all.

(1)

Rocco Luiere, Jr., "the son of a Spanish mother whose parents were born in Spain," owns seventy-five percent of the shares in Jana-Rock Construction, Inc. Luiere and Jana-Rock bring a challenge under the Equal Protection Clause of the Fourteenth Amendment to New York's "affirmative action" statute for minority-owned businesses, because the law does not include in its definition of "Hispanic" people of Spanish or Portugese descent unless they also come from Latin America. The plaintiffs allege that by distinguishing among different subclasses of Hispanics, Article 15-A contains an explicit classification on the basis of national origin that should be subjected to strict scrutiny, and that under strict scrutiny New York's definition of "Hispanic" would fail. Applying rational basis review rather than strict scrutiny, the district court entered judgment in favor of the defendants and dismissed the complaint.

When a plaintiff challenges "racial classifications, imposed by whatever federal, state, or local governmental actor, [the classifications] must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[1] "The purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."

But once the government has shown that its decision to resort to explicit racial classifications survives strict scrutiny by being narrowly tailored to achieve a compelling interest, its program is no longer presumptively suspect. We do not think that it is appropriate to apply automatically strict scrutiny a second time in determining whether an otherwise valid affirmative action program is underinclusive for having excluded a particular plaintiff. In order to trigger strict scrutiny, such a plaintiff—like other plaintiffs with equal-protection claims—must demonstrate that his or her exclusion was motivated by a discriminatory purpose. Because the plaintiffs do not otherwise challenge the constitutional propriety of New York's race-based affirmative action program, and because Luiere and Jana-Rock cannot show that New York adopted its chosen definition of "Hispanic" for a discriminatory purpose or that its definition lacks a rational basis, we agree with the district court's judgment for the defendants and affirm.

Source: *Jana-Rock Construction, Inc. v. New York State Department of Economic Development, Division of Minority & Women's Business Development,* 438 F.3d 195 (2d Cir. 2006).

(2) RACIAL AND ETHNIC CLASSIFICATIONS USED IN CENSUS 2000 AND BEYOND

Introduction. The purpose of this document is to provide information about changes to the questions on race and Hispanic origin that have occurred for the Census 2000. These changes conform to the revisions of the standards for the classification of federal data on race and ethnicity promulgated by

[1] The classifications that are the subject of this appeal are based on national origin rather than race. It is undisputed, however, that principles of analysis applicable to race-based affirmative action programs are the same as those applicable to national-origin-based affirmative action programs. We therefore use the terms interchangeably.

continued

Exhibit 5.4 *Continued*

the Office of Management and Budget (OMB) in October 1997.

Old Standards. In response to legislative, programmatic, and administrative requirements of the federal government, the OMB in 1977 issued Statistical Policy Directive Number 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting." In these standards, four racial categories were established: American Indian or Alaskan Native, Asian or Pacific Islander, Black, and White. In addition, two ethnicity categories were established: Hispanic origin and Not of Hispanic origin. Although the Census Bureau has traditionally used more categories for decennial censuses, those categories collapsed into the four minimum race categories identified by the OMB, plus the category Some Other Race.

Reason For Changing the Old Standards. The racial and ethnic makeup of the country has changed since 1977, giving rise to the question of whether those standards still reflected the diversity of the country's present population. In response to this criticism, the OMB initiated a review of the Directive. This review included (1) organizing a workshop to address the issues by the National Academy of Science, (2) convening four public hearings, and (3) appointing an Interagency Committee for the Review of Racial and Ethnic Standards, which later developed a research agenda and conducted several research studies. The result of the Committee's efforts was a report describing recommended changes to the Directive. The members of the Committee included representatives of more than 30 agencies that covered the many diverse federal requirements for data on race and ethnicity. In 1997, the OMB accepted almost all of the recommendations of the Interagency Committee, resulting in changes to the standards.

What Are The New Standards And When Do They Take Effect?

In October 1997, the Office of Management and Budget (OMB) announced the revised standards for federal data on race and ethnicity. The minimum categories for race are now: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White. Instead of allowing a multiracial category as was originally suggested in public and congressional hearings, the OMB adopted the Interagency Committee's recommendation to allow respondents to select one or more races when they self-identify. With the OMB's approval, the Census 2000 questionnaires also include a sixth racial category: Some Other Race. There are also two minimum categories for ethnicity: Hispanic or Latino and Not Hispanic or Latino. Hispanics and Latinos may be of any race.

How Should Hispanics or Latinos Answer the Race Question?

People of Hispanic origin may be of any race and should answer the question on race by marking one or more race categories shown on the questionnaire, including White, Black or African American, American Indian or Alaska Native, Asian, Native Hawaiian or Other Pacific Islander, and Some Other Race. Hispanics are asked to indicate their origin in the question on Hispanic origin, not in the question on race, because in the federal statistical system ethnic origin is considered to be a separate concept from race.

What Racial Categories Will Be Used in Current Surveys and Other Data Collections by the Census Bureau?

By January 1, 2003, all current surveys must comply with the 1997 revisions to the Office of Management and Budget's standards for data on race and ethnicity, which establish a minimum of five categories for race: American Indian or Alaska Native,

continued

Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. Respondents will be able to select one or more of these racial categories. The minimum categories for ethnicity will be Hispanic or Latino and Not Hispanic or Latino. Tabulations of the racial categories will be shown as long as they meet agency standards for data quality and confidentiality protection. For most surveys, however, tables will show data at most for the White, Black, and Asian populations.

Source: U.S. Census Bureau, Population Division, Special Population Staff, http://www.census.gov/population/www/socdemo/race/racefactcb.html.

some understanding to the matter in a world in which things had changed since passage of the act.

So while we may now think of race under Title VII as a more inclusive concept, until now it has been somewhat different. We applaud EEOC's recognition of this trend and modify our approach accordingly. In the 1998 *Alonzo v. Chase Manhattan Bank, N.A* case, provided at the end of the chapter, you can see for yourself the struggle the courts had dealing with this issue when a Hispanic employee sued for national origin discrimination, then amended his complaint to include a claim for race discrimination. Compare the court's analysis about Hispanics and race in *Alonzo* to the discussion of race versus ethnicity in Exhibit 5.4, "Hispanic: Race or National Origin—and Who Is Included?" Do they seem consistent to you?

Things have certainly changed dramatically in the 40-odd years since passage of the Civil Rights Act. But keep the previously mentioned poll in mind: 9 out of 10 whites under 30—most of you reading this text—believe African Americans and whites are treated equally. With this mind-set, employers would be less likely to respond appropriately to claims of racial discrimination from nonwhite employees and thus increase the likelihood of liability under Title VII. This is only the last in many such polls with similar results. Even in the midst of legalized segregation and Jim Crow, polls showed that whites thought blacks were treated equally. It demonstrates one of the reasons that the disappearance of race discrimination may not necessarily be as realistic in the near future as we would like to think.

In fact, researchers refer to the idea that whites think everything is fair for everyone, so nothing need be done to ensure equal opportunity anymore, as the "new racism." Because our unique racial history involved systemic, institutionalized, legal, and social race discrimination, we are left with enough of the vestiges to account for much of the racial differences we see reflected in the statistics above. If managers and supervisors do not realize that vestiges remain, they are likely to run afoul of the law. Employers do not need to engage in deliberate, intentional racial discrimination in order to violate the law and the law does not require this in order to find liability. That is why providing information here to address these matters is so important for making workplace decisions that avoid liability.

Exhibit 5.5 *Reality of Intentional Job Discrimination*

In 2002, Alfred W. Blumrosen and Ruth G. Blumrosen, well-respected lawyers, law professors, and civil rights researchers, released an unprecedented, comprehensive, groundbreaking study of workplace discrimination called *The Reality of Intentional Job Discrimination in Metropolitan America—1999.* The objective of the Ford Foundation–funded study was "to advance the public 'sense of reality' concerning the present extent of intentional job discrimination." The study examined 160,297 EEO-1 reports (discussed in Chapter 4) supplied to the federal government by private employers with 100 or more employees and federal contractors with 50 or more employees, for the period 1975–1999. It identified intentional employment discrimination by applying legal standards to statistics of the race, gender, and ethnic composition of large and medium-sized employers in the private sector. The report contained statistical information on 40 individual states, as well as the nation as a whole.

The report concluded that "A substantial part of the public has erroneously assumed that intentional job discrimination is either a thing of the past, or the acts of individual 'bad apples' in an otherwise decent work environment. . .Meanwhile, thousands of employers have continued systematic restriction of qualified minority and female workers, and these workers have lost opportunities to develop and exercise the skills and abilities that would warrant higher wages." The report found that African Americans "still bear the severest brunt of this discrimination. . .Thirty-five thousand business establishments discriminated against 586,000 African Americans. Ninety percent of these black workers were affected by establishments that were so far below the average utilization that there was only a 1 in 100 chance that this happened by accident and half by 'hard core' employers who had been discriminating for at least nine years."

Source: Alfred W. Blumrosen and Ruth G. Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America—1999* (2002), http://www.eeo1.com/1999_NR/Title.pdf.

Despite this, clearly much progress has been made in the area of race discrimination in the workplace since Title VII was enacted. An extremely comprehensive, four-year, 1,400-page study of intentional workplace discrimination between 1975 and 1999 was released by Alfred and Ruth Blumrosen in 2002.[5] The report found that workplace discrimination against African Americans is still the worst of all groups, and "the seriousness of intentional job discrimination against Black workers by major and significant industries is evident; and the 'playing field' is far from level. However, minorities increased their participation in the labor force by 4.6 million workers beyond the increase resulting from economic growth and increased their share of 'better jobs' as officials, managers, professionals, technical, and sales workers." The study showed that 15 percent of African Americans experience intentional workplace discrimination.

In addition, there are, in fact, companies that are doing just fine and understand the impact of race in the workplace and work to make sure they do not violate the law. *The Wall Street Journal* reported that after a study of 31,000 of their U.S. jobs showed discrepancies, Eastman Kodak Co. agreed to pay about $13 million in retroactive and current pay raises to 2,000 female and minority

Exhibit 5.6 *EEOC's E-RACE Initiative*

THE E-RACE INITIATIVE (ERADICATING RACISM AND COLORISM FROM EMPLOYMENT)

Why Do We Need E-RACE?

The most frequently filed claims with the EEOC are allegations of race discrimination, racial harassment, or retaliation arising from opposition to race discrimination. In Fiscal Year 2006, 27,238 charges alleged race-based discrimination, accounting for 36% of the charges filed that year.

In a 2005 Gallup poll, 31% of Asian Americans surveyed reported having witnessed or experienced incidents of discrimination, the largest percentage of any ethnic group, followed closely by 26% of African Americans, the second largest group. A December 2006 CNN poll conducted by Opinion Research Corporation revealed that 84% of 328 Blacks/African Americans and 66% of 703 non-Hispanic Whites/Caucasians think racism is a "very serious" or "somewhat serious" problem in America.

Color discrimination in employment seems to be on the rise. In Fiscal Year 1992, EEOC received 374 charges alleging color-based discrimination. By Fiscal Year 2006, charge-filings alleging color discrimination increased to 1,241. A recent study conducted by a Vanderbilt University professor "found that those with lighter skin earn on average 8 to 15 percent more than immigrants with the darkest skin tone—even when taking into account education and language proficiency. This trend continued even when comparing people of the same race or ethnicity." Similarly, a 2006 University of Georgia survey revealed that a light-skinned Black male with only a Bachelor's degree and basic work experience would be preferred over a dark-skinned Black male with an MBA and past managerial positions. However, in the case of Black female applicants seeking a job, "the more qualified or experienced darker-skinned woman got it, but if the qualifications were identical, the lighter-skinned woman was preferred."

Meanwhile, overt forms of race and color discrimination have resurfaced. In the past decade, some of the American workforce have witnessed nooses, KKK propaganda, and other racist insignia in the workplace. Racial stereotypes and cultural distortions continue to influence some decisions regarding hiring, discipline, evaluations, and advancement.

Finally, some facially neutral employment criteria are significantly disadvantaging applicants and employees on the basis of race and color. Studies reveal that some employers make selection decisions based on names, arrest and conviction records, employment and personality tests, and credit scores, all of which may disparately impact people of color. Further, an employer's reliance on new technology in job searches, such as video résumés, could lead to intentional race or color discrimination based on appearance or a disproportionate exclusion of applicants of color who may not have access to broadband-equipped computers or video cameras.

Collectively, this data shows that racial inequality may remain a problem in the 21st century workplace.

Source: http://eeoc.gov/initiatives/e-race/index.html.

employees in New York and Colorado. The pay raise was not in response to a threatened lawsuit, as is generally the case. Employees had complained about it to supervisors the year before, so Kodak conducted the study and determined it would make the correction.

Exhibit 5.7 *EEOC's Revised Race Guidance*

WHAT IS "RACE" DISCRIMINATION?

Title VII prohibits employer actions that discriminate, by motivation or impact, against persons because of race. Title VII does not contain a definition of "race," nor has the Commission adopted one. For the collection of federal data on race and ethnicity, the Office of Management and Budget (OMB) has provided the following five racial categories: *American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander;* and *White;* and one ethnicity category, *Hispanic or Latino.* OMB has made clear that these categories are "social-political constructs . . . and should not be interpreted as being genetic, biological, or anthropological in nature."

Title VII's prohibition of race discrimination generally encompasses:

- **Ancestry:** Employment discrimination because of racial or ethnic ancestry. Discrimination against a person because of his or her ancestry can violate Title VII's prohibition against race discrimination. Note that there can be considerable overlap between "race" and "national origin," but they are not identical. For example, discrimination against a Chinese American might be targeted at her Asian ancestry and not her Chinese national origin. In that case, she would have a claim of discrimination based on race, not national origin.
- **Physical Characteristics:** Employment discrimination based on a person's physical characteristics associated with race, such as a person's color, hair, facial features, height and weight.
- **Race-linked Illness:** Discrimination based on race-linked illnesses. For example, sickle cell anemia is a genetically-transmitted disease that affects primarily persons of African descent. Other diseases, while not linked directly to race or ethnicity, may nevertheless have a disproportionate impact. For example, Native Hawaiians have a disproportionately high incidence of diabetes. If the employer applies facially neutral standards to exclude treatment for conditions or risks that disproportionately affect employees on the basis of race or ethnicity, the employer must show that the standards are based on generally accepted medical criteria.
- **Culture:** Employment discrimination because of cultural characteristics related to race or ethnicity. Title VII prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person's name, cultural dress and grooming practices, or accent or manner of speech. For example, an employment decision based on a person having a so-called Black accent, or "sounding White," violates Title VII if the accent or manner of speech does not materially interfere with the ability to perform job duties.
- **Perception:** Employment discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.
- **Association:** Employment discrimination against an individual because of his/her association with someone of a particular race. For example, it is unlawful to discriminate against a White person because he or she is married to an African American or has a multiracial child, or because he or she maintains friendships or otherwise associates with persons of a certain race.
- **Subgroup or "Race Plus":** Title VII prohibits discrimination against a subgroup of persons in a racial group because they have certain attributes in addition to their race. Thus, for example, it would violate Title VII for an employer to reject Black women with preschool age children, while not rejecting other women with preschool age children.
- **"Reverse" Race Discrimination:** Title VII prohibits race discrimination against all persons, including Caucasians. A plaintiff may prove a claim of discrimination through direct or circumstantial

continued

evidence. Some courts, however, take the position that if a White person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. The Commission, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used. In either case, the ultimate burden of persuasion remains always on the plaintiff.

Source: *EEOC Compliance Manual,* Section 15-II, http://www.eeoc.gov.

One of the best ways we have found to address this gap in awareness that can lead to employer liability is to give you some of the history of race in our country. We have found in our own classrooms that most of our students fit quite neatly into that "9 out of 10" category. They come into the course thinking everyone is treated equally and see little reason to still have Title VII in force. Until, that is, we show them documentaries on historical events like slavery, the Jim Crow era, and school desegregation riots leading up to its passage and discuss this and the information in this introduction. Then they get it. They are astonished at how clueless (their term, not ours) they were about it all and how little they really knew about this history, yet how important it is to know in order to understand the law, where we are today, and how it impacts their actions in the workplace. It would fill volumes to do it any real justice, but we will give you the most significant highlights leading up to passage of Title VII primarily to address racial discrimination in the workplace, so that you can see what contributes to some of the workplace situations resulting in employer liability.

Case 2

Before we do this, however, we want you to read the *Jones v. Horseshoe Casino & Hotel* case, included at the conclusion of the chapter. It is a case in which you get to see how race plays out in the workplace. We want you to read it before you proceed to the next section so you can have some sense of why the next section is such an important one for you to be aware of.

Background

Chances are, the *Jones* case doesn't make a lot of sense to you. You probably can't figure out why, in this day and time, an employer would do such a thing, and be so open and blatant about it. You likely think that if Jones was as good as the court said, a casino would be glad to get him. This makes perfect sense if you've never really thought about or been confronted with race discrimination. That's why a bit of background is helpful. None of this makes any sense unless you understand where it comes from. The fact that this took place in Mississippi is even more insightful, given its racial history.

LO2

History and its present-day effects account for much of the race discrimination we see manifested today. And make no mistake about it, our history regarding race has been a long, complex, and tortured one. Six months after the death of the erstwhile staunch segregationist, South Carolina Senator Strom Thurmond, in

Exhibit 5.8 *EEOC's National Origin Guidance*

NATIONAL ORIGIN DISCRIMINATION

Whether an employee or job applicant's ancestry is Mexican, Ukrainian, Filipino, Arab, American Indian, or any other nationality, he or she is entitled to the same employment opportunities as anyone else.

ABOUT NATIONAL ORIGIN DISCRIMINATION

National origin discrimination means treating someone less favorably because he or she comes from a particular place, because of his or her ethnicity or accent, or because it is believed that he or she has a particular ethnic background. National origin discrimination also means treating someone less favorably at work because of marriage or other association with someone of a particular nationality.

- **Employment Decisions.** Title VII prohibits any employment decision, including recruitment, hiring, and firing or layoffs, based on national origin.
- **Harassment.** Title VII prohibits offensive conduct, such as ethnic slurs, that creates a hostile work environment based on national origin. Employers are required to take appropriate steps to prevent and correct unlawful harassment. Likewise, employees are responsible for reporting harassment at an early stage to prevent its escalation.
- **Accent discrimination.** An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance.
- **English fluency.** A fluency requirement is only permissible if required for the effective performance of the position for which it is imposed.
- **English-only rules.** English-only rules must be adopted for nondiscriminatory reasons. An English-only rule may be used if it is needed to promote the safe or efficient operation of the employer's business.

COVERAGE OF FOREIGN NATIONALS

Title VII and the other antidiscrimination laws prohibit discrimination against individuals employed in the United States, regardless of citizenship. However, relief may be limited if an individual does not have work authorization.

Source: EEOC Compliance Manual, http://www.eeoc.gov.

2003, it was a national media event when a black woman announced she was his daughter and had been privately, but not publicly, acknowledged by him all her life. She had been the result of a union between Thurmond, then a 22-year-old lawyer living with his parents, and her mother, a 16-year-old maid in the household. Despite the fact that the hallmark of Thurmond's career had been supporting racial segregation, including running for president on a segregationist "Dixiecrat" ticket, he had an acknowledged daughter by a black woman and was one of the first southern legislators to hire a black aide in the early 1970s. Complex indeed.

Africans arrived in this country in 1619, before the *Mayflower.* Their initial experience was as free people who were contracted as indentured servants. After the first 40 years or so, this changed as the need for cheap labor grew as America rapidly expanded, and slavery came into existence. While a very small number of African Americans were free, slavery as an integral and defining part of American life lasted for well over 200 years, until after the Civil War ended in 1865. With

a slight pause (11 years) for Reconstruction after the Civil War, the next 99 years saw Black Codes and Jim Crow laws legalize and codify racial discrimination.

It is well documented that Africans were brought from Africa specifically to be enslaved or otherwise work for whites and that they had no other place in American life. In many places, there were many more slaves than whites (e.g., South Carolina had an 80 percent slave population), so absolute control was necessary in order to prevent slave uprisings, which were a *major* concern for whites. Without having sufficient manpower to exercise this control physically, such control had to be done psychologically as well. Since there were not enough resources available to be able to watch each enslaved person every minute of the day, it was important to devise a system that gave them the message, in their every waking moment, that they were to be subjugated to the will of whites. This meant imposing a system so severe that it assured whites that African Americans would not forget the place designed for them. This was done quite systematically and with the intention of keeping the system of slavery in place forever. The legal system that governed the lives of African Americans was codified into laws known as "Slave Codes." Each of the rules and regulations imposed in the Slave Codes, and later, after Reconstruction, in the Black Codes, was designed to do this.

To give you an idea of the detail into which such measures went, a February 21, 2002, *USA Today* news article excerpted a quote from an 1822 South Carolina grand jury in response to complaints about slaves wearing clothes made from ordinary cloth. The grand jury said: "Negroes should be permitted to dress only in coarse stuffs [called "Negro cloth" and manufactured by WestPoint Stevens, today the United States' largest producer of bed and bath textiles]. . . .Every distinction should be created between whites and the Negroes, calculated to make the latter feel the superiority of the former." "Drapetomania" was an actual "medical condition" doctors ascribed to slaves who wanted to run away and be free. Clearly the control was comprehensive, all-encompassing, and minutely detailed to accomplish this purpose.

When Reconstruction ended, about 11 years after the Civil War was over, the Slave Codes were virtually simply renamed "Black Codes" and used virtually as if slavery had never ended. This system of laws governing black and white relations was based on both law and social custom that was as ironclad as any law ever was. The system, adopted by either law or social custom all over the country, remained in place until the Civil Rights Act of 1964, and in some places well into the 1970s, constantly reasserting the institutionalized role of race in the United States. If you think this was a terribly long time ago, you'd probably be surprised to know that there are audio recordings of actual former slaves telling their stories of what life was like under slavery.[6]

But what do we really mean by "a system" and "the institutionalized role of race"? And why can't we just all forget it and move on? Well, let's take a look and see if we can gain some insight. Doing so is helpful in trying to figure out why race is still such a persistent and pervasive issue in the workplace today.

After Reconstruction, as during slavery, every facet of the life of African Americans was regulated. Recall from Chapter 4 that state and local laws or customs

made it virtually impossible for African Americans to vote and made it illegal for African Americans to marry whites; have sex with them; go to the same schools, universities, professional schools, parks, recreational facilities, movies, churches, theaters, hospitals, restrooms, libraries, restaurants, transportation facilities, department stores, and beaches; be serviced by the same barbers and beauticians, doctors, and lawyers (or, if they were allowed to be, they waited in a separate waiting room and were seen last); drink from the same water fountains; or, in some places, drive a car, stay in a town past sundown, go to town on certain days, be out past curfew, or drive taxi customers of a different race. If space was provided for African Americans at all in public accommodations, it was separate from that occupied by whites. African Americans were routinely seated in the balconies of movie theaters or made to attend on different days than whites. Some fairs had "Negro days" on which African Americans could attend, and some towns had "Negro days" for African Americans to shop. Rather than be seated in restaurants, they were generally sent to the back door, where they ordered their food on a take-out basis long before take out came to be. Staying in hotels was virtually out of the question, even if they had the funds to do so (keep in mind they were relegated to menial labor).

African Americans could not try on clothes or shoes in clothing or shoe stores. Although paying full bus fare, in the South, African Americans had to sit in the back of the bus. They could not simply pay their fare and walk to the back of the bus, as this would mean they had to be in close contact with whites. Rather, they were required to pay their fare in the front, get off the bus, and reenter through the back, rain or shine. If whites wanted or needed blacks' seats, African Americans had to give up their seats even though they were full-fare-paying passengers.

African Americans could not testify against whites in court; look whites in the eye; stay on the sidewalk when whites passed by; be called "Mr.," "Mrs.," or "Miss"; or contradict anything a white person said. The simple act of registering to vote could cost an African American his or her job, family, home, or life. It was not until the Voting Rights Act of 1965 that African Americans received full voting rights in the United States. Breach of Jim Crow law or social policy by African Americans resulted in swift retribution, up to and including death—generally by lynching for males—an event that was often attended by whole families of whites, including children, and treated as a festive family outing, complete with picnic baskets.

Segregated public schools were outlawed by the U.S. Supreme Court in *Brown v. Board of Education*[7] in 1954, but African Americans were not admitted into many schools until well into the 1970s. Counties in some states shut down their entire public school system rather than admit African Americans. In 1957 the "Little Rock 9" integrated Central High School in Little Rock, Arkansas, but not before President Dwight Eisenhower sent in 10,000 federalized National Guardsmen and 1,000 paratroopers to handle the angry mob of 1,000 whites and guard the nine students. Even though their taxes paid for the public institution, African Americans were not admitted to the University of Georgia until 1961, amid campus riots protesting integration. At the University of Mississippi in 1962, two

people were killed and more than 150 federal marshals were injured when the first black student enrolled.

Sounds like something out of a bad dream, doesn't it? It was real. And it was not that long ago. If you were not alive during that time, then most certainly your parents or grandparents were. Remember that the system officially ended only in 1964, and in many places it, or its effects, lingered on long after—in some places, even until today. For instance, in Atlanta, retiring black police officers are suffering right now because of the police department's racial policy that lingered until the 1970s, which prevented black officers from contributing to a whites-only pension fund. This is now resulting in hundreds of dollars a month less in pension payouts to retiring black officers. Along with the difference in pensions, black officers were not permitted to partner with white officers, were made to dress in separate dressing rooms in separate buildings, and were not permitted to arrest white suspects. There are other examples of present-day vestiges:

- Between 2000 and 2004, 16 major insurance cases were settled, covering about 14.8 million policies sold by 90 insurance companies between 1900 and the 1980s to African Americans who were charged more, as was the custom of the day, simply because they were black. The settlements amounted to more than $556 million. During the high-water mark for burial insurance, as it was known, American insurance companies held policies worth more than $40 billion. According to the Federal Trade Commission, some companies, like Metropolitan Life, built their businesses largely on such policies, which not only charged African Americans higher premiums, but were specifically targeted to poor African Americans and often benefits paid out less than the premiums paid in.
- In June 2007, former KKK member James Ford Seale was convicted of kidnapping and conspiracy in the 1964 murders of Charles Eddie Moore and Henry Hezekiah Dee, two 19-year-old black men whose bodies were found in the Mississippi River during the search for missing voting rights workers Michael Schwerner, James Chaney, and Andrew Goodman. In 2005, Edgar Ray Killen was convicted for the deaths of Schwerner, Chaney, and Goodman, two whites and an African American, who had been abducted, killed, and buried in an earthen dam in Mississippi for helping African Americans register to vote. Their murder was the basis of the popular movie *Mississippi Burning.* Moore's and Dee's bodies had been discovered during the search for Schwerner, Chaney, and Goodman, but because these two men were black and nothing was generally done about black deaths, inquries into these murders were quickly dropped. The two men had died when Seale suspected them of being civil rights workers, so he and others beat the men, tied them to a Jeep block and train rails with chains, and dumped them in the river, reportedly while they were still alive.
- In 2004, the U.S. Justice Department announced they were reopening the 50-year-old Emmett Till murder investigation to determine whether others were involved in the murder of 14-year-old Till. While visiting family in Mississippi in 1955, Till, from Chicago, allegedly whistled at a white woman and was later

taken from his bed at 2:30 a.m. and beaten, his eyes were gouged out, and he was shot in the head. He was found in the Tallahatchie River, tied with barbed wire to a heavy metal fan. The two men tried for the crime were acquitted by an all-white jury within an hour (a juror later said they drank a Coke before returning the verdict, to make things look legitimate), and a few months later sold the detailed story of their murder of Till to *Look* magazine, which published it in January 1956.[8] Thousands of people attended the open-casket funeral of Till, and a few months later the trial verdict fueled the Montgomery, Alabama, bus boycott begun by Rosa Parks and led by Dr. Martin Luther King Jr. that was the opening shot of the Civil Rights Movement. In 2007 a grand jury in Mississippi heard the represented case and failed to return an indictment. In June 2007, the U.S. Department of Justice testified before the U.S. House of Representatives Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security that they supported H.R. 923, the Emmett Till Unsolved Civil Rights Crime Act, that would establish a division within the U.S. Department of Justice whose objective would be a "comprehensive effort to identify and investigate racially-motivated murders committed during our nation's civil rights era." The Justice Department had begun this initiative in 2006 by asking local field offices for files, and is now working with organizations such as the NAACP and the Southern Poverty Law Center to help with these unsolved Civil Rights–era cases. The bill passed the House and is awaiting the Senate's consideration of its bill, S. 535. The bill would reopen thousands of unsolved civil rights–era cases that remained unsolved because the southern justice system had been virtually closed to African Americans during that time.

- In 2002, a federal judge in Mississippi approved a desegregation plan for Mississippi's universities based on a case brought 28 years earlier in 1975.
- In 2006, the U.S. Supreme Court unanimously held that the term "boy" used by white managers at an Alabama Tyson Foods, Inc. plant to refer to black employees could, alone, be used as evidence of workplace race discrimination. The term is one used in the slave and Jim Crow era to refer to black men.[9]
- In 2006, the Delaware Masons fraternal organization signed a compact to end 150-plus years of racial separation. In 12 southern states, white Masons still do not officially recognize black Masons as their brothers.
- In early 2007, nearing the 400th anniversary of the founding of Jamestown, America's first permanent English settlement and an entry point for those coming from Africa to be enslaved, the Virginia House of Delegates expressed "profound regret" for its role in the slave trade and other injustices against African Americans and Native Americans. Nine members did not cast ballots. In 2001, the Virginia legislature had expressed "profound regret" for its role in the discredited "science" of eugenics that led to the sterilization of well over 6,000 Virginians between 1924 and 1979 under the Racial Integrity Act and the Sterilization Act, in the name of purifying the white race. Virginia's apology was later joined by apologies in Florida, Alabama, North Carolina, and New Jersey. The U.S. Congress is also considering such a proposal.

- In 2008—after years of refusing to do so, but after doing so to Native Americans, Japanese detention camp detainees, and Hawaiians for overthrough of their government—the U.S. House of Representatives passes a resolution apologizing for slavery, Jim Crow, and it's present-day impact on blacks.

Notice that this is not dull, dry history from eons ago. This is now. We are living the history as we speak. In fact, the last Civil War widow just died in May 2004.

We provided this fairly detailed picture of pre-1964 life because in order to understand why the issue still persists today, it is important to get a picture of what it meant in everyday life for all concerned. It was not until passage of the Civil Rights Act of 1964 that this country was first forced to deal with African Americans on anything even approaching an equal basis. For virtually their entire history in this country, African Americans were dealt with as inferiors, with societal laws and customs totally built around that approach. Then came the Civil Rights Act of 1964, attempting to change this 300+-year history overnight. You might now understand a bit better why we have been struggling with the issue ever since.

While African Americans were visibly fighting for civil rights and an end to segregation, their struggle for civil rights highlighted for other groups that they also had received poor treatment in this country. The struggle for civil rights, in part, helped some of those permitted to realize their full potential and become the successful and productive members of society they longed to be. The Irish went from being so reviled that store windows had signs saying "No Dogs, No Irish," to having John F. Kennedy become a revered first Irish and Catholic president of the United States. Other groups, like Native Americans, Hispanics, and Asians were, for various reasons, castigated, vilified, ostracized, marginalized, and discriminated against by the greater society. They dealt with it in different ways. Asian Americans are now the minority with the highest income, but also an increasing number of discrimination claims.

But a rising tide lifts all boats, so once the Civil Rights Act was passed, it benefited all groups by protecting them from discrimination. As was stated about Supreme Court Justice Thurgood Marshall, who argued, and won, the *Brown v. Board of Education* case that began to dismantle racial segregation in our country by outlawing segregated public schools, "He created a new legal landscape, where racial equality was an accepted principle. He worked in behalf of black Americans but built a structure of individual rights that became the cornerstone of protections for all Americans."[10]

LO2

When race has been as ingrained in a culture as it has been in the United States, it is predictable that it is taking a rather long while to rid the workplace of the vestiges of race discrimination. The effects of racially based considerations and decisions linger long after the actual intent to discriminate may have dissipated.

Department of Labor Glass Ceiling Studies in 1991 and 1995 of barriers to full management participation in the workplace by women and minorities found that minorities had made strides in entering the workplace, but a "glass ceiling" exists beyond which minorities rarely progress. The study found that minorities

plateau at a lower corporate level than women, who plateau at a lower level than white males.

According to the studies, monitoring for equal access and opportunity was almost never considered a corporate responsibility or a part of the planning and developmental programs and policies of the employer, nor as part of participation with regard to senior management levels. Neither employee appraisals nor total compensation systems were usually monitored. Most companies had inadequate records regarding equal employment opportunity and affirmative action responsibilities in recruitment, employment, and developmental activities for management-level positions.

Such factors militate against serious consideration of full participation by all sectors of the work population and prevent the employer from being presented in the best light should lawsuits arise. If an employer analyzed and monitored workplace information based on the Glass Ceiling considerations, much race discrimination could be discovered and addressed long before it progressed to the litigation stage. As you saw in the affirmative action chapter, that is the approach that the law would prefer employers to take so that liability can be avoided altogether.

The cases in this chapter are specifically chosen to help you learn to recognize race discrimination claims when you see them coming, before they turn into litigation. Pay particular attention to the facts in the cases and the case questions following them. They are specifically developed to make you think about the issue as a manager would so that you will be able to practice analyzing situations for potential liability as they arise and become familiar with issues in this area with which you may not have experience. After thoroughly reading and thinking about the cases, you should feel much more comfortable about being a manager or supervisor who is able to spot trouble in this area and do what needs to be done to avoid it.

General Considerations

Title VII was enacted primarily in response to discrimination against African Americans in this country, but the act applies equally to all. Though, as we saw in Chapter 4 on affirmative action, there are times when it *appears* the law does not equally protect rights of nonminorities; this is done only in a remedial context with strict safeguards in place. The *McDonald v. Santa Fe Transportation* case, included at the conclusion of the chapter, demonstrates that racial discrimination may occur against whites also and is equally prohibited under Title VII. Note that the *McDonald* decision is written by Justice Thurgood Marshall, who strenuously fought on the U.S. Supreme Court, and even before, to end racial discrimination. (See Exhibit 5.9, "Profile: Thurgood Marshall.")

We have often heard the perception from our students and employees in the business world that "all someone has to do is yell discrimination, and they win a case." This is not so. It takes far more than alleging discrimination to win a case under Title VII. It is necessary to present credible evidence of discrimination

Exhibit 5.9 *Profile: Thurgood Marshall (1908–1993), Associate Justice of the U.S. Supreme Court, 1967–1992*

You probably had no idea how different your life would be had it not been for Justice Thurgood Marshall.

Thurgood Marshall was born in Baltimore, Maryland, the son of a steward and a school teacher. He graduated from Lincoln University and from Howard University Law School in 1933. While at Howard, Marshall attracted the attention of Dean Charles Houston, a noted black lawyer and chief legal planner for the NAACP. When he met Marshall, Houston was about to begin a campaign challenging the constitutionality of racial segregation laws in the United States. After law school, Marshall practiced law for a brief period, joined the NAACP as a staff attorney, then took over as chief counsel after Houston in 1938.

When Marshall assumed leadership of the NAACP legal program, racial segregation pervaded every aspect of life in the United States—its legality was hardly questioned, and blacks were not considered full partners in the American republic. The Thirteenth, Fourteenth, and Fifteenth Amendments and the laws enacted to give meaning to their promise of black equality had been emptied of content by decisions of the U.S. Supreme Court. The most influential decision, *Plessy v. Ferguson,* 1896, was understood to give broad approval to providing separate public facilities and services for blacks. The political power of the southern states was such that neither Congress nor the president would support legislation to outlaw lynching, much less to end racial segregation. Marshall and his colleagues determined, therefore, to concentrate their efforts on the courts. Their early cases aimed at documenting the inequalities—for example, in per-pupil spending and teacher pay—that made the segregated public facilities and education offered to blacks by the southern and border states not equivalent to those provided to whites. It was thought that such litigation might lead to significant short-term improvement in the facilities with which blacks were provided. However, the NAACP's ultimate goal and grand design were to persuade the Supreme Court that racial segregation as such was unconstitutional, that regardless of the facilities offered to blacks it inevitably relegated them to a position of inferiority and second-class citizenship.

After World War II, the pace of litigation quickened, and the Supreme Court struck down particular instances of racial discrimination in interstate travel, primary elections, housing, and criminal justice. Eventually litigation efforts were concentrated on education. By 1954 when Marshall argued *Brown v. Board of Education,* dealing with public school segregation, extensive documentation had been accumulated demonstrating that, as the Court ultimately found, "separate educational facilities are inherently unequal." Soon after, civil rights lawyers won a series of cases that made clear that *Brown* had undermined any constitutional basis for the government to make invidious distinctions in the allocation of goods, services, or benefits on the basis of race.

During his years with the NAACP, Marshall earned a reputation as a tough, shrewd legal tactician with a deceptively easygoing personal style. Southern senators attempted to block his appointment to the U.S. Court of Appeals in 1961, but the nomination was confirmed in 1962. In 1965, President Lyndon B. Johnson named Marshall solicitor-general, and in 1967 Johnson appointed him an associate justice of the Supreme Court.

On the Supreme Court, Marshall usually supported positions taken by civil libertarians, equal rights advocates, and those who construe the procedural guarantees of the Bill of Rights to protect criminal defendants. In the 1970s when many ground-breaking liberal decisions of the later 1950s and the 1960s were restricted by a new conservative majority of justices appointed by President Richard M. Nixon, Marshall became one of the Court's more vocal dissenters, especially in cases such as the *Bakke* decision outlawing reverse racial quotas, where he believed the Court had retreated from a commitment to eliminate racism in public life.

Source: Adapted from Michael Meltsner, "Thurgood Marshall," *Collier's Encyclopedia,* vol. 15. Copyright © 1983 by Macmillan Educational Company. Reprinted by permission of the publisher.

in order to succeed. This can be done directly, by presenting evidence that the employer did or said something racially negative, or indirectly, by way of the *McDonnell Douglas* case requirements discussed Chapter 2. In *Phongsavane v. Potter,* given at the end of the chapter, an Asian employee was unable to prove the discrimination she alleged, and thus lost her case. This is one of the reasons that employers should not fear Title VII claims. Either there is a viable basis for discrimination or there is not. If there is not, the employee's alleging discrimination does not make it true and no liability will attach to the employer. Of course, an employer still must use resources to counter the claim, which is another reason why a "best practices" approach is always best. It lessens the likelihood that employees will file claims because they perceive fairness by the employer on an ongoing basis. *Phongsavane* is the basis for opening scenario 1.

Recognizing Race Discrimination

Often, one of the most difficult things for a manager is recognizing race discrimination when it presents itself. The latest EEOC statistics for FY 2007 indicated that race remains the most frequent type of claim filed with the agency, with 37 percent of the total claims filed being on the basis of race. Many of these claims involve systemic race discrimination affecting hundreds of employees. That is, the glass ceiling is still at work, denying full workplace participation to minorities. Just within the past couple of years, EEOC has settled class-action suits with Abercrombie & Fitch ($50 million), Consolidated Freightways ($2.75 million), Milgard Windows ($3.37 million), Home Depot ($5.5 million), Carl Buddig ($2.5 million), Local 28 Steelworkers' Union ($6.4 million), and Supercuts ($3.5 million). All of these cases involve widespread workplace discrimination in hiring, promotions, training, and other aspects of work life. Cases of systemic glass ceiling–type discrimination that actually go to trial are becoming increasingly rare. Even if, as was the case with Abercrombie and Fitch, the employer settles with EEOC for a whopping $50 million, they still may be better off than taking the case to trial where higher compensatory damages and punitive damages are possible.

Often employers are held liable for race discrimination because they treated employees of a particular race differently without even realizing they were building a case of race discrimination for which they could ultimately be liable. Sometimes it is something seemingly small or subtle, but given the stage we are playing on, with the history we presented to you, it can be perceived as discriminatory. Remember Sen. Joseph Biden's January 2007 statement about his 2008 presidential opponent Barack Obama as the "first mainstream African American who is articulate and bright and clean and a nice looking guy"? Though he said he did not mean to offend, because of the history we provided in this and other chapters, you should be able to recognize why his statement would cause a stir. At the very least it offered insight into his questionable perception of blacks—keep in mind these are people who had run for the highest office in or government. As the *Vaughn v. Edel* case demonstrates, provided for your review, intent may be established by direct evidence of discrimination by the employer even when an employer may discriminate for what

it considers to be justifiable reasons. In *Vaughn,* a manager told a supervisor not to have any confrontations with a black female employee about her work after she asked a member of the legal staff if she thought a conversation she had with her supervisor sounded discriminatory. Two years later when she was terminated for low performance, she sued and alleged race discrimination in that she was not given proper feedback that would have allowed her to better her performance. As you read the *Vaughn* case, think about whether you would have handled things differently to avoid the result the court reached here. *Vaughn* is the basis for opening scenario 2.

2 Scenario

An employer who has not considered the issue of race may well develop and implement policies that have a racially discriminatory impact, without ever intending to do so. The *Bradley v. Pizzaco of Nebraska, Inc., d/b/a Domino's Pizza* "no-beard" case is a good example of this, and is provided at the end of the chapter. It is also a good example of why disparate impact cases must be recognized if Congress's legislative intent of ridding the workplace of employment discrimination is to be at all successful. *Bradley* is the basis for opening scenario 3. *Bradley* also clearly demonstrates why the more an employer knows about diverse groups, the better. Here, where the employer was not aware of the impact of pseudo folliculitis barbae (PFB) on black males, it could have saved the employer from liability. You can see from the *Bradley* case just how important it is to simply be able to recognize race discrimination when you see it. If you, as a manager, never had to deal with PFB (as 95 percent of the white male population and certainly all of the white female and other ethnicities need not do), you would be blissfully unaware of the impact of your policy on 50 or so percent of the black male population (and only about 4 percent of the white male population). Simply taking the time to treat the employee's concern as legitimate (rather than merely dismissing it because it was not something with which the manager was familiar) and trying to seek alternatives would have made all the difference.

Case 6

3 Scenario

How would you avoid this situation? If the employer in *Bradley* had simply asked the employee to provide documentation for his condition from a reputable and reliable source, such as a dermatologist or barber, the outcome might have been different. The employer would have had a basis for providing an exception to the rule in these particular circumstances, while still maintaining the general rule for other employees. While not satisfied that everyone does not have to obey the policy, the employer at least would feel satisfied that sufficient justification was provided to excuse this employee. Other employees seeing the employee treated differently would feel reasonably comfortable knowing that the difference in treatment is based on justifiable medical reasons. If the employer had been flexible, rather than dismissing the employee's assertions out of hand simply because it was not familiar to him, he undoubtedly could have avoided the result in this case. As a manager, make sure you try to consider all angles before making a decision. It is especially important to consider the realities of those who belong to groups with whom you may not be familiar. Don't be afraid to seek help or information from those in a better position to know—starting with the employee for whom it is an issue. (For more examples of manifestations of discrimination, see Exhibit 5.10, "Names and 'Hello' Can Keep You Out.")

Exhibit 5.10 *Names and "Hello" Can Keep You Out*

Two recent studies have shown just how pervasive, yet subtle, race discrimination can be for employees and job applicants.

In the first, researchers from the University of Chicago and MIT conducted a study in which they sent out nearly 5,000 fictional résumés in response to 1,300 newspaper ads for jobs in Chicago and Boston. To each ad they sent two sets of two résumés: one identical set had a résumé with a "traditionally black" name and one with a "traditionally white" name; the other set of résumés had more experience, and again, one had a "traditionally black" name and the other a "traditionally white" name. "Traditionally black" names included Rasheed, Kareem, Leroy, Tyrone, Ebony, Kenya, LaTonya, Tanisha, Keisha, Hakim, Aisha, and Tamika. "Traditionally white" names included Greg, Jill, Allison, Emily, Laurie, Sarah, Brendan, Brad, Meredith, Kristen, Matthew, and Brett.

Applicants with "traditionally white" names received 50 percent more callbacks than those with "traditionally black" names. The researchers found that increasing credentials resulted in a better chance of whites being called back more often, but not African Americans. Applicants with "traditionally white" names were called back at a rate comparable to having eight additional years of experience. The result was the same across occupations, industries, and employer size. Federal contractors or others who indicated they were equal employment opportunity employers were just as likely to discriminate as other employers, according to the researchers. Having more upscale addresses helped whites, but not African Americans. The researchers concluded that "Differential treatment by race still appears to still be prominent in the U.S. labor market."

In the second study, Dr. John Baugh, a professor of education and linguistics at Stanford University, presented over 300 university students recordings of voices saying a single word. The students were asked to identify the ethnicity of the speaker. Over 80 percent were able to do so correctly, based solely on hearing the single word, "hello."

Baugh, black, became interested in linguistic profiling when he placed several calls in response to newspaper ads for housing, but when he showed up at the property, he was always given reasons why it could not be rented to him. He suspected that the phenomenon was because he used his professional voice on the phone and the landlords thought he was white, but he showed up and was black. He set out to investigate his suspicions. Dr. Baugh is particularly adept at voices, having grown up in Philadelphia and Los Angeles with many different dialects. He placed over 100 calls inquiring about a rental property, some using his professional voice, and others his "ethnic dialects." He used the exact same sentence each time he called, and only varied his voice and intonation. Dr. Baugh found that when using his "white" voice, he received 50 percent more callbacks.

After James Johnson suspected that the same thing happened to him while looking for an apartment in San Francisco, he reported it to the local fair housing agency, the Eden Council for Hope and Opportunity. Eden used five callers to inquire about housing, leaving messages. Three of the callers "sounded white" and two "sounded black." The "white" callers' calls were returned within hours. The "black" callers' calls were not returned. The counselor who ran the investigation said it was "pretty blatant." Shanna Smith, executive director of the National Fair Housing Alliance, says it is a familiar practice for housing, banking, and other industries, such as insurance.

Sources: Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination," 2004, http://post.economics.harvard.edu/faculty/mullainathan/papers/emilygreg.pdf; Patrice D. Johnson, "Linguistic Profiling," *The Black Commentator* 1 (April 5, 2002), http://www.blackcommentator.com/linguistic_profiling_pr.html; Steve Osunsami, "Voice Recognition," *ABC News.com,* December 6, 2001, http://more.abcnews.go.com/sections/wnt/workdnewstonight/linguistic_profiling011206.html; "The Color of Voice: How Inferring Race Can Become Discrimination," *ABC News.com,* February 6, 2002, http://abcnews.go.com/sections/Downtown/2020/downtown_linguisticsprofiling_020205.html.

Chandler v. Fast Lane, Inc., provided for your review, is another unusual manifestation of racial discrimination that might well slip by a manager, just as it did in this case. In *Chandler,* the action was brought by a white manager who was trying *not* to discriminate when her company wanted her to do so. This also is covered by Title VII.

Racial Harassment

In addition to an employer being liable for race discrimination under Title VII, the employer also can be liable for workplace racial harassment. Harassment claims filed with EEOC have been increasing, particularly incidents involving nooses, the "n-word", and other racial epithets. "It is shocking that such egregious and unlawful conduct toward African-American employees is still occurring, even increasing, in the 21st century workplace, more than 40 years after enactment of the landmark Civil Rights Act of 1964," said David Grinberg of the EEOC.[11] The Louisiana House and Senate recently, unanimously passed a bill outlawing public display of a hangman's noose with the intent to intimidate someone. The bill was signed into law by Govenor Jindal on July 7, 2008. According to EEOC, harassment claims have more than doubled since the early 1990s, from 3,075 in fiscal year 1991 to about 7,000 in 2007, with race the most frequently alleged basis.[12] As EEOC general counsel Eric Dreiband said, "as blatant discrimination decreases, other areas like harassment increase."

To hold an employer liable for racial harassment, the employee must show that the harassment was (l) unwelcome, (2) based on race, and (3) so severe or pervasive that it altered the conditions of employment and created an abusive environment, and that (4) there is a basis for imposing liability on the employer. The employer is responsible for such activity if the employer himself or herself is the one who perpetrates the harassment, or if it is permitted in the workplace by the employer or supervisory employees. For instance, in January 2008, EEOC announced a settlement with Lockheed Martin for $2.5 million for claims that it allowed a black electrician to be "severely harassed," including, among other things, threats of lynching and the use of the "n-word" while working on military aircraft at various places he was assigned all over the country. One of the harassers was a supervisor, and though the employer knew, no discipline was imposed and the harassment continued unabated.[13] This is the largest settlement EEOC has ever obtained for a single employee in a racial harassment case, and one of the largest for any single employee.

Actions for racial harassment, like those of race discrimination under Title VII, may be brought under the same alternative statutes as race discrimination, as appropriate—that is, the post–Civil War statutes, state human rights or fair employment practice laws, or constitutional provisions.

As shown by the *Daniels v. WorldCom Corp.* case, included at the end of the chapter, racial harassment has as its basis the employer imposing on the harassed employee different terms or conditions of employment based on race. The employee is required to work in an atmosphere in which severe and pervasive harassing

activity is directed at the employee because of the employee's race or color. As we shall see later with sexual harassment, the employer's best approach to racial harassment is to maintain a workplace in which such activity is not permitted or condoned in any way, to take all racial harassment complaints seriously, and to take immediate corrective action, if necessary, after investigation. As the *Daniels* case demonstrates, an employer must do this to avoid liability. The case also demonstrates how important it is for a manager to keep up with changes that result in new and different ways to harass. In *Daniels,* the harassment was accomplished by e-mail., but because the employer took immediate corrective action, liability was avoided.

Keep in mind that an employer's prompt response to harassment is important. In a recent case in which the EEOC sued the employer for workplace racial harassment, the employer ended up paying a $1.8 million settlement despite the fact that in responding to the racial harassment it had called the police, photographed the "racist graffiti," offered rewards, placed undercover employees in the plant, hired handwriting analysts, sent employees to diversity training, increased plant security, and sought the help of the FBI. The graffiti continued to appear, yet declined to a large extent "after the company started taking the remedial steps and the litigation was in full swing." The EEOC said that the company could have stopped the harassment earlier if it had wanted to. The company also was required to take preventive measures including adopting a policy against racial harassment and instituting camera monitoring of its facilities, training for managers and employees, and periodic reporting to the EEOC on racial harassment complaints.[14]

In the *Henderson v. Irving Materials, Inc.* case, provided at the conclusion of the chapter, it is clear that racial harassment may be gathered from piecing together many things that in and of themselves may seem insignificant but, when taken together, as they must be for racial harassment, create for the harassee a very different workplace than for those not being harassed. This is extremely important for employers to keep in mind, as it may not be one big harassing act that causes liability, but rather, many small ones. That is why staying on top of things and dealing with them as they arise is so very important.

A Word about Color

Detroit DJ and promoter, Ulysses "DJ Lish" Barnes, was totally surprised when a furor erupted over the "Light Skin Libra Birthday Bash" at Club APT he scheduled for October 2007. The plan was to allow light-skinned African-American women to get into the party for free. An Internet blitz led him to change his mind and he canceled the event. "I made a mistake," Barnes said. "I didn't think there would be a backlash."

We can't imagine why not. As an African American, very brown at that, Barnes would certainly have been aware that skin color has a long and painful history in the African American culture, stretching back to a time when lighter blacks were given jobs in the slave owner's home, while darker blacks worked the fields. This often resulted in better treatment and the pitting of one group against the other. Later, after slavery ended, the division stuck and "the paper bag test" was used as

Exhibit 5.11 *EEOC's Color Guidance*

WHAT IS "COLOR" DISCRIMINATION?

Title VII prohibits employment discrimination because of "color" as a basis separately listed in the statute. The statute does not define "color." The courts and the Commission read "color" to have its commonly understood meaning—pigmentation, complexion, or skin shade or tone. Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Even though race and color clearly overlap, they are not synonymous. Thus, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity.

EXAMPLE 1. COLOR-BASED HARASSMENT

James, a light-complexioned African American, has worked as a waiter at a restaurant for over a year. His manager, a brown-complexioned African American, has frequently made offensive comments and jokes about James's skin color, causing him to lose sleep and dread coming in to work. James's requests that the conduct stop only intensified the abuse. James has been subjected to harassment in the form of a hostile work environment, based on his color.

EXAMPLE 2. COLOR-BASED EMPLOYMENT DECISIONS

Melanie, a brown-complexioned Latina, works as a sales clerk for a major department store. She applies for a promotion to be the Counter Manager for a major line of beauty products, but the employer denies her the promotion because the vendor prefers a "light skinned representative" to manage its product line at this particular location. The employer has unlawfully discriminated on the basis of color.

Source: EEOC Compliance Manual, section 15-III, http://www.eeoc.gov.

a basis for allowing admittance to everything from schools to social organizations. If your skin was any darker than a brown paper bag, you were excluded. Color has been a divisive issue for as long as African Americans have been in this country and it is still with us today. As other ethnicities have joined the mix, it is clear that color is an issue with them also. Lighter-toned Hispanics, East Asians, and Asians, among others, all have expressed color issues within their cultures. While you may not think that you think about color, research indicates that we tend to feel more comfortable with those most like ourselves, and one of the ways this is manifested is through color discrimination.

Color is one of the five categories included in Title VII as a prohibited basis for discrimination. (See Exhibit 5.11, "EEOC's Color Guidance.") Despite the findings reflected in Exhibit 5.12, "Light and Dark," until recently few cases had been brought using color as a basis for discrimination. After Title VII was enacted, the country started out with such severe race issues that it was not until later that the fine-tuning of looking at color discrimination came along—even though the color issues had been around as long as race had. However, it should be noted that color is a basis for discrimination in employment and EEOC says that color discrimination cases are on the rise. Be aware that while we tend to be faced with race discrimination where the discriminator is one race and the discriminatee another, with color discrimination, that is not necessarily the case. Often the discrimination

Exhibit 5.12 *Light and Dark*

- *Jet* magazine reported that the National Survey of Black Americans across the country, published in the *American Journal of Sociology,* found that "the fairer one's pigmentation (skin color), the higher his or her occupational standing." Researchers found that a light-complexioned black, on average, had a 50 percent higher income than darker African Americans, regardless of educational, occupational, or family background.
- We are proud to say that one of our students, psychology doctoral student (now a newly minted PhD!) Matthew Harrison, received national attention (including by EEOC: see Exhibit 5.6) recently when he presented at the national meeting of the Academy of Management results of a first-of-its-kind study indicating that dark-skinned African Americans face a distinct disadvantage when applying for jobs even if their résumés are better than those of lighter-skinned African Americans. Other studies had been conducted on colorism, but Harrison was the first to specifically examine how colorism operates in workplace hiring. He used the same photo, but had the skin tone manipulated to dark, medium, or light with Adobe Acrobat. A light-skinned man with a bachelor's degree and minimal experience was consistently chosen for a job over a dark-skinned man with an MBA and managerial experience when evaluators were presented with their résumés.
- A law and economics professor at Vanderbilt University looked at a government survey of 2,084 legal immigrants to the United States from around the world and found that even taking into consideration virtually all other factors that could affect wages, those with the lightest skin earned an average of 8 to 15 percent more than similar immigrants with much darker skin. Economics professor Shelly White-Means of the University of Tennessee at Memphis said the study shows there is a growing body of evidence that there is a preference for whiteness in America that goes beyond race.

is by people of the same race. In several cases, both the party alleging discrimination as well as the alleged perpetrator of the discrimination have been black. Employers should not miss the possibility of this legal liability by thinking there can be no discrimination since two people of the same race are involved.

If you think color doesn't matter, think about whether it was a mere coincidence that the first-ever black Miss America in 1984, Vanessa Williams, was light with green eyes and long hair. As recently as 1984, America was not ready for Miss America to be a darker brown with short, kinky natural hair. It didn't appeal to the nation's cultural sensibilities of beauty. That is why African Americans and other ethnic groups began, and still hold, their own beauty pageants (e.g., "Miss Black America" pageant, "Miss Latina America" pageant, "Miss Asian America" pageant). It is not for purposes of self-segregation. Rather, it is to have a pageant that reflects the standards of beauty and talent that arise from, and are appreciated by, the group itself rather than that of the larger society that may not reflect the group's own standards. However, it was also against the rules for nonwhites to be in the pageant. African Americans were not allowed into the Miss America pageant until after the Civil Rights Movement in the 1960s. It was not until 1945 that they even had someone Jewish, and it was a *very* big deal when Bess Myerson won the crown.

The recent flap over the third U.S. president, Thomas Jefferson, allegedly having a 38-year-long relationship with his slave Sally Hemmings also reflected this color issue. When several of the Hemmings who claimed to be the descendants of the relationship between Jefferson and Hemmings appeared in public and looked just as white as many of their white Jeffereson kin, there was initially widespread public disbelief. If color did not matter, this simply would not have occurred. In his book *Ace of Spades,*[15] David Matthews, born of a Jewish mother and African American father and who looks white, gives a vivid and gut-wrenching portrayal of growing up in Baltimore, Maryland, with his dad (his mother left when he was an infant), walking the tightrope of race by passing for white. He did this because even as a child, he could clearly see how much better whites were treated than African Americans, even by teachers.

Whether or not you agree with the idea that color matters, the point is that skin color exists and has a value (negative or positive) in our society that may be reflected in the workplace. Make sure you are aware that Title VII prohibits discrimination on the basis of color, and be mindful of the subtle, though not necessarily conscious, role it may play in how we deal with others. As *Walker v. Secretary of the Treasury, Internal Revenue Service* (included at the end of the chapter) demonstrates, liability for color discrimination is still possible, although for other reasons it was not imposed here.

Case 10

The Reconstruction Civil Rights Acts

LO6

In this chapter we have been discussing race discrimination under Title VII of the Civil Rights Act of 1964. However, the Civil Rights Act of 1964 was not the first piece of legislation aimed at prohibiting racial discrimination. Since these other laws are still used today, a chapter on race discrimination in employment would not be complete without including some mention of them. It is important to know the full range of potential employer liability for discrimination lawsuits by employees.

There are three main pre–Title VII laws. (See Exhibit 5.13, "The Reconstruction Civil Rights Acts.") Collectively, they are known as the post–Civil War statutes, or the Reconstruction Civil Rights Acts. They were passed by Congress after the Civil War ended in 1865 in an effort to provide a means of enforcing the new status of the ex-slaves as free citizens. In 1865, passage of the Thirteenth Amendment to the Constitution abolishing slavery had merely set African Americans free. Nothing on the books at that point said what that picture had to look like. In fact, largely in response to the Thirteenth Amendment, states enacted "Black Codes"—mostly revisions of their pre–Civil War "Slave Codes"—that codified discrimination on the basis of race and limited the rights of the newly free slaves.

Beginning in 1866, Congress began enacting the post–Civil War statutes, understanding that without legislation providing rights for the new status of African Americans, things would almost certainly revert to pre–Civil War status. It passed section 1981, making all African Americans born in the United States citizens and

Exhibit 5.13 *The Reconstruction Civil Rights Acts*

42 U.S.C. Section 1981. Equal Rights under the Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . as is enjoyed by white citizens.

42 U.S.C. Section 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. Section 1985. Conspiracy to Interfere with Civil Rights—Preventing Officer from Performing Duties ("Ku Klux Klan Act")

Depriving persons of rights or privileges. . .

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any rights or privileges of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

ensuring them the right to make and enforce contracts the same "as enjoyed by white citizens." In 1868, Congress passed the Fourteenth Amendment to make its laws applicable to the states, dictating that no state "shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. . .[or] deprive any person of life, liberty, or property, without due process of law, [or] deny to any person within its jurisdiction the equal protection of the laws."

The three post–Civil War statutes are now codified as 42 U.S.C. sections 1981, 1983, and 1985. They prohibit discrimination on the basis of race in making and enforcing contracts; prohibit the denial of civil rights on the basis of race by someone behaving as if they are acting on behalf of the government (called "**under color of state law**"); and prohibit concerted activity to deny someone their rights based on race.

under color of state law
Government employee is illegally discriminating against another during performance of his or her official duties.

Sections 1981 and 1983 are the laws most frequently used in the employment setting if a claim is not brought using Title VII. Since Title VII is part of a comprehensive statutory scheme to prohibit race and other discrimination, it is the preferred method of enforcing employment discrimination claims. As we have seen, a complete and comprehensive administrative structure has been set up to deal with such claims. The post–Civil War statutes do not offer such a structure.

Employees bringing claims under Title VII go to EEOC to file their claim and do not have to pay. Employees bringing claims under the post–Civil War statutes must go to an attorney and must pay. They do not go to EEOC and file their claim for free. On the other hand, the statute of limitations for the post–Civil War statutes is longer than under Title VII. While Title VII's basic statute of limitations is 180 days from the precipitating event, the U.S. Supreme Court has ruled that the statute of limitations on race cases under section 1981 is four years.[16]

When you put the post–Civil War statutes' limitations together with the historical context in which African Americans operated after the Civil War until passage of the Civil Rights Act in 1964, 99 years later, it makes sense that these laws were not used as much as Title VII. From the end of the Civil War until passage of the Civil Rights Act of 1964, Jim Crow laws and iron-clad social customs segregated African Americans and denied them basic rights. This was often enforced through violence. Few African Americans had the money to sue. Between not having the legal right to have a job based on their race, not being able to afford to bring lawsuits, and taking their lives into their hands if they tried to enforce any rights they did have under these law, the post–Civil War statutes provided little relief to African Americans facing employment discrimination.

Still, they remain a viable source of employer liability and, as such, you should have some exposure to them. Note also that the laws were created to address the issue of the newly freed slaves, but the language applies to anyone, so national origin cases are also brought under the statutes. By and large, most of the cases are brought under these statutes as opposed to Title VII either because the claimant was outside the Title VII statute of limitations deadline or because the claim involves a government employer.

42 U.S.C. Section 1981

Section 1981. Equal Rights under the Law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.

This provision of the post–Civil War statutes has been used to a limited extent in the past as a basis for employees suing employers for racial discrimination in employment. In a case of first impression, the Second Circuit Court of Appeals recently held that section 1981 did not cover a race discrimination claim filed by an African American employee for actions occurring while he was on temporary work assignment in South Africa because, by its terms, the law only covers those within the jurisdiction of the United States.[17]

In 1975, the U.S. Supreme Court held that section 1981 prohibits purely private discrimination in contracts, including employment contracts. In *Patterson v. McLean Credit Union,* given for your review, the limitations of section 1981 become evident. *Patterson* was nullified by the Civil Rights Act of 1991. The act overturned *Patterson*'s holding that section 1981 does not permit actions for racial discrimination during the performance of the contract, but only in making or enforcing the contract. Note that the limitation on damages the Court spoke of as part of Title VII's administrative

scheme no longer applies. The Civil Rights Act of 1991 now permits recovery of compensatory and punitive damages. How do you think this squares with the Court's statement, "Neither party would be likely to conciliate if there is the possibility of the employee recovering the greater damages permitted by section 1981"?

As you read the case for historical and analytical purposes, see if you can determine why Congress would want to overrule the Supreme Court's decision by enacting the 1991 legislation. *Patterson* was specifically chosen for inclusion here to demonstrate how seemingly small, insignificant matters can accumulate and provide a solid picture of discriminatory treatment leading to employer liability. Again, vigilance pays off. Managers should curtail discriminatory activity as soon as they see it, so that it does not progress and result in liability.

42 U.S.C. Section 1983

Section 1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Act of 1871, codified as 42 U.S.C. section 1983, protects citizens from deprivation of their legal and constitutional rights, privileges, and immunities, under color of state law. That is, someone acting on behalf of the state cannot deprive people of their rights. Examples would be (1) the New Jersey state troopers who were convicted in 2002 when racial profiling admittedly caused them to shoot 11 bullets into a car with four unarmed black and Latino students, wounding three, and (2) the police officers who were videotaped beating Rodney King during his arrest in Los Angeles in 1991. While performing their duties as government employees, they were alleged to have deprived King of his rights by using excessive force and thus depriving him of his rights as if it were a legitimate part of their duties.

In the employment area, section 1983 cases arise when, for instance, a city fire department or municipal police department discriminates against an employee on the basis of race, gender, or one of the other bases protected under federal or state law.

Neither the Fourteenth Amendment nor section 1983 may be used for discrimination by private employers. They both redress actions by government personnel. The government may not be sued without its permission because of the Eleventh Amendment to the Constitution, so the action is brought against the government official in his or her individual and official capacity.

In *Jett v. Dallas Independent School District,* given at the end of the chapter, a white high school teacher and coach successfully used this law to sue for race discrimination when the school district diminished his employment status after the previously predominantly white school became predominantly black. Since

Exhibit 5.14 *Still Not Convinced?*

We know it is difficult to imagine that race discrimination is still an issue of grave importance when you may live in a world in which race doesn't seem to matter. Just in case you're still having trouble believing it, we ask you to consider the following.

A 2007 survey conducted by TheLadders.com, the world's largest online executive job search service, concluded that racial discrimination in the workplace is as bad now as it was 10 years ago. According to the research, 81 percent of executives had witnessed discriminatory actions in their companies, with race accounting for 42 percent of the discrimination; 54 percent say there has been no improvement in the past 10 years and 77 percent say discrimination starts at the top.

Source: "Workplace Discrimination Starts at the Top; Found to Be Commonplace in American Business," February 28, 2007, http://www.theladders.com/press/job_search_engine/workplace_discrimination_2007.2.28.

the school was a public school and the principal therefore a representative of the government, when the principal discriminated, it was under color of state law and thus a violation of section 1983.

42 U.S.C. Section 1985

Section 1985. Conspiracy to Interfere with Civil Rights—Preventing Officer from Performing Duties

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any rights or privileges of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. section 1985, known as the "Ku Klux Klan Act," addresses conspiracies to interfere with or deprive the civil rights of others. For instance, it was used to convict the murderers of the three student civil rights activists in Mississippi in 1964 who were killed for trying to help African Americans register to vote referred to earlier (the *Mississippi Burning* case). It is not used as much as the other post–Civil War statutes for employment because the types of facts needed are so specific and, despite the earlier chapter discussion of the increase in workplace racial harassment and use of nooses and the "n-word," for the most part, we've moved away from such acts in the workplace. Title VII is used more than all of them.

Management Tips

LO8

Race discrimination can seem elusive. Many of us tend to think it no longer exists, or that others feel as neutral as we do about race. That is not necessarily so. Because a manager can be unaware of the presence of race discrimination, he or she can miss it until litigation arises. Think back to the *Patterson* case. Remember that many of the things Patterson alleged as part of a discriminatory pattern of treatment toward her would have been insignificant in and of themselves. However, taken together, the list becomes quite significant. Be aware of what goes on in the workplace and "don't miss the forest for the trees." The following tips may prove useful:

- Believe that race discrimination occurs and be willing to investigate it when it is alleged.
- Make sure that there is a top-down message that the workplace will not tolerate race discrimination in *any* form.
- Don't shy away from discussing race when the issue arises. Be open to learning and sharing.
- Provide a positive, nonthreatening, constructive forum for the discussion of racial issues. Don't let the only time a discussion of race arises be in the midst of an allegation of racial discrimination.
- Be aware of cultural differences which may be connected, at least in part, to race, when doing things as simple as deciding how to celebrate special events in the workplace. Be inclusive regarding what music will be played, what food will be served, what recreation will be offered, what clothes will be worn, and other factors. These all form a part of the atmosphere in which an employee must work and experience workplace leisure. If people do not see themselves reflected in the workplace culture, they will not feel a part of it and will feel isolated. If they feel isolated, they are more likely to experience other factors leading to discrimination and ultimately to litigation. If this seems like a small matter to you, imagine yourself showing up at a gathering at work, and the music, decorations, food, and clothing were all Japanese. There's sushi to eat, sake to drink, and everyone is speaking Japanese. You'd probably feel a bit out of your element and would quickly realize how those seemingly simple things make a big impact. Now imagine that happening at *every* workplace party.
- When an employee reports discrimination based on race, don't let the first move be telling the employee he or she must be mistaken. Investigate it as any other workplace matter would be investigated.
- Be willing to treat the matter as a misunderstanding if it is clear that is what has taken place. There is no use in making a federal case (literally) out of a matter that could be handled much more simply. Do not, however, underplay the significance of what occurred.
- Offer support groups if there is an expressed need.
- Offer training in racial awareness and sensitivity. Courts have offered language indicating they will look more favorably on employers who do so.
- Constantly monitor workplace hiring, termination, training, promotion, raises, and discipline to ensure that they are fair and even-handed. If there are differences in treatment among races, be sure they are explainable and legally justifiable.

Employees also can sue under the state or federal Constitution for a denial of equal protection if they work for the government or under state tort laws for defamation, intentional infliction of emotional distress, assault, or any other tort the facts support.

An employer who must remedy racial discrimination may not avoid doing so because of the possibility of a reverse discrimination suit by employees alleging they were adversely affected. If an employer institutes a judicially imposed or voluntary affirmative action plan that can withstand judicial scrutiny for the reasons set forth in the affirmative action chapter, the employer will not be liable to employees for reverse discrimination. (See Exhibit 5.14, "Still Not Convinced?")

Chapter Summary

- Title VII prohibits discrimination on the basis of race and color. This also may intersect with national origin discrimination.
- Employers must ensure that every employee has an equal opportunity for employment and advancement in the workplace, regardless of race, color, or national origin.
- Employers must be vigilant in guarding against the more stubborn, subtle manifestations of race and color discrimination.
- Racial discrimination may be by way of disparate treatment or disparate impact.
- Disparate treatment may be shown by direct or indirect evidence of discrimination.
- Disparate impact may be more difficult to discern, so employers need to closely scrutinize workplace policies and procedures to prevent unintended disparate impact leading to liability.
- Race cannot be used as a bona fide occupational qualification.

Chapter-End Questions

1. A black firefighter alleges that each time he is transferred from one fire station to another, he must take his bed with him, on orders of the fire chief. The chief defends on the basis that it is a legitimate decision because white firefighters would not want to sleep in the same bed in which a black firefighter slept. Is this illegal under Title VII? Explain. [Georgia newspaper article]
2. A white college receptionist is fired when it is found that she told a black college applicant that the applications for admissions are distinguished by race by the notation of a small *RH* in the corner of black applicants' applications. "RH," she says, is her supervisor's term for "raisin heads," which he calls African Americans. Is the employee entitled to reinstatement? [*Jet* magazine article]
3. It is discovered that, at a health club, the owner has been putting a notation on the application of black membership applicants that reads "DNWAM," which means "do not want as member." In addition, the black membership applicants are charged

higher rates for the club fee and are much less likely to be financed as other nonblack applicants. Can the black applicants bring a successful action under Title VII?

4. A black female employee is told that she cannot come to work with her hair in decorative braids traditionally worn in Africa, and if she continues to do so, she will be terminated. Does the employee have a claim under Title VII?
5. Bennie's Restaurant chain routinely hires Hispanics, but it only assigns them to the lower-paying jobs as kitchen help, rather than as higher-paid servers, salad bar helpers, or managers. Bennie's says it does not discriminate because it has many Hispanic employees. If suit is brought by the Hispanic employees, who will likely win? [Based on Denny's restaurants]
6. Five white and one black canine unit officers sued for race discrimination when the operating procedures for their unit were drastically changed, they alleged, because the unit was "too white." Can the black officer bring suit even for race discrimination on these facts even though he is not white? [*Ginger v. District of Columbia,* 477 F. Supp. 2d 41 (D. D.C. 2007).]
7. Ken recruits applicants for several prominent companies. Often when the companies call for Ken's services, they strongly hint that they do not wish to hire Southeast Asians, so Ken never places them with those companies. Is Ken liable for illegal discrimination?
8. José and César, both Hispanic, are carpenters employed by a contractor to help build an office building in Maryland. While working, José and César discover that they are being paid less than non-Hispanic employees. In addition, they allege a hostile work environment and discriminatory terms and conditions of employment, including anti-Hispanic statements by managers and employees, segregated eating areas, and an "English-only" rule imposed by the contractor. José and César sue for race discrimination. Will they win? [*Aleman v. Chugach Support Services,* 485 F.3d 206 (4th Cir. 2007).]
9. Jill, the owner of a construction business, says her construction crew will not work if she hires Hispanic crew members, so Jill does not do so. Is this a defense to a Title VII action?
10. Sam has worked at Allied for several years with no problems. Avril is transferred into Sam's unit. Sam immediately begins having a strong allergic reaction to the perfume Avril wears each day. After having to take days off work because of his allergies, Sam asks Avril if she can tone down her perfume. Avril does so for a few days, then resumes her usual amount. Sam does not complain any further but is thinking of quitting because his allergies are so bad. He doesn't want to go any further with Avril about it because Sam is white and Avril is Asian and Sam thinks it might lead to race discrimination liability for his employer. Is Sam correct? [Based on student's parent's dilemma]

End Notes

1. 127 S. Ct. 625 (2006).
2. 127 S. Ct. 638 (2006).
3. 2006 U.S. TRANS LEXIS 48.
4. *EEOC v. Professional Transit Management, d/b/a Springs Transit,* Case No. 06-cv-01915 (D. Colo. May 17, 2007).
5. Alfred Blumrosen and Ruth Blumrosen, *The Reality of Intentional Job Discrimination in Metropolitan America—1999* (Jersey City, NJ: EEO1, 2002).

6. Ira Berlin, Marc Favreau, and Steven F. Miller, *Remembering Slavery: African Americans Talk About Their Personal Experiences of Slavery and Emancipation* (with MP3 Audio CD) (New York: The New Press, 1998).
7. 347 U.S. 483 (1954).
8. http://www.pbs.org/wgbh/amex/till/sfeature/sf_look_confession.html. Accessed July 7, 2008.
9. *Ash v. Tyson Foods, Inc.,* 546 U.S. 454 (2006).
10. Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Three Rivers Press, 1998), p. xiv.
11. Eve Tahmincioglu, "Racial Harassment Still Infecting the Workplace," *MSNBC.com,* January 13, 2008, http://www.msnbc.com/id/22575581/from/ET/print/1/displaymode/1098/ (last visited January 15, 2008).
12. "Lockheed Martin to Pay $2.5 Million to Settle Racial Harassment Lawsuit," http://www.eeoc.gov/press/1-2-08.html (last visited February 6, 2008).
13. *EEOC v. Lockheed Martin,* CV-05-00479 (D. Hawaii 2008).
14. *EEOC v. Scientific Colors, Inc., d/b/a Apollo Colors,* No. 99 C 1959 (N.D. Ill. 2002).
15. David Matthews, *Ace of Spades: A Memoir* (New York: Henry Holt, 2007).
16. *Jones v. R.R. Donnelley & Sons Co.,* 541 U.S.369 (2004).
17. *Ofori-Tenkorang v. AIG,* 460 F.3d 296 (2d Cir. 2006).

Cases

Case 1

Alonzo v. Chase Manhattan Bank, N.A *25 F. Supp. 2d 455 (S.D.N.Y. 1998)*

A Hispanic employee sued his employer for national origin discrimination, alleging he was the only Hispanic in his unit and the only person subjected to name calling and racial slurs because of it. After EEOC's determination and before bringing the case to court, the employee amended the complaint to include race discrimination. The employer argued that race was not included in the original EEOC complaint; therefore, the court had no jurisdiction to hear it at this point. In holding that it was permissible to include the new category because it was within the scope of what could reasonably have been expected to grow out of the EEOC investigation, the court discussed the uncertainty of race versus national origin discrimination.

Sweet, J.

Whereas the term "black," or even "Asian," does not trigger the concept of national origin or an affiliation to a particular country, the term "Hispanic" may trigger the concept of race. Thus, the allegations contained in Alonzo's EEOC charge would reasonably cause the EEOC to investigate discrimination based both on national origin and race, thereby satisfying the "reasonably related" requirement, even though he only checked the box labeled "national origin" on his EEOC charge.

Alonzo stated his belief that he was discriminated against because he is Hispanic. While the term "black" is not associated with national origin, some courts have treated "Hispanic" as a racial category. In an oft-cited passage, the court in *Budinsky v. Corning Glass Works,* 425 F. Supp. 786 (W.D. Pa. 1977), reasoned that:

> The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. . .On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination." Hispanic persons and Indians, like African Americans, have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites."

Whether being Hispanic constitutes a race or a national origin category is a semantic distinction with historical implications not worthy of consideration here. Thus, submits Alonzo, neither he nor the EEOC employee who filled out his EEOC charge should be penalized for not checking the box marked "race". Alonzo points out that because he did not state that he was the only Hispanic from a particular country treated in a discriminatory manner, he did not confine his claim to one of national origin discrimination.

Due to Alonzo's pronouncement that he was discriminated against because he is an Hispanic, because it has not been established that the designation of being an Hispanic precludes a claim of racial discrimination, and given the uncertainty among courts as to whether "Hispanic" is better characterized as a race or a national origin, Alonzo's claims of racial discrimination are reasonably related to his claims of national origin discrimination as they fall within the reasonable scope of EEOC investigation. Accordingly, Defendants' MOTION for judgment on the pleadings regarding the claims premised on racial discrimination is DENIED.

Case Question

1. What do you think of the court's quote from the *Budinsky* case about classification of race being stupid and inaccurate? Explain.
2. Do you think it matters whether someone's category is called "race" vs. "ethnicity"? Explain.
3. Do you agree with the court that the employee should not be penalized for checking the race box? Explain.

Case 2 Jones v. Robinson Property Group, L.P., d/b/a Horseshoe Casino & Hotel *427 F.3d 987 (5th Cir. 2005)*

A better-than-average black poker dealer with a good deal of experience sued a casino for refusing to hire him over an eight-year period, alleging it was only because of his race. Based on the facts, the court agreed.

Stewart, J.

Ralph Jones is an African-American male living in Tunica County, Mississippi. He is a certified poker dealer who has worked in various casinos as a poker dealer and in other capacities. He has also dealt in several major poker tournaments, including the World Poker Open held at the Horseshoe Casino. It is undisputed that Jones is a well qualified poker dealer, whose dealing skills are better than the average poker dealer in Tunica County, Mississippi.

Robinson Property Group (RPG) first opened the Horseshoe Casino and Hotel in Tunica, Mississippi, in 1995. Ken Lambert has served as the poker room manager at the Horseshoe since that time.

Jones alleges that he has repeatedly sought and been refused a position with RPG. Jones first applied for a position at Horseshoe in late 1994, before the casino opened. In May 1995, Jones applied for a poker floor person and a poker dealer position at Horseshoe. Jones was not hired for either position. Two weeks later, Jones complained to Anna West, Horseshoe's Director of Human Resources, that his non-hiring was due to racism. Jones asked her whether the casino had a problem with hiring blacks as poker dealers because he observed that there were no African-Americans working at the Horseshoe as poker dealers at that time. Lambert was summoned to respond to Jones' question. Lambert responded to Jones' complaint by stating that there were no qualified African-American poker dealers in Tunica County. Jones informed him that there were at least five qualified African-Americans in the area, including himself. Lambert testified that he became indignant at Jones' accusation, and he felt "misjudged" and "embarrassed." He claims that he nonetheless offered Jones a position as a poker dealer again. When Jones refused and he persisted in his racial allegations, Lambert testified that his feelings became hurt and he ended the conversation. Jones denies that he was offered a position as a poker dealer.

Between 1995 and 2002, Jones submitted applications for a poker dealer position no less than 10 times. Horseshoe has employed Jones in other departments and on a temporary basis as a poker dealer during high profile poker tournaments; however, Jones has never been hired by Horseshoe on a permanent basis. The record reveals that during the relevant time period the Horseshoe was hiring poker dealers for permanent positions. The Horseshoe generally employs a staff of 40–45 poker dealers.

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LO7

Under Title VII, an employer cannot "fail or refuse R to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race[.]" An employee can prove discrimination through direct or circumstantial evidence. If an employee presents credible direct evidence that discriminatory animus at least in part motivated, or was a substantial factor in the adverse employment action, then it becomes the employer's burden to prove by a preponderance of the evidence that the same decision would have been made regardless of the discriminatory animus.

***

We have previously held that "statements or documents which show on its face that an improper criterion served as a basis—not necessarily the sole basis, but a basis—for the adverse employment action are direct evidence of discrimination." When a person or persons with decision making authority evinces [sic] racial animus that may constitute direct evidence of discrimination. [sic] ("This court has implied that calling an employee a 'nigger' would be direct evidence of race discrimination.") We have also previously observed that racial epithets undoubtably demonstrate racial animus.

***

. . . Upon extensive review of the parties' arguments and the record in this case, we find that Jones has demonstrated direct evidence of discrimination.

Mims [a poker dealer and part-time supervisor] stated that she inquired why an African-American poker dealer

was not hired and was told, by either Lambert or his assistant, that "they hired who they wanted to hire and there [sic] were not going to hire a black person unless there were extenuating circumstances." She was then told by Lambert, or his assistant, that "good old white boys don't want blacks touching their cards in their face." Sam Thomas [a former Horseshoe employee] testified that in 1995, that Lambert told him that "maybe I've been told not to hire too many blacks in the poker room." It is incontrovertible that Lambert made the hiring decisions at Horseshoe and Presley as his assistant would have provided input, therefore, viewing the evidence in the light most favorable to Jones, the aforementioned evidence proves, without inference or presumption, that race was *a* basis in employment decisions in the poker room at Horseshoe. The evidence need not show that race was the sole basis in order to constitute direct evidence. . . . Mims' and Thomas' testimony clearly and explicitly indicates that decision maker(s) in the poker room used race as a factor in employment decisions, which is by definition direct evidence of discrimination. Thus, we find that Jones has presented direct evidence of discrimination and accordingly, he has established a prima facie case of discrimination. The district court erred in granting summary judgment for RPG. We thus REVERSE and REMAND this case back to the district court for further proceedings consistent with this opinion.

Case Questions

1. Are you surprised that this is a 2005 case? Explain.
2. Given the evidence, do you understand why the lower court would have found that no race discrimination had taken place? Explain.
3. What do you think of the statements that management allegedly made? Do they seem like appropriate bases for making workplace decisions? Explain.

McDonald v. Santa Fe Trail Transportation *427 U.S. 273 (1976)*

Two white employees and one black employee misappropriated cargo from one of the employer's shipments. The two white employees were discharged and the black employee was not. The white employees sued the employer for race discrimination. The Court held that Title VII is not limited to discrimination against members of any particular race and applies equally to whites and blacks.

Marshall, J.

Santa Fe Transportation employees, McDonald, Laird and Jackson were separately and together accused by their employer of misappropriation of 60-gallon cans of antifreeze which were part of a shipment they were carrying for one of Santa Fe's customers. Six days later, McDonald and Laird, white, were fired by the employer. Jackson, black, was not. We hold that this unequal discipline based on race violates Title VII even though the employees bringing suit are white.

Title VII of the Civil Rights Act of 1964 prohibits the discharge of "any individual" because of "such individual's race." Its terms are not limited to discrimination against any particular race. Thus, although we were not there confronted with racial discrimination against whites, we described the Act in *Griggs v. Duke Power Co.* as prohibiting "[d]iscriminatory preference for any [racial] group, minority or majority."

This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to "cover white men and white women and all Americans," 110 Cong. Rec. 2578 (1964), and create an "obligation not to discriminate against whites," *id.,* at 7218.

Santa Fe, while conceding that "across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII," contends nevertheless that "such discrimination in isolated cases which cannot reasonably be said to burden whites as a class unduly," such as is alleged here, "may be acceptable." We cannot agree. There is no exception in the terms of the Act for isolated cases; on the contrary, "Title VII tolerates no racial discrimination, subtle or otherwise." Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, and we emphasize that we

do not consider here the permissibility of such a program, whether judicially required or otherwise prompted.

While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be applied alike to members of all races, and Title VII is violated if, as employees allege, it is not. Thus, we conclude that the district court erred in dismissing the employees' Title VII claims and we REVERSE and REMAND.

Case Questions

1. Does it seem consistent with Title VII for the Court to hold as it did? Why or why not?
2. Do you agree with the employer's "isolated case" argument? Explain.
3. How does this holding square with what you know of affirmative action and race discrimination?

Phongsavane v. Potter *2006 U.S. Dist. LEXIS 70103 (W.D. Tex. 2006)*

An Asian employee alleged discrimination on the basis of race because she was not assigned as much overtime as she had been getting before. Unable to find sufficient evidence of discrimination to support her claim, the court dismissed it.

Rodriguez, J.

This case was brought under Title VII of the Civil Rights Act of 1964 by plaintiff/employee, Khonsovanh Phongsavane, who worked for the United States Postal Service as a mail processing clerk in San Antonio, Texas. Employee is an Asian female who was born in Laos and immigrated to the United States in 1981. Employee was the only Asian female working at her location.

Employee alleges that she was consistently denied overtime from September 12, 2003 through January 10, 2004 because of race discrimination. Employee alleged that this discrimination began on September 12, 2003, when Manager of Distribution Operations Sheila Speirs, a female African-American, denied employee overtime because of her race. Employee alleges that although she worked 8.24 hours of overtime between September 12, 2003 and January 10, 2004, it was not nearly as much overtime as the sixteen hours of overtime per week that she averaged before September 12, 2003.

Employee can prove a claim of intentional discrimination by either direct or circumstantial evidence. "Direct evidence" is "evidence which if believed, proves the fact [in question] without inference or presumption."

Employee has no direct evidence to support her claim of race discrimination. Employee's subjective belief that she was denied overtime because of her race does not establish a material question of fact regarding the Postal Service's motives. Generalized testimony by an employee regarding her subjective belief is insufficient to make an issue for the jury. In her deposition, employee acknowledged that she had never heard Speirs make any comments suggesting that Speirs was biased against Asians. Since employee has no direct evidence of race discrimination, she must establish her claim based on circumstantial evidence.

Since employee has presented no direct evidence of race discrimination, she must rely on the burden-shifting framework articulated in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), to create a presumption of intentional race discrimination. To create such a presumption, employee must establish a *prima facie* case of race discrimination by providing evidence that she (1) is a member of a protected class; (2) was qualified for her position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or in the case of disparate treatment, show that others similarly situated were treated more favorably. If she succeeds, employer must then articulate a legitimate, nondiscriminatory reason for its action. Finally, if the parties satisfy their initial burdens, the case reaches the "pretext stage," and employee must then adduce sufficient evidence to permit a reasonable trier of fact to find pretext or intentional discrimination.

The facts demonstrate that employee (1) was a member of a protected class (Asian), (2) was qualified for her

mail processing clerk position, and (3) was subject to an adverse employment action. An allegation of denial of overtime opportunities is sufficient to show an ultimate employment decision and therefore an adverse employment action. Therefore, in order to establish her *prima facie* case, employee must establish that she was replaced by someone outside her protected class or that other similarly situated employees were treated more favorably.

Employee produced no evidence indicating that she was "replaced" by someone outside her protected class (Asian). Employee failed to produce any evidence that the Postal Service replaced employee by reassigning employee's overtime hours to another non-Asian employee on the same scheme. Employee might argue that Williams and Aguirre "replaced" employee by working regular hours on employee's scheme when employee was available to work overtime hours. However, the Court finds, for purposes of establishing a *prima facie* case of race discrimination, that floater employees who work regular hours (thus reducing available overtime hours) do not "replace" regular employees who were otherwise available to work overtime hours. The employee who works regular hours is in a different position than an employee who works overtime hours on the same scheme. By assigning floaters who worked regular hours to employee's scheme, the Postal Service significantly reduced the overall number of overtime hours available on employee's scheme. However, *reducing* the number of overtime hours *for all employees on employee's scheme* is not the same as *redistributing* available overtime hours *from employee to another non-Asian employee working on employee's scheme.*

The undisputed evidence also indicates that Aguirre worked approximately the same amount of overtime hours as employee, therefore no disparity between overtime granted to employee and Aguirre (a non-Asian**,** scheme-qualified employee) creates an inference of discrimination. The evidence suggests that the Postal Service limited overtime available to all employees on employee's scheme, including Aguirre (female Hispanic), through the use of floaters. Since the Court finds that employee was not replaced by someone outside her protected class, employee must rely on her allegations of disparate treatment in order to establish her *prima facie* case.

In cases alleging disparate treatment, employee must establish that other similarly-situated employees were treated more favorably. Employee must show that (1) an employee outside of her protected class was similarly situated; and (2) this employee was treated differently under circumstances "nearly identical" to hers.

The Court finds that [the other employees to whom employee compares herself] are not similarly situated to employee and that their circumstances were not "nearly identical" to employee's. The Court finds that these employees were not similarly situated to employee because they were qualified to work (and actually did work) on different schemes. Additionally, these other employees were not similarly situated to employee because each scheme required a different test to qualify and had a different mail volume on any given day. Thus, employee cannot establish a *prima facie* case of race discrimination based on disparate treatment because she cannot demonstrate that other similarly situated employees were treated more favorably.

Even assuming, *arguendo,* that employee could establish her *prima facie* case, the Court finds that employer has proffered a legitimate, non-discriminatory reason for the denial of overtime and that employee has failed to adduce sufficient evidence to permit a reasonable trier of fact to find pretext or intentional discrimination. The Postal Service stated that employee "was denied overtime only when mail volume on her routes did not justify overtime or when an employee [i.e. a 'floater'] was available to process the mail during a regularly scheduled work day." Employee never challenged or produced evidence contradicting the Postal Service's sworn assertion that employee was denied overtime because of lack of mail volume or the availability of floaters to work regular hours on employee's scheme. The Postal Service was particularly attuned to its overtime costs because it had not been managed well in the past. To stay within budget, the Postal Service processed mail by utilizing floaters working on regular time and by assigning overtime only as the "last alternative." Additionally, employee acknowledged that the Postal Service used floaters to reduce payroll costs by covering for employees who would otherwise be eligible for overtime. The Court finds that these reasons for denial of overtime were legitimate, uncontradicted, and non-discriminatory.

Title VII protects employee against discrimination *on the basis of race.* Employee opined at length that the Postal Service violated the union collective bargaining agreement when it selectively targeted employee's scheme for overtime reduction. The Court finds that this argument is plausible. Employee alleged that Speirs might have been motivated by pro-union bias or a personal relationship with one of the employees when she selectively targeted employee's scheme for overtime reduction. The Court finds that this argument is also plausible. Nevertheless,

Title VII does not strip the Postal Service of its discretion to reduce overtime hours on some schemes and not others, so long as that decision is not motivated by race discrimination. Even if the decision to reduce overtime on employee's scheme was arbitrary or unfair, that does not necessarily mean that it was illegal. Title VII is not the proper vehicle for vindicating that right.

The Court finds that race discrimination did not play any role in the Postal Service's decision to reduce overtime opportunities on employee's scheme and Employee's race discrimination claim is DISMISSED on the merits.

Case Questions

1. Do you agree with the court's decision? Explain.
2. Why do you think employee thought that race was the basis for the overtime decision, yet she could produce no proof of this?
3. Did you think that the outcome would be different because you thought that courts routinely believed allegations of discrimination? Discuss.

Vaughn v. Edel *918 F.2d 517 (5th Cir. 1990)*

During a retrenchment, a black female was terminated for poor performance. She alleged race discrimination in that her employer intentionally determined not to give her necessary feedback about her performance that would have helped her perform better and perhaps avoid dismissal. The court upheld the employee's claim.

Wiener, J.

Emma Vaughn, a black female attorney, became an associate contract analyst in Texaco's Land Department in August of 1979. Her supervisors were Robert Edel and Alvin Earl Hatton, assistant chief contract analyst. In Vaughn's early years with Texaco, she received promotions and was the highest ranked contract analyst in the department.

The events leading to this dispute began on April 16, 1985, the day after Vaughn returned from a second maternity leave. On that day, Edel complained to Vaughn about the low volume of her prior work and the excessive number of people who visited her office. Vaughn later spoke with Roger Keller, the head of the Land Department, about Edel's criticism of her.

In a memorandum concerning this discussion, Keller wrote that he had told Vaughn that he had been told that Vaughn's productivity "was very low"; that he "had become aware for some time of the excessive visiting by predominantly blacks in her office behind closed doors"; and that "the visiting had a direct bearing on her productivity." Keller then told Vaughn, as he noted in his memo, that "she was allowing herself to become a black matriarch within Texaco" and "that this role was preventing her from doing her primary work for the company and that it must stop."

Keller's remarks offended Vaughn, so she sought the advice of a friend who was an attorney in Texaco's Legal Department. Keller learned of this meeting and of Vaughn's belief that he was prejudiced. To avoid charges of race discrimination, Keller told Vaughn's supervisor, Edel, "not [to] have any confrontations with Ms. Vaughn about her work." Keller later added that "if he [Edel] was dissatisfied, let it ride. If it got serious, then see [Keller]."

Between April 1985 and April 1987 when Vaughn was fired, neither Edel nor Hatton expressed criticism of Vaughn's work to her. During this period all annual written evaluations of Vaughn's work performance (which, incidentally, Vaughn never saw) were "satisfactory." Vaughn also received a merit salary increase, though it was the minimum, for 1986. Keller testified that for several years he had intentionally overstated on Vaughn's annual evaluations his satisfaction with her performance because he did not have the time to spend going through procedures which would result from a lower rating and which could lead to termination.

In 1985–86 Texaco undertook a study to identify activities it could eliminate to save costs. To meet the cost-reduction goal set by the study, the Land Department fired its two "poorest performers," one of whom was Vaughn, as the "lowest ranked" contract analyst. The other employee fired was a white male.

In passing Title VII, Congress announced that "sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."

When direct credible evidence of employer discrimination exists, employer can counter direct evidence, such as a statement or written document showing discriminatory motive on its face, "only by showing by a preponderance of the evidence that they would have acted as they did without regard to the [employee's] race."

Vaughn presented direct evidence of discrimination. Keller testified that to avoid provoking a discrimination suit he had told Vaughn's supervisor not to confront her about her work. His "black matriarch" memorandum details the events that led Keller to initiate this policy. Keller also testified to deliberately overstating Vaughn's evaluations in order not to start the process that might eventually lead to her termination. This direct evidence clearly shows that Keller acted as he did solely because Vaughn is black.

Although Vaughn's race may not have directly motivated the 1987 decision to fire her, race did play a part in Vaughn's employment relationship with Texaco from 1985–1987. Texaco's treatment of Vaughn was not color-blind during that period. In neither criticizing Vaughn when her work was unsatisfactory nor counselling her how to improve, Texaco treated Vaughn differently than it did its other contract analysts because she was black. As a result, Texaco did not afford Vaughn the same opportunity to improve her performance and perhaps her relative ranking, as it did its white employees. One of those employees was placed on an improvement program. Others received informal counselling. The evidence indicates that Vaughn had the ability to improve. As Texaco acknowledges, she was once its highest ranked contract analyst.

Had her dissatisfied supervisors simply counselled Vaughn informally, such counselling would inevitably have indicated to Vaughn that her work was deficient. Had Keller given Vaughn the evaluation that he believed she deserved, Texaco's regulations would have required his placing her on a ninety-day work improvement program, just as at least one other employee—a white male—had been placed. A Texaco employee who has not improved by the end of that period is fired.

When an employer excludes black employees from its efforts to improve efficiency, it subverts the "broad overriding interest" of Title VII—"efficient and trusty workmanship assured through fair and racially neutral employment and personnel decisions." Texaco has never stated any reason, other than that Vaughn was black, for treating her as it did. Had Texaco treated Vaughn in a color-blind manner from 1985–1987, Vaughn may have been fired by April 1987 for unsatisfactory work; on the other hand, she might have sufficiently improved her performance so as not to be one of the two lowest ranked employees, thereby avoiding termination in April 1987.

Because Texaco's behavior was race-motivated, Texaco has violated Title VII. Texaco limited or classified Vaughn in a way which would either "tend to deprive [her] of employment opportunities or otherwise adversely affect [her] status as an employee" in violation of the law.

Case Questions

1. Do you agree with the court's decision? Why or why not?
2. How would you have handled this matter if you were the manager?
3. What do you think of Keller's remarks about Vaughn becoming the "black matriarch" of Texaco, "meeting behind closed doors," and "excessive meetings with predominantly blacks"? What does it signify to you? What attitudes might it reflect that may be inappropriate in the workplace? What concern, if any, might be appropriate?

Bradley v. Pizzaco of Nebraska, Inc., d/b/a Domino's Pizza *7 F.3d 795 (8th Cir. 1993)*

Employee brought a race discrimination case against his employer after being discharged for failure to comply with the employer's policy requiring employees to be clean-shaven. The court held that the policy had a disparate impact on African Americans and violated Title VII.

Bowman, J.

This action arose out of a Title VII employment discrimination claim brought by Langston Bradley, a former Domino's delivery man. Bradley alleged that Domino's discriminated against him on the basis of race when it fired him for failure to appear clean-shaven in compliance with the company's no-beard policy. The no-beard policy is established nationwide by Pizzaco's franchiser, Domino's Pizza, Inc. Bradley alleged that he suffered from pseudofolliculitis barbae ("PFB"), a skin condition affecting approximately fifty percent of African American males, half of which number cannot shave at all. Bradley claimed that the no-beard policy deprived him and other African American males suffering from PFB of equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964.

Domino's offered the testimony of Paul D. Black, Domino's vice president for operations. Black said it was "common sense" that "the better our people look, the better our sales will be." Black also cited a public opinion survey indicating that up to 20 percent of customers would "have a negative reaction" to a delivery person wearing a beard. Further, Black speculated that Domino's would encounter difficulty enforcing any exceptions to their dress and grooming code. Black did not offer evidence of any particular exception that was tried without success; rather, he merely stated that monitoring the hair length and moustaches of employees at five thousand Domino's locations is difficult.

Black's testimony was largely speculative and conclusory. Such testimony, without more, does not prove the business necessity of maintaining the strict no-beard policy.

In addition to Black's testimony, Domino's offered the results of a public opinion survey it commissioned. The survey purported to measure public reaction to beards on pizza shop employees. The survey showed that up to 20 percent of those surveyed would react negatively to a delivery man wearing a beard. Even if the survey results indicated a significant customer apprehension regarding beards, which they do not, the results would not constitute evidence of a sufficient business justification defense for Domino's strict no-beard policy. Although this Circuit has not directly addressed customer preference as a business justification for policies having a disparate impact on a protected class, cases from other circuits have not looked favorably on this kind of evidence. Customer preference may only be taken into account when it goes to a matter affecting the company's ability to perform the primary necessary function or service it offers, rather than a tangential aspect of that service or function. The existence of a beard on the face of a delivery man does not affect in any manner Domino's ability to make or deliver pizzas to their customers. Customer preference, which is at best weakly shown by Domino's survey, is clearly not a colorable business justification defense in this case. Significantly, the survey makes no showing that customers would order less pizza in the absence of a strictly enforced no-beard rule.

Domino's is free to establish any grooming and dress standards it wishes; we hold only that reasonable accommodation must be made for members of the protected class who suffer from PFB. We note the burden of a narrow medical exception for African American males who cannot shave because of PFB appears minimal. The employer, of course, should not be precluded from requiring that any beards permitted under this narrow medical exception be neatly trimmed, clean, and not in excess of a specified length. REVERSED and REMANDED.

Case Questions

1. If you had been the manager, would you have been surprised at this case outcome? Explain.
2. Why do you think Pizzaco had a no-beard policy? What purpose did it serve? Was there another way to get what Pizzaco may have wanted by instituting the policy?
3. Did stereotypes play a role in this policy? What role should stereotypes play in developing workplace policies?

Case 7 Chandler v. Fast Lane, Inc. *868 F. Supp. 1138 (E.D. Ark., W. Div. 1994)*

A white employee brought suit against her employer for constructive dismissal under Title VII and other statutes, alleging that she was forced to leave her job when the employer would not allow her to hire and promote African Americans. The employer argued that since its policies discriminated only against African Americans, the white employee had no right to sue under Title VII. The court disagreed and permitted the case to be brought.

Eisele, J.

In the complaint filed with the Court, Chandler (who is white) alleges that she was the victim of a discriminatory employment practice at the hands of her employers. Chandler, a former manager of employers' restaurant, claims that her employer thwarted her efforts to employ and promote African-American employees, and that as a result the conditions of her employment became so intolerable that she was forced to resign. The employer argues that because they are alleged to have adopted discriminatory hiring and promotional practices targeted only at African-Americans, a white person has no standing to assert a Title VII claim premised upon these policies.

It is true that only individuals whom employers are claimed to have failed or refused to hire or promote were African-Americans. However, by focusing on the "fail or refuse to hire" provision of 2000e-2(a)(1), employers' argument misperceives the unlawful employment practice alleged by Chandler. Chandler does not claim that she was a target of employers' allegedly anti–African-American employment practices. Rather, Chandler argues that employers' insistence that she enforce these practices violated her fundamental right to associate with African-Americans, and as a consequence employer committed a separate violation by engaging in an unlawful employment practice that "otherwise discriminate[d] against an individual," namely Chandler.

Although the Court recognizes that Chandler's Title VII claim is somewhat novel, it is of the opinion that such a claim, if proven, would state a cause of action under Title VII. A white person's right to associate with African-Americans is protected by Sec. 1981. Therefore, the Court concludes that an employer's implementation of an employment practice that impinges upon this right is actionable under Title VII.

Additionally, Chandler's allegations are sufficient to establish a Title VII claim under a separate provision of the statute. The relevant provision of Title VII is found in 42 U.S.C.A. § 2000e-3(a), which provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [s]he has opposed any practice made an unlawful employment practice by [Title VII].

In order to establish a prima facie case under the "opposition" clause of § 2000e-3(a), an employee must show: (1) that she was engaged in an opposition activity protected under Title VII; (2) that she was a victim of adverse employment action; and (3) that a causal nexus exists between these two events. The Court has no doubt that an employee who exercises her authority to promote and employ African-Americans engages in protected "opposition" to her employer's unlawful employment practice which seeks to deprive African-Americans of such benefits. Thus, Chandler's allegations are clearly sufficient to meet the first requirement of a § 2000e-3(a) claim. The Court further concludes that employers' insistence that Chandler enforce such an employment practice, if proven, would certainly cause an "adverse employment action" to be visited upon her. Title VII forbids an employer from requiring its employees "to work in a discriminatorily hostile or abusive environment," and included within this prohibition is the right of white employees to a work environment free from discrimination against African-Americans, or any other class of persons. Indeed, subjecting an employee to such a hostile working environment may result in an actionable constructive discharge, a result that is especially likely under facts similar to those presently alleged. Under Title VII, a constructive discharge occurs whenever it is reasonably foreseeable that an employee will resign as a result of her employer's unlawful employment practice, and it is plainly foreseeable that an employee might choose to resign rather than to acquiesce in or enforce her employer's discriminatory and illegal employment practice.

The Court is therefore satisfied that employers' efforts to hinder Chandler from hiring and promoting

African-Americans, and their insistence that she discriminate against such persons, if proven, would result in an actionable Title VII claim. Indeed, "[u]nder the terms of § 2000e-3(a), requiring an employee to discriminate is itself an unlawful employment practice." Accordingly, it is therefore ordered that employers' motion to dismiss is DENIED.

Case Questions

1. What do you think of the employer's argument that since its policies discriminated against African Americans, the white employee should not be able to bring a suit for discrimination? Explain.
2. Do you understand the court's reasoning that the white employee was being discriminated against by not being able to hire and promote black employees? Explain.
3. What reason can you think of as to why the employer had the policy of not hiring or promoting African Americans? Do you think it makes good economic sense? (Consider all facets of economics, including the possibility of litigation over the policies.)

Daniels v. WorldCom Corp. *1998 U.S. Dist. LEXIS 2335 (N.D. Tex. 1998)*

Employees sued the employer under Title VII and state civil causes of action when jokes with racial undertones were sent to them and other employees on their workplace computers. While the court dismissed the actions based on legal problems with the case, the case is instructive for demonstrating how racial harassment can arise in the workplace, and even changes with technology.

Solis, J.

Angela Daniels and Dimple Ballou allege that they were racially discriminated against while working at WorldCom, Inc. Specifically, they assert that four electronic mail [e-mail] jokes sent by a non-managerial employee of WorldCom were racially harassing. Further, the employees assert that WorldCom was negligent for allowing the e-mail system to be used to send the jokes and that WorldCom retaliated against them for reporting the jokes.

On January 21, 1997, Cathy Madzik, a non-managerial employee at WorldCom, sent a joke to Daniels and two other co-workers across the company's e-mail system. After receiving this and construing the joke as having racial undertones, Daniels sent a message to Madzik objecting to the joke's contents. Three days later, Madzik sent three more jokes to Daniels and others. Daniels was offended by what she perceived as racial undertones in one of the jokes.

At some point shortly after receiving these jokes, Daniels complained to the manager of the Information Systems Department, Dianne Summers. Daniels also took her concerns to Tom Adams, the Human Resources Manager at WorldCom's Dallas facility. After learning of Daniels' concerns and discussing the situation with the Human Resources Department, Summers issued a "strong verbal warning" to Madzik and placed a written reprimand in her personnel file. On or about January 27, 1997, Summers held a staff meeting which Daniels and Ballou attended. At the close of this meeting, Summers dismissed Madzik and warned the remaining individuals not to use the e-mail system for non-business purposes. On January 29, 1997, Adams held a meeting during which Daniels and Ballou were also allowed to voice their displeasure about the jokes. Adams also addressed the appropriate use of the company e-mail system. In addition to the two meetings discussed above, Summers requested several workers at WorldCom, including Daniels and Ballou, to review the company's Electronic Mail Policy. Daniels and Ballou filed suit on February 27, 1997.

Daniels and Ballou assert that WorldCom was negligent in allowing employees to use the e-mail system to send racially discriminatory jokes. To the extent that they claim an allegation of common-law negligence, this claim fails as a matter of law because WorldCom acted reasonably. Within ten days of the employees' complaints regarding the e-mail jokes, supervisors at WorldCom organized two meetings to discuss the proper use of

the company's e-mail system. Further, Summers verbally reprimanded Madzik and issued a written warning regarding improper use of e-mail. Finally, WorldCom had an established policy regarding the use of e-mail and Summers attached a copy of this policy on February 4, 1997, for the employees in her department to review. Based on all of this evidence, WorldCom acted reasonably and employees' common-law claim of negligence fails as a matter of law. Employer's motion to dismiss is GRANTED.

Case Questions

1. Does it surprise you that there would be liability on the part of the employer for harassing e-mails sent from a workplace computer? Explain.
2. Do you agree with the court that the employer quickly and appropriately addressed the problem here so that liability should not attach?
3. If you were the manager to whom the employees came reporting the e-mail jokes, what would you have done?

Henderson v. Irving Materials, Inc. *329 F. Supp. 2d 1002 (S.D. Ind., Indianapolis Div., 2004)*

A black employee was subjected to a number of incidents at work, including racial epithets, threats, greasing of his truck, dead mice placed in his truck, and the buttons cut off his uniform, by two of his white co-workers. Several of the incidents were witnessed by their supervisor. The court found that though some of the events, in isolation, may not qualify as harassment, when taken in the total context of the employee's experience as the first black hired to work there and in the greater context of race in our country, they constituted racial harassment.

Hamilton, J.

To survive summary judgment on his hostile work environment claim against SouthSide, Henderson must come forward with evidence that would allow a reasonable jury to find that: (a) he was subject to unwelcome harassment; (b) the harassment was based on his race; (c) the harassment was sufficiently severe or pervasive so as to alter the conditions of his employment and to create a hostile or abusive working environment; and (d) there is a basis for employer liability.

A. Target of Unwelcome Harassment

The undisputed facts easily support a finding that Henderson was the target of unwelcome harassment, thus satisfying the first required element of his claim.

B. "Based on" Race

There is no dispute that plaintiff's evidence of Moistner's racial jokes and comments, Moistner's claims to be a member of the Ku Klux Klan and to know the Klan's grand dragon, and Moistner's calling Henderson a "nigger"at the small claims court were racial incidents and stemmed directly from racial hostility. As for the remainder of the incidents alleged by plaintiff, the racial connection might appear more attenuated if the incidents were considered in isolation. However, the court may not view those incidents in isolation. Viewing the other acts of harassment by Moistner and Santerre, tolerated by plant manager Taylor, in combination with the incidents involving the more blatant racial hostility, a reasonable jury could find that all were part of a racially hostile environment.

Defendants argue that some incidents were not based on race because there was not an explicit racial dimension. Defendants' argument is easily refuted with respect to one incident in particular, the evidence that Moistner threatened to drag Henderson behind his pick-up truck. Defendants' contention that a threat to drag Henderson behind a pick-up truck was devoid of a racial element is blind to history. In a murder that gained worldwide attention in 1998, James Byrd, a black man, was chained to the back of a pick-up truck by three white men who drove through the streets of Jasper, Texas, dragging Byrd to his death. The murder of Mr. Byrd triggered images of similar past acts of lynching, a tactic used by whites to terrorize and kill members of the black community.

The threat by Moistner, a self-proclaimed member of the Ku Klux Klan, that he "would like" to drag Henderson, a black man, down the street on the back of Moistner's pick-up truck has racial connotations that date back to the days when lynching black people in this manner was

commonplace. A jury could easily find that Moistner's threat carried as much racist freight as the most vile racial epithets (which Moistner himself also aimed at Henderson), combined with a threat of murder.

A reasonable jury could also draw the reasonable inference that, in light of the explicit racist character of several incidents, the superficially neutral acts of harassment were also all based on race. These forms of harassment include the buttons cut from Henderson's work shirt, the grease slathered inside his truck, the dead mice placed in his truck, the "no one wants you here" comment by Santerre, and Santerre's attempts to hit or frighten Henderson with his truck. The alleged wrongful conduct need not have been explicitly racial in order to create a hostile environment. The complained of conduct must have a racial character *or purpose* to support a Title VII claim. Plaintiff has set forth sufficient evidence to convince a reasonable jury that the conduct that defendants characterize as not based on race did indeed have a racial purpose and/or character.

C. "Severe or Pervasive"

The next issue is whether the conduct was sufficiently severe or pervasive to support a claim under Title VII. To be considered severe or pervasive, the conduct must have been objectively hostile or abusive and must have been subjectively perceived as such. Isolated and innocuous incidents will not support a hostile environment claim.

The jury could easily find that Henderson subjectively perceived his work environment to be hostile and abusive. He complained to plant manager Taylor on several occasions. He submitted a detailed letter of complaint to general manager Goins and met with Goins to discuss the incidents that he believed made his work environment intolerable. Henderson also directly told Moistner that he did not appreciate Moistner's racist jokes and comments.

To ascertain whether an environment is objectively hostile or abusive, the court must consider all the circumstances, including the frequency of the discriminatory conduct; the severity of the conduct; whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and whether that conduct unreasonably interferes with an employee's work performance.

Defendants also contend that the incidents alleged by plaintiff cannot satisfy the pervasive arm of the "severe or pervasive" test because no specific incident occurred more than once. The argument is specious. The plaintiff need not show that the alleged conduct was both severe *and* pervasive; either is sufficient. There also is no principle of law requiring the harassers to repeat any particular form of harassment. If we are counting, as defendants suggest, there were a total of at least nine incidents in September and October 2001 alone. A reasonable jury considering the totality of the circumstances in this case could find that the hostile work environment was sufficiently severe and pervasive and that plaintiff worked in a racially abusive environment so severe as to alter the terms and conditions of his employment. Further, although Henderson did not lose his job, proof of termination is not dispositive on the question of severe or pervasive.

Conclusion

For the foregoing reasons, defendants' motion is denied as to plaintiff's Title VII hostile environment claim against SouthSide. GRANTED IN PART AND DENIED IN PART.

Case Questions

1. How could the employer have avoided liability here?
2. Why do you think Taylor did as little as he did about the harassers?
3. Does it make sense to you that the black employee was transferred? Explain.

Walker v. Secretary of the Treasury, Internal Revenue Service *742 F. Supp. 670 (N.D. Ga., Atlanta Div. 1990)*

A light-skinned black employee sued her employer alleging discrimination by her supervisor based on color. The employee alleged that the supervisor, a brown-skinned black, said and did derogatory things to her because the supervisor resented the employee's lighter skin color. The court recognized that color could be a basis for discrimination under Title VII, but held that the employee failed to demonstrate that the employer had discriminated since there were legitimate nondiscriminatory reasons for the dismissal.

May, J.

Employee, a lighter-skinned black female, filed a complaint alleging, among other things, that she had been terminated by her darker-skinned black female supervisor because of employee's lighter colored skin, in violation of Title VII of the Civil Rights Act of 1964.

The employer maintains that employee's termination was based upon her poor performance, poor attitude and misconduct. Employee argues that these reasons were a mere pretext and that she was actually terminated because of her supervisor's color-based prejudice. We hold that employee failed to meet her burden by proving by a preponderance of the evidence that her termination was the result of a violation of Title VII rather than the stated reasons of poor performance and attitude.

The only significant evidence that employee offered that, if true, would tend to prove that her supervisor did indeed have feelings of prejudice toward her are some derogatory personal comments that her supervisor allegedly made to her, such as: "you need some sun"; "you think you're bad, you ain't about nothing, you think you're somebody, I can do what I want to do to you"; "why don't you go back to where you belong?"; and "why did you come down here?" However, this court holds that employee has failed to prove by a preponderance of the evidence that the comments were in fact made.

But even if the comments were made, employee failed to prove that they were uttered for any reason other than the personal animosity that the two individuals might have had for each other. It appears undisputed that there was a personality conflict between the employee and her supervisor, and that her supervisor was not wholly innocent in the propagation of the conflict. However, a personality conflict alone does not establish invidious discrimination. There is ample evidence in the record to support the supervisor's contention that the reason for the personality conflict, and likewise the subsequent termination of employment, was employee's performance on the job.

Employee has failed to prove by a preponderance of the evidence that she was terminated because of invidious discrimination on the basis of color on the part of her supervisor. Conversely, the employer has offered legitimate reasons for employee's termination which the court finds nonpretextual. JUDGMENT for DEFENDANT.

Case Questions

1. Do you think the court was correct in interpreting Title VII to permit a color discrimination case to be brought by a black employee against a black supervisor? Why or why not?
2. If you were the manager here, what would you have done to deal with employee and her supervisor?
3. Since the statements were insufficient to show discrimination, what else do you think the employee could have used to satisfy the court? Do you think the case would have been decided differently if the supervisor was a different race than the employee? Explain.

Patterson v. McLean Credit Union *491 U.S. 164 (1989)*

A black female alleged racial discrimination in violation of section 1981 in that she was treated differently from white employees and not promoted, on the basis of race. The Court held that section 1981 was not available to address this problem since the case did not involve the making of a contract, but rather its performance.

Kennedy, J.

Patterson, a black female, worked for the McLean Credit Union (MCU) as a teller and file coordinator for 10 years. She alleges that when she first interviewed for her job, the supervisor, who later became the president of MCU, told her that she would be working with all white women and that they probably would not like working with her because she was black. According to Patterson, in the subsequent years, it was her supervisor who proved to have the problem with her working at the credit union.

Patterson alleges that she was subjected to a pattern of discrimination at MCU which included her supervisor repeatedly staring at her for minutes at a time while she performed her work and not doing so to white employees; not promoting her or giving her the usually perfunctory raises which other employees routinely received; not arranging to have her work reassigned to others when she went on vacation, as was routinely done with other employees, but rather, allowing Patterson's work to accumulate during her absence; assigning her menial, non-clerical tasks such as sweeping and dusting, while such tasks were not assigned to other similarly situated employees; being openly critical of Patterson's work in staff meetings, and that of one other black employee, while white employees were told of their shortcomings privately; telling Patterson that it was known that "blacks are known to work slower than whites, by nature" or, saying in one instance, "some animals [are] faster than other animals"; repeatedly suggesting that a white would be able to perform Patterson's job better than she could; unequal work assignments between Patterson and other similarly situated white employees, with Patterson receiving more work than others; having her work scrutinized more closely and criticized more severely than white employees; despite her desire to "move up and advance," being offered no training for higher jobs during her 10 years at the credit union, while white employees were offered training, including those at the same level, but with less seniority (such employees were later promoted); not being informed of job openings, nor interviewed for them, while less senior whites were informed of the positions and hired; and when another manager recommended to Patterson's supervisor a different black to fill a position as a data processor, the supervisor said that he did not "need any more problems around here," and would "search for additional people who are not black."

When Patterson complained about her workload, she was given no help, and in fact was given more work and told she always had the option of quitting. Patterson was laid off after 10 years with MCU. She brought suit under 42 U.S.C. section 1981, alleging harassment, failure to promote and discharge because of her race.

None of the racially harassing conduct which McLean engaged in involved the section 1981 prohibition against refusing to make a contract with Patterson or impairing Patterson's ability to enforce her existing contract rights with McLean. It is clear that Patterson is attacking conditions of employment which came into existence after she formed the contract to work for McLean. Since section 1981 only prohibits the interference with the making or enforcement of contracts because of race, performance of the contract is not actionable under section 1981.

Section 1981's language is specifically limited to making and enforcing contracts. To permit race discrimination cases involving post-formation actions would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims. While section 1981 has no administrative procedure for review or conciliation of claims, Title VII has an elaborate system which is designed to investigate claims and work toward resolution of them by conciliation rather than litigation. This includes Title VII's limiting recovery to backpay, while section 1981 permits plenary compensatory and punitive damages in appropriate cases. Neither party would be likely to conciliate if there is the possibility of the employee recovering the greater damages permitted by section 1981. There is some overlap between Title VII and section 1981, and when conduct is covered by both, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under section 1981 without resort to those statutory prerequisites.

Regarding Patterson's failure to promote claim, this is somewhat different. Whether a racially discriminatory failure to promote claim is cognizable under section 1981 depends upon whether the nature of the change in positions is such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under section 1981. AFFIRMED in part, VACATED in part, and REMANDED.

Case Questions

1. Do you think justice was served in this case? Explain. Why do you think Patterson waited so long to sue?
2. If you had been the manager when Patterson was initially interviewed, would you have made the statement about whites not accepting her? Why or why not?
3. When looking at the list of actions Patterson alleged McLean engaged in, do any seem appropriate? Why do you think it was done or permitted?

Case 12 Jett v. Dallas Independent School District *491 U.S. 701 (1989)*

Plaintiff, a white high school coach and teacher, brought suit under section 1983 against his employing school district and a black principal, alleging they were responsible for a racially discriminatory diminution in his employment status. A jury held for the coach and awarded compensatory and punitive damages. The U.S. Supreme Court upheld the verdict in part.

O'Connor, J.

Norman Jett, a white male, was employed by Dallas Independent School District (DISD) as a teacher, athletic director, and head football coach at South Oak Cliff High School (South Oak) until his reassignment to another DISD school in 1983. Jett was hired by the DISD in 1957, was assigned to assistant coaching duties at South Oak in 1962, and was promoted to athletic director and head football coach of South Oak in 1970. During Jett's lengthy tenure at South Oak, the racial composition of the school changed from predominantly white to predominantly black. In 1975, the DISD assigned Dr. Fredrick Todd, a black, as principal of South Oak. Jett and Todd clashed repeatedly over school policies and in particular over Jett's handling of the school's football program. These conflicts came to a head following a football game between South Oak and the predominately white Plano High School. Todd objected to Jett's comparison of the South Oak team with professional teams before the match, and to the fact that Jett entered the officials' locker room after South Oak lost the game and told two black officials that he would never allow black officials to work another South Oak game. Todd also objected to Jett's statements, reported in a local newspaper, to the effect that the majority of South Oak players could not meet proposed National Collegiate Athletic Association academic requirements for collegiate athletes.

Todd informed Jett that he intended to recommend that Jett be relieved of his duties as athletic director and head football coach at South Oak. Jett was reassigned as a teacher at the DISD Business Magnet School, a position that did not include any coaching duties. Jett's attendance and performance at the Business Magnet School were poor, and he [was notified he was being] placed on "unassigned personnel budget" and reassigned to a temporary position in the DISD security department. Jett filed this lawsuit, and the DISD subsequently offered Jett a position as a teacher and freshman football and track coach at Jefferson High School. Jett did not accept this assignment and sent his formal letter of resignation to the DISD.

Jett brought this action under 42 U.S.C. §§ 1981 and 1983, alleging due process, First Amendment, and equal protection violations. His equal protection and § 1981 causes of action were based on the allegation that his removal from the athletic director and head coaching positions at South Oak was motivated by the fact that he was white, and that Principal Todd, and through him the DISD, were responsible for the racially discriminatory diminution in his employment status. These claims were tried to a jury, which found for Jett on all counts. The jury awarded Jett $650,000 against the DISD, $150,000 against Principal Todd and the DISD jointly and severally, and $50,000 in punitive damages against Todd in his personal capacity. The District Court set aside the punitive damages award against Principal Todd as unsupported by the evidence, found the damages award against the DISD excessive and ordered a remittitur of $200,000, but upheld the jury's verdict in all respects.

While finding the question "very close," the Court of Appeals concluded that there was sufficient evidence from which a reasonable jury could conclude that Principal Todd's recommendation that Jett be transferred from his coaching duties at South Oak was motivated by impermissible racial animus. The court noted that Todd had replaced Jett with a black coach, that there had been racial overtones in the tension between Todd and Jett before the Plano game, and that Todd's explanation of his unsatisfactory rating of Jett was questionable and was not supported by the testimony of other DISD officials who spoke of Jett's performance in laudatory terms. AFFIRMED in part and REMANDED.

Case Questions

1. Does the decision make sense to you? Explain.
2. What difference do you think it made to the coach's job that the school district's racial composition changed?
3. If you were the principal, what would you have done differently?