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## Civil Rights in the Workplace: It's Time to Cut the Excess and Get to the Truth

Hnin N. Khaing

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# CIVIL RIGHTS IN THE WORKPLACE: IT’S TIME TO CUT OUT THE EXCESS AND GET TO THE TRUTH

HNIN N. KHAING\*

I. Introduction .....	321
II. The Employment Litigation Framework.....	330
A. Establishment of Administrative Enforcement Agencies.....	330
1. Pre-Litigation Exhaustion Requirement and the Litigation Process.....	332
III. Measures that Can Reduce Barriers in Litigating Employment Cases .....	335
A. Amending the Rules .....	337
IV. Strengthening Administrative Enforcement .....	338
V. Conclusion .....	341

## I. INTRODUCTION

On February 8, 1964, during the last few hours before the enactment of the Civil Rights Act, thanks to an individual described as a “racist, male octogenarian,” Congress haphazardly added “sex” as a prohibited basis for discrimination alongside race, color, religion, and national origin under Title

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VII<sup>1</sup> of the Act.<sup>2</sup> It was not until two decades later, in 1986, that the Supreme Court recognized sexual harassment as a form of sex discrimination under Title VII.<sup>3</sup> Five years later, Anita Hill's riveting public testimony, during the nomination hearings for Justice Clarence Thomas, ignited a nationwide discussion on sexual harassment.<sup>4</sup> A quarter century later, a celebrity tweet<sup>5</sup> in 2017 asking for "me too"<sup>6</sup> sexual harassment stories reignited the conversation and reminded us that sexual harassment was not only an active issue but a hugely pervasive problem in the American culture and workplace.<sup>7</sup>

Although many legal practitioners were keenly aware of the magnitude and prevalence of workplace harassment, the public was shocked by the endemic nature of sexual harassment as story after story emerged of people detailing their #MeToo experiences.<sup>8</sup> In the aftermath of this explosion, articles surfaced examining the history of sexual harassment and why it hadn't "disappeared" or why it remained so "rampant."<sup>9</sup> The reason is two-

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

2. Gillian Thomas, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* 1–2 (2016).

3. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (J. Rehnquist writing, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.").

4. Lenora M. Lapidus, *If Sexual Harassment is Illegal, Why is it so Rampant?*, ACLU (Jan. 18, 2018, 3:30 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/if-sexual-harassment-illegal-why-it-so-rampant> (discussing the long history of sexual harassment in America).

5. Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied.*, NBC NEWS (Oct. 15, 2018, 5:59 PM), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246> (discussing Alyssa Milano's tweet that began the #MeToo Movement).

6. Tarana Burke, *I Founded 'Me Too' in 2006. The Morning it Went Viral Was a Nightmare*, TIME (Sept. 14, 2021, 2:51 PM), <https://time.com/6097392/tarana-burke-me-too-unbound-excerpt/> (In 2006, Tarana Burke, who survived sexual assault, coined the phrase "me too" to help women and girls of color, but it would not be until 2017, when the "#MeToo" tweet went viral, that the movement and the coined phrase would get on America's main stage).

7. Sophie Gilbert, *The Movement of #MeToo*, THE ATL. (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> (discussing how the Milano Twitter explosion brought to light the magnitude of sexual harassment as stories multiplied and Milano's tweet was re-tweeted almost half a million times within 24 hours).

8. *Id.* (discussing the shocking plethora of sexual harassment stories brought to light by the Milano tweet).

9. Michael Green, *Before #MeToo: The Long Struggle Against Sexual Harassment at Work*, KQED (Dec. 14, 2017), <https://www.kqed.org/lowdown/29228/timeline-a->

fold: (1) under reporting and (2) cover ups.<sup>10</sup> Both relate to the way our legal system works. Without something like the #MeToo Twitter phenomenon, the public is generally unaware of sexual harassment victims' experiences. That is because, like any discrimination case—or any legal claim for that matter—cases may go unexposed because of private settlements, non-disclosure provisions in those settlement agreements, or mandatory arbitrations, which are private proceedings that occur outside of court, and thus, outside of the public eye.<sup>11</sup> As to the under reporting, many victims are unwilling to pay the cost of going public out of fear of reprisal, fear of not being believed, and lack of sufficient redress.<sup>12</sup>

Law professor Lauren Edelman has also argued that that the role of courts and judges had a hand in “shielding” companies from legal liability when it comes to adjudicating claims alleging sexual harassment.<sup>13</sup> She explains that courts' acceptance of robust anti-harassment policies as evidence of non-discrimination is flawed logic because often these documents amount to

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short-history-of-the-long-fight-against-sexual-harassment (detailing a brief history of sexual harassment); Retro Report, *'Why Hasn't Sexual Harassment Disappeared?'*, YOUTUBE (Oct. 17, 2017), [https://www.youtube.com/watch?v=fnk\\_mDuu9o4&ab\\_channel=RETROREPORT](https://www.youtube.com/watch?v=fnk_mDuu9o4&ab_channel=RETROREPORT); see also Lapidus, *supra* note 4.

10. Retro Report, *supra* note 9 (alluding to lack of filing due to cost of going public, private settlements, non-disclosure agreements, and arbitrations as the reasons why sexual harassment in the workplace might not have disappeared); Lapidus, *supra* note 4 (citing fear of retaliation, having to suffer through a legal proceeding, non-disclosure agreements and arbitration requirements as the reasons why sexual harassment remain rampant); see also Carly McCann & Donald T. Tomaskovic-Devey, *Nearly All Sexual Harassment at Work Goes Unreported—And Those Who Do Report Often See Zero Benefit*, THE CONVERSATION (Dec. 14, 2018, 6:45 AM), <https://theconversation.com/nearly-all-sexual-harassment-at-work-goes-unreported-and-those-who-do-report-often-see-zero-benefit-108378> (discussing the lack of redress or monetary benefit from filing a legal claim); Neta Meidav, *Why Workers Don't Report Misconduct in the Workplace*, VAULT (Feb. 17, 2020), <https://vaultplatform.com/why-workers-dont-report-misconduct-in-the-workplace> (citing fear of repercussion, embarrassment, concerns over perception, and lack of redress as reasons why workers do not report misconduct).

11. See Chase J. Edwards & Bradford J. Kelley, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, A.B.A. (Oct. 19, 2018), [https://www.americanbar.org/groups/business\\_law/publications/blt/2018/10/02\\_edwards/](https://www.americanbar.org/groups/business_law/publications/blt/2018/10/02_edwards/) (discussing the usage of out of court legal action to hide the pervasiveness of workplace sexual misconduct).

12. See Meidav, *supra* note 10 (explaining the ramifications and fears of reporting misconduct).

13. See Lauren B. Edelman, *How HR and Judges Made it Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), <https://hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court>.

nothing more than “symbolic structures.”<sup>14</sup> Indeed, when examining the challenges of litigating employment discrimination cases, there is well regarded scholarship on the reluctance of courts to legitimize these claims.<sup>15</sup> It is theorized that courts, which themselves comprise people, are likely to have biases upon which they may rely when viewing employment discrimination cases.<sup>16</sup> One common misconception is that discrimination has largely disappeared from the courts and thus there is a reluctance to conclude a finding of discrimination unless there is very compelling evidence.<sup>17</sup>

This article will focus on another aspect of our legal system—the process itself—and identify imbalances and inefficiencies within it that stand in the way of finding the truth in civil rights cases.

To contextualize this discussion, it is important to highlight the sequence of events that led to the establishment of current equal employment opportunity laws. The modern civil rights movement began more than a century ago in 1905, when W.E.B. Du Bois and other Black activists began organizing the “Niagara Movement” to call for political, social, and civil rights for African Americans.<sup>18</sup> The group consisted of twenty-nine business owners, teachers, and clergy members.<sup>19</sup> The deadly race riots of 1908, which began with an angry mob pursuing a Black man whom they believed had sexually assaulted a young White woman, led Du Bois, other African American activists, and White abolitionists, including Mary White Ovington and Oswald Garrison Villard, to form the nation’s premier civil rights organization known as the National Association for Advancement of Colored People (“NAACP”).<sup>20</sup> In line with its mission to secure rights guaranteed under the Thirteenth, Fourteenth, and Fifteenth Amendment to the United States Constitution,<sup>21</sup> the NAACP spent the next several decades

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14. *See id.*

15. Michael Selmi, *Why Are Employment Cases So Hard to Win?*, 61 LA. L. REV. 555, 556–57 (2001).

16. *Id.* at 561–62.

17. *Id.* at 563 (discussing court bias partially rooted in deep skepticism toward the merits of the cases and misconceived consensus that discrimination has largely diminished in America).

18. *See Niagara Movement*, ENCYCLOPEDIA BRITANNICA (May 9, 2019), <https://www.britannica.com/topic/Niagara-Movement>; Stephanie Christensen, *Niagara Movement (1905-1909)*, BLACKPAST (Dec. 16, 2007), <https://www.blackpast.org/african-american-history/niagara-movement-1905-1909/>.

19. Christensen, *supra* note 18.

20. *Our History*, NAACP, <https://naacp.org/about/our-history> (last visited Apr. 24, 2022).

21. *Id.*

successfully using the legal system to eliminate lynching, disenfranchisement and racial segregation.<sup>22</sup> One of the NAACP's earliest legal successes included a 1913 case which challenged the so-called "grandfather clause" put in place in Oklahoma to effectively disqualify Black voters.<sup>23</sup> Although the Fifteenth Amendment<sup>24</sup> enabled Black men to vote, the Oklahoma clause provided that only residents whose grandfathers had voted in 1865 could vote.<sup>25</sup> The Supreme Court agreed with the NAACP and found that the "grandfather clause" was in violation of the Fifteenth Amendment.<sup>26</sup>

On the heels of this success, the push for advancement of women's right to vote culminated in 1920 with the enactment of the Nineteenth Amendment.<sup>27</sup> Soon thereafter, debates over the rights of Asian Americans followed in the aftermath of a 1923 Supreme Court decision,<sup>28</sup> finding that an Indian Sikh man, as a nonwhite, was ineligible for citizenship under the Immigration Act of 1917. Unfortunately, this decision also had negative consequences as several states began to deny Asian Americans the right to own land.<sup>29</sup> By 1939, additional civil rights movements developed, including gay and lesbian rights, and the "Congress of Spanish Speaking People" was established.<sup>30</sup>

In 1954, NAACP secured a landmark victory under the Equal Protection clause of the Fourteenth Amendment when the Supreme Court dismantled the notion of "separate but equal" in *Brown v. Board of Education*.<sup>31</sup> That same day, under the Fifth Amendment, the Court ruled similarly with respect

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22. *The Civil Rights Act of 1964: A Long Struggle for Freedom. The Segregation Era (1900–1939)*, LIBR. OF CONG. 1–3, 6, <https://www.loc.gov/exhibits/civil-rights-act/segregation-era.html> (last visited, Apr. 24, 2022) [hereinafter *The Segregation Era*].

23. *Guinn v. U.S.*, 238 U.S. 347, 357 (1915).

24. U.S. CONST. amend. XV.

25. *Guinn*, 238 U.S. at 357.

26. *Id.* at 364–65.

27. U.S. CONST. amend. XIX.

28. *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 215 (1923).

29. *Rekindling Civil Rights, 1900–1940*, NAT'L PARK SERV., <https://www.nps.gov/subjects/civilrights/rekindlingcivilrights.htm> (last visited Apr. 24, 2022).

30. *Id.* Congress of Spanish Speaking People worked to end discrimination against non-citizens as well as to stand against the Klu Klux Klan. A Latinx Resource Guide: Civil Rights Cases and Events in the United States, 1938: *Spanish Speaking People's Congress*, LIBR. OF CONG., <https://guides.loc.gov/latinx-civil-rights/spanish-speaking-peoples-congress> (last visited Aug. 5, 2022).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (declaring that racial segregation in public schools indeed violated the Equal Protection clause of the Fourteenth Amendment).

to racial segregation in District of Columbia public schools.<sup>32</sup> In the wake of these decisions, schools slowly began to desegregate. However, segregation remained in public transit. The following year, Rosa Parks, a long-time NAACP member, sat in the segregated White area of the bus and was arrested,<sup>33</sup> which would lead to a public transit segregation case before the Supreme Court, where the Court affirmed that segregation on buses contravened the Fourteenth Amendment.<sup>34</sup>

In 1957, Congress passed the first civil rights legislation since the Reconstruction Era<sup>35</sup> when it established the Civil Rights Division at the Department of Justice and added an enforcement mechanism to protect the right to vote.<sup>36</sup> Though this legislation did little to achieve racial equity, it signaled a growing effort by the federal government to tackle such issues. It would take another seven years, during which the nation experienced: military desegregation of the South; the “great migration” Northward; the economic cost of World War II; the expanding Black middle class; non-violent Civil Rights demonstrations like the American Freedom Rides; the rise of the great Dr. Martin Luther King, Jr.; and the historic March on Washington in 1963, all before the more comprehensive Civil Rights Act of 1964 would land in Congress.<sup>37</sup> Once passed, Title VII of the Civil Rights Act protected against discrimination in employment based on race, color, religion, sex, and national origin.<sup>38</sup> In the subsequent years Congress passed a litany of anti-discrimination protective measures focused on employment

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32. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

33. *On This Day, Rosa Parks Wouldn't Give Up Her Bus Seat*, CONST. CTR. (Dec. 1, 2021), <https://constitutioncenter.org/blog/it-was-on-this-day-that-rosa-parks-made-history-by-riding-a-bus#:~:text=Today%20marks%20the%20anniversary%20of,bus%20to%20a%20white%20passenger>.

34. *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (affirming *Browder v. Gayle*, 142 F. Supp. 707 (1956)).

35. The Reconstruction Era (1865–1877) was the period following the Civil War when the U.S. was attempting to reintegrate the previously seceded states into the Union and the impact of this effort on the rights of African Americans. *See Reconstruction: United States History*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Reconstruction-United-States-history> (last visited Aug. 5, 2022).

36. The Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; *see also* C.R. Digit. Libr., [http://crdl.usg.edu/events/civil\\_rights\\_act\\_1957/?Welcome](http://crdl.usg.edu/events/civil_rights_act_1957/?Welcome).

37. George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. C.R. & C.L. 159, 163–64 (2014); *see also* Megan Turchi, *Events That Led to the Civil Rights Act of 1964*, BOSTON.COM (Jul. 2, 2014), <https://www.boston.com/news/untagged/2014/07/02/events-that-led-to-the-civil-rights-act-of-1964/>.

38. 42 U.S.C. § 2000e *et seq.*

discrimination, including: the Equal Pay Act in 1963<sup>39</sup> to address pay gaps between men and women; the Age Discrimination in Employment Act (“ADA”) of 1967<sup>40</sup> to protect older workers; Section 501 of the Rehabilitation Act of 1973 for disability protections;<sup>41</sup> the Americans with Disabilities Act of 1990;<sup>42</sup> and most recently, the Genetic Information Nondiscrimination Act of 2008.<sup>43</sup> The ADA was amended in 2008<sup>44</sup> and Title VII of the Civil Rights Act was amended in 1978 to explicitly protect against pregnancy and related medical condition discrimination<sup>45</sup> and then again in 1991 to permit jury trials and compensatory and punitive damages for related claims.<sup>46</sup>

Despite the legal progress of the last century in establishing laws that prohibit adverse actions based on race, color, national origin, age, religion, sex, disability, and genetic information,<sup>47</sup> events like the #MeToo explosion and the ongoing wave of racial violence and hate crimes, call into question whether the United States has truly made progress toward achieving equality and reducing workplace harassment. One aspect of the problem is that many of the civil rights laws of the twentieth century were aimed at ending segregation, addressing overt discrimination, and outlawing Jim Crow laws.<sup>48</sup> In the twenty-first century overt discrimination rarely exists in plain sight. Rather, the discrimination that exists today is a more harmful insidious

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39. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

40. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.

41. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 501, 87 Stat. 355, 390.

42. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 101 Stat. 327.

43. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881.

44. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

45. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

46. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a).

47. Although states have surpassed federal laws in terms of the number of protected traits, as this article addresses a nationwide issue, the protected traits cited here are limited to those under federal laws.

48. See Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315 (2008); see also Ibram X. Kendi, *The Civil Rights Act was a Victory Against Racism. But, Racism Also Won*, WASH. POST (July 2, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/02/the-civil-rights-act-was-a-victory-against-racism-but-racists-also-won/>; *The Civil Rights Act of 1964: A Long Struggle for Freedom. Epilogue*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/epilogue.html> (last visited Apr. 24, 2022) [hereinafter *Epilogue*].

discrimination that can evade detection in a court of law. This type of discrimination may manifest in the form of disparate impact discrimination where seemingly neutral policies have an adverse impact on a particular group<sup>49</sup> or where policies or rules are used to produce a preferred outcome.<sup>50</sup> The procedures we utilize, particularly the protracted nature of the process, to enforce laws aimed at ending segregation rather than achieving equality, are a mismatch for combating present day forms of discrimination. As referenced earlier, our judicial system and the rules governing the system play a large role in how discrimination claims are perceived and adjudged. Consequently, the judicial system plays a large role in the state of racism and bias in the U.S. today.<sup>51</sup> The subject of civil rights is vast, and though the proposals discussed in this article can easily apply to other aspects of civil rights, this article proposes making adjustments in the legal process in order to make advancements toward achieving equality and eliminating sexual harassment in the workplace.

Employment discrimination cases are often an uphill battle, extremely difficult to establish, and “generally fare worse than most other kinds of civil plaintiffs.”<sup>52</sup> Indeed, a review of statistics for employment discrimination cases shows that in courts, after lengthy, costly, and often hostile discovery battles, more than half of the cases get dismissed before proceeding to a trial.<sup>53</sup> The Bureau of Justice Statistics reported a decline from eight percent in 1990 to three percent in 2006 of employment cases getting to trial, while

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49. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 426, 432–36 (1971) (discussing disparate impact in the context of race discrimination); *Meacham v. Knolls Atomic Power Lab’y*, 553 U.S. 84, 87 (2008) (discussing age-based disparate impact); *Ricci v. DeStefano*, 557 U.S. 557, 561–63 (2009) (race discrimination); *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project Inc.*, 576 U.S. 519, 530–31 (2015) (discussing disparate impact within the housing context).

50. Kendi, *supra* note 48.

51. See Selmi, *supra* note 15, at 563 (summarizing modern judicial bias as viewing “the role discrimination plays in contemporary America has sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence”); see also Suk, *supra* note 48, at 1317 (“Procedure can strongly influence a legal culture’s continued perception of a social problem like discrimination . . .”).

52. Selmi, *supra* note 15, at 558.

53. Tracey Kyckelhahn & Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts, 1990 – 2006*, BUREAU OF JUST. STATS. 1, 5 (2008), <https://bjs.ojp.gov/content/pub/pdf/crcusdc06.pdf> (providing that the percentage of civil rights cases dismissed was 75% in 2003 and 72% in 2006); see also *Administrative Office of the Courts, U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2021*, <https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2021/03/31> (depicting approximately 60% of employment civil rights cases being disposed of before trial) [hereinafter *Civil Cases Terminated*].

the 2021 data from the Administrative Office of the Courts shows less than one percent of employment civil rights cases reaching trial.<sup>54</sup> Based on these data points, one might be inclined to believe that most employment cases are frivolous.<sup>55</sup> There is no doubt some cases warrant dismissal, but others which might have otherwise survived summary judgment, failed due to lack of sufficient evidence, most of which began and remained in the defendants' possession.

In our current legal system, civil cases must go through several hoops before a claimant can get their day in court. From the beginning of the case, a plaintiff must be able to identify and properly serve the right defendant. And if a case involves a large corporation, it can take several months for a pro se plaintiff or less experienced attorney to identify the correct entity who can be held accountable for the allegations contained in the complaint, not to mention other possible service issues. Once the defendant accepts service, before the case can really begin, a plaintiff must be able to respond to the defendant's challenge of the complaint itself through a motion to dismiss. While motions to dismiss were fairly easy to overcome in the past, the pleading standards established in *Iqbal*<sup>56</sup> and *Twombly*<sup>57</sup> can quickly throw out a case before it can even begin. Once the case survives a motion to dismiss and a scheduling order is put in place, a plaintiff must next overcome summary judgment. To do so, the plaintiff must engage in robust discovery and this is where cases can rise or fall. As covered in greater detail below, a common set of information a plaintiff must be able to present at summary judgment (and trial for that matter), is comparator information, which means obtaining information about other employees. Most employees do not have detailed information about other employees and therefore must obtain this from the defendant during discovery. This process typically triggers the issue of litigation within litigation, resulting from the juxtaposition of one side seeking as much as possible and the other side aiming to produce as little as possible. Courts are loath to engage in these battles, which leaves litigants in a state of unending turmoil and in the end, lack of sufficient information. But unlike other civil matters, the defendant in employment cases is in sole possession of the relevant information, and without sufficient evidence, the plaintiff has little to no chance at overcoming summary judgment and getting to trial.

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54. Kyckelhahn & Cohen, *supra* note 53, at 5; *Civil Cases Terminated*, *supra* note 53, at 1, 3.

55. Selmi, *supra* note 15, at 569 (surmising that low success rates may be due to the existence of many frivolous or marginal claims).

56. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

57. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

## II. THE EMPLOYMENT LITIGATION FRAMEWORK

A. *Establishment of Administrative Enforcement Agencies*

In addition to prohibiting discrimination, Title VII also established the Equal Employment Opportunity Commission (“EEOC”).<sup>58</sup> The EEOC opened its doors on July 2, 1965, and on its first day—owed almost entirely to the efforts of the NAACP—the Commission received 1,000 complaints, technically known as “Charges of Discrimination” (“Charge”).<sup>59</sup> By the end of its first year, the EEOC had received 8,852 Charges, creating an immediate “backlog” for the starting staff of 100, most of whom had been detailed from other federal agencies.<sup>60</sup> In the first and second decades of the millennium, this number rose tenfold to about 80,000 Charges.<sup>61</sup>

When the EEOC first opened its doors in 1965, it lacked enforcement powers beyond investigation. Hence, many referred to the Commission as a “toothless tiger.”<sup>62</sup> In particular, the public complained that despite the EEOC’s “heroic attempt” to tackle employment discrimination, there was still “widespread discrimination in both the private and public sectors; little progress by Blacks, Hispanics, and women in any occupational field; continued concentration of all these groups in the lowest-paid positions and industries; discrimination and exclusion of these same groups from higher-paid jobs and occupations; and significant pay disparities traced to such discrimination.”<sup>63</sup>

Based on these issues, Congress passed the Equal Employment Opportunity Act of 1972, which expanded the EEOC’s enforcement authority in several ways.<sup>64</sup> First, the Act gave the EEOC litigation authority to enforce its administrative findings including the ability to file pattern or practice cases.<sup>65</sup> Second, the Act expanded the pool of covered employers by decreasing the number of requisite employees from twenty-five to fifteen.<sup>66</sup> Finally, the Act created the Equal Employment Opportunity

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58. 42 U.S.C. § 2000e *et seq.* (2020).

59. EEOC, STORY OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ENSURING THE PROMISE OF OPPORTUNITY FOR 35 YEARS, 1965–2000, 5 (2000).

60. *Id.*

61. *Charges Filed with the EEOC from FY 1997 - FY 2020*, EEOC, <https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020> (last visited October 15, 2021).

62. EEOC, *supra* note 59, at 5.

63. *Id.*

64. Equal Opportunity Act of 1972, 42 U.S.C. § 2000a.

65. *Id.*

66. *Id.*

Coordinating Council, which consisted of the EEOC, the Department of Justice (“DOJ”) and Department of Labor (“DOL”), the Civil Service Commission, and the Civil Rights Commission in order to “maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency” among the various federal agencies.<sup>67</sup> Two years later, with its newly expanded authority and together with the Departments of Labor and Justice, the EEOC was able to obtain a consent decree providing almost \$31 million in back pay for discriminatory hiring, promotion, assignment, and disparate impact wage policies.<sup>68</sup> In 1978, the EEOC secured \$29.4 million in back pay and benefits to minority and female workers in its first nationwide conciliation agreement with General Electric.<sup>69</sup>

By the 1970s, states had formed their own local fair employment practices agencies (“FEPAs”), where they too began to receive and investigate complaints of discrimination.<sup>70</sup> The New York and Pennsylvania state legislatures were ahead of Congress and had already created anti-discrimination laws and state agencies similar to the EEOC in 1945 and 1955 respectively.<sup>71</sup> As with the EEOC, the process and the scope of enforcement authorities with the FEPAs developed at different paces over time.<sup>72</sup> For most local jurisdictions, since the EEOC and Title VII were established prior to the analogous state laws, FEPAs tended to follow the EEOC’s interpretation of federal law in interpreting its own local antidiscrimination laws. However, this has proven more difficult in recent decades as local city and state laws have advanced beyond Title VII. For example, in Washington D.C., the D.C. Human Rights Act (“DCHRA”) was not enacted until 1977, however it was far more expansive in its coverage than its federal counterparts and included the following protected traits: marital status, personal appearance (including hair style), sexual orientation, family

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67. *Id.*

68. EEOC, *supra* note 59, at 15.

69. *Id.*

70. See *About MCCR*, STATE OF MD. COMM’N ON CIV. RTS., <https://mccr.maryland.gov/Pages/About-MCCR.aspx> (last visited Nov. 18, 2021); *About the Pennsylvania Human Relations Commission*, PA HUM. RELS. COMM’N, <https://www.phrc.pa.gov/AboutUs/Pages/default.aspx> (last visited Aug. 5, 2022); FAIRFAX CNTY. OFF. OF HUM. RTS. & EQUITY PROGRAMS, ANNUAL REPORT (2020), <https://www.fairfaxcounty.gov/humanrights/sites/humanrights/files/assets/documents/pdf/ohrep%20fy2020%20annual%20report.pdf> (last accessed Apr. 14, 2021).

71. N.Y. DIV. ON HUM. RTS., <https://dhr.ny.gov/agency-history> (last visited Aug. 5, 2022); PA. HUM. RELS. COMM’N, *supra* note 70.

72. See PA. HUM. RELS. COMM’N., *supra* note 70; N.Y. DIV. ON HUM. RTS., *supra* note 71.

responsibilities, matriculation, and political affiliation.<sup>73</sup> Today, the DCHRA is one of the most progressive laws in the nation and also includes gender identity and expression, status as a victim or a family member of a victim of domestic violence, a sexual offense, or stalking, credit information, pregnancy, childbirth, related medical conditions, breastfeeding, reproductive health decisions, and homelessness.<sup>74</sup>

Like D.C., New York City has also advanced well beyond federal laws with coverage of caregivers and immigration status in addition to those under the DCHRA.<sup>75</sup> In many jurisdictions, criminal background inquiries conducted prior to a conditional offer of employment have been made unlawful.<sup>76</sup> In 2014 and 2016, affirmative obligations were placed upon employers to provide reasonable accommodations to pregnant workers in D.C. and New York City.<sup>77</sup> Following these state trends, in February 2021, the House passed the Pregnant Workers Fairness Act.<sup>78</sup> Though discrimination based on hairstyle has been protected in D.C. since 1977,<sup>79</sup> in December 2019, the House introduced H.R. 5309, the Creating a Respectful and Open World for Natural Hair Act of 2020 (“CROWN”).<sup>80</sup> While most local laws have surpassed federal laws in scope, few FEPAs have the expanded enforcement authority the way the EEOC does, particularly with respect to litigation authority. This article questions whether it is time to close this gap and implement measures to reduce barriers associated with litigating employment discrimination.

### *I. Pre-Litigation Exhaustion Requirement and the Litigation Process*

Under most federal civil rights laws, like Title VII, before an employee can pursue a claim in court, they must first “exhaust” administrative remedies with an agency like the EEOC by filing a Charge within 180 days

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73. D.C. Law § 2-38 (1977). The D.C. Human Rights Act also includes age and disability, but I did not include these in this list because these are covered under the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

74. D.C. CODE § 2-1401.01 (2021); D.C. CODE § 2-1401.05 (2021); D.C. CODE § 2-1401.06 (2021).

75. N.Y.C. Admin. Code § 8-107 (2021).

76. *See, e.g.*, The D.C. Fair Criminal Records Screening Amendment Act, D.C. CODE § 32-1341; The New York City Human Rights Law, N.Y.C. ADMIN. CODE § 8-107(10).

77. The D.C. Protecting Pregnant Workers Fairness Act, D.C. CODE § 32-1231.01; The New York City Pregnant Workers Fairness Act, N.Y.C. Admin. Code § 8-107(22).

78. Pregnant Workers Fairness Act, H.R.1065, 117th Cong. (2021).

79. D.C. CODE § 2-1401.02(22) (1977).

80. CROWN Act, H.R. 5309, 116th Cong. (2020).

of the discriminatory conduct or discovery thereof.<sup>81</sup> If a FEPA exists in the jurisdiction, then the claimant may have up to 300 days to file a Charge with the EEOC.<sup>82</sup>

Once a Charge is filed, the investigating agency can resolve the complaint through several means, including mediation, investigation, and litigation.<sup>83</sup> The law requires the EEOC investigate claims within 180 days and where the agency is unable to resolve the claim within this timeframe, claimants may request a right to sue.<sup>84</sup> The EEOC estimates that on average it takes about ten months to investigate a complaint<sup>85</sup> and if a claimant proceeds with their right to sue in court, it could take anywhere from one to several more years. The latest available data from the Bureau of Justice, covering 1990 to 2006, indicates that civil rights cases languish in court for about eleven to thirteen months.<sup>86</sup> Anecdotally, however, lawyers in recent times estimate a wider range of two to four years to resolve an employment discrimination case. Advocates and employees say this is far too long to remedy discrimination in the workplace.

In employment cases, claims are analyzed under a “burden-shifting” *McDonnell Douglas* framework—based on a Supreme Court case decided in 1973—where the employee must establish the *prima facie* elements of their claim and thereafter, the burden “shifts” back to the employer to articulate a “legitimate non-discriminatory” reason for the adverse action.<sup>87</sup> At this point, the burden once again “shifts” back to the employee to establish that the employer’s stated non-discriminatory reason was not a true reason but rather a pretext for discrimination.<sup>88</sup> However, in 1981, the Supreme Court made clear that the employee always “retains” the burden of persuasion, as the employer only has a burden of production to state a non-discriminatory reason but is not required to prove it.<sup>89</sup>

Generally, the *prima facie* elements in disparate treatment cases require a showing that: (1) the plaintiff was a member of a protected class; (2) the

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81. 42 U.S.C. § 2000e-5(f). Comparatively, in Washington D.C., the D.C. Human Rights Act does not require administrative exhaustion with OHR. D.C. CODE § 2-1403.16. Instead, complainants may proceed directly to filing a civil complaint in court, if they wish.

82. 42 U.S.C. § 2000e-5(e)(1).

83. *Id.* § 2000e-5.

84. *Id.* § 2000e-5(f)(1).

85. *What You Can Expect After You File a Charge*, EEOC, <https://www.eeoc.gov/what-you-can-expect-after-you-file-charge> (last visited Aug. 5, 2022).

86. Kyckelhahn & Cohen, *supra*, note 53, at 7.

87. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

88. *Id.* at 804.

89. *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981).

plaintiff was qualified for the job; (3) despite qualification, the plaintiff suffered an adverse action such as termination, demotion or non-selection; and (4) there is an inference that the adverse action was taken based on unlawful discriminatory reasons.<sup>90</sup> The first element is easily satisfied in most cases and does not require a great deal of evidence to establish it. The second and third elements can be contentious points if the parties disagree as to whether the employee was “qualified” for the job. By and large, the biggest sticking point appears to be with the final element: whether the conduct was motivated by a discriminatory animus. As stated previously, though the burden shifts to the employer after the employee establishes their prima facie case, the burden rests with the plaintiff throughout the case to prove the employer’s stated non-discriminatory reason was not the true reason for the adverse action, and instead a pretext for intentional discrimination.<sup>91</sup> To meet this burden, employees will seek discovery on treatment of similarly situated employees outside of the plaintiff’s protected class, information about the decision makers, statistical evidence, and similar past complaints against the employer.<sup>92</sup> While most employees have information that leads to evidence, they do not actually have access,<sup>93</sup> possession, or control of the evidence. After all, personnel records, which are usually what is largely at stake, are treated as confidential. And, to demonstrate that the employer’s stated non-discriminatory reason—which employees are not privy to know until disclosed in litigation—is pretextual, the employee must have access to the employer’s evidence showing the stated reason for the personnel action was non-discriminatory.<sup>94</sup>

There are two obstacles that stand in the way of these cases being resolved more expeditiously. First, there is an obvious imbalance in litigation power between the employee and the employer.<sup>95</sup> Often, individual employees have little resources to hire an experienced attorney to vindicate their rights. Even if they do, at least at the outset of the case, employees typically have little bargaining power to resolve the case without litigation because they are in possession of very little evidence.<sup>96</sup> Employers, on the other hand, usually have complete access and control over most of the relevant evidence, such

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90. *McDonnell Douglas Corp.*, 411 U.S. at 802.

91. *Burdine*, 450 U.S. at 256.

92. See generally Ann K. Hadrava, *The Amendment to Federal Rule of Civil Procedure 26(b)(1) Scope of Discovery: An Empirical Analysis of its Potential “Relevancy” to Employment Discrimination Actions*, 26 OKLA. CITY U.L. REV. 1111, 1138–40 (2001).

93. *Id.* at 1133–34.

94. *Id.* at 1143–44.

95. *Id.* at 1134.

96. *Id.*

as its EEO policies and procedures, records of communication, records of personnel actions, its own internal investigation records, and, of course, personnel records of other employees, who might be a comparator in a case. Additionally, where employers are large corporations, they typically enter these cases with the legal strength of an in-house counsel and an outside litigation team, usually from a large firm.<sup>97</sup> In contrast, employees bring their cases *pro se* or through an attorney from a solo or small firm.

The second obstacle is the discovery process. This part of the legal process is extraordinarily time consuming and prohibitively costly.<sup>98</sup> Naturally, plaintiffs and defendants do not agree on much, but one thing they both agree on is that too much time and money are being spent on discovery, “almost . . . to the exclusion of giving attention to the merits.”<sup>99</sup> Unlike other civil cases, this stands to have a greater impact on employment cases: not only on the individual employee’s ability to challenge unlawful conduct, but also on the ability of most employment cases to prevail in litigation. Thus, this article proposes taking steps to amend rules governing discovery and to encourage the expansion of enforcement authority of local civil rights enforcement agencies in order to amplify the kind of impact the EEOC had once it was able to prosecute its own cases.

### III. MEASURES THAT CAN REDUCE BARRIERS IN LITIGATING EMPLOYMENT CASES

In 1993, Senator Edward Kennedy said, “civil rights is the unfinished business of America.” In the twenty-first century, with the proliferation of social media, the world witnessed several instances of America’s “unfinished business,” including the 2016 deadly Orlando shooting targeting the LGBTQ+ community,<sup>100</sup> the 2017 #MeToo explosion showcasing thousands of stories of sexual harassment,<sup>101</sup> the string of incidents in 2018 that denied Black children the ability to wear braids in schools,<sup>102</sup> the racist killings of

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97. *Id.* at 1121, 1123.

98. *Id.* at 1123.

99. John H. Beisner et al., *Emerging Civil Justice Issues*, 9 J.L. ECON. & POL’Y 325, 332 (2013).

100. Ariel Zambelich & Alyson Hunt, *3 Hours in Orlando: Piecing Together an Attack and its Aftermath*, NPR (Jun. 26, 2016, 5:09 PM), <https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update>.

101. Pflum, *supra*, note 5; Gilbert, *supra*, note 7.

102. Andrew Johnson, *Referee Facing Charges of Racism After Forcing NJ High School Wrestler to Cut Dreadlocks or Forfeit Match*, CBS NEWS (Dec. 21, 2018, 11:01 PM), <https://www.cbsnews.com/newyork/news/buena-wrestler-cuts-hair-dreadlocks-new-jersey/>; Julia Jacobs & Dan Levin, *Black Girl Sent Home From School Over Hair*

Black men like George Floyd,<sup>103</sup> Ahmaud Arbery,<sup>104</sup> and the 2021 Atlanta shooting targeting Asian women.<sup>105</sup>

In response to these events, Americans sought to make changes in law and policy. For example, in the wake of the #MeToo movement, businesses hurriedly began revising their internal policies, and instituting measures like “Weinstein Clauses” in mergers and acquisitions to require disclosure of sexual harassment allegations.<sup>106</sup> Similarly, legislatures, both local and federal, have been working to expand the coverage of civil rights.<sup>107</sup> These efforts include adding homelessness as a protected trait, explicitly prohibiting hair discrimination, codifying “harassment” as a form of discrimination, and mandating policies and trainings on discrimination and harassment.<sup>108</sup> While these measures are certainly laudable, it is unclear whether it will actually reduce workplace discrimination or if it will just lead to increased litigation.<sup>109</sup> To this point, David Gevertz, the co-chair of the ABA’s Employment and Labor Relations Law Committee, responded, “I would have preferred courts to have been more liberal with discovery, rather than enacting legislation.”<sup>110</sup> If the desire is to reduce workplace discrimination, through effective enforcement of laws, then this Article

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*Extensions*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/black-student-extensions-louisiana.html> (discussing two viral instances where young Black children were sent home from school because of their hair).

103. Jelani Cobb, *The Death of George Floyd, in Context*, NEW YORKER (May 27, 2020), <https://www.newyorker.com/news/daily-comment/the-death-of-george-floyd-in-context> (explaining video footage of a fatal use of excessive force).

104. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> (explaining video footage of a racially-charged murder).

105. Marlene Lenthag, *Atlanta Shooting and the Legacy of Misogyny and Racism Against Asian Women*, ABC NEWS (Mar. 21, 2021, 9:28 AM), <https://abcnews.go.com/US/atlanta-shooting-legacy-misogyny-racism-asian-women/story?id=76533776>.

106. Nicole Lyn Pesce, *The #MeToo Movement has Changed Policies Across Industries, But There’s Still Work to Be Done*, MARKET WATCH (Oct. 4, 2018, 6:59 PM), <https://www.marketwatch.com/story/the-metoo-movement-has-changed-policies-across-industries-but-theres-still-work-to-be-done-2018-10-04>.

107. Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, A.B.A. (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/>.

108. *Id.*; see, e.g., Human Rights Enhancement Amendment Act of 2021, B24-0229 (D.C. 2021) (concerning homelessness and other discrimination); CROWN Act of 2020, H.R. 5309, 116th Cong. (2d Sess. 2020) (concerning hair discrimination); Be HEARD in the Workplace Act, H.R. 2148, 116th Cong. (1st Sess. 2019) (concerning harassment).

109. Christiansen, *supra* note 107.

110. *Id.*

recommends streamlining discovery, reforming civil rules, and allowing litigants to obtain the core information necessary to have meaningful adjudication, rather than adding more grounds for litigation to an already overburdened and inefficient system. The point here is that before expanding the number or types of claims one can bring, lawmakers can be more effective at reducing workplace discrimination by understanding that the current rules governing the litigation process, like discovery, can stand in the way of finding the truth and can prevent a plaintiff from getting to trial.

#### A. *Amending the Rules*

The Federal Rules of Civil Procedure are meant “to secure the just, speedy, and *inexpensive* determination of every action and proceeding.”<sup>111</sup> But this is far from the truth given that discovery, as governed by the rules of civil procedure, is estimated to be fifty to ninety percent of total litigation costs and thought to be one of the principal causes of delays in litigation.<sup>112</sup> Although a number of sympathetic courts hold firm that discovery ought to be liberal in civil rights cases,<sup>113</sup> the discovery process is often not only unhelpful but serves as an impediment to successful prosecution of discrimination cases. Discovery is so costly because the employer normally possesses the majority of the relevant evidence, and once terminated from employment, an average plaintiff has little to no evidence and thus must rely heavily on the discovery process.<sup>114</sup> Lack of results in discovery battles means that after exhausting great legal expenses, if the discovery ruling is unfavorable, the employee is left at a significant disadvantage.

To level the playing field and allow victims of discrimination a fair shot at presenting their cases, rules must be reformed<sup>115</sup> to provide for efficient evidentiary disclosures to shorten the litigation process as a whole. One suggestion is to amend Rule 26 to add specific discovery requirements in civil rights cases, such as requiring more tailored automatic disclosures for both parties, imposing certain mandatory initial interrogatories and data

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111. FED. R. CIV. P. 1 (addressing the scope and purpose of the Federal Rules of Civil Procedure) (emphasis added).

112. See Beisner, *supra* note 99, at 549.

113. See Trevino v. Celanese Corp., 701 F.2d 397, 405 (5th Cir. 1983) (“The imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases”); cf. Sallis v. Univ. of Minn., 408 F.3d 470, 478 (8th Cir. 2005) (stating in Title VII cases, “liberal civil discovery rules give plaintiffs broad access to document their claims” (quoting Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 657 (1989))).

114. Hadrava, *supra* note 92, at 1118.

115. Although there have been several amendments to the rules, to date, none has had the effect of reducing the time and cost of litigation or conducting discovery. *Id.* at 1150 (explaining that discovery rules have been amended over the years, but the scope of Rule 26 has remained essentially unchanged).

disclosures, and explicitly establishing penalties for violations of these rules.<sup>116</sup> These proposed reforms will enable the parties to quickly and economically obtain basic relevant information without having to incur unnecessary legal expenses in order to pry these materials out of the opposing party's hands. Moreover, the reforms will eliminate courts having to resolve the unnecessary sideshow discovery battles asserting a party is going on a "fishing expedition" or that they are abusing the discovery process.<sup>117</sup>

In addition, courts and administrative agencies should adopt form interrogatories and requests for admission which might prevent unnecessary discovery disputes over whether certain information is relevant or beyond the scope of the issue in litigation. California, through its Judicial Council, has developed and approved such a practice since 2009.<sup>118</sup> The state's form interrogatories provide preformulated specific questions on a broad range of topics such as: the existence of employment contract, the reason for the adverse action, whether job performance is at issue, replacement information, information on internal complaints and investigations, the employer's relevant policies, prior employment complaints against the employer from the past ten years, benefit and compensation information, and lastly, whether the employer had any insurance policy in effect.<sup>119</sup> Too often in federal and state courts, plaintiffs are burdened with drafting a set of interrogatories that contain sufficiently specific descriptions of their requests so as to enable the employer to identify and produce the information. Plaintiffs then expend unnecessary time and money to compel a full response to requests for basic information necessary to reach a just and speedy determination of the claims.

#### IV. STRENGTHENING ADMINISTRATIVE ENFORCEMENT

In a comparative study between French criminal law and the American civil system within the context of employment discrimination, Professor Julie C. Suk discussed the idea of "procedural path dependence," explaining that procedures in a given legal system "can strongly influence a legal culture's perception of a social problem like discrimination" and that the

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116. See generally FED. R. CIV. P. 26.

117. John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010).

118. See CAL. CIV. PROC. CODE § 2033.710 (West 2005) (requiring the Judicial Council to develop and approve official form interrogatories and requests for admission; the law went into effect July 1, 2005, but the earliest form is dated 2009); see also DISC-002 Form Interrogatories-Employment Law, CAL. CTS., <https://www.courts.ca.gov/documents/disc002.pdf> [hereinafter DISC-002].

119. DISC-002, *supra* note 118.

systems and process assigned to resolving discrimination cases can limit the law's ability to reach its full enforcement goal.<sup>120</sup> In exploring this principle, Professor Suk discussed the benefits of rendering discrimination a criminal offense and treating it as morally reprehensible criminal behavior, versus the U.S. civil process of treating these claims akin to a tort claim brought by a private individual to be compensated.<sup>121</sup> Based on her research, she too concludes that American laws are unable to combat the contemporary manifestation of discrimination.<sup>122</sup> Her article includes highlights of the French criminal code and the associated process by which it prosecutes discrimination claims. For instance, in France, once a penal violation is alleged, there is an "investigation judge" assigned to the matter with full authority to question witnesses (without the presence of another party), who has broad search and seizure powers, which include ordering the police to seize all relevant non-privileged documents for "revealing the truth." Of course, the purpose of our legal system and the rules within it is "to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>123</sup> Notably, there is nothing said about uncovering the truth. The French system also allows "testing operations" to reveal discriminatory motive where advocacy organizations can send out testers to determine whether an employee really "no longer needs" a worker or if the color of a person's skin was the determining factor.<sup>124</sup> Any recordings from such operations are deemed admissible evidence in the French criminal court as long as other private matters of the business are not discussed.<sup>125</sup> As a result of these enforcement powers, investigation judges are able to obtain requisite evidence in discrimination cases that would otherwise be unavailable or inaccessible in civil proceedings.<sup>126</sup>

Neither the American public nor its representatives are likely to consider changing the existing anti-discrimination laws into criminal offenses. Still, it is worthwhile examining whether the concept of "procedural path dependence" is at issue here in preventing workplace discrimination; that is, whether our current litigation system and processes may be limiting the ability to truly eradicate discrimination.<sup>127</sup> As discussed throughout this paper, if in fact, as studies have shown, the cost of litigation and the

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120. Suk, *supra* note 48, at 1317.

121. *Id.* at 1317–18.

122. *Id.* at 1320.

123. FED. R. CIV. P. 1 (addressing the scope and purpose of the Federal Rules of Civil Procedure).

124. Suk, *supra* note 48, at 1345.

125. *Id.* at 1343.

126. *Id.* at 1341.

127. *Id.* at 1317.

imbalance of power between the parties are at the root of why employment cases hardly prevail, then is it not time to consider removing these barriers? Earlier, this article discussed reforming rules to overcome cost and duration of discovery. The next suggestion—expanding administrative agency authority—will address both the imbalance problem and reducing workplace inequalities.

There are lessons to be learned from the evolution of the EEOC's enforcement role, including how it was able to transform itself from being a "toothless tiger" to the "master of its own cases."<sup>128</sup> As discussed earlier, the EEOC was dubbed a "toothless tiger" because it was limited to investigation and conciliatory powers.<sup>129</sup> After Congress amended Title VII in 1972 to expand the EEOC's authority to bring lawsuits against private entities, the EEOC became the "master of its own cases" and its work has had lasting effects in bringing change to the American work environment.<sup>130</sup> In the first few years after receiving its litigation authority, the EEOC filed 39 pattern or practice suits, filed or intervened in 484 cases, engaged in appellate practice, secured \$29.4 million for minorities and women at a major utility company and provided nearly \$31 million in back pay for 40,000 female and minority employees in the steel industry.<sup>131</sup> All of these results included requiring defendants to set hiring and promotion goals consistent with Title VII.<sup>132</sup> Within a decade of its newly minted authority, the EEOC had resolved a number of systemic discrimination cases involving race, national origin and gender discrimination.<sup>133</sup> The EEOC's expanded authority enabled it to continuously increase monetary benefits recovered on behalf of employees, including the period between 1996 and 1998 when it secured over \$169 million in recovery.<sup>134</sup> These numbers pale in comparison to an average of \$24,700 in monetary compensation in sexual harassment cases brought by individual claimants, with half of these claimants receiving less than \$10,000.<sup>135</sup>

Though the EEOC has had its litigation authority since 1972, the majority of state and local agencies still lack this authority, including the D.C. Office of Human Rights, the nation capital's administrative arm.

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128. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L. J. 671, 672–97 (2005).

129. *Id.* at 672–92.

130. *Id.* at 672–92.

131. *Id.* at 680–85.

132. *Id.*

133. *Id.* at 684.

134. *Id.* at 689.

135. McCann & Tomaskovic-Devey, *supra*, note 10.

## V. CONCLUSION

In recent years, there has been an increasing demand for more workplace fairness through the establishment of offices, programs and trainings on diversity, equity, and inclusion. While these efforts play a significant role in workplace fairness, they do not on their own advance workplace rights without systems and infrastructure that can effectively remedy workplace harm. If, as history indicates, our civil rights laws were made only to end segregation—as opposed to achieving equality—and the processes assigned to enforce these laws are broken, how then can we truly expect to reduce discrimination in the workplace? In order to bring the enforcement teeth in alignment with the reality of discrimination in the twenty-first century, rather than just expanding the scope of our laws, we must make meaningful changes to the system in which the substance of the law will depend. For without a robust system, laws are words made permanent on paper with only a whisper of hope.