

Distinguishing Diversity from Inclusion in the Workplace:
Legal Necessity or Common Sense Conclusion?

by

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ABSTRACT

This article examines the intertwined development of voluntary “diversity” and “inclusion” practices in business from their origins in mandated affirmative action legislation and provides separate and distinct definitions for both concepts. Through analysis of a series of reverse employment discrimination cases concerning non-inclusive “diversity” policies, and empirical workplace studies, this article argues that a transition away from “diversity” practices toward “inclusion” strategies is not necessarily a legal requirement but instead a business imperative in a perpetually changing society. The article concludes by providing guidance on creating and implementing effective “inclusion” practices.

INTRODUCTION

“Diversity and inclusion” is among the most echoed phrases in corporate America today.¹ Countless organizations now strive to incorporate “diversity and inclusion” strategies in both recruiting and operational practices under the premise that doing so will enhance productivity, foster an inviting workplace culture, and increase profit margins.² Using the terms “diversity” and “inclusion” either inseparably or interchangeably, these organizations voluntarily engage in targeted hiring initiatives, the implementation of culturally sensitive work-life balance policies, and the formation of employee affinity groups.³

In theory, these actions should bring about the desired results. However, in practice, the failure to distinguish “diversity” from “inclusion” and understand the differences therein leaves many organizations with a variety of unintended challenges counterintuitive to stated goals. While the potential for legal liability under Title VII remains a concern with singular, non-inclusive “diversity” policies⁴, the more significant consequence is the marginalization of all employees resulting in decreased performance and morale across an entire organization.⁵

Modern diversity and inclusion policies or “voluntary affirmative action” plans instituted by employers are often confused with affirmative action requirements for certain employers.⁶ As

¹ Juliet Bourke et al., *From diversity to inclusion*, Global Human Capital Trends 2014, 87–93 (2014) (studying the growing trend of businesses implementing diversity and inclusion programs globally).

² *Id.* at 87.

³ *Id.*

⁴ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S.193 (1979).

⁵ Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, Harvard Business Review, 21-28 (July 2016).

⁶ Megan Belcher et al., *Not All Diversity and Inclusion Programs are Created Equal*, Association of Corporate Counsel Annual Meeting (New Orleans 2014). (distinguishing affirmative action from diversity and inclusion).

voluntary diversity and inclusion practices evolved from government mandated affirmative action orders, employment discrimination legislation, and administrative regulations, establishing historical context and distinctions is essential in defining the terms.⁷

Narrow in scope, affirmative action began by executive order of President John F. Kennedy in 1961 prohibiting employment discrimination and encouraging employment opportunity on the basis of “race, creed, color, or national origin” by only the federal government, its contractors and subcontractors.⁸ The order required that covered employers “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”⁹ Kennedy’s 1961 order additionally established a “Committee on Equal Employment Opportunity” to “scrutinize and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government.”¹⁰

Two years later, Kennedy slightly expanded the scope of his prior order by further prohibiting employment discrimination and requiring affirmative action by all entities seeking federal grants, contracts, loans, insurance and guarantees.¹¹ The initial protected characteristics of “race, creed, color, or national origin” remained unchanged.¹²

The first prohibition of employment discrimination by all employers did not occur until passage by Congress of Title VII to the Civil Rights Act of 1964 (“Title VII”) during the subsequent administration of President Lyndon B. Johnson.¹³ Moreover, Title VII broadened the initial and limited protected characteristics within Kennedy’s executive orders into the ‘protected classes’ existing today: race, color, religion, sex and national origin.¹⁴

During the 54 years since Title VII’s passage, federal legislation further prohibited employment discrimination on additional bases.¹⁵ Prohibited forms of discrimination under Title VII

⁷ *Id.*

⁸ Exec. Order No. 10925, 26 Fed. Reg. 1977 (March 6, 1961). Prior, President Franklin D. Roosevelt issued an executive order prohibiting racial discrimination on the basis of “race, creed, color or national origin” in the national defense industry and establishing the President’s Committee on Fair Employment Practice during World War II. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941). Falling short of affirmative action, Roosevelt’s 1941 order required only “full and equitable participation of all workers in defense industries.” *Id.* Subsequently, over a decade later, President Dwight D. Eisenhower issued Executive Order No. 10479 creating the Government Contract Committee and encouraging employer educational programs to “reduce the basic causes and costs of discrimination in employment.” 18 Fed. Reg. 4899 (August 13, 1953).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Exec. Order No. 11114, 28 Fed. Reg. 6485 (June 22, 1963).

¹² *Id.*

¹³ 42 U.S.C. § 2000e. *See also* Executive Order 11246, 30 Fed. Reg. 12319 (September 24, 1965) (prohibiting employment discrimination and requiring affirmative action by “federal contractors and federally assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year”)

¹⁴ *Id.*

¹⁵ The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, was enacted in 1967; The Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, was enacted in 1990; The Uniform Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. 4301, was enacted in 1994; and the Genetic Information Nondiscrimination Act (“GINA”), 42 U.S.C. 2000ff, was enacted in 2008.

and later federal laws include consideration of protected class membership when making employment decisions¹⁶, granting preferential treatment¹⁷, and implementing employment practices.¹⁸ Though the prohibition on employment discrimination in Title VII and its progeny is clear, notably absent is the inclusion of any requirement that employers take affirmative action when recruiting, hiring and employing individuals based on underrepresented characteristics in the workplace.

Established in 1965 as an enforcement mechanism for Title VII, regulations promulgated by the Equal Employment Opportunity Commission (“EEOC”) aimed to promote voluntary affirmative action through diversity and inclusion practices where Title VII did not.¹⁹ “Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.”²⁰ EEOC regulations also allow for “flexibility in modifying employment systems and practices to comport with purposes” of Title VII including adoption of diversity and inclusion policies to remedy past instances of unequal employment opportunity.²¹

Interestingly, it is not the EEOC’s firm positions on employment equality and remediating prior discrimination motivating employers to adopt diversity and inclusion initiatives in the current global economy.²² Rather, the perceived business benefits of this approach drive corporate decision-making.²³ Diversity and inclusion practices offer, among other tangible gains, competitive advantages in broadening organizational competency, stimulating creativity, and gaining wider market share, all leading to their current prevalence.²⁴

Section I of this article documents the challenges posed to employers by diversity and inclusion programs. Section I*A* specifically explores the legal challenges an employer may face when promoting diversity and inclusion through voluntary affirmative action plans and concludes that while reverse discrimination lawsuits are possible, they do not pose a significant threat to employers. Section I*A1* focuses on the standards set by the Supreme Court for asserting employment discrimination claims and examines three central reverse discrimination cases where these seemingly clear standards are complicated by varying interpretations. Section I*A2* then considers the difficulty of the United States Circuit Courts in applying the Supreme Court’s rulings. This discussion yields multiple, often-inconsistent analyses with the net effect of diminishing the potency and efficacy of reverse employment discrimination claims spawned from an employers’ diversity and

¹⁶ 42 U.S.C. §§ 2000e-2(a) & 2(d).

¹⁷ 42 U.S.C. § 2000e-2(m).

¹⁸ 42 U.S.C. § 2000e-2(m).

¹⁹ 29 C.F.R. § 1608.

²⁰ 29 C.F.R. § 1608.1(c).

²¹ See 29 C.F.R. §§ 1607.13, 1608.3, 1608.4. Employers may also be required to adopt an affirmative action plan pursuant to government regulation. For example, federal contractors may be subject to the affirmative action requirement of Executive Order 11246, which is enforced by the U.S. department of Labor’s Office of Federal Contract Compliance Programs, and/or affirmative action requirements of state and local governments. Executive Order No. 11246, available at <http://www.dol.gov/compliance/laws/comp-eeo.htm#overview> (last visited Mar. 8, 2018). In addition, race-conscious efforts may be required when court-ordered after a finding of discrimination or negotiated as a remedy in a consent decree or settlement agreement. See, e.g., *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 448-49 (1986) (noting that Congress gave lower courts broad power under Title VII to craft the most complete relief possible to remedy discrimination, including the power to fashion affirmative action relief).

²² Josh Bersin, *Why Diversity And Inclusion Will Be A Top Priority For 2016*, Forbes (2015), <https://www.forbes.com/sites/joshbersin/2015/12/06/why-diversity-and-inclusion-will-be-a-top-priority-for-2016/#78880e8f2ed5> (last visited Mar 9, 2018).

²³ Anka Wittenberg, *Why Diversity Is Good for Your Bottom Line*, Fortune (2017), <http://fortune.com/2017/01/18/leadership-diversity-bottom-line-career-advice/> (last visited Mar 9, 2018).

²⁴ *Id.*

inclusion policies. By examining workplace studies, Section *IB* introduces the more viable internal business challenges employers face in promoting diversity and inclusion. It is observed that employer diversity and inclusion initiatives regularly disenchant majority members of an organization while decreasing, rather than increasing, its diversity and inclusivity.

Section II of this article aims to provide deeper understanding and solutions to the questions raised throughout Section I and identifies the failure of employers to significantly separate diversity from inclusion as a central culprit for the ineffectiveness of many diversity and inclusion programs. Based on human resources' training materials and sociological research, Section *IIA* proposes distinct definitions for both diversity and inclusion. Finally, Section *IIB* concludes that strategies founded not solely on diversity, but instead on inclusion with diversity as one of several necessary components; help achieve an organization's business and ethical goals while also suggesting practical examples.

I. CHALLENGES TO DIVERSITY AND INCLUSION PRACTICES

By encouraging the adoption of voluntary diversity and inclusion programs in the spirit of Title VII or for business purposes, the EEOC and employers following suit create a legal tension.²⁵ Specifically, when most people think of discrimination in the workplace, they imagine a scenario where a supervisor who is a member of a “majority” group takes adverse action against an applicant or employee who is a member of a “minority” group.²⁶ It is important to remember that the law protects all individuals from discrimination in the workplace, even if that discrimination constitutes reverse discrimination.²⁷ The very laws and corporate policies meant to address discrimination against historically underrepresented groups often prompt claims of reverse discrimination.²⁸ Under this theory, historically dominant groups receive unfair and discriminatory treatment as a direct result of affirmative action and similar, voluntary diversity and inclusion programs.²⁹ For example, in response to an employer's diversity and inclusion policy, a Caucasian plaintiff may assert that he or she suffered racial employment discrimination despite membership in a racial majority.³⁰ An extreme political climate, as experienced currently, generally proliferates an increase in such legal claims and public debate.³¹

²⁵ See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976) (stating that Title VII's prohibition of employment discrimination is not limited to members of a specific race).

²⁶ Ryan Mainhardt & William Volet, *The First Prong's Effect on the Docket: How the Second Circuit Should Modify the McDonnell Douglas Framework in Title VII Reverse Discrimination Claims*, 30 Hofstra Lab. & Empl. L.J. 219, 219-20 (2012).

²⁷ *Id.* at 220-27

²⁸ Frederick R. Lynch, *Invisible Victims: White Males and the Crisis of Affirmative Action* (1989) (exploring the negative impact of voluntary affirmative action policies on white males from the perspective of affected individuals, those close to them, their respective institutions, and the media).

²⁹ *Id.* at 51-55.

³⁰ Shirley W. Bi, *Race-Based Reverse Employment Discrimination Claims: A Combination of Factors to the Prima Facie Case for Caucasian Plaintiffs*, 2016 Cardozo L. Rev. de novo 40.

³¹ In 2017, under President Donald J. Trump's direction, the Justice Department began investigating universities maintaining affirmative action plans that may discriminate against white applicants or students. Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, The New York Times (2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> (last visited Mar 22, 2018); David A. Graham, *Why the Justice Department Is Targeting Affirmative Action*, The Atlantic (2017), <https://www.theatlantic.com/politics/archive/2017/08/the-justice-department-embraces-white-grievance/535683/> (last visited Mar 22, 2018); Though not directly related, the issue of affirmative action in higher education closely parallels voluntary

The Supreme Court has not yet squarely addressed the question of whether promoting diversity can be a sufficient justification for an employer considering race, or another protected characteristic, when making an employment decision. Both lower courts and businesses must instead infer judicial guidance from the Supreme Court's standards for interpreting Title VII violations and narrow holdings concerning voluntary diversity and inclusion policies.³² What results is an uneven judicial and corporate application of Title VII's protections that inhibits successful reverse discrimination claims.³³

Although the threat of successful reverse discrimination claims against employers for maintaining diversity and inclusion initiatives appears overstated, the practical effect in the workplace seems understated.³⁴ While majority employees impacted by diversity and inclusion, policies may encounter difficulty in successfully seeking legal address, emotional and, as a result, business consequences, remain.³⁵ For instance, a white male employee may feel his job security threatened when he observes his employer expressing a preference for hiring candidates from underrepresented populations.³⁶ This, in turn, can lead to decreased productivity and morale for that employee.³⁷ Conversely, a minority employee recently hired under a diversity and inclusion initiative may feel unwelcome or 'token' upon arrival.³⁸ In other words, this employee may feel that he or she was only hired because of some characteristic other than experience, skill or merit. This too can lead to feelings of isolation and a lack of desire to contribute.³⁹

A. Legal Challenges

1. Reverse Employment Discrimination in the Supreme Court

affirmative action in an employment setting and generates passionate argument both for and against diversity and inclusion policies generally. See Jillian Berman, *White men who can't get jobs say they're being discriminated against*, Market Watch (2018), <https://www.marketwatch.com/story/that-google-engineer-isnt-alone-other-white-men-say-theyre-discriminated-against-2018-01-09> (last visited Mar 22, 2018) (discussing significant percentage of white men in STEM professions who feel reverse discrimination is barrier to employment opportunity); Vann R. Newkirk II, *The Myth of Reverse Racism*, The Atlantic (2017), <https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/> (last visited Mar 22, 2018) (contrasting responses of white men expressing victimization through reverse discrimination with data indicating their disproportionate receipt of preference).

³² Bi, *supra* note 30, at 42-43.

³³ *Id.*

³⁴ Glenn Llopis, *Why Most Corporate Diversity Programs Are Wrong-headed*, Forbes (2011), <https://www.forbes.com/sites/glennllopis/2011/02/21/why-most-corporate-diversity-programs-are-wrong-headed/#621ef6638fa8> (last visited Mar 22, 2018).

³⁵ Tessa L Dover, Brenda Major & Cheryl R Kaiser, *Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men*, Harvard Business Review (2016), <https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they-make-white-men-feel-threatened> (last visited Mar 22, 2018).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

In evaluating a Title VII claim, the Supreme Court has recognized two separate categories of employment discrimination.⁴⁰ The first, “disparate treatment”, occurs when an employer intentionally discriminates based on an individual’s protected characteristic or class.⁴¹ In *McDonnell Douglas Corp. v. Green*, the Court articulated a burden-shifting framework for successfully asserting and defending against allegations of disparate treatment discrimination under Title VII.⁴² The plaintiff bears the initial burden of proving his or her “*prima facie*” case.⁴³ Upon doing so, the burden of proof then shifts to the defendant who must set forth a “legitimate, non-discriminatory reason” for his or her actions.⁴⁴ Thereafter, the burden of proofs shifts once more to the plaintiff who must prove that the submissions by defendant are merely a “pretext” for behavior actually motivated by a discriminatory purpose.⁴⁵

The second category of employment discrimination arising under Title VII, “disparate impact”, occurs when an employer’s action or policy appears neutral on its face but, in practice, operates to the detriment of individuals with a protected characteristic or membership in a protected class at a disproportionate rate.⁴⁶ The Supreme Court set forth a distinct analysis for deciding a disparate impact claim in *Griggs v. Duke Power Co.*⁴⁷ Here, a plaintiff must establish a more simplified version of the *prima facie* case introduced in the *McDonnell Douglas* burden-shifting framework.⁴⁸ An employer defendant need only then present a showing of “business necessity” in response.⁴⁹ Thereafter, to prevail, the plaintiff must put forward a “less discriminatory alternative” that serves the defendant’s purported business necessity.⁵⁰

⁴⁰ See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54 (2003) (“This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact”).

⁴¹ *Id.* at 52-53.

⁴² 411 U.S. 792, 802-03 (1973).

⁴³ *Id.* In order to prove his or her *prima facie* case of disparate treatment employment discrimination, a plaintiff must show that: (1) he or she is a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the employment opportunity or benefit at issue, and; (4) the employer continued to seek individuals with similar qualifications to plaintiff for the employment opportunity or benefit at issue. *Id.*

⁴⁴ *Id.* Both Title VII and the ADEA allow for a bona fide occupational qualification defense where consideration of a protected characteristic by an employer is “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. §§ 2000e-2(e); 29 U.S.C. §623(f)(1). Though a bona fide occupational qualification based on race, color, or national origin may never constitute a legitimate, non-discriminatory reason for an employer’s discriminatory actions, the Supreme Court has found determinations based on sex and age where safety is a concern to be acceptable. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (allowing state penitentiary system to grant preference to male correction officer applicants in prison block for male sexual offenders under Title VII); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985) (permitting airline to enforce mandatory retirement age for pilots under ADEA).

⁴⁵ *Id.* A fair opportunity for plaintiff to prove that a defendant employer’s legitimate, non-discriminatory reason for an employment decision is merely pretextual does not obfuscate a plaintiff’s burden to prove that the employer’s actions were motivated by discrimination. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 514-20 (1993). A plaintiff must always put forth an employer’s discriminatory intent to prevail in a Title VII claim. *Id.*

⁴⁶ *Raytheon*, 540 U.S. at 54.

⁴⁷ 401 U.S. 424, 430-36 (1971).

⁴⁸ Lori B. Rassas, *Employment Law: A Guide to Hiring, Managing, and Firing for Employers and Employees*, 36 (3rd ed. 2017) (“The plaintiff...must establish a *prima facie* case of discrimination by presenting an employment practice or decision that...is neutral on its face; and...has a disproportionate impact on members of a protected class.”).

⁴⁹ *Id.* at 37.

⁵⁰ *Id.*

The Supreme Court wrestled with the application of its own Title VII jurisprudence to a reverse employment discrimination claim in *United Steelworkers v. Weber*.⁵¹ *Weber* involved an affirmative action plan collectively bargained for between a union and its members.⁵² Specifically, the agreed upon plan dealt with a craft training program established at a Gramercy, Louisiana steel plant where trainees were selected based primarily on seniority.⁵³ However, white and black trainees were to also be selected for the program on a one-to-one basis until “the percentage of skilled black craft workers in the Gramercy plant approximated the percentage of blacks in the local labor force.”⁵⁴ When plaintiff, a white male, was not selected for the training program, he filed suit under Title VII alleging reverse employment discrimination.⁵⁵

In holding that the selection process at issue did not violate Title VII, the Court’s majority omitted any analysis, or even mention, of its prior rulings in *McDonnell Douglas* and *Griggs* and explicitly limited its holding.⁵⁶ Similar to subsequent EEOC guidance, the majority relied heavily on the legislative intent of Title VII to foster equal opportunity while remedying historical inequality:

[W]e cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause “employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history,” cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges. It would be ironic indeed, if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had “been excluded from the American dream for so long,” constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁵⁷

In other words, if any employment decision based on a protected characteristic is prohibited by Title VII, the legislation is altogether futile and also contrary to legislative intent.⁵⁸ Moreover, the majority added that the selection process in *Weber* was temporary in nature and did not prohibit the advancement of white employees.⁵⁹

In his dissent, Chief Justice Burger addresses the central dilemma raised by the implementation of any voluntary affirmative action plan under Title VII.⁶⁰ Relying on *Griggs*, Burger argues

⁵¹ 443 U.S. 193.

⁵² *Id.* at 197-200.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 200 (“We emphasize at the outset the narrowness of inquiry...since the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act.”).

⁵⁷ *Id.* at 204.

⁵⁸ *Id.* at 205-06.

⁵⁹ *Id.* at 208-09.

⁶⁰ *Id.* at 216-18 (Burger, C.J., dissenting).

that Title VII operates as a complete bar to any employment discrimination regardless of a plaintiff's minority or majority status and should, therefore, be evenly applied.⁶¹ He continued that if Congress intended instead to specifically increase the percentage of minority laborers in the workforce, it was within Congress's legislative power to explicitly do so.⁶²

Almost a decade after *Weber*, *Johnson v. Transportation Agency, Santa Clara County* again presented the Supreme Court with the question of whether a voluntary affirmative action program discriminated against historically dominant groups in violation of Title VII.⁶³ Distinct from *Weber* however, *Johnson* did not involve a policy negotiated by a union and its members.⁶⁴ Rather, it focused on a county transportation agency's consideration of an applicant's gender as one factor when making hiring and promotion decisions for positions where women were disproportionately underrepresented.⁶⁵ The stated goal for considering gender "was to attain a workforce whose composition reflected the proportion of minorities and women in the area labor force."⁶⁶ *Johnson*, a male plaintiff, alleged that despite his higher score during the interview portion of the application process for promotion, a female applicant received preferential treatment in receiving the position instead due to her gender being the determinative factor.⁶⁷

The Court's majority ruled against the plaintiff, relying primarily on the prior decision in *Weber* for determining that the affirmative action policy at issue did not violate Title VII.⁶⁸ Unlike in *Weber* however, the *Johnson* majority invoked the *McDonnell Douglas* burden-shifting framework.⁶⁹ Analyzing the legitimacy of the defendant transportation agency's non-discriminatory reason for considering gender as a factor in employment decisions, the second phase of the *McDonnell Douglas* inquiry, the *Johnson* majority fashioned the *Weber* holding into a litmus test of sorts.⁷⁰ Accordingly, in order for consideration of gender in employment decisions to constitute a legitimate non-discriminatory reason, the employer must show a "manifest imbalance" of representation in "traditionally segregated job categories" and that it does not "unnecessarily trammel the rights of male employees or create an absolute bar to their advancement."⁷¹

In considering the formalized *Weber* factors, the *Johnson* majority noted that no women were employed in the position denied to the plaintiff evidencing a significant underrepresentation.⁷² Additionally, consideration of gender was neither a determinative factor nor a strict quota and, therefore, men were not inhibited from successfully seeking employment or promotion.⁷³

⁶¹ *Id.* at 218.

⁶² *Id.* at 218-19.

⁶³ 480 U.S. at 619.

⁶⁴ *Id.* at 620-26.

⁶⁵ *Id.*

⁶⁶ *Id.* at 616.

⁶⁷ *Id.* at 620-26.

⁶⁸ *Id.* at 630-31.

⁶⁹ *Id.* at 626.

⁷⁰ *Id.* at 628, 630.

⁷¹ *Id.*

⁷² *Id.* at 636.

⁷³ *Id.* at 638. The affirmative action plan in *Johnson* closely mirrors those implicated in both *Gratz v. Bollinger* and *Grutter v. Bollinger* dealing with admissions in public higher education. 539 U.S. 244 (2003); 539 U.S. 306 (2003). In *Gratz*, the Court found that a state university's admission policy violated the Equal Protection Clause because it awarded an automatic point increase to all racial minorities akin to a quota rather than making individual determinations. 539 U.S. 244. In *Grutter* however, a policy similar to that one in *Johnson*, allowing for special consideration of racial minority status as one factor in admission decisions, did not violate the Equal Protection Clause. 539 U.S. 306.

Moreover, in a departure from *Weber*, the *Johnson* majority rejected the permanency of the policy reasoning that it intended to attain rather than maintain a balanced workforce.⁷⁴

Johnson's concurrences and dissent further complicate the analysis for a reverse discrimination claim under Title VII. Justice Stevens joined in the majority opinion but concurred primarily "to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups."⁷⁵ Conversely, Justice Scalia's dissent chided the majority for essentially ensuring employment discrimination in its crusade to eradicate it.⁷⁶ Instead of creating equal employment opportunity where it did not previously exist Justice Scalia argued, the majority's interpretation of Title VII strived to impermissibly redefine social attitudes by disturbing traditional gender roles where a need to do so did not exist.⁷⁷ Most interestingly, Justice Scalia also observed the extension of the Court's limited holding in *Weber*, applying to a private employer, to include public employers not mandated to adopt affirmative action policies as well.⁷⁸

The Supreme Court's confounding holdings in reverse employment discrimination claims came to a head in 2009.⁷⁹ In *Ricci*, the Court was presented with the issue of whether engaging in intentional, disparate treatment employment discrimination was permissible when an employer does so to avoid engaging in unintentional, disparate impact employment discrimination.⁸⁰ *Ricci* dealt, therefore, not only with the routinely acknowledged tension where reverse employment discrimination may occur when an employer seeks to remedy past discrimination with a voluntary affirmative action plan, but also with the seemingly conflicting intents behind disparate treatment and disparate impact legislation when pitted against one another.⁸¹

A decade later, upon revisiting the enactment of affirmative action based admissions policies in public higher education, the Court required that strict scrutiny be applied in evaluating any such plan and requiring that colleges and universities demonstrate the remedial motivation behind it. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013). Although outside the employment context, businesses confused by the Supreme Court's Title VII jurisprudence often refer to the cases discussed herein for guidance when crafting diversity and inclusion policies thus warranting their reference in this discussion. See Robert K. Robinson, GERALYN McCLURE FRANKLIN & KAREN EPERMANIS, *The Supreme Court Rulings in Grutter v. Bollinger and Gratz v. Bollinger: The Brave New World of Affirmative Action in the 21st Century*, 36 Public Personnel Management 33–49 (2007). See also discussion *infra* note 78.

⁷⁴ *Id.* at 639.

⁷⁵ *Id.* at 642 (Stevens, J., concurring).

⁷⁶ *Id.* at 658 (Scalia, J., dissenting).

⁷⁷ *Id.* at 664.

⁷⁸ *Id.* at 667–71. Recognizing that the *Johnson* majority extended *Weber* to include public employers, Justice Scalia suggests that *Weber* should be strictly limited to private employers and that the allegedly discriminatory acts of public employers should instead be evaluated under the Equal Protection Clause as seen later in *Gratz*, *Grutter*, and *Fisher* dealing with affirmative action in higher education. See discussion *supra* note 73. While outside the scope of this article, the application of Title VII instead of Equal Protection in public sector employment discrimination claims merits further inquiry and discourse. See Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. Chi. Legal F. 95 (documenting the cyclical divergence and convergence of Title VII and Equal Protection Clause interpretations in employment discrimination cases over time); Allen R. Camp, *Ricci v. Destefano and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 Cap. U. L. Rev. 1 (2011) (equating Title VII and Equal Protection Clause while examining contradictory effect of creating reverse discrimination when aiming to end discrimination in disparate treatment cases).

⁷⁹ *Ricci*, 557 U.S. 557.

⁸⁰ *Id.* at 591.

⁸¹ *Id.* Although the common standard for evaluating a disparate impact discrimination claim was first articulated in *Griggs*, it was later modified by the Supreme Court. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

Specifically at issue was the decision of a city fire department to discard the results of an examination administered to fill vacant captain and lieutenant positions when it realized that white candidates significantly outperformed black candidates.⁸² The white candidates filed suit under Title VII alleging the city fire department's actions constituted disparate treatment employment discrimination.⁸³ In response, the city fire department argued that no matter what action it took, it would still be subject to liability.⁸⁴ Essentially, had it not discarded the examination results, the city fire department could instead face a suit brought by black candidates alleging disparate impact employment discrimination and it asserted that probability as a defense to the claims of disparate treatment.⁸⁵

The *Ricci* majority rejected the city fire department's contention in attempting to reconcile the two recognized categories of employment discrimination at odds with one another.⁸⁶ However, it did not ignore the possibility that fear of disparate impact liability could potentially serve as a defense to disparate treatment liability.⁸⁷ Accordingly, the *Ricci* majority adopted the "strong basis in evidence" standard articulated in its prior Equal Protection jurisprudence to resolve the issue: "The Court has held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."⁸⁸ By applying the strong basis in evidence standard in a Title VII context, the *Ricci* majority sought to accomplish three distinct goals.⁸⁹ First, it aimed to harmonize the disparate treatment and disparate impact provisions while ensuring neither was rendered dead letter law.⁹⁰ Second, it intended to create a stringent requirement employers must meet when engaging in voluntary affirmative action for the purpose of remedying past inequality to avoid a proliferation of employers freely discriminating to avoid discriminating without

As to business necessity for a practice that disproportionately excludes members of minority groups, *Wards Cove* held, the employer bears only the burden of production, not the burden of persuasion. And in place of the instruction that the challenged practice "must have a manifest relationship to the employment in question," *Wards Cove* said that the practice would be permissible as long as it "serve[d], in a significant way, the legitimate employment goals of the employer."

Ricci, 557 U.S. at 625 (citing *Wards Cove*, 490 U.S. at 659-60) (citations omitted). In 1991, the requirements laid out in *Wards Cove* were superseded by the Civil Rights Act of 1991 when it formally codified the initial *Griggs* disparate impact standard. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁸² *Id.* at 563-66, 574.

⁸³ *Id.* at 562-63.

⁸⁴ *Id.* at 580-81.

⁸⁵ *Id.*

⁸⁶ *Id.* at 581-82 (stating that acceptance of employer's "good-faith belief" for asserting fear of disparate impact liability as defense to disparate treatment claim "would amount to a *de facto* quota system").

⁸⁷ *Id.* at 582-84.

⁸⁸ *Id.* at 582-83 (citing *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277 (1986)). In *Wygant*, white public school teachers challenged actions taken pursuant to the layoff provision in collective bargaining agreement based on seniority but also requiring "that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." 476 U.S. at 270. The Court applied the Equal Protection Clause in lieu of Title VII because the plaintiffs failed to meet the "jurisdictional prerequisite to a Title VII claim by filing discrimination charges with the Equal Employment Opportunity Commission and held the defendants actions unconstitutional as they were not supported by a strong basis in evidence. *Id.* at 271, 277.

⁸⁹ *Id.* at 580-83.

⁹⁰ *Id.* at 580 ("by codifying the disparate-impact provision in 1991, Congress has expressly prohibited both types of discrimination. We must interpret the statute to give effect to both provisions where possible").

limit.⁹¹ Lastly, it hoped to provide opportunity for an employer’s voluntary compliance efforts to promote employment equality.⁹²

The city fire department in *Ricci* did not have a strong basis in evidence for concluding that failure to discard the disproportionate examination results would subject it to disparate impact liability per the Court’s majority.⁹³ The *Ricci* majority concluded that based on the evidence, the examination, created by an independent organization reputed for designing such examinations, was not only fairly and validly constructed, administered, and assessed, but also produced to reduce rather than increase any adverse effect on protected classes.⁹⁴ Moreover, the *Ricci* majority noted that, under the third prong of *Griggs*, the city fire department also failed to establish a strong basis in evidence that no less discriminatory alternative to discarding the examination results existed.⁹⁵ Therefore, it could not stand behind the test results alone to excuse itself from liability for disparate treatment.⁹⁶

The dissent, on the other hand, criticized the methods utilized in designing the examination at issue and condemned the majority’s strong basis in evidence standard for frustrating the purpose of anti-employment discrimination legislation.⁹⁷ Such a high burden would chill employers’ voluntary efforts at eradicating discrimination altogether the dissent argued.⁹⁸ Relying on the holdings in *Griggs* and *Johnson*, the dissent proposed instead questioning whether an employer merely had “good cause to believe the device would not withstand examination of business necessity” as a more appropriate standard.⁹⁹ The majority’s interpretation and standard, according to the dissent, unnecessarily juxtaposed disparate treatment and disparate impact doctrine in fashioning an “enigmatic” result whereas simply adhering to the Court’s prior precedent and EEOC guidance produced both judicial and legislative consistency as well as equal employment opportunity in the spirit of Title VII.¹⁰⁰

2. Reverse Employment Discrimination in the Circuit Courts

⁹¹ *Id.* at 581 (“A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination.”) *See also supra* note 86.

⁹² *Id.* at 583 (“The standard leaves ample room for employers’ voluntary compliance efforts, which are essential to the statutory scheme and to Congress’s efforts to eradicate workplace discrimination.”).

⁹³ *Id.* at 587.

⁹⁴ *Id.* at 587-88.

⁹⁵ *Id.* at 589-90.

⁹⁶ *Id.* at 587.

⁹⁷ *Id.* at 611 (Ginsburg, J., dissenting)(“New Haven, the record indicates, did not closely consider what sort of practical examination would “fairly measure the relative fitness and capacity of the applicants to discharge the duties of a fire officer.”)(internal quotation marks omitted).

⁹⁸ *Id.* at 629 (“As a result of today’s decision, an employer who discards a dubious selection process can anticipate costly disparate-treatment litigation in which its chances for success—even for surviving a summary-judgment motion—are highly problematic.”)

⁹⁹ *Id.* at 626.

¹⁰⁰ *Id.* at 624 (“Neither Congress’ enactments nor this Court’s Title VII precedents...offer even a hint of “conflict” between an employer’s obligations under the statute’s disparate-treatment and disparate-impact provisions. Standing on an equal footing, these twin pillars of Title VII advance the same objectives: ending workplace discrimination and promoting genuinely equal opportunity.”)(citations omitted).

Receiving unclear and sometimes conflicting guidance from the Supreme Court, the United States Circuit Courts experience difficulty when applying Title VII standards in reverse employment discrimination cases.¹⁰¹ These challenges include both disparate treatment and disparate impact inquiries and significant ‘Circuit splits’ have emerged in analyzing either category of claim under Title VII.¹⁰² The different approaches to disparate treatment actions revolve primarily around the McDonnell Douglas burden-shifting framework’s first prong; that plaintiff must prove his or her *prima facie* case.¹⁰³ Specifically, variations arise when determining whether a Caucasian plaintiff is a member of a protected class despite his or her historically majority racial status.¹⁰⁴ Nearly all Circuits have adopted one of the following three standards to evaluate this question: “background circumstances”, “protected class”, or “sufficient evidence”.¹⁰⁵ With disparate impact, analyses diverge when confronted with the strong basis in evidence requirement articulated in *Ricci*, itself an offshoot of the showing of business necessity required by *Griggs* and codified by the Civil Rights Act of 1991.¹⁰⁶ More precisely, some Circuits require an employer to demonstrate varying combinations of statistical significance for potential disparate impact discrimination and a documented history of past discrimination for an employer to successfully assert a *Ricci* defense to claims of disparate treatment.¹⁰⁷ Other Circuits have yet to provide any clarification at all for what constitutes a strong basis in evidence.¹⁰⁸ What results, therefore, from reverse employment discrimination suits in the Circuit Courts generally are inconsistent outcomes requiring vastly different burdens for a plaintiff or employer and rendering any reasonably accurate prediction of success a futile pursuit.

¹⁰¹ Bi, *supra* note 30 at 48.

¹⁰² Bi, *supra* note 30 at 47-48; Erica E. Hoodhood, *The Quintessential Employer’s Dilemma: Combating Title VII Litigation by Meeting the Elusive Strong Basis in Evidence Standard*, 45 Val. U. L. Rev 111, 143-46 (2010).

¹⁰³ See discussion *supra* note 43.

¹⁰⁴ Bi, *supra* note 30 at 47-48.

¹⁰⁵ *Id.* “The Sixth, Eighth, and the District of Columbia Circuits all require that a plaintiff provide background circumstances to prove that the defendant-employer discriminated against members of the majority race.” *Id.* at 48 (internal quotation marks omitted). The First, Fifth, Ninth and Eleventh Circuits instead engage in a racially neutral reading of Title VII under which white plaintiffs asserting disparate treatment claims are automatically presumed members of a protected class based on their race. *Id.* at 52. “The sufficient evidence approach has been adopted by the Third, Fourth, and Tenth Circuits.” *Id.* at 54. The Seventh Circuit previously utilized the background circumstances approach but now analyzes disparate treatment claims under a standard more closely resembling the sufficient evidence approach. See discussion Bi, *supra* note 30, at n.111. The Second Circuit has yet to adopt a standard in assessing reverse disparate treatment discrimination claims. Bi, *supra* note 30 at 56-57; see also Mainhardt & Volet, *supra* note 26 at 261-62 (advocating for adoption of sufficient evidence approach in the Second Circuit).

¹⁰⁶ Hoodhood, *supra* note 102 at 143-46. The Circuit Courts applied differing interpretations of the strong basis in evidence standard even before *Ricci* was decided. *Id.* at 130-34. Guided by the Supreme Court’s holding in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the various interpretations included: a showing of statistical significance, a documented history of discrimination, evidence approaching “a prima facie case of a constitutional or statutory violation”, and “where cities entered into consent decrees to ensure that minorities were not being underutilized.” *Id.* In *Ricci* however, the Supreme Court held “that a prima facie case of a statutory violation is not enough to satisfy the strong basis in evidence standard” and also cast doubt that mere statistical significance alone could satisfy the same. *Id.* at 135, 146-48. See also Cheryl I. Harris, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. Rev. 73, 135 (2010)(posing inquiry based on *Ricci* as to what constitutes a strong basis in evidence).

¹⁰⁷ *Id.* (“Likewise, the circuit courts have not provided a uniform standard of application, but the First and Sixth Circuits have identified situations where employers satisfied the standard with some specificity.”)

¹⁰⁸ *Id.* (“The “strong basis in evidence” standard has not been clearly defined by any federal court.”)

a. Disparate Treatment in the Circuit Courts

The D.C. Circuit Court in *Parker v. Baltimore and Ohio Railroad Company* was faced with the Title VII claim of a white male railroad conductor and trainman allegedly denied the position of locomotive fireman on the basis of his gender and race over a period of three years.¹⁰⁹ The Court applied both *Weber* and *McDonnell Douglas* to the plaintiff's claim in denying the defendant railroad's motion for summary judgment. In doing so, the Court adjusted the *McDonnell Douglas* framework, framed by the Supreme Court around a plaintiff's racial minority status, to fit a disparate treatment reverse employment discrimination claim brought by a Caucasian plaintiff.¹¹⁰ The background circumstances approach laid out by the D.C. Circuit allows a majority plaintiff, upon a showing of circumstantial evidence, to meet his or her *prima facie* burden under *McDonnell Douglas* when "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."¹¹¹ The Court reasoned that by requiring historically majority plaintiffs to meet this higher burden but allowing the use of circumstantial evidence to do so, the intent behind Title VII was properly and justly served.¹¹² It effectively balanced, the Court stated, Title VII's goal of repairing historical discrimination in employment opportunity with its protection of individuals representing all races.¹¹³

In contrast, other Circuit Courts engage in a neutral interpretation of *McDonnell Douglas* where, no matter a plaintiff's race, he or she is considered a member of a protected class when alleging discrimination on that basis under the plain language of Title VII.¹¹⁴ In the Eleventh Circuit, *Wilson v. Bailey* involved white deputy sheriffs alleging gender and racial disparate treatment employment discrimination when denied promotion to sheriff's sergeant.¹¹⁵ At issue was a process by which a list of candidates for promotion was supplemented with the highest scoring female and minority candidates "in proportion to their numbers within the applicant pools."¹¹⁶ The list was then forwarded to the sheriff who would selectively grant promotions to included candidates based on numerous criterion unrelated to gender or race.¹¹⁷ The Eleventh Circuit ruled against the plaintiffs, finding that gender and race were not dispositive factors in any employment decisions.¹¹⁸ Most interestingly however, in evaluating the plaintiffs' claim, the Court ignored their majority gender racial statuses altogether.¹¹⁹ The Court simply applied *McDonnell Douglas* and considered plaintiffs as members of a protected class simply because they alleged disparate treatment discrimination based on gender and race.¹²⁰

¹⁰⁹ 652 F.2d 1012, 1013 (D.C. Cir. 1981).

¹¹⁰ *Id.* at 1015-17.

¹¹¹ *Id.* at 1017-18.

¹¹² *Id.* at 1017.

¹¹³ *Id.* Shirley Bi considers arguments against adoption of the background circumstances approach. *See* Bi, *supra* note 30 at 58-61. Specifically, she posits that in requiring a higher burden for one class of plaintiffs based on their race, the entire purpose behind Title VII is arguably frustrated. *Id.*

¹¹⁴ Bi, *supra* note 30 at 52-54.

¹¹⁵ 934 F.2d 301, 303 (11th Cir. 1991).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 304-05.

¹¹⁹ *Id.* at 304.

¹²⁰ *Id.* Ryan Mainhardt and William Volet put forth a slightly different perspective on *Wilson* concluding that it is not necessarily an articulated standard for evaluating a reverse disparate treatment discrimination claim under Title VII but rather a strong rejection of the background circumstances approach. *See* Mainhardt & Volet, *supra* note 26 at 238-

Yet another approach for applying *McDonnell Douglas* to a reverse disparate treatment discrimination claim emerged in the Third Circuit when it confronted the allegations of a white male postal worker that he was denied a promotion based on his race.¹²¹ The discriminatory act at issue in *Iadimarco* involved the promotion of a black female postal worker to one of three superior opportunities.¹²² White males received the two other promotions and a desire to “diversify the workplace”, plaintiff contended, resulted in his denial despite receiving a “superior” rating in every category considered.¹²³ Ruling in favor of the plaintiff, the *Iadimarco* Court soundly rejected the background circumstances standard adopted in *Parker* as unclear, overly burdensome and potentially an insurmountable obstacle to a white plaintiff under Title VII.¹²⁴ Accordingly,

rather than require “background circumstances” about the uniqueness of the defendant employer, a plaintiff who brings a “reverse discrimination” suit under Title VII should be able to establish a prima facie case in the absence of direct evidence of discrimination by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff “less favorably than others because of [his] race, color, religion, sex, or national origin.”¹²⁵

In embracing the sufficient evidence standard, the Court reasoned that any plaintiff in a disparate treatment discrimination case, regardless of race, would at the very least receive some judicial consideration of his or her claims as the initial component of a threshold inquiry personifying the *McDonnell Douglas* framework in the spirit of Title VII.¹²⁶

b. Disparate Impact in the Circuit Courts

In the same way the Circuit Courts have struggled when applying *McDonnell Douglas* in reverse disparate treatment discrimination cases, they have struggled analogously when applying

39. Shirley Bi also accounts for complications created by the protected class approach including its “oversimplification of the *McDonnell Douglas* framework” that could lead to “overcrowding federal dockets with baseless claims” and the production of counterintuitive results under Title VII. See Bi, *supra* note 30 at 63-68.

¹²¹ *Iadimarco v. Runyon*, 190 F.3d 151, 154-55, 163 (3d Cir. 1999).

¹²² *Id.* at 154-55.

¹²³ *Id.*

¹²⁴ *Id.* at 161-63.

¹²⁵ *Id.* at 163. The sufficient evidence approach adopted by the Third Circuit in *Iadimarco* was originally articulated by the Tenth Circuit as part of a two-prong inquiry that also included the background circumstances approach. *Notari v. Denver Water Dep’t.*, 971 F.2d 585, 589-90 (10th Cir. 1992). In *Notari*, the Court allowed for a majority plaintiff to prove his or her *prima facie* case under *McDonnell Douglas* through either background circumstances or sufficient evidence. *Id.* In adopting only the sufficient evidence standard, the *Iadimarco* Court condemned the background circumstances requirement as an affront to Title VII. *Iadimarco*, 190 F.3d at 160. See also discussion *infra* note 126.

¹²⁶ *Id.* at 160. Mainhardt and Volet recognize the *Notari* approach’s value of meeting in the middle between *Parker* and *Iadimarco*. Mainhardt and Volet, *supra* note 26 at 258-59 (“The approach set forth in *Notari* presents an interesting compromise between *Parker* and *Iadimarco*... While direct evidence of background circumstances may not be required, the plaintiff is still not entitled to the presumption of discrimination implicit in the *McDonnell Douglas* framework.”) Nevertheless, they advocate for an adoption of the *Iadimarco* standard as the most evenhanded yet contextually appropriate application of Title VII to a reverse disparate treatment discrimination claim. *Id.* at 261-62. Shirley Bi, however, points out that the sufficient evidence standard invites Courts to improperly legislate diversity from the bench. Bi, *supra* note 30 at 69-70. She advocates instead for a “combination of factors” approach more closely resembling the *Notari* standard. *Id.* at 71-72.

Ricci to reverse disparate impact discrimination cases.¹²⁷ More precisely, they endeavor to define what constitutes a strong basis in evidence for engaging in disparate treatment discrimination.¹²⁸ After *Ricci*, only the First and Sixth Circuits were left with an interpretation consistent with the Supreme Court's.¹²⁹ In *Rutherford v. City of Cleveland*, the Sixth Circuit rejected the claims of white police officers alleging disparate treatment discrimination resulting from a city police department's race based hiring practices.¹³⁰ The Court determined that the city police department successfully demonstrated a strong basis in evidence through both citing a prior court finding of past discrimination and also presenting statistical evidence showing "a gross disparity exists between the expected percentage of minorities selected [for hire] and the actual percentage of minorities selected [for hire]".¹³¹ The First Circuit similarly rejected the reverse disparate treatment claims brought by white police officers denied promotion by an allegedly racially motivated decision making process.¹³² In *Cotter*, the Court determined that the defendant city police department's "history of discrimination...well-documented by past litigation and records" and statistical significance in the "disparity between the number of African-American officers eligible for promotion and the number of non-African-American officers eligible for promotion" established a strong basis in evidence.¹³³ Accordingly, both city police departments could assert what would later come to be known as a *Ricci* defense.¹³⁴

¹²⁷ Hoodhood, *supra* note 102 at 143-44. Interestingly and similarly, the Circuit Courts have also struggled in achieving a uniform standard for evaluating what constitutes an "adverse effect" in traditional disparate treatment discrimination claims where the plaintiff is a racial minority. Elliot Ko, *Big Enough to Matter: Whether Statistical Significance or Practical Significance Should be the Test for Title VII Disparate Impact Claims*, 101 Minn. L. Rev. 869, 871-72 (2016). More precisely, several Circuits require that a minority plaintiff show "statistical significance" of an adverse effect when making a disparate treatment claim. *Id.* at 884-85 ("Three circuits—the First, Third, and Tenth...only require a showing of statistical significance, and not practical significance."). Other Circuits require a showing of not only "statistical significance" but also "practical significance". *Id.* at 881-884 ("Six circuits—the Second, Fourth, Fifth, Sixth, Ninth, and Eleventh—take a holistic approach to disparate impact claims, considering both statistical and practical significance."). Additionally, "Three circuits—the D.C., Seventh, and Eighth Circuits—have not clearly indicated whether proof of practical significance should be required for disparate impact claims." *Id.* at 886. Elliot Ko argues "that abolishing the practical significance requirement would further the purposes of Title VII" as "statistical evidence should be enough, standing alone, to weed out most limited magnitude cases." *Id.* at 899-901 (quotation marks omitted).

¹²⁸ *Id.*

¹²⁹ *Id.* See also discussion *supra* note 106.

¹³⁰ 179 Fed.Appx. 366, 367-68 (6th Cir. 2006).

¹³¹ *Id.* at 375-76. In framing its strong basis in evidence standard, the *Rutherford* Court drew inspiration the Supreme Court's Equal Protection jurisprudence, a common theme throughout both this article and Title VII jurisprudence. *Id.* at 372-74. The Court's opinion includes lengthy discussions of "strict scrutiny" and "compelling government interest" that, as in other reverse employment discrimination cases brought against public employers, confuse all employers contemplating voluntary diversity and inclusion efforts. *Id.* See Hoodhood, *supra* note 102 at 111.

¹³² *Cotter v. City of Boston*, 323 F.3d 160, 164-65 (1st Cir. 2003).

¹³³ *Id.* at 169-70. The *Cotter* Court, in evaluating the statistical significance of the disparity between white and minority officer promotions, also considered the EEOC's "four-fifths" rule. *Id.* at 170. The "four-fifths" rule provides employers guidance in determining when potential disparate impact discrimination may exist. 29 C.F.R. 1607.4 (D). Specifically, it reads "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact". *Id.* Erica Hoodhood advocates for congressional action transitioning the four-fifths rule from guidance to mandate as it would provide a clear standard for an employer to establish a strong basis in evidence. Hoodhood, *supra* note 102 at 151-52.

¹³⁴ *Rutherford*, 179 Fed.Appx. at 375-76; *Cotter*, 323 F.3d at 164-65.

B. Business Challenges

Accepting that reverse employment discrimination lawsuits do not pose a significant threat to voluntary affirmative action plans¹³⁵, employers instead face formidable, internal challenges created by majority employees from their diversity and inclusion initiatives.¹³⁶ Specifically, white male employees may feel discriminated against in organizations with diversity-infused rhetoric and policies.¹³⁷ In their study, Tessa Dover, Brenda Major, and Cheryl Kaiser measured the response of white male subjects to stated “pro-diversity values” in an organization.¹³⁸ Subjects exposed to the organization’s diversity message anticipated encountering reverse bias and discrimination from management.¹³⁹ Notable to any employer, the same subjects also performed poorly during a common professional task.¹⁴⁰ Moreover, responses were consistent regardless of a particular subject’s worldview.¹⁴¹ “This suggests just how widespread negative responses to diversity may be among white men: the responses exist even among those who endorse the tenets of diversity and inclusion.”¹⁴²

Employers frequently compound these adverse reactions from white male employees through the misguided mechanisms selected to foster a diversity and inclusion culture.¹⁴³ The most commonly utilized, yet least effective, method for achieving diversity and inclusion goals is mandating organizational diversity trainings.¹⁴⁴ Mandatory diversity trainings often yield results completely at odds with their intended purpose by frustrating white male employees who may feel under attack.¹⁴⁵ The main reason behind this outcome is that these diversity trainings are required and not voluntary.¹⁴⁶ Generally, when an employer requires participation in any sort of training, a

¹³⁵ Dover, Major, & Kaiser, *supra* note 35 (“In a Supreme Court class action case, Walmart successfully used the mere presence of its anti-discrimination policy to defend itself against allegations of gender discrimination. And Walmart isn’t alone: the “diversity defense” often succeeds, making organizations less accountable for discriminatory practices.”). See discussion *supra* Section IA.

¹³⁶ *Id.* (“There’s another way the rhetoric of diversity can result in inaccurate and counterproductive beliefs...we found evidence that it not only makes white men believe that women and minorities are being treated fairly...it also makes them more likely to believe that they themselves are being treated unfairly.”)

¹³⁷ *Id.*

¹³⁸ *Id.* (“We put young men through a hiring simulation for an entry-level job at a fictional technology firm. For half of the applicants, the firm’s recruitment materials briefly mentioned its pro-diversity values. For the other half, the material did not mention diversity. In all other ways, the firm was described identically.”) (quotation marks omitted).

¹³⁹ *Id.*

¹⁴⁰ *Id.* (“They also performed more poorly in the job interview, as judged by independent raters...Thus, pro-diversity messages signaled to these white men that they might be undervalued and discriminated against. These concerns interfered with their interview performance and caused their bodies to respond as if they were under threat.”). See also C.W. Von Bergen, Barlow Soper & Teresa Foster, *Unintended Negative Effects of Diversity Management*, 31 *Public Personnel Management* 239 (2002) (discussing negative attitude, behavior, and performance of white males employees in response to employer’s diversity and inclusion efforts).

¹⁴¹ *Id.* (“diversity messages led to these effects regardless of these men’s political ideology, attitudes toward minority groups, beliefs about the prevalence of discrimination against whites, or beliefs about the fairness of the world”).

¹⁴² *Id.*

¹⁴³ Dobbin & Kalev, *supra* note 5 at 23.

¹⁴⁴ *Id.* (“The positive effects of diversity training rarely last beyond a day or two, and a number of studies suggest that it can activate bias or spark a backlash. Nonetheless, nearly half of midsize companies use it, as do nearly all the *Fortune 500*.”). See also Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 *American Sociological Review* 589 (2006) (providing a deeper empirical examination of how employers improperly implement diversity training).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

negative and/or remedial connotation exists.¹⁴⁷ In this instance, white male employees may feel an employer is simply trying to avoid a lawsuit, appease certain populations within the organization upon receiving complaints, or garner positive public perception and, therefore, do not fully or genuinely engage in the process.¹⁴⁸ Worse still, are those circumstances where a white male employee becomes offended and feels he is somehow being admonished by mandated diversity training when he did nothing wrong.¹⁴⁹ This, in turn, can lead to withdrawal, poor performance, or, most alarmingly, an instigation of personal bias and prejudice born out of resentment where none had previously existed.¹⁵⁰

The resistant reactions of white male employees to diversity and inclusion initiatives becomes most problematic where those employees serve in managerial roles.¹⁵¹ In this scenario, a white male manager with business decision-making authority who feels slighted or threatened in some way may actively undermine any diversity and inclusion movement in an organization as a matter of practicality.¹⁵² Unsurprisingly, some studies have found that despite widespread diversity and inclusion initiatives, the percentage of female and black employees in management positions has actually decreased.¹⁵³ Other studies have also indicated that an employer's diversity stance does not alter the perceptions of minority employees or candidates concerning equal opportunity and fair treatment.¹⁵⁴ Essentially, efforts aimed at increasing diversity and inclusion, whether for compliance or business purposes, have actually decreased diversity and inclusion.¹⁵⁵ What results then for employers and their organizations is a failure to realize the full benefits offered by a diverse and inclusive workforce.¹⁵⁶

II. DISTINGUISHING DIVERSITY FROM INCLUSION

As advanced technology, increased connectivity, and multicultural engagement continue transforming our global economy, failing to leverage diversity and inclusion as a business strategy

¹⁴⁷ *Id.* at 23-24.

¹⁴⁸ *Id.* at 23.

¹⁴⁹ *Id.* at 24.

¹⁵⁰ *Id.* at 23-24. *See also* Dover, Major, & Kaiser, *supra* note 35.

¹⁵¹ *Id.* at 24.

¹⁵² *Id.* (“White managers made only strangers—most of them minorities—take supervisor tests and hired white friends without testing them...But even managers who test everyone applying for a position may ignore the results”).

¹⁵³ *Id.* at 23 (“Although the proportion of managers at U.S. commercial banks who were Hispanic rose from 4.7% in 2003 to 5.7% in 2014, white women’s representation dropped from 39% to 35%, and black men’s from 2.5% to 2.3%”).

¹⁵⁴ Dover, Major, & Kaiser, *supra* note 35 (“In another set of experiments...Participants from ethnic minorities viewed a pro-diversity company as no more inclusive, no better to work for, and no less likely to discriminate against minorities than a company without a pro-diversity stance.”).

¹⁵⁵ *Id.* (“A longitudinal study of over 700 U.S. companies found that implementing diversity training programs has little positive effect and may even *decrease* representation of black women.”). *See also* Dobbin & Kalev, *supra* note 5 at 23 (“In analyzing three decades worth of data from more than 800 U.S. firms and interviewing hundreds of line managers and executives at length, we’ve seen that companies get better results when they ease up on the control tactics.”); discussion *supra* note 153.

¹⁵⁶ *See* Llopis, *supra* note 34 (“Businesses need to vastly increase their ability to sense new opportunities, develop creative solutions, and move on them with much greater speed. The only way to accomplish these changes is through a revamped workplace culture that embraces diversity so that sensing, creativity, and speed are all vastly improved.”).

is not only a missed opportunity but also a severe, and potentially fatal, disadvantage in a competitive consumer market.¹⁵⁷ Nevertheless, many organizations remain incapable of translating diversity and inclusion into survival and success.¹⁵⁸ This often results from improperly grouping diversity and inclusion together as one unified concept.¹⁵⁹ Simply maintaining acceptably proportionate representation across relevant demographics or requiring trainings many managers falsely assume, dictates an accomplished mission of achieving diversity and inclusion.¹⁶⁰ The data, however, continually disproves this flawed understanding as programs founded solely on the premise of diversity fall far short of realizing actual equity in employment opportunity.¹⁶¹ When employers instead distinguish between diversity and inclusion, separately defining and understanding each distinct concept, outcomes more closely align with stated goals.¹⁶² Diversity of employees alone is not a solution to the proverbial business and moral diversity challenges but rather an opportunity to foster a genuinely inclusive organizational culture and, as a result, tangible productivity.¹⁶³ Implementing strategies based on inclusion drives organizations toward equality, overall well-being, and prosperity.¹⁶⁴

A. Defining Diversity and Inclusion

“Generally, diversity refers to the similarities and differences between individuals accounting for all aspects of one’s personality and individual identity.”¹⁶⁵ These similarities and differences may include “values, beliefs, experiences, backgrounds, preferences, and behaviors.”¹⁶⁶ Research proves that a significant portion of the modern workforce share this same basic understanding of

¹⁵⁷ *Id.* See also Talent Intelligence, *Connecting the Dots: Inclusion and the Benefits of Diversity in the Workplace*, The Talent Intelligence Company (2014), <http://www.talentintelligence.com/blog/bid/377611/inclusion-and-the-benefits-of-diversity-in-the-workplace> (last visited Apr 5, 2018) (analyzing how a rapidly changing workforce demands successful implementation of diversity and inclusion strategies).

¹⁵⁸ See Talent Intelligence, *supra* note 157; Victoria Brescoll, *What do leaders need to understand about diversity?*, Yale Insights (2016), <https://insights.som.yale.edu/insights/what-do-leaders-need-to-understand-about-diversity/> (last visited Apr 5, 2018) (discussing methods of creating value from diversity); Laura Sherbin & Ripa Rashid, *Diversity Doesn't Stick Without Inclusion*, Harvard Business Review (2017), <https://hbr.org/2017/02/diversity-doesnt-stick-without-inclusion> (last visited Apr 5, 2018) (examining how unclosed distance between diversity and inclusion inhibits business benefits); Peter Williams, *Diversity and inclusion: what's the difference?*, Lumesse Learning (2017), <https://www.lumesselearning.com/diversity-inclusion-whats-difference> (last visited Apr 5, 2018) (stating that despite increase of diversity programs, lack of inclusion hampers future progress); Monisha Kapila, Ericka Hines & Martha Searby, *Why Diversity, Equity, and Inclusion Matter*, Independent Sector (2016), <https://independentsector.org/resource/why-diversity-equity-and-inclusion-matter/> (last visited Apr 5, 2018) (arguing for need to transform diversity dialogue into inclusive action).

¹⁵⁹ *See Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See* discussion *supra* Section 1B.

¹⁶² *See supra* note 158.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Society of Human Resources Management, *Introduction to the Human Resources Discipline of Diversity* (2017), <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/introdiversity.aspx> (last visited Apr 5, 2018).

¹⁶⁶ Talent Intelligence, *supra* note 157. Talent Intelligence further breaks down diversity into two separate categories: “visible diversity” and “invisible diversity”. *Id.* Visible diversity traits “are often what is emphasized and include race, gender, physical abilities, age, and body type.” *Id.* Invisible diversity traits instead focus on “things such as sexual orientation, religion, socio-economic status, education, and parental status among other things.” *Id.*

the concept.¹⁶⁷ In her study, Quinetta Roberson solicited definitions of diversity from employees at over 50 publicly traded organizations and responses consistently included phrases such as: “unique differences and similarities...”, “the many ways people differ...”, and “[v]ariation in the human capital profile of the organization...”.¹⁶⁸ Plainly, diversity represents what is either the same or different about a group of people.¹⁶⁹

Comparatively, “[i]nclusion describes the extent to which each person in an organization feels welcomed, respected, supported and valued as a team member.”¹⁷⁰ When an employee experiences feelings of inclusion, he or she is very likely to be more engaged and productive.¹⁷¹ Responses from employees to Quinetta Roberson’s survey echo this sentiment.¹⁷² Some reported definitions for inclusion included: “seeking out, valuing and using the knowledge and experiences of diverse employees for business benefit...”, “[r]ecognizing, understanding, and respecting all the ways we differ, and leveraging those differences for competitive business advantage...”, and “leveraging the awareness, understanding, and appreciation of differences in the workplace to enable individuals, teams, and businesses to perform at their full potential...”.¹⁷³ Put simply, inclusion is what successfully unites a group of different people together with a common purpose, motivation, and work ethic.¹⁷⁴

B. Moving from Diversity Toward Inclusion

Successfully implementing inclusive practices and programs, as distinguished from diversity practices and programs, yields the business and social benefits of diversity.¹⁷⁵ Diversity itself does not achieve its ends without inclusion as its vehicle for progress.¹⁷⁶ Only through inclusivity

¹⁶⁷ Quinetta M. Roberson, *Disentangling the Meanings of Diversity and Inclusion in Organizations*, 31 *Group & Organization Management* 212, 220 (2006).

¹⁶⁸ *Id.* at 218-20.

¹⁶⁹ Society of Human Resources Management, *supra* note 165. Interestingly, “millennials”, constituting an ever-increasing percentage of the workforce, define diversity much differently than the “baby boomers” and “gen-Xers” that precede them. Lydia Dishman, *Millennials Have A Different Definition Of Diversity And Inclusion*, *Fast Company* (2015), <https://www.fastcompany.com/3046358/millennials-have-a-different-definition-of-diversity-and-inclusion> (last visited Apr 5, 2018). Millennials view diversity not just as the differences between individuals, but also as the blending of those differences within a team. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Roberson, *supra* note 167 at 220.

¹⁷³ *Id.*

¹⁷⁴ Sherbin & Rashid, *supra* note 158. In addition to their different interpretation of diversity, millennials similarly offer a unique perspective on inclusion. Dishman, *supra* note 169. The millennial definition of diversity curiously mirrors what is more commonly accepted today as a definition for inclusion. Anna Johansson, *How Millennials Separate Diversity From Inclusion - And Why That Matters*, *Forbes* (2017), <https://www.forbes.com/sites/annajohansson/2017/06/16/how-millennials-separate-diversity-from-inclusion-and-why-that-matters/#7b0bd3a81d93> (last visited Apr 5, 2018). Despite the observed failure of diversity and inclusion program generally, the more progressive perspective of tomorrow’s leaders inspires hope for future workplace equality. *Id.* Accordingly, millennials define inclusion not as the appreciation of differences but instead as a collaborative support function of what they consider diversity. Dishman, *supra* note 169. Significant research has yet to address how the next generation to enter the workforce, “generation Z”, will view diversity and inclusion other than to note that “gen-Zers” appear inherently inclusive by nature so long as, ironically, they feel included. Door of Clubs, *Generation Z Could Solve Your Inclusion Problems - If You Include Them*, *Student Voices* (2017), <https://mystudentvoices.com/generation-z-could-solve-your-inclusion-problems-if-you-include-them-2ee8a689d4b9> (last visited Apr 5, 2018).

¹⁷⁵ *See supra* note 158.

¹⁷⁶ *Id.*

are the overarching goals of diversity strategies, equal employment opportunity and organizational success, fully achieved.¹⁷⁷ In other words, when diversity and inclusion are considered separately, added clarity poses diversity as a challenge and provides inclusion as its solution.¹⁷⁸ Effective inclusion practices typically represent a compromise between employers and employees, operating from both the bottom up and from the top down.¹⁷⁹

From an employee perspective, autonomy fuels the most flourishing of inclusion initiatives.¹⁸⁰ Voluntary, as opposed to mandated, diversity trainings are one efficient method of meeting the need for autonomous inclusivity.¹⁸¹ Rather than instigating negative backlash from white males, voluntary diversity trainings instead reduce bias and result in a proliferation of female and minority managers.¹⁸² Self-managed teams represent an additional pathway to inclusion through autonomy.¹⁸³ They “allow people in different roles and functions to work together on projects as equals.”¹⁸⁴ Just as importantly, self-managed teams make it acceptable to propose novel ideas or solutions and empower all team members to make decisions, avoiding uninspiring and counter-productive “groupthink” resulting from conformance to a manager’s preferences.¹⁸⁵ Finally, encouraging flexible work schedules allows employees the autonomy to feel unburdened by outside personal obligations and excluded as a result.¹⁸⁶ When an employee receives assurances that his or her contributions will still receive due consideration despite working remotely or on a modified work schedule, the quality of those contributions will be high and the employee will not perceive themselves as being left out or viewed negatively.¹⁸⁷

Supporting employee autonomy to create an inclusive workplace requires management to lead by example.¹⁸⁸ For instance, in order for flexible work schedules to effectively serve their inclusivity purpose, managers should clearly indicate their importance by proactively modeling the behavior for employees.¹⁸⁹ Additionally, for self-managed teams to fully reap the benefits from differences in thought, perspective, and opinion, managers must exhibit some degree of inclusive leadership encouraging the free flow of ideas and inspiring the feeling that ideas are being heard and recognized.¹⁹⁰

This is where emotional intelligence and social intelligence come in. Leaders need some degree of emotional intelligence to rise above our need to justify or validate ourselves, which is what happens when we seek people who are just like us in their

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Dobbin & Kalev, *supra* note 5 at 26.

¹⁸⁰ *Id.* See also Talent Intelligence, *supra* note 157; Williams, *supra* note 158.

¹⁸¹ *Id.* at 24.

¹⁸² *Id.* (“voluntary training evokes the opposite response...leading to better results: increases of 9% to 13% in black men, Hispanic men, and Asian-American men and women in management...When people felt pressure to agree with it, the reading strengthened their bias...When they felt the choice was theirs, the reading reduced bias.”).

¹⁸³ *Id.* at 24, 26.

¹⁸⁴ *Id.* at 26.

¹⁸⁵ *Id.* See also Williams, *supra* note 158.

¹⁸⁶ Talent Intelligence, *supra* note 157. “Flexibility provides the added benefit of aiding in the recruitment and *retention* of women at the senior level who, despite working full-time, still take on the bulk of household and child care responsibilities.” *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Sherpin & Rashid, *supra* note 158.

thinking. And we need a certain amount of social competency to be able to engage people who do have differences of ideas and perspectives.¹⁹¹

Another effective inclusion leadership strategy is creating formal mentorship programs.¹⁹² Through mentoring, employees inherently feel included by virtue of maintaining a personal and professional mentor-mentee relationship.¹⁹³ This also provides an employee with what they feel is a “safe-space” for openly sharing ideas or concerns without being judged, further supporting an inclusive organizational culture.¹⁹⁴ Moreover, diverse mentor-mentee pairings will also naturally spark inclusivity.¹⁹⁵ Mentors, through both the close and supportive nature of a mentorship relationship and also their own self-interest, will naturally develop, groom and favor mentees regardless of color or gender for advancement opportunities.¹⁹⁶

CONCLUSION

Misconceptions and misapplications pervade the widespread and growing trend of employers adopting diversity and inclusion strategies. Some organizations progressively seek EEOC compliance and avoidance of Title VII liability, other organizations opportunistically pursue the business benefits diversity offers, and some organizations still act out of misplaced fear due to their difficulty distinguishing between voluntary and required affirmative action altogether. In doing so, these employers often swing the pendulum of diversity too far in a manner disappointing the expectations of majority and minority employees alike, as well as the organization itself. What results therefrom, are not legal challenges but instead business challenges and unrealized potential. Though lawsuits exist, the failure of the Supreme Court to determine when a voluntary diversity and inclusion program unlawfully exceeds its bounds has left the Circuit Courts in a perpetual struggle to define a workable standard for a majority employee to prove reverse discrimination. Whether a white male employee may successfully challenge an employer’s diversity and inclusion policy seemingly hinges on a random game of jurisdictional chance.

Nevertheless, the perceived marginalization of majority employees resulting from many diversity and inclusion programs legitimately exists. Minority employees feel similarly marginalized by these same programs intended to support them. This ineffectiveness of modern diversity and inclusion initiatives stems from employers’ general misunderstanding of the concept altogether. Specifically, employers tend to treat diversity and inclusion as one concept instead of as two separate and distinct concepts. This frequently results in misguided, control-oriented programs and policies proved to diminish diversity and its benefits. When employers successfully deduce that diversity is the destination and inclusion is the vehicle, what results instead is an open, autonomous and collaborative organizational culture founded on the pride of self-responsibility. Only in this harmonious and empowering environment do maximized potential, enhanced productivity, unity, and equal employment opportunity become a reality.

¹⁹¹ Brescoll, *supra* note 158.

¹⁹² Talent Intelligence, *supra* note 157; Dobbin & Kalev, *supra* note 5 at 26.

¹⁹³ *Id.*

¹⁹⁴ Talent Intelligence, *supra* note 157.

¹⁹⁵ Dobbin & Kalev, *supra* note 5 at 26.

¹⁹⁶ *Id.* “Mentoring programs make companies’ managerial echelons significantly more diverse: On average they boost the representation of black, Hispanic, and Asian-American women, and Hispanic and Asian-American men, by 9% to 24%.” *Id.*