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## **Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice**

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BULLETPROOFING THE WORKPLACE:  
SYMBOL AND SUBSTANCE IN  
EMPLOYMENT DISCRIMINATION LAW PRACTICE

*Susan Bisom-Rapp*

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# BULLETPROOFING THE WORKPLACE: SYMBOL AND SUBSTANCE IN EMPLOYMENT DISCRIMINATION LAW PRACTICE

SUSAN BISOM-RAPP\*

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## I. INTRODUCTION

Discussions of whether workplace equality has been achieved in American society can be both vexing and painful. While few would dispute that the civil rights revolution has produced significant results,<sup>1</sup> there is considerable and often heated disagreement about the

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extent to which some employees continue to confront discrimination in employment and what, if anything, the law can and should do about it. Empirical evidence indicates that discrimination in employment, while not as overt as in the past, is nevertheless quite prevalent.<sup>2</sup> Despite these findings, however, much of the popular debate is characterized by anecdote. For every story of an employer that operates like Texaco or Mitsubishi,<sup>3</sup> there is a comparable tale of

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formed yeoman service in filling my never-ending requests for interlibrary loans. Cara Lockwood and Debbie Russo provided much needed administrative support. Most significant, however, was the assistance of Charles Bisom-Rapp, who designed the database for the survey and performed the statistical analysis. Thank you to all.

1. Members of many protected groups have experienced economic gains; it remains unclear, however, to what extent civil rights law is responsible for that progress. See, e.g., FRANCINE D. BLAU ET AL., *THE ECONOMICS OF WOMEN, MEN, AND WORK* 220-21 (3d ed. 1998) (discussing studies examining the effectiveness of antidiscrimination law in reducing gender and race-based pay differentials); Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 LAW & SOC'Y REV. 79 (1994) (concluding that litigation victories are associated with long-term increases in African-American earnings); John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1603-04 (1991) (suggesting that African-American economic advancement may be due to government antidiscrimination efforts).

2. The recent Federal Glass Ceiling Commission report describes in detail the barriers to employment advancement that many women and people of color still face, including stereotypes, prejudice, and bias. See FEDERAL GLASS CEILING COMM'N, *GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL* 27-28 (1995). The earnings gap between these groups and white males makes the problem concrete. Studies of the male/female earnings gap find that "labor market discrimination may explain as much as half or more of the pay differential between men and women." BLAU ET AL., *supra* note 1, at 193. One recent study found that on average, women's wages are 72% that of men. See Francine D. Blau & Lawrence M. Kahn, *Swimming Upstream: Trends in the Gender Wage Differential in the 1980s*, 15 J. LABOR ECON. 1, 12 (1997). The Glass Ceiling Commission Report notes that "African-[A]merican men with professional degrees earn 79% of the amount earned by white males who hold the same degrees and are in the same job categories." FEDERAL GLASS CEILING COMM'N, *supra*, at iv. African-American women earn only 60% of the compensation garnered by their white male counterparts. See *id.* at 80. The Glass Ceiling Report also notes that "when promoted to middle- or upper-levels of management, [Asian and Pacific Islanders] are more likely to receive lower economic returns compared to whites occupying similar positions." *Id.* at 112. This is so even though Asian and Pacific Islanders are more likely to possess superior qualifications in terms of education and work experience. See *id.* In addition to depressing the compensation and promotional opportunities of minorities and women, employment discrimination is often manifest in the hiring process. Hiring audits demonstrate persistent racism and sexism. See, e.g., Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1498-99 (1997) (discussing studies of racism in the hiring process); David Neumark et al., *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915 (1996) (finding statistically significant evidence of sex discrimination in the hiring of servers by high-priced restaurants).

3. Top executives of Texaco found themselves in the limelight after a former executive revealed tape recordings of a meeting at which a pending class action race discrimination suit against the company was discussed. As initially reported, it appeared the tapes contained derogatory racial remarks and evidence of document tampering. See Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impending Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1. Although Texaco disputed both allegations, it shortly thereafter reached a

an employee who has abused the legal system by filing a frivolous discrimination lawsuit.<sup>4</sup>

On the surface, there seems to be a yawning chasm separating the abusive employer narrative from the parable of the disgruntled employee. Yet the stories share a common reference point. In both, a potential or actual lawsuit serves as the vehicle for expressing perceptions of workplace conditions. Tacit celebration or indictment of civil rights law turns on the perceived validity of a legal cause of action. But what makes the tale teller discern discrimination in one case and malicious prosecution in another? Certainly, personal experience and perspective play a role. Human beings, though, do not interpret in a vacuum. Rather, they train their interpretive skills, such as they may be, with available data.<sup>5</sup>

This Article examines how employment lawyers representing management play a role in creating data and affect the perception of employment disputes. More specifically, it explores how defense lawyers attempt to strategically position employers to safeguard these clients against discrimination and other employment-related litigation. A primary focus of their advice is on producing an evidentiary record that an employer can use defensively should the need ever arise.<sup>6</sup> Defense attorneys, therefore, counsel employers to implement

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landmark settlement with the plaintiffs for over \$170 million. See Nadya Aswad & John Herzfeld, *Texaco Corp. Agrees to Spend \$176 Million to Settle Race Bias Suit*, Daily Lab. Rep. (BNA) AA1 (Nov. 18, 1996). A federal jury acquitted two former Texaco executives of conspiracy and obstruction of justice charges in the matter. See John Herzfeld, *Race Discrimination: Jury Acquits Former Texaco Executives in Criminal Obstruction of Justice Case*, Daily Lab. Rep. (BNA) A9 (May 14, 1998).

Mitsubishi recently settled a sexual harassment suit for \$34 million, brought by a class of 350 current and former women employees. At the time, the suit was filed, the Equal Employment Opportunity Commission (EEOC) referred to the company's work environment as "outrageous" and "egregious." Michael Bologna, *Sexual Harassment: Mitsubishi Settles EEOC Suit for \$34 Million; Agency Says Class, Amount Largest Ever*, Daily Lab. Rep. (BNA) AA1 (June 12, 1998).

4. One popular writer recently made such anecdotal references a central part of his lengthy condemnation of American employment law. See generally WALTER OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* (1997). Some federal district court judges appear to hold similar views. See, e.g., *Tschappat v. Reich*, 957 F. Supp. 297, 299 (D.C. 1997) ("It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases."); *Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994) ("[Antidiscrimination law has] unquestionably served to embolden disgruntled employees, who have been legitimately discharged because they were incompetent, insubordinate, or dishonest, to file suits alleging that they have been the victims of discrimination."). Employment discrimination horror stories are not unique. Such anecdotes are frequently used in attacks on the civil justice system and in calls for tort reform. See Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1094-98 (1996).

5. For a comprehensive description of how causal attribution and other forms of social inference function, see Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998).

6. See *infra* Part C.III.1.

and carefully administer standardized employee evaluation systems and train supervisors how to write up and terminate employees without running afoul of the law.<sup>7</sup>

It goes without saying that defense strategies, where effective, can significantly alter the way a given discharge or failure to promote is understood in both personal and legal terms. Additionally, regardless of merit, management attorneys' collective actions may influence public attitudes concerning workplace equality achievements more broadly. Most importantly, however, litigation prevention strategies may impact employment discrimination law's effectiveness as a remedial tool.<sup>8</sup> While these strategies may prompt managers to identify and remedy certain biased actions, preventative practices may mask rather than eliminate some discriminatory decisions. In fact, the central premise of the advice, that one eradicates bias by ignoring immutable characteristics such as race, sex, and age,<sup>9</sup> runs counter to the conscious process that social scientists claim is necessary to correct the subconscious effects of stereotypes disadvantaging minorities, women, and members of other protected groups.<sup>10</sup>

To place defense advice in context and highlight its potential effect, one must examine employers' responses to antidiscrimination law. Beginning in the 1960s, ambiguities in equal employment opportunity (EEO) law created an unstable legal environment for employers.<sup>11</sup> This instability prompted human resource professionals and employment lawyers to recommend that corporations embrace a range of EEO compliance mechanisms,<sup>12</sup> including grievance proce-

7. See *id.*

8. Through everyday practices, legal actors may ignore, re-interpret, or alter formal law. See Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 55 (Austin Sarat & Thomas R. Kearns eds., 1993).

9. This proposition is, in fact, pivotal to discrimination law doctrine. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) ("Th[e] law requires the employer to ignore an employee's age . . .").

10. See *infra* Part IV.A.

11. See Frank Dobbin et al., *Equal Opportunity Law and the Construction of Internal Labor Markets*, 99 AM. J. SOC. 396, 402-03 (1993) (discussing employer responses to the Civil Rights Act and the Act's subsequent judicial and administrative clarification); see also Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1406 (1990).

12. See John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 800-01 (1996) (suggesting also that companies influenced by legal and personnel professionals were more inclined to administer compliance mechanisms).

dures,<sup>13</sup> formal hiring and promotion procedures,<sup>14</sup> and specialized corporate EEO/affirmative action (AA) offices.<sup>15</sup>

Many workplaces now have presumably nondiscriminatory procedures and make seemingly fair, merit-based employment decisions.<sup>16</sup> These policies were adopted out of a sincere desire to prevent organizations from running afoul of antidiscrimination law and to advance the goals of antidiscrimination legislation.<sup>17</sup> Nonetheless, as described below, there are incentives for organizations adopting such structures to do so in minimally disruptive ways.<sup>18</sup> Employers frequently demonstrate fidelity to EEO law through symbolic rather than substantive actions.<sup>19</sup> Organizations with workplace conditions and cultures favoring white males may make procedural alterations yet fail to significantly alter the status of protected groups.<sup>20</sup>

One might view the changed corporate landscape and the prevalence of EEO compliance practices as indisputable evidence that workplace discrimination has been eliminated or greatly reduced. These mechanisms cannot help but influence assessments of the prevalence of workplace bias. Corporations that eliminate supervisors' arbitrary discretion and provide avenues for employees to voice complaints certainly look unbiased. Employees may derive some real benefits from these organizational changes.<sup>21</sup> Symbolic, legal conformity also ensures that, in the aggregate, there will be less evidence

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13. See Edelman, *supra* note 11, at 1422-35.

14. See Dobbin et al., *supra* note 11, at 402.

15. See PETER REUTER, RAND INSTITUTE FOR CIVIL JUSTICE, THE ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY: AN EXPLORATORY STUDY at vii (1988) (noting that concern over wrongful discharge litigation has caused employers to change employment practices); ALAN F. WESTIN & ALFRED G. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION 4-13, 247 (1988) (discussing changes in personnel practices prompted by employment litigation trends); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1547 (1992); see also Dobbin et al., *supra* note 11, at 421; Sutton & Dobbin, *supra* note 12, at 795.

16. For example, one study examining 495 large organizations found that formal performance appraisal programs covered more than 80% of all managers and nonunion employees. See JOHN THOMAS DELANEY ET AL., U.S. DEPT. OF LABOR, HUMAN RESOURCE POLICIES AND PRACTICES IN AMERICAN FIRMS 18 (1989).

17. See Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 923-24 (1996).

18. See *infra* notes 66-68 and accompanying text.

19. See Edelman, *supra* note 15, at 1542-44; Suchman & Edelman, *supra* note 17, at 924.

20. See *infra* notes 297-303 and accompanying text.

21. See Suchman & Edelman, *supra* note 17, at 924 ("[A]lthough affirmative action plans and EEO offices exert little *direct* impact on the workforce representation of minorities and women, these gestures appear to engender stronger organizational commitments to affirmative action goals." (emphasis added)); see also Sutton & Dobbin, *supra* note 12, at 807 (noting that organizational responses produce both "rights-generating" and "rights-limiting" rules for employees).

of discriminatory decision making and practices.<sup>22</sup> What one sees may well affect one's perception of employment conditions, whether one is a judge, a juror, or a cocktail party conversationalist.

Adoption of grievance procedures, standard employee evaluation systems, and affirmative action offices, however, may be read another way. While perhaps representing improvements in personnel procedures, these devices, in some cases, may also hinder the detection of workplace discrimination. This alternative interpretation requires asking whether a decrease in evidence of bias signifies a co-terminous decrease of discrimination in the workplace.

While this Article cannot answer that question empirically, it troubles the waters by describing how certain compliance mechanisms, specifically those recommended by defense attorneys, may obscure conditions of inequality. Part of the problem is psychological: the recommended strategies teach managers to bulletproof their decisions but may do nothing to alter the conscious and subconscious discriminatory impulses that can drive decision making.<sup>23</sup> Yet there is also a sociological component to explore. By producing evidence that appears nondiscriminatory, litigation prevention techniques may affect the perceptions of outsiders reviewing employment decisions, such as courts, administrative agencies, and the plaintiffs' bar.<sup>24</sup>

Plaintiffs' attorneys are of particular concern. While both defense and plaintiffs' attorneys hold strikingly similar conceptions of the factors giving rise to viable discrimination claims, client representation does not occur on a level playing field.<sup>25</sup> My analysis exposes employers' tactical advantages and examines whether current legal frameworks for evaluating evidence acknowledge and compensate for that strategic superiority.<sup>26</sup>

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22. Many commentators note that it is increasingly rare to find probative evidence of discrimination. See, e.g., DEBORAH L. RHODE, *SPEAKING OF SEX* 159 (1997); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1679 (1996).

23. See *infra* Part IV.A-B.

24. See *infra* Part V.A-C.

25. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (highlighting advantages held by repeat players in their encounters with formal law); see also Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 L. & SOC'Y REV. 1243, 1246 (1994).

26. A recent American Bar Association (ABA) study confirmed employers' tactical advantages in disability discrimination cases. See John Parry, *American Bar Association Survey on Court Rulings Under Title I of Americans with Disabilities Act*, Daily Lab. Rep. (BNA) E1 (June 22, 1998) (summarizing the results of a 1998 ABA survey). The ABA survey of cases decided under the Americans with Disabilities Act since 1992 found that employers prevail in "approximately 92% of the final case decisions." *Id.* at E1. This is due, in part, to employers using "procedural devices that favor defendants." *Id.* at E3.



This Article does not seek to portray employers and defense attorneys as villainous characters who are out to subvert civil rights mandates, nor does it attempt to imply that all employees are deserving, helpless victims of bias.<sup>27</sup> Discrimination is a subtle, complex, and often unconscious phenomenon.<sup>28</sup> Moreover, employment decision making can be a complicated process subject to a broad range of influences, some legitimate, some illegitimate. Given these premises, however, one may wonder about the net effects of the social practices that developed after the legal prohibition of employment discrimination. Many unquestioningly assume that EEO compliance mechanisms necessarily produce nondiscriminatory work environments. We should pause and think before accepting that assumption as true.

Part II of this Article reviews the sociological literature on employer responses to civil rights law and discusses the role of human resource professionals and employment lawyers in developing and promoting EEO compliance mechanisms. These personnel practices certainly produce some benefits for employees by rationalizing employment decision making and limiting supervisor discretion. The literature, however, reveals that compliance is often achieved through symbolic rather than substantive exhibits of adherence to legal principles. Furthermore, these symbolic responses may undermine the goals of civil rights law and stymie the efforts of discrimination victims seeking outside redress.

Part III describes how management lawyers use compliance principles in practice. It discusses the ubiquity of litigation prevention advice proffered by the defense bar and explains why employers are receptive to such suggestions. Part III then presents the results of my content analysis of the defense literature advocating preventa-

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27. I feel it is necessary to make these points explicit for two reasons. First, in sharing my ideas with management attorneys, I have invariably provoked extremely defensive and angry responses. Second, a student Note warning that employers are tempted to abuse performance appraisal systems faced a similar response. A management lawyer's review of the Note curtly dismissed the student author's contention as based on "a dark, conspiratorial vision of the American workplace [that] has no basis in reality." James A. Burns, Jr., *Use and Abuse of Performance Appraisals*, 22 EMPLOYEE REL. L.J. 165, 170 (1996) (responding to John Edward Davidson, Note, *The Temptation of Performance Appraisal Abuse in Employment Litigation*, 81 VA. L. REV. 1605 (1995)). I ask those who experience such sentiments to put them aside, open their minds, and judge this Article on its merits.

28. Relying on social cognition theory, Linda Krieger argues that many biased employment decisions are produced unconsciously, the result of "categorization-related judgment errors" that affect all people, not only those who are prejudiced. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995). Other legal scholars discuss unconscious discrimination in different terms. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (utilizing Freudian psychology).

tive practices.<sup>29</sup> Through recommendations, management attorneys attempt to ensure the generation of documentation and oral testimony that would support employers' decisions in the event of an adverse employment action, such as discharge or discipline.<sup>30</sup> Much of the advice evidences an overriding concern for creating the appearance of nondiscriminatory decision making without an equivalent emphasis on facilitating substantive change for protected groups. In other words, the defense bar speaks to employers in symbolic terms.<sup>31</sup>

Part IV examines the psychological implications of litigation prevention advice. Clearly, the vast majority of attorneys proffering this advice hope their clients will implement consistent, objective performance measures, thus eliminating employment bias. Yet there are ways in which these practices can mask discriminatory conditions. In part, this is because evaluation devices are susceptible to unconscious influences that disadvantage minorities, women and members of other protected groups. Perhaps supervisors are being trained to write and speak in "neutral" language but are not significantly changing their ability to evaluate employees. Indeed, some preventative suggestions run counter to what social psychologists deem necessary to eliminate stereotypical responses in evaluation.<sup>32</sup> With this in mind, Part IV reviews empirical research on evaluation bias.

Part V describes how compliance mechanisms may obscure workplace bias. The trouble people have discerning discrimination<sup>33</sup> could well result in bulletproofing biased decisions that would otherwise be

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29. The initial results from the content analysis were published in a different form. See Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers, Litigation Prevention Measures, and the Limits of Anti-Discrimination Law*, 6 COLUM. J. GENDER & L. 323 (1996). Since publication of that article, I have updated and greatly expanded the analysis. My final results appear below.

30. There are two major theories of discrimination available to aggrieved employees under civil rights law. The first theory, disparate treatment, encompasses acts of intentional discrimination. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The second, disparate impact, addresses facially neutral employment policies with a disproportionate negative effect on protected groups that cannot be justified on the basis of business necessity. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). This Article is concerned mainly with the effects of compliance practices on plaintiffs' use of the former theory and on public perception of the extent to which discrimination continues to be a problem in the American workplace.

31. This observation does not imply that defense attorneys are equipped to train employers on the subtleties of discrimination or the mechanics of achieving substantive improvements for people of color and women. Little empirical attention has been paid to the effects of in-service education such as diversity training. In fact, such efforts may produce backlash against protected groups. See *infra* note 225.

32. See *infra* Part IV.B.

33. In fact, people have difficulty discerning bias in individual cases. See Faye J. Crosby et al., *The Denial of Personal Disadvantage Among You, Me, and All the Other Ostriches*, in GENDER AND THOUGHT: PSYCHOLOGICAL PERSPECTIVES 79, 80 (Mary Crawford & Margaret Gentry eds., 1989).

viable claims. This type of alteration may not only affect a formal legal outcome in the sense of convincing a judge or jury that no legal violation exists, it may make it difficult for an employee to obtain legal representation when the evidentiary record favors the employer's explanation for the action. In short, as implemented, defense advice may cause symbolic rather than substantive compliance with anti-discrimination law.<sup>34</sup>

Part V considers the response of the plaintiff's bar to litigation prevention techniques. It presents the results of a survey I distributed to over 1200 members of the plaintiffs' bar in the summer of 1997.<sup>35</sup> My study data shed light on how employee advocates evaluate and react to compliance strategies. Analysis reveals that plaintiffs' attorneys not only acknowledge the employer's evidentiary advantage in discrimination cases, they conceptualize claim viability in ways that mirror the defense bar. The fact that compliance mechanisms incorporate these shared conceptions is an indication of their power to forestall litigation.

In Part VI, the Article concludes by noting that formal law is increasingly limited in its ability to remedy workplace discrimination. While this result is undoubtedly due to the increasingly subtle nature of bias itself and to case law considered favorable to employers,<sup>36</sup> it is also a product of the effective efforts of those subject to the law to demonstrate symbolic adherence to it. In a sense, employment attorneys are trading in symbols:<sup>37</sup> where symbolic compliance mechanisms function, no discrimination is perceived; where they break down or are underutilized, a viable discrimination claim exists. A possible solution to the problem is to challenge the symbols themselves. More important than any symbol is a careful assessment of the work environment in which it was produced. This Article concludes with proposals for making relevant social science research on this topic available to plaintiffs' lawyers, for correcting the information asymmetry by making employment law strategies available to employees, and for suggestions for further research.

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34. See Edelman, *supra* note 15, at 1542-43 (noting that symbolic compliance with equal opportunity law does not guarantee real change for women and minorities).

35. The survey questions are reproduced *infra* Appendix I.

36. See *infra* notes 386-87 and accompanying text.

37. I borrow this terminology from Maureen Cain, who describes all lawyers as "symbol traders." Maureen Cain, *The Symbol Traders*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 15, 15 (Maureen Cain & Christine B. Harrington eds., 1994).

## II. LAW IN EVERYDAY LIFE: EMPLOYER RESPONSES TO CIVIL RIGHTS LAW

Management lawyers' advice regarding recommended compliance strategies must be placed in context for full understanding. In particular, one must consider historical shifts in American public policy and examine how employment practices have changed in response. Over the last ten years, a small but impressive body of sociological literature has begun to document and explain how and why corporate personnel policies were altered in the wake of the 1960s civil rights revolution. These studies show that organizations reacted not just to changes in the law, but to changes in societal conceptions of the individual, fairness, and efficiency. The studies also illustrate the ways in which employers' everyday actions impact the legal meaning of discrimination itself.

Sociologists mark the passage of Title VII of the Civil Rights Act of 1964 (Title VII)<sup>38</sup> as a watershed event in employment relations.<sup>39</sup> Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin, represented a new and significant limitation on managerial authority over workplace terms and conditions.<sup>40</sup> Moreover, Title VII and the social movements that gave rise to it provided a basis for criticizing employment decisions made in exercise of that authority.<sup>41</sup>

The hallmark of the new legislation was its ambiguity.<sup>42</sup> Title VII did not explicitly require new policies or procedures.<sup>43</sup> Instead, it set forth a broad prohibition of "discrimination" without defining the

38. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

39. See Dobbin et al., *supra* note 11, at 402; Edelman, *supra* note 15, at 1532; Edelman, *supra* note 11, at 1407; see also John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944, 948-49 (1994) (noting Title VII's importance but attributing the subsequent adoption of corporate due process governance mechanisms to actions of all three branches of government). Sociologists also see President Lyndon Johnson's issuance of Executive Order No. 11,246 in 1965 as having had a great effect on employers. See Dobbin et al., *supra* note 11, at 402-03; Edelman, *supra* note 11, at 1407. Under Executive Order No. 11,246, 3 C.F.R. 567, 568 (1964-1965), federal contractors are required to take "affirmative action" to ensure that applicants and employees are treated without regard to race, color, religion, sex, and national origin.

40. See Edelman, *supra* note 15, at 1532. A similarly great legal intrusion on traditional management prerogatives dates back to the New Deal period of the 1930s. Congress and the states passed a number of statutes regulating the workplace, which the Supreme Court subsequently deemed constitutional. Of particular significance was the National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69 (1994), which gave employees the right to unionize, and the Fair Labor Standards Act of 1938, 29 U.S.C. 201-19 (1994), which regulates wages and hours of employment.

41. See Edelman, *supra* note 11, at 1406-07.

42. See Edelman, *supra* note 15, at 1536-38; Sutton & Dobbin, *supra* note 12, at 798.

43. See Edelman, *supra* note 15, at 1537. Edelman notes that the regulations implementing Title VII contain workforce composition reporting requirements. However, these rules do not require any specific alteration of personnel policies or procedures. See *id.*

term. This hole or absence left the statute subject to varying interpretations. For example, the scope of the practices prohibited by Title VII was unclear.<sup>44</sup> Whether Title VII embodied a procedural notion of equality demanding no more than equal treatment of similarly situated individuals or envisioned a more substantive form of equality aimed at redistributing jobs to members of disadvantaged groups remained to be seen.<sup>45</sup> Additionally, Title VII lacked definitions of the enumerated protected categories thereby creating a host of questions. Did the category "race," for example, include people of Caucasian ancestry?<sup>46</sup> Did the prohibition against sex discrimination include pregnancy discrimination?<sup>47</sup>

These ambiguities created tremendous uncertainty for employers.<sup>48</sup> The lack of clarity, however, enabled employers to play a central role in helping to define compliance with the terms of the ambiguous law to which they found themselves subject.<sup>49</sup> Indeed, Title VII's passage marked the beginning of a period of corporate experimentation with various approaches to achieving bias-free work environments.<sup>50</sup>

Persuasive evidence demonstrates that EEO law catalyzed the development and broad dispersal of a range of personnel practices most people now take for granted. Frank Dobbin and his colleagues, for example, analyzed data from 279 organizations and concluded that after 1964, antidiscrimination law facilitated the spread of formal promotion mechanisms including performance evaluations, job

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44. See Robert Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U. L.J. 225, 228 (1976).

45. See Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality* and Weber, 59 N.C. L. REV. 531, 539 (1981) (noting that there are "two basic concepts of equality" discussed in Title VII case law and academic literature); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2370 (1994) (discussing the "contest" in Title VII "over the meaning of workplace equality"); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-40 (1971) (arguing that both senses of equality are imbedded within our fair employment laws).

46. The Supreme Court answered that question affirmatively in *McDonald v. Santa Fe Trail Transport. Co.*, 427 U.S. 273 (1976).

47. The Supreme Court answered that question negatively in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). Congress subsequently amended Title VII to expressly include discrimination on the basis of pregnancy within the definition of sex discrimination. See Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978) (current version at 42 U.S.C. § 2000e(k) (1994)).

48. See Dobbin et al., *supra* note 11, at 402-03; Edelman, *supra* note 11, at 1406.

49. See Suchman & Edelman, *supra* note 17, at 924.

50. See Dobbin et al., *supra* note 11, at 402. Subsequent passage of additional antidiscrimination legislation undoubtedly provided continued inducement for corporate reform. Some of the major statutes passed after Title VII include the Equal Pay Act of 1963, 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; the Rehabilitation Act of 1973, 29 U.S.C. § 706-796; the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b; the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213; and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654.

descriptions, and job ladders.<sup>51</sup> In a later study, Dobbin and John Sutton surveyed 154 private, for-profit firms and determined that the adoption rates of corporate grievance procedures correspond to trends in antidiscrimination law enforcement and wrongful discharge litigation.<sup>52</sup> Lauren Edelman's investigation of the growth of affirmative action offices and antidiscrimination rules in 346 organizations found similar effects.<sup>53</sup>

Personnel professionals and management lawyers played a critical role in developing and disseminating these practices.<sup>54</sup> Responding opportunistically to the changing legal landscape, in the 1970s, human resource managers began arguing that employers must upgrade personnel procedures.<sup>55</sup> Defense attorneys joined in calls for reform, albeit a bit later.<sup>56</sup> Formal evaluation and promotion procedures were touted as mechanisms for defeating discrimination and efficiently determining the use of human resources.<sup>57</sup> Mechanisms fostering procedural due process, such as grievance procedures, were extolled as efficient and profit enhancing.<sup>58</sup> By articulating the existence of a looming legal threat and offering solutions to reduce employers' consequent risk, these allied professions enhanced their prestige and authority.<sup>59</sup>

Yet there is more to the story of how and why these corporate changes occurred.<sup>60</sup> Edelman uses the "legal environment" concept to

51. See Dobbin et al., *supra* note 11, at 396. These mechanisms received their first push in response to 1930s federal labor legislation and federal labor market controls adopted during World War II. See *id.* at 422.

52. See Sutton & Dobbin, *supra* note 12, at 807.

53. See Edelman, *supra* note 15, at 1567-69.

54. See Dobbin et al., *supra* note 11, at 404-05; Edelman, *supra* note 11, at 1410-11; Edelman, *supra* note 15, at 1546; Suchman & Edelman, *supra* note 17, at 924; Sutton & Dobbin, *supra* note 12, at 800.

55. See Sutton & Dobbin, *supra* note 12, at 800.

56. See *id.* at 800-01.

57. See Dobbin et al., *supra* note 11, at 404.

58. See Edelman, *supra* note 11, at 1411-12.

59. See Suchman & Edelman, *supra* note 17, at 935; Sutton & Dobbin, *supra* note 12, at 795; see also Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC'Y REV. 47, 74-76 (1992) (describing how the legal profession has helped to create and solve these employment conflicts).

60. One can draw from a number of theories to devise an account of the phenomenon described above. For example, Sutton and Dobbin advanced the hypothesis that firms adopted formal personnel procedures on efficiency grounds. See Sutton & Dobbin, *supra* note 12, at 807. In the face of labor market uncertainty created by EEO laws, employers responded with compliance mechanisms calculated to reduce legal risks and protect firm investments in human capital. See *id.* at 796-97.

Critical theorists could offer another possible account in that they might view the changes in corporate policy as mechanisms for simultaneously preserving and obscuring the prerogatives of the dominant race and class in America. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, in MARXISM AND LAW 210 (Piers Beirne & Richard Quinney eds.,

explain the process of organizational response to civil rights law.<sup>61</sup> A legal environment consists of the indirect effects that formal law can produce in society's norms and values.<sup>62</sup> Edelman posits that EEO law affected the legal environment by altering the public perception of employee entitlement.<sup>63</sup> Not only did Title VII give rise to an expectation of bias-free employment decision making, it created an expectation of fair treatment.<sup>64</sup> This change in the culture at-large threatened the legitimacy of employers, who, until this time, generally had no need to justify or explain how employment decisions were made. The quest to maintain public approval became a motivating force in the development of EEO compliance mechanisms.<sup>65</sup>

The legal environment, however, was not the only force that influenced employers. Managerial resistance existed in tension with changing public expectations.<sup>66</sup> Management prerogative, in the form of unfettered discretion over employment decision making, did not simply evaporate in the face of the new legal environment. Instead, it affected the forms of compliance. As Edelman notes:

The conflict between EEO/AA law and managerial interests poses a dilemma to organizations: they must demonstrate compliance in order to maintain legitimacy and at the same time they must minimize law's encroachment on managerial power. This dilemma motivates a process of response to law in which organizations test, negotiate, and collectively institutionalize forms of compliance that, to the greatest extent possible, maximize both interests . . . .<sup>67</sup>

In other words, employers are driven to create compliance mechanisms that are "minimally disruptive to the status quo."<sup>68</sup>

One way of harmonizing the opposing forces described above is to adopt personnel policies and procedures *symbolically* demonstrating

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1982); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

61. Some describe Edelman's work as drawing from neo-institutional theory. See Sutton & Dobbin, *supra* note 12, at 794-95. This branch of organizational theory sees organizations as complex social actors responding to changes in the culture at-large through symbolic gestures. See generally THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991). See Suchman & Edelman, *supra* note 17, at 917-18.

62. See Edelman, *supra* note 11, at 1402.

63. See Edelman, *supra* note 15, at 1535.

64. See Edelman, *supra* note 11, at 1402.

65. See Edelman, *supra* note 15, at 1534-35. Edelman notes that the changed legal environment was a primary impetus for the development of compliance mechanisms, though certainly not the only such factor. See Edelman, *supra* note 11, at 1403.

66. See Edelman, *supra* note 15, at 1535.

67. *Id.* at 1535-36 (citations omitted).

68. *Id.* at 1535.

commitment to EEO law and principles.<sup>69</sup> These symbols, such as the creation of corporate affirmative action offices<sup>70</sup> and employee grievance procedures,<sup>71</sup> should not be seen as efforts to evade the law.<sup>72</sup> Actually they may be immensely beneficial to employees. For example, Edelman and Stephen Petterson report that while affirmative action plans and EEO offices do not directly impact the position of minorities and women in an organization, they do inspire stronger institutional commitments to EEO goals.<sup>73</sup> Dobbin and his colleagues also argue that formal promotion mechanisms “symbolically transformed” members of disadvantaged groups, previously viewed as uninterested in career advancement, into “ambitious, occupationally mobile individuals.”<sup>74</sup> This new way of thinking about individuals traditionally relegated to a narrow range of jobs certainly accrues to the advantage of those employees.<sup>75</sup>

Nonetheless, the implementation of symbolic policies and procedures in no way guarantees substantive change for members of the groups that EEO law is designed to protect.<sup>76</sup> In fact, symbolic policies and procedures may provide unjustified optimism that an organization is governed fairly. For example, Edelman notes the danger of grievance procedures: they may be powerful symbols of equity and simultaneously channel employee complaints into avenues producing few significant results.<sup>77</sup>

Moreover, the compliance mechanisms may actually undermine the legal rights of employees. Edelman, Howard Erlanger, and John Lande conducted a study of personnel specialists who administer discrimination complaint handling procedures that illustrates the potential undermining effects of compliance mechanisms.<sup>78</sup> Employers commonly adopt internal dispute resolution (IDR) procedures for handling discrimination complaints. Through use of these proce-

69. See Suchman & Edelman, *supra* note 17, at 920-21.

70. See Edelman, *supra* note 15, at 1567-69.

71. See Edelman, *supra* note 11, at 1423-35.

72. Of course “window dressing” or sham efforts are possible. However, Edelman’s approach to understanding organizational response to civil rights law views employer reforms as sincere, for the most part. See Suchman & Edelman, *supra* note 17, at 923-24.

73. See Lauren B. Edelman & Stephen Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, in RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY (forthcoming) (manuscript on file with author).

74. Dobbin et al., *supra* note 11, at 400.

75. Theoretical and even actual access to previously unattainable positions may coexist with experiences of prejudice and marginalization on the part of those who occupy the jobs. See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 159-79 (1993) (examining the experiences of Black, middle class professionals and managers).

76. See Edelman, *supra* note 11, at 1436; Edelman, *supra* note 15, at 1542-43.

77. See Edelman, *supra* note 11, at 1436.

78. See Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC’Y REV. 497 (1993). The study focused on “complaint handlers” in 10 large organizations. See *id.* at 498.



dures, organizations buffer their core activities from outside intrusion.<sup>79</sup> IDR procedures help employers “avoid the cost, time, and harm to public image” occasioned when an employee ventures outside the organization for more formal redress.<sup>80</sup> Discrimination complaint procedures are also powerful symbols signifying concern for EEO law and procedural fairness.<sup>81</sup> Employers are likely to create such structures with both legitimacy and efficiency in mind.<sup>82</sup>

Whether complainants benefit equally from internal complaint procedures and external legal processes greatly depends on who administers the internal mechanisms. While administrators may be sincerely committed to equal employment opportunity, their position as middle managers, concerned for their own careers, may hamper their abilities to bring about significant change.<sup>83</sup> To mediate these competing concerns, complaint handlers may administrate in a way that is minimally intrusive in an organizational sense yet shows concern for legal ideals.<sup>84</sup>

Indeed, semistructured interviews of such personnel specialists found that they were not concerned with actual legal rights and outcomes.<sup>85</sup> Instead, personnel specialists narrowed the range of claims and remedies by recasting most disputes as individual personality clashes rather than instances of possible discrimination.<sup>86</sup> The goal of racial and gender equality was exchanged for a goal of good managerial practice and a rather unspecified notion that decisions should be fair.<sup>87</sup> Complaints were resolved, constituting a true gain for employees. However, complaint handlers viewed the procedures as mechanisms for venting frustrations and healing relationships rather than

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79. See *id.* at 499, 502.

80. *Id.*

81. See *id.* at 501.

82. See *id.*

83. See *id.* at 501; see also Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73, 77 (1991) (noting that “[t]oo many challenges to organizational practices might result in conflict with top management and the affirmative action officer's loss of authority or dismissal”).

84. See Edelman et al., *supra* note 78, at 498, 502.

85. See *id.* at 513-17.

86. See *id.* at 515-16. The tendency of alternative dispute resolution practitioners to recast broad social problems as interpersonal difficulties has been noted in other settings. See, e.g., RICHARD HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE* (1987) (examining neighborhood dispute resolution); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS* (1990) (examining family and neighborhood dispute resolution).

87. See Edelman et al., *supra* note 78, at 515-16.

punishing perpetrators or compensating complainants for actual losses.<sup>88</sup>

This approach to complaint resolution can undermine legal rights in several ways. First, the punitive, compensatory, and deterrence goals of civil rights law will typically remain unfulfilled by these procedures.<sup>89</sup> Next, the systemic reach of discrimination can be obscured by the focus on individual problems.<sup>90</sup> In other words, reducing a supervisor-subordinate conflict to a mere lack of rapport can conceal group-based biases that affect many employees. Furthermore, the study's authors posit that discrimination complaint procedures can encourage complainants not to take legal action even though there may be grounds for it; that is to say, the process itself may convince the complainant that further action is unwarranted or futile.<sup>91</sup>

The final, most significant way in which complaint procedures can undermine legal rights is that agencies or courts may view these procedures themselves as evidence that discrimination was not present.<sup>92</sup> In another recent study, Edelman and her colleagues found evidence that courts may be using employers' symbolic responses as "ready-made yardsticks for compliance."<sup>93</sup> If these sociologists are correct, then human resource professionals and management attorneys can be seen, in a roundabout way, as providing a definition for the once ambiguous term "discrimination." These professionals' everyday practices create a judicially accepted form of legal compliance that is symbolic and procedural rather than substantive and result-oriented. In other words, to the extent that compliance mechanisms are equated with nondiscriminatory working conditions, the procedures provide a kind of counter-definition for discrimination itself.

88. See *id.* at 526-28. In fact, the IDR mechanisms examined in the study did not incorporate traditional legal remedies for complainants even where discrimination was found. See *id.* at 523.

89. Sexual harassment complaints, however, are an exception. The study found that virtually all of the terminations reported by complaint handlers involved cases where they concluded that sexual harassment had occurred. See *id.* at 523-24.

90. See *id.* at 519.

91. See *id.* at 528.

92. See *id.* at 530. Vicki Schultz has noted a similar phenomenon in job segregation cases. Employers defending against such suits strengthen their arguments that women were not interested in nontraditional occupations by pointing to antidiscrimination personnel policies such as affirmative action plans. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750 (1990).

93. Suchman & Edelman, *supra* note 17, at 924; see also Edelman, *supra* note 11, at 1412; Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth* (paper presented at the 1995 Law & Society Association Annual Meeting, on file with author).

Evidence of this phenomenon may be found in Justice Anthony Kennedy's majority opinion in *Burlington Industries, Inc. v. Ellerth*.<sup>94</sup> In *Ellerth*, the Supreme Court held that employers are vicariously liable for hostile environment sexual harassment perpetrated by supervisors.<sup>95</sup> However, where no tangible employment action is taken against the victim, an affirmative defense is available to the employer. The employer may avoid liability by demonstrating the following: (1) it acted reasonably to prevent and rectify any harassing behavior, for example, by promulgating a sexual harassment complaint procedure; and (2) the plaintiff unreasonably failed to use the procedure or otherwise avoid harm.<sup>96</sup>

In setting forth the justification for the affirmative defense, Justice Kennedy noted that "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."<sup>97</sup> This statement is fascinating in light of the sociological literature discussed above. Kennedy does not simply say that legal compliance can be achieved through employment practices long recommended by personnel managers and defense attorneys.<sup>98</sup> Rather, he reflexively states that a *central purpose* of this once ambiguous antidiscrimination statute is to promote practices recommended by these professionals.

The affirmative defense described in *Ellerth*, at least as interpreted by some courts, represents an affirmation of symbolic compliance and a turn away from mandating a truly discrimination-free working environment. Achieving the latter goal would require holding employers strictly liable for supervisor harassment.<sup>99</sup> In contrast, recent judicial analyses view the standard for legal compliance as based on the existence of appropriate personnel policies rather than based on the work environment itself.<sup>100</sup> Thus, an employer will not

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94. 118 S. Ct. 2257 (1998).

95. *See id.* at 2265-68.

96. *See id.* at 2270.

97. *Id.* The Court recently expanded its view of Title VII's preventative purposes along similar lines. *See Kolstad v. American Dental Ass'n*, No. 98-208, 1999 WL 407481, at \*12 (U.S. June 22, 1999) ("The purposes underlying Title VII are . . . advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.").

98. The Supreme Court first addressed the relevance of complaint procedures as a potential defense in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70-73 (1986).

99. Where the supervisor's conduct results in a tangible employment action, like termination or demotion, the employer is strictly liable. *See Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2284 (1998).

100. *See, e.g., Duran v. Flagstar Corp.*, 17 F. Supp. 2d 1195, 1203 (D. Colo. 1998) (granting summary judgment for an employer on a Title VII claim when the company's policy prohibited harassment, described complaint procedure, and was distributed to employees via handbook); *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1386 (S.D. Ga. 1998) (granting summary judgment for the employer on all Title VII claims after finding a harassment grievance procedure "legally sufficient"). *But cf. Lancaster v. Sheffler Enters.*, 19

be said to discriminate, notwithstanding its supervisor's creation of a hostile environment, if a standard harassment policy exists and has been communicated to employees.<sup>101</sup> An employee whose fear of using the policy is judged unreasonable is without redress.<sup>102</sup>

This discussion does not suggest that sexual harassment procedures are inconsequential. They are certainly important symbols that demonstrate commitment to EEO principles. These procedures may also be valuable mechanisms for venting frustrations, resolving disputes, and even for punishing perpetrators when employees complain and discrimination is recognized.<sup>103</sup> However, even in the best of cases, these procedures do not provide compensation to victims. Nor are they likely to have as great a deterrent effect as that produced by litigation.<sup>104</sup>

The next section examines the degree to which management lawyers use compliance principles in legal practice today and considers the effect this may produce in popular and legal perceptions of discrimination. As noted above, by offering litigation prevention advice, defense attorneys attempt to ensure that their clients' employment decisions can withstand legal challenges. Precepts gleaned from the prior discussion, however, are important for understanding the possible ramifications of this defense strategy.

One should view litigation prevention advice as part of the effort to create antidiscrimination compliance mechanisms. Therefore, the strategies recommended may well tend to produce symbolic rather than substantive results. We might also expect that employers' adoption of the attorneys' suggestions would make it increasingly difficult to discern discrimination in any given situation. Because bulletproofed employment decisions do not bear the traditional markers of discriminatory process, aggrieved employees may be persuaded not to take formal legal action even when there are grounds for it. Moreover, outsiders reviewing bulletproofed decisions—whether courts, administrative agencies, or plaintiffs' attorneys—may regard

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F. Supp. 2d 1000, 1003 (W.D. Mo. 1998) (“[Employer r]easonableness requires more than issuing a policy.”).

101. See *Jones*, 20 F. Supp. 2d at 1386; *Duran*, 17 F. Supp. 2d at 1203.

102. See *Jones*, 20 F. Supp. 2d at 1386; *Duran*, 17 F. Supp. 2d at 1203.

103. See *supra* notes 87-88 and accompanying discussion.

104. The lack of a public declaration that rights have been violated may well impede the deterrence goals of civil rights laws. In fact, Edelman and her colleagues found that discrimination complaint handlers tend to handle disciplinary cases with utmost discretion out of concern for the privacy of the accused and fear that the accused will sue the employer for wrongful discharge or discipline. See Edelman et al., *supra* note 78, at 524. Employer-protective court decisions barring suits where the employer acted fairly, honestly, and in good faith may ameliorate some of the complaint handlers' concerns. See, e.g., *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125 (10th Cir. 1998); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998); *Southwest Gas v. Vargas*, 901 P.2d 693 (Nev. 1995).

the way the decisions were produced as evidence that discrimination did not infect them. In short, just as the actions of discrimination complaint handlers may undermine the rights of employees, the strategies of defense attorneys may significantly alter the ability of employees, plaintiffs' counsel, and the public-at-large to discern continuing conditions of inequality in the workplace.

### III. DEFENSE PRACTICE IN EVERYDAY LIFE

To determine how practitioners' everyday actions may affect anti-discrimination law, it makes sense to examine what they say about it. This project, therefore, began with a content analysis of advice and training materials published by employment lawyers. I studied a sample of the literature created by these professionals—both those who represent defendants and those who represent plaintiffs—and analyzed the publications' themes.<sup>105</sup> Materials were plentiful, a bounty that reflects the extent to which the American workplace has been infiltrated by formal law. Most striking, however, was the realization that defense attorneys are producing much of the literature. This is due to the role that management lawyers play for their clients.

Employers rely extensively on the legal profession for advice about the ambiguities of employment law.<sup>106</sup> This is in great part because the legal system lacks a simple method for conveying information on legal developments to nonlawyers.<sup>107</sup> As workplace regulation proliferates, navigating its complexities becomes increasingly difficult. Out of necessity, employers turn to individuals with the time and expertise to make sense of the ever-evolving legal climate within which they must operate.

Management attorneys transmit their impressions of the legal environment to managers in a number of ways. One obvious method is by offering client-specific legal advice on a tangible problem confronting the organization.<sup>108</sup> Such legal problem solving addresses far more than the particular dilemma at hand and educates management about how particular kinds of problems fit into the larger legal context.

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105. Content analysis involves systematically studying a set of objects to interpret the themes contained in the set. See MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS* 381 (1990) ("Content analysis is the process of identifying, coding, and categorizing the primary patterns in the data."); CELIA C. REAVES, *QUANTITATIVE RESEARCH FOR THE BEHAVIORAL SCIENCES* 349 (1992) ("Content analysis [is] a type of unobtrusive research that analyzes the meanings of recorded messages, including books, diaries, letters, songs, and television commercials.").

106. See Edelman et al., *supra* note 59, at 60-62.

107. See *id.* at 47.

108. See *id.* at 61.

Another transmission mechanism involves providing formal classroom training on employment law. Many defense attorneys conduct workshops on legal topics for managers.<sup>109</sup> At least one study has noted that corporate personnel professionals regard such presentations highly:

[Personnel professionals] repeatedly emphasized the value of the increasingly prevalent personnel workshops (often organized by lawyers) that are intended to demystify many types of federal regulation, especially Title VII. A common theme of such workshops is that by formalizing evaluation and discipline procedures, documenting unsatisfactory work and behavioral problems, and giving written warning before terminating an employee, organizations are more likely to appear to have acted fairly and therefore to prevail in lawsuits.<sup>110</sup>

In fact, evidence indicates an increasing demand for such training.<sup>111</sup>

Many defense lawyers also publish what I refer to as general advisory material. These publications include legal reference books aimed at human resource managers<sup>112</sup> and articles in frequently read legal and business trade journals.<sup>113</sup> The books and articles generally discuss employment law topics and often provide "tips" on legal compliance.

A great deal of the literature for my analysis, however, came from continuing legal education (CLE) programs dedicated to instructing attorneys on workplace law. These seminars provide study guides and training materials to participants.<sup>114</sup> The materials, typically a

109. See *id.* at 76-77.

110. Edelman, *supra* note 11, at 1435. *The Wall Street Journal* reports that "[f]iring lessons may be the hottest trend in management seminars." Andrea Gerlin, *Seminars Teach Managers Finer Points of Firing*, WALL ST. J., Apr. 26, 1995, at B1. The main thrust of these seminars is "minimizing employers' legal exposure." *Id.*

111. See Susan J. Wells, *Supervisors Learn Rules of Hiring, Firing Game*, PORTLAND OREGONIAN, Mar. 8, 1998, at B1 (noting the need and increased demand for employment law training); see also *Employers Wage War on Workplace Lawsuits*, PR NEWSWIRE, Nov. 11, 1998 (discussing training programs as part of employers' "increasingly aggressive war against employee lawsuits").

112. See, e.g., STEVEN C. KAHN ET AL., LEGAL GUIDE TO HUMAN RESOURCES (1994).

113. See, e.g., Jonathan Segal, *EEO Policies: Walking the Razor's Edge*, HR MAGAZINE, Dec. 1997, at 109; Simon Malko, *On the Defensive with the ADA*, HR FOCUS, Feb. 1998, at 5; James Seaman, *An Extension of the ADA*, in GETTING RESULTS FOR THE HANDS ON MANAGER, Oct. 1997, at 5; John J. Myers, *Reduce the Risk of Frivolous Law Suits*, in GETTING RESULTS FOR THE HANDS ON MANAGER, Oct. 1997, at 7; Dave Pelland, *Employment Practices Liability: Coverage Expands as Claims Increase*, RISK MGMT., May 1996, at 60; Stephen Ruffino, *An Ounce of Prevention*, SMALL BUS. REP., Feb. 1994, at 9; *Employment Audits Reduce Chance of Litigation*, SUPERVISORY MGMT., Sept. 1994, at 14 [hereinafter, *Employment Audits*].

114. ALI-ABA's brochure for its *Current Developments in Employment Law* course notes that "[a]n important aspect of this course has been the study materials, which have averaged nearly a thousand pages." ALI-ABA, *Current Developments in Employment Law*, July 17-19, 1997 (brochure on file with author).

compilation of individual papers authored by faculty members, memorialize the advice and information given at the course.

Employment law CLE programs have proliferated in recent years. Some courses specifically offer instruction to both plaintiffs' and defense attorneys. For example, a 1997 American Law Institute-American Bar Association (ALI-ABA) course entitled *Current Developments in Employment Law* was promoted as an "Advanced . . . Course of Study for Plaintiffs' and Defendants' Bars."<sup>115</sup> Other seminars are targeted to a particular legal audience. The Greater New York Chapter of the American Corporate Counsel Association (ACCA) recently sponsored a course, *Trends in Employment Litigation*, providing instruction on "preventative labor and employment law."<sup>116</sup> Across the aisle so to speak, the National Employment Lawyers Association (NELA) hosts an annual convention that facilitates the ongoing education of the plaintiffs' bar.<sup>117</sup>

The conference and course materials from these programs reveal a great deal about the practice of employment discrimination law in the 1990s. There are two points to consider in this respect. First, the instructors generally are highly accomplished legal professionals, and most are experienced attorneys. However, law professors and judges might be listed on faculty rosters as well.<sup>118</sup> The recommended

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115. ALI-ABA CLE Review, May 30, 1997, at 5 (brochure on file with author). A brochure for Georgetown University's annual, bipartisan conference attempts to entice participants as follows: "Learn how your adversaries analyze issues by receiving BOTH the PLAINTIFF and DEFENSE perspective on almost every subject." Continuing Legal Education Division, Georgetown University Law Center, Employment Law & Litigation Update, Apr. 10-11, 1997 (brochure on file with author). The brochure for the Practising Law Institute's (PLI's) 27th Annual Institute on Employment Law describes its preventative law workshop as offering something for both plaintiffs' lawyers and defense counsel: "Learn how far-sighted employers 'paper' themselves out of trouble with policies which lower workforce expectations, and how plaintiff lawyers in many jurisdictions can block these safe harbors." PLI, 27th Annual Institute on Employment Law, Oct. 5-6, 1998 (brochure on file with author).

116. Jackson, Lewis, Schnitzler & Krupman, *in* TRENDS IN EMPLOYMENT LITIGATION 1 (American Corporate Counsel Association, 1995). A brochure for a recent seminar aimed at in-house attorneys had a similar slant: "Counsel's job . . . is to *avoid* litigation. So this course discusses how to handle investigations and avoid or defend potentially 'mega' claims in the wake of such uncertain law." ALI-ABA, Employment and Labor Relations Law for the Corporate Counsel and the General Practitioner, Apr. 23-25, 1998 (brochure on file with author).

117. The line between the defense and plaintiffs' bar is apparently semipermeable. One defense attorney recently noted that "more and more defense lawyers have 'made the switch' to practicing at least some employment law . . . representing plaintiffs." Gary R. Kessler, *A View from the Other Side—Favorite Defense Lawyer Tactics in Defending Employment Cases*, *in* 1998 NINTH ANNUAL CONVENTION 1224 (NELA, 1998). The reverse phenomenon, plaintiffs' attorneys who occasionally represent employers, was one finding of my survey of the plaintiffs' bar described herein. See *infra* note 426 and accompanying text.

118. The faculty for ALI-ABA's course on Advanced Employment Law and Litigation, held on Dec. 7-9, 1995, included: the late Honorable Charles Richey, a well-respected federal district court judge; Gilbert Casellas, then Chairman of the EEOC; and Charles Shanor, a professor at Emory University School of Law. See ADVANCED EMPLOYMENT LAW AND

strategies and advice rendered in the study guides represent views of those considered among the most highly skilled in the legal profession.

Second, the views presented in these programs are widely disseminated. Many of the courses provide credit hours to participating attorneys who practice in mandatory continuing legal education jurisdictions.<sup>119</sup> Significant numbers of lawyers take the courses for both the CLE credit and the practice pointers they receive.<sup>120</sup> Moreover, the dissemination of this information likely influences legal practice around the country. Lawyers rely on experts within their field for their interpretations of legal developments.<sup>121</sup> Professional meetings like the employment law CLE courses "create a fairly strong consensus . . . as to what problems (or opportunities) the law creates and what the appropriate responses are."<sup>122</sup> Thus, by examining the course and study guides, one gains a sense of how employment lawyers view and utilize antidiscrimination law.

#### A. *The Ubiquity of Litigation Prevention Advice*

Examination of the materials described above reveals a striking number of recurring themes and topics that fall roughly into three broad categories: general reviews of the law,<sup>123</sup> litigation strategy,<sup>124</sup>

LITIGATION at xv-xvi (ALI-ABA Course of Study, Dec. 7-9, 1995) (faculty roster). Another ALI-ABA course listed on its faculty roster no less than eight judges. See ALI-ABA, *Employment Discrimination and Civil Rights Actions in Federal and State Courts* (brochure for Mar. 1998 seminar, on file with author).

119. For example, a Federal Publications course, entitled *Avoiding Liability in the Workplace*, was announced in an advertising brochure as being eligible for 11 continuing legal education credit hours in the following states: Alabama, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. See Federal Publications Inc., *Avoiding Liability in the Workplace* (May 1995) (brochure on file with author).

120. ALI-ABA, for example, reports that its approximately 100 courses, which cover a broad range of substantive areas, are taken by thousands of lawyers each year. *Preface to CURRENT DEVELOPMENTS IN EMPLOYMENT LAW* at ii (ALI-ABA Course of Study, July 25-27, 1997).

121. See Edelman et al., *supra* note 59, at 61.

122. *Id.* at 62.

123. See, e.g., Robert B. Fitzpatrick, *Review of Supreme Court's Employment and Other Significant Cases and Emerging Employment Issues*, in *CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 1* (ALI-ABA Course of Study, July 17-19, 1997); Delores Y. Leal, *Developments in Sexual Harassment Law*, in *GEORGETOWN UNIV. LAW CENTER CLE DIV., THE TWELFTH ANNUAL EQUAL EMPLOYMENT OPPORTUNITY UPDATE* 113 (1994); Mary K. O'Melveny, *Recent Developments Under the Americans with Disabilities Act*, in 1996 SEVENTH ANNUAL CONVENTION 287 (NELA, 1996) (on file with author); Merrick T. Rossein, *Recent Developments in Employment Law*, in 1998 NINTH ANNUAL CONVENTION 5 (NELA, 1998) (on file with author); Charles A. Shanor, *Recent Developments in Age Discrimination Litigation*, in *ADVANCED EMPLOYMENT LAW AND LITIGATION* 309 (ALI-ABA Course of Study, Dec. 7-9, 1995); William R. Sullivan, Jr., *Litigation Issues Arising Under the Ameri-*



and litigation prevention strategies. Both plaintiffs' and defense attorneys offer advice and analysis in the first two categories. However, defense lawyers almost exclusively author recipes for legal compliance, and their suggestions are comprehensive and detailed.

There are, of course, logical reasons why employee advocates rarely publish litigation prevention advice. The most obvious reason is that they practice employment discrimination law under constraints that do not affect defense attorneys. Unlike management lawyers, plaintiffs' attorneys are usually unable to market their skills to employees before a specific workplace problem materializes. The majority of employees seeking their assistance do so because they have a specific workplace problem. In most cases, the plaintiffs' attorney does not meet a client until that individual has been fired, demoted, or passed over for promotion.<sup>125</sup> At that point, as plaintiffs' lawyer Paul Merry notes, "the facts are established, an inalterable part of the case, and nothing we can tell the client will change this history."<sup>126</sup>

Some employees, however, are more legally sophisticated and proactive and contact counsel when they begin to fear for their jobs,

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*cans with Disabilities Act*, in *BENEFIT AND EMPLOYMENT LAW LITIGATION* § VII (American Confidence Institute, 1994).

124. For materials on discovery, see Mark S. Dichter & Deidre A. Grossman, *Discovery and the New Federal Rules of Civil Procedure*, in *EMPLOYMENT DISCRIMINATION LITIGATION* 51, 67-106 (PLI, 1994); Thomas P. Murphy, *Managing Discovery in Employment Litigation: The Employer's Perspective*, in *SOUTHERN METHODIST UNIV. SCHOOL OF LAW CLE PROGRAM, TWELFTH ANNUAL MULTI-STATE LABOR AND EMPLOYMENT LAW SEMINAR* at B1-12 (1994); Robert J. Truhlar, *Discovery: Invading Their Space*, in *1997 EIGHTH ANNUAL CONVENTION* 141 (NELA, 1997) (on file with author). For materials on summary judgment, see Katherine L. Butler, *Avoiding Summary Judgment: Practical Tips and Current Developments*, in *1997 EIGHTH ANNUAL CONVENTION* 49 (NELA, 1997) (on file with author); Mark S. Dichter, *The Rush to Summary Judgment in Employment Cases*, in *THIRD ANNUAL EMPLOYMENT LAW & LITIGATION CONFERENCE* 775-824 (Law Journal Seminars Press, 1994); Ellen M. Martin, *Dispositive Motions in Federal Employment Discrimination Cases*, in *EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS* 859, 872-900 (ALI-ABA Course of Study, June 3-5, 1993). For materials on opening and closing statements at trial, see Robert L. Bell, "Ready for the Plaintiff!" and *Other First Impressions in an Employment Discrimination Trial: Voir Dire and Opening Statement*, in *THE TWELFTH ANNUAL EQUAL EMPLOYMENT OPPORTUNITY UPDATE: SUPPLEMENTAL COURSE MATERIALS* § VIII (CLE Division, Georgetown Univ. Law Center, 1994); Roxanne Barton Conlin, *Opening Statement: First Impressions Count Most in Employment Cases*, in *1997 EIGHTH ANNUAL CONVENTION* 20 (NELA, 1997) (on file with author); John R. McCall, *Trying an Employment Case to a Jury*, in *SOUTHERN METHODIST UNIV. SCHOOL OF LAW CLE PROGRAM, § I* (Southern Methodist Univ. School of Law CLE Program, 1994); Keith M. Pyburn, Jr., *Sex Discrimination: Demonstration of Effective Opening and Closing Statements*, in *THE THIRD ANNUAL EMPLOYMENT LAW & LITIGATION CONFERENCE* 827 (Law Journal Seminars Press, 1994).

125. See Paul H. Merry, *Thoughts on Counseling the Current Employee*, in *1996 SEVENTH ANNUAL CONVENTION* 797 (NELA, 1996) (on file with author).

126. *Id.*

but before formal action is taken against them.<sup>127</sup> When this occurs, the plaintiffs' lawyer may be able to assist the employee in obtaining a satisfactory outcome that avoids litigation.

There are risks and significant limitations for the attorney who plays such a role. First, a danger exists that the employer will discover the employee has hired a lawyer, a fact likely to escalate the existing conflict and prompt the employer to adopt an adversarial posture.<sup>128</sup> Next, some advocates worry that attorneys who focus on providing advice short of litigation may overlook the running of the statute of limitations on some types of claims, thereby exposing themselves to malpractice claims.<sup>129</sup> Moreover, if the employee is ultimately terminated or otherwise adversely affected, the employee may attribute it to the advice that was given by the lawyer.<sup>130</sup> Thus, one attorney cautions his colleagues to give only general advice "that may or may not apply to a given situation."<sup>131</sup>

Finally, the issue of attorney compensation may be problematic. Because employees often cannot afford to pay counsel on an hourly basis, plaintiffs' lawyers frequently rely on contingency fees for compensation.<sup>132</sup> Determining what an employee has recovered in a case, for the purposes of obtaining a percentage, may be difficult absent a damage award or settlement.<sup>133</sup> How does one calculate the value of a transfer, for example?

This is not to say that plaintiffs' lawyers see no value in consulting with employees before adverse action has been taken against the employees. Nor are plaintiffs' lawyers averse to obtaining positive results for clients without resorting to litigation. Nonetheless, understanding the constraints under which these practitioners labor helps explain why one finds little litigation prevention advice published by the plaintiffs' bar in comparison to their defense counterparts.

127. See *infra* text accompanying note 427 (describing the percentage of my survey respondents who reported having counseled employees before adverse employment actions are taken against them).

128. See Stephen M. Murphy, *What to Advise an Employee on the Firing Line*, in 1996 SEVENTH ANNUAL CONVENTION 818 (NELA, 1996) (on file with author) (reprinted from *Lawyers Weekly USA*, 1993).

129. See Merry, *supra* note 125, at 802; William Quackenbush et al., *Problems Encountered When Representing Current Employees*, in 1996 SEVENTH ANNUAL CONVENTION 791 (NELA, 1996) (on file with author).

130. See Merry, *supra* note 125, at 802; Quackenbush et al., *supra* note 129, at 791.

131. Joseph Posner, *Counseling the About to be Terminated Employee*, L.A. TRIAL LAW. ASS'N ADVOC., May 1987, at 5.

132. See PAUL H. TOBIAS & SUSAN SAUTER, *JOB RIGHTS & SURVIVAL STRATEGIES: A HANDBOOK FOR TERMINATED EMPLOYEES* 107 (1997). Many attorneys require clients to pay costs and a retainer fee. See *id.*

133. See Merry, *supra* note 125, at 804.

In contrast, defense attorneys find a tremendous market for their services as expert interpreters of employment law.<sup>134</sup> As legal regulation of the workplace continues to expand, employers increasingly seek the assistance of management attorneys in helping them make sense of it. Indeed, a recent survey by the Bureau of National Affairs indicates that human resource managers have grown more dependent on lawyers over the past several years.<sup>135</sup>

It should surprise no one that defense attorneys engage in the discussion and dissemination of compliance strategies. Both associates and partners are under tremendous pressure to generate revenues for their firms.<sup>136</sup> Business development not only takes the form of servicing old clients, it also requires that attorneys attract new clients.

Providing litigation avoidance advice facilitates business generation in two ways. First, this advice operates as a form of advertisement for the attorney and his or her firm. Not only does a publication or speech place one's name before the public; it can also establish professional status and expertise.<sup>137</sup> For example, a well-written article in a personnel management journal can help a lawyer demonstrate the breadth of his or her legal knowledge and skill.

Second, articles on compliance strategies attempt to set the stage for corporate action. Discussions aimed at managers often make the threat of employer liability explicit. A recent article, for example, asks ominously, "Could your company become the victim of judicial blackmail?"<sup>138</sup> It then continues:

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134. Management attorneys can be creative marketers. For example, mega-management firm Littler, Mendelsohn, Fastiff & Tishy recently joined with an insurance company that supplies a new insurance product: employment practices liability insurance. See Jenna Ward, *Program Links Littler with Insurer*, THE RECORDER, Nov. 19, 1997 at A1; Albert R. Karr, *Insurers Press Firms to Ensure Against Litigation*, WALL ST. J., Nov. 18, 1997, at A1. The insurance policy, which protects employers from workplace-related law suits brought by employees, comes with a risk management audit performed by Littler. The law firm reviews corporate policies and practices, and issues a report on the company's vulnerability to suit. Obviously, for Littler this is more than a one-shot evaluation; rather, it is an opportunity to establish an ongoing relationship with a new corporate client.

135. See *HR Managers Turn to Counsel More Often in Wake of New Laws*, BNA Survey Finds, Daily Lab. Rep. (BNA) D27 (Feb. 15, 1995). Fifty-five percent of the human resource executives responding to the survey described their companies as "somewhat more reliant" or "much more reliant" on legal counsel than they were in 1989. Ninety-three percent of the managers seek legal review of some of their human resource policies and procedures, 66% consult with attorneys about new laws, and 62% seek advice in response to employee and applicant complaints, such as discrimination claims.

136. Many commentators bemoan that legal practice, rather than being a civic-calling, now functions primarily as a profit-making endeavor. See, e.g., ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 1-2 (1993).

137. This is known as "reputation marketing" and consists of "speeches, articles and seminars that will build [the attorney's] reputation." Barbara Lewis & Dan Otto, *Marketing Techniques: A Contact Sport*, CAL. LITIG., Winter 1998, at 10.

138. Myers, *supra* note 113, at 7.

All too often, terminated employees will retaliate against their former employers by bringing frivolous discrimination lawsuits. Those who file these suits are banking—literally—on the company's willingness to make a payoff rather than risk the costs and embarrassment of a public trial. Even a frivolous lawsuit, after all, generates high expenses and negative press.<sup>139</sup>

This sort of pitch, followed by extensive recommendations for alteration of company practices, makes the need for legal expertise palpable. In the business law context, Donald Langevoort and Robert Rasmussen posit that lawyers overstate legal risk to demonstrate the necessity and value of legal services.<sup>140</sup> Lauren Edelman, Steven Abraham, and Howard Erlanger find this phenomenon present in employment law counseling as well.<sup>141</sup> Even if one does not believe that the threat to employers from discrimination litigation is overestimated, preventative strategies in both content and tone are calculated to drum up business for the lawyers offering them.<sup>142</sup>

The proliferation of litigation avoidance advice is thus easy to explain. Management lawyers dispense it in order to create a market for their services. An important issue, however, is whether employers assimilate the suggestions they receive. I suggest that to a great, but admittedly imperfect, extent they do.<sup>143</sup> One need not argue that employers slavishly follow litigation prevention advice to understand that compliance activity is enormously consequential. The reasons corporate clients are receptive to the compliance strategies recommended by defense attorneys are considered below.

139. *Id.*

140. See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 377 (1997).

141. See Edelman et al., *supra* note 59, at 74-75. This study argues that employment attorneys inflate the threat of wrongful discharge litigation and then "claim to be able to contain that threat" in order to create a market for their services. *Id.*

142. Edelman and her colleagues did not analyze attorney rhetoric regarding employment discrimination litigation. Indeed, perceptions of the amount of federal civil rights litigation activity differ significantly depending upon who is asked. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 202-03 (1997). Some portray the federal civil rights docket as inundated by an avalanche of claims. See *id.* Others note that civil rights may be "among the least invoked of all laws." David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 L. & SOC'Y REV. 7, 10 (1996); see also KRISTEN BUMILLER, THE CIVIL RIGHTS SOCIETY 1-4 (1988) (arguing, *inter alia*, that people tend not to pursue civil rights claims because they resist defining themselves as victims). Nonetheless, raw numbers provide a sense of how much formal litigation is taking place. In 1997 the number of EEO case filings in federal court was 24,174, a 4.4% increase from 1996. See Nancy Montwieler, *Rate of EEO Litigation Eased in '97, But Government Cases Jumped Sharply*, Daily Lab. Rep. (BNA) B2 (Mar. 27, 1998).

143. See Suchman & Edelman, *supra* note 17, at 931 (noting that organizations give formal law selective, imperfect attention).

### B. Why Employers Listen

Corporations are receptive to litigation prevention advice for a number of reasons. The first reason is the existence of a sympathetically allied group of professionals who work on the inside: human resource managers. As noted above, in the early 1970s, personnel professionals and management attorneys began to respond opportunistically to the threats posed by an expanding field of employment regulation.<sup>144</sup> Interestingly, the legal profession initially reacted in a more measured way than the personnel profession.<sup>145</sup> For example, human resource managers actively advocated for the use of nonunion grievance procedures and employment at will clauses<sup>146</sup> as compliance mechanisms before employment lawyers advocated their use.<sup>147</sup>

The enthusiasm of human resource professionals for legal compliance strategies is in part attributable to the desire of this group to enhance its standing within the corporation.<sup>148</sup> Personnel managers, occupying in many respects marginal roles within organizations, need to demonstrate their importance and expertise.<sup>149</sup> By offering solutions to the perceived threat of litigation, they extend their influence over corporate affairs. In fact, Sutton and Dobbin note that some human resource professionals in the 1970s quite consciously advocated using "managers' uncertainty over standards of compliance as leverage for upgrading and formalizing the personnel function within firms."<sup>150</sup>

Management attorneys assist human resource managers in maintaining their jurisdiction over corporate employment relations.<sup>151</sup> The affiliation between the professional groups has been described this way:

[R]ather than competing with lawyers for jurisdiction over organizational response to the legal environment, the personnel profession has developed an informal alliance with the legal profession. Because the legal profession's expertise over law-related matters enjoys widespread social acceptance, the personnel profession

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144. See *supra* notes 54-59 and accompanying text; see also Sutton & Dobbin, *supra* note 12, at 800.

145. See Sutton & Dobbin, *supra* note 12, at 801.

146. These clauses, also called disclaimers of contractual liability, expressly state that the employer may terminate the employee without just cause. See *id.* at 796. They are often published in employee handbooks and employment applications. See *id.* For examples of such clauses, see CHARLES A. SULLIVAN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 182 (1993).

147. See Sutton & Dobbin, *supra* note 12, at 801.

148. See *id.* at 800; Sutton et al., *supra* note 38, at 949-50.

149. See Edelman et al., *supra* note 59, at 74-76.

150. Sutton & Dobbin, *supra* note 12, at 800.

151. See Edelman et al., *supra* note 59, at 61.

benefits from, and is legitimated by, the alliance between the two professions.<sup>152</sup>

In return, the presence of a receptive audience inside the corporation helps defense attorneys secure a market for legal services.<sup>153</sup>

A second reason why employers are receptive to litigation avoidance strategies concerns the nature of corporate response to legal regulation itself: organizations are resistant to the intrusion of formal law. Writing about tax regulation, Doreen McBarnet notes that the imposition of legal rules often prompts corporations to use legal services to achieve their goals.<sup>154</sup> Corporate lawyers minimize the effects of law on their clients by developing creative legal strategies for avoiding the law's consequences, a technique McBarnet calls "creative compliance."<sup>155</sup>

Creative compliance is also a way of managing legal regulation of the workplace. Corporate responses to union organizing efforts are a useful example. While, by law, an employer cannot prohibit the concerted activities of its employees, an employer can take steps to diminish the chances that an organizing effort will be successful.<sup>156</sup> Indeed, employers typically offer active resistance to the attempts of their employees to unionize.

One recent analysis of union organizing campaigns concluded that union busting, an aggressive and often unlawful form of employer resistance, is a widespread occurrence among employers.<sup>157</sup> Moreover, the study found that employers routinely hire management attorneys and consultants to help them defeat organizing ef-

152. *Id.* at 76.

153. The alliance between the two professional groups is nicely illustrated by the Society for Human Resource Management's annual employment law and legislative conference. The conference sessions, which are designed to educate personnel managers, often showcase attorneys who discuss legal developments and compliance strategies. See, e.g., *ADA, FMLA May Frustrate Human Resources, But Laws Can Be Dealt With, Attorneys Say*, Daily Lab. Rep. (BNA) C2 (March 12, 1998) (discussing the compliance strategies recommended by attorneys at two different conference sessions).

154. See Doreen McBarnet, *Legal Creativity: Law, Capital and Legal Avoidance*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 73, 75 (Maureen Cain & Christine B. Harrington eds., 1994).

155. *Id.*

156. The National Labor Relations Act (NLRA) grants to employees, *inter alia*, the right "to form, join, or assist labor organizations." 29 U.S.C. § 157 (1994). Section 158(a)(1) of the NLRA prohibits employer interference with restraint or coercion in the exercise of that right. See *id.* § 158(a)(1). Additionally, section 158(a)(3) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment" to "discourage membership in any labor organization." *Id.* § 158(a)(3). Nonetheless, employers are entitled to make their views on unionization known to employees so long as those views are not expressed coercively. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

157. See Richard W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Case Studies of the Union Busting Convention*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 61, 62 (Sheldon Friedman et al. eds., 1994).

forts.<sup>158</sup> These specialists frequently employ strategies that “test the legal and technical limits” of the law’s protection of workers rights.<sup>159</sup> In other words, they assist employers in achieving union avoidance by practicing creative compliance.

One labor and employment law firm has coined a phrase to describe a particular type of workplace creative compliance. Jackson, Lewis, Schnitzler & Krupman refers to the technique it helped develop as *preventive employment relations*.<sup>160</sup> The goal of preventative employment relations is to create a workplace environment free from the factors that trigger outside regulation. Note the firm’s pitch for its services: “perhaps our proudest accomplishment is the number of clients who have relied on our expertise in developing issue-free environments, thereby making intervention of a union unnecessary.”<sup>161</sup> At its best, the technique inoculates the employees against the desire to explore the benefits of union representation.

From an employer’s perspective, practicing union avoidance makes sense because unions restrain the decision-making ability of corporate management. Employment discrimination law offers a similar challenge to managerial authority.<sup>162</sup> Given the proliferation of antidiscrimination laws,<sup>163</sup> it is not possible to hire, fire, or promote without considering potential liability. Moreover, workplace legal regulation potentially opens up to scrutiny and reevaluation every employment decision an employer makes, an outcome viewed as both inefficient and antithetical to the business interests of the firm.<sup>164</sup>

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158. See *id.* A recent study of 261 National Labor Relations Board (NLRB) union certification elections found that 86% of the employers used outside management consultants or lawyers to help orchestrate their campaigns. See Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 157, at 75, 80. However, the study determined that only 15% of the outside experts were lawyers. See *id.*

159. Gordon R. Pavy, *Winning NLRB Elections and Establishing Collective Bargaining Relationships*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 157, at 110, 115.

160. As the firm notes in its promotional materials:

Jackson Lewis has been, in many respects, a pioneer. We are probably the first firm actively to practice preventive labor and employment law. From our beginning 37 years ago, Jackson Lewis has advocated that the education of management is the key to avoiding legal problems. This preventive approach continues to be the foundation of our practice.

Jackson, Lewis, Schnitzler & Krupman, *supra* note 116, at 1.

161. *Id.*

162. See Bisom-Rapp, *supra* note 29, at 361; see also Edelman, *supra* note 15, at 1532-33.

163. See *supra* note 50 (listing the major federal statutes passed after Title VII).

164. See Bisom-Rapp, *supra* note 29, at 361; Edelman, *supra* note 15, at 1535. Many management attorneys stress that defending suits is a costly and time-consuming process. See, e.g., David A. Cathcart, *Employment Termination Litigation: Collateral Tort Theories and the Multimillion Dollar Verdict*, in RESOURCE MATERIALS: EMPLOYMENT AND LABOR

A partial solution to this problem can be obtained by enlisting the services of management attorneys or, at the very least, reading and absorbing their general advice. What do these lawyers recommend organizations do to decrease the risk of costly legal challenges? They advocate the adoption of compliance strategies that greatly increase an employer's ability to defend the decisions the employer makes.

A third reason employers are receptive to management attorneys' advice has been discussed previously: organizations experience normative pressures to comply with equal opportunity law and preventative strategies are compliance mechanisms. By adopting the practices lawyers recommend, organizations demonstrate adherence to antidiscrimination principles. Organizations are complex social actors that react not only to efficiency concerns, but also to society's cultural norms.<sup>165</sup> Support for equal employment opportunity is widespread in American society<sup>166</sup> and has had a decided impact on corporate practices.<sup>167</sup> These compliance mechanisms are adopted because, *inter alia*, organizations view adoption as "the proper, legitimate, or natural thing to do."<sup>168</sup>

Finally, employers likely assimilate the suggestions they receive from defense lawyers because they gain a great deal by doing so. As Lauren Edelman notes:

[O]rganizations that appear attentive to EEO/AA law are less likely to provoke protest by protected classes of employees within the firm or community members who seek jobs, they are more likely to secure government resources (contracts, grants, etc.), and they are less likely to trigger audits by regulatory agencies. And, if sued, organizations can point to the structural changes as evidence of the non-discriminatory nature of their policies and practices.<sup>169</sup>

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LAW 309, 328 (ALI-ABA, 1995) (describing "substantial risks and costs arising from litigation"); Peter M. Panken & Stacey B. Babson, *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, in *ADVANCED EMPLOYMENT LAW AND LITIGATION* 61, 64 (ALI-ABA Course of Study, Dec. 1-3, 1994) ("It is time to stop this proliferation of litigation, find a faster method of resolving disputes and get on with productive pursuits."); Stephen M. Paskoff, *Members of the Jury: Aftershocks of New Employment Laws 6* (June 1994) (warning that litigation saps "financial and human resources which should be devoted to business") (training materials distributed at the Society for Human Resource Management Annual Conference, on file with author).

165. See Suchman & Edelman, *supra* note 17, at 918.

166. One commentator aptly notes, "Civil rights laws in our secular culture play a role analogous to that of a sacred text." D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 *VAND. L. REV.* 349, 350 n.4 (1992).

167. See *supra* notes 11-17 and accompanying text.

168. Suchman & Edelman, *supra* note 17, at 919.

169. Edelman, *supra* note 15, at 1542.



In short, listening to what management lawyers say about how to comply with employment discrimination law and avoid litigation makes good sense. A little compliance can go a long way.

The harder question, however, is the net effect of compliance mechanisms on conditions of workplace inequality. To the extent that litigation prevention advice promotes symbolic rather than substantive gestures, it may mask discrimination and make it difficult for aggrieved employees to obtain outside assistance.<sup>170</sup> It may also, as previously noted, affect public perceptions of the prevalence of employment discrimination. The next sections will review the content of defense advice with this key question in mind.

### C. *Scripting Reality with Litigation Prevention Advice*

Perhaps the most interesting attribute of litigation prevention advice is the degree to which it consciously advocates the creation of beneficial evidence on an ongoing basis and envisions the potential use of that proof. Indeed, development of a record that can be used by an employer to defend its employment decisions is the main thrust of the literature.<sup>171</sup> Management attorneys clearly recognize that the workplace is a fertile site for generating information that both supports and undermines the goals of their clients. By recommending various compliance tools, these lawyers attempt to maximize the amount of data available for the resistance of legal challenges and minimize the data favorable to a future plaintiff-employee.<sup>172</sup>

Recognizing that evidence in employment discrimination cases is not found but created by human beings is important for this discussion.<sup>173</sup> Some of it may be produced inadvertently, such as when a supervisor makes an unthinking derogatory statement about minorities or women.<sup>174</sup> Some evidence is created deliberately, for example,

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170. See Edelman et al., *supra* note 78, at 530.

171. See *infra* Part III.C.1.

172. One attorney put it this way: "Fortunately, employers need not be idle victims. Instead, you can review your employment practices and make small changes that will decrease the possibility of legal claims and improve your chances of having a successful defense if a dispute cannot be avoided." Ruffino, *supra* note 113, at 9.

173. See GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 106 (1989) (noting that in criminal cases investigators will generate more or less evidence depending on their interest in winning a case).

174. See, e.g., *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1318 (8th Cir. 1994) (quoting employer's admission that "women in sales were the worst thing that had happened" to the company); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990) (quoting a supervisor's remark that "if it were his company he would not hire blacks"). In discrimination cases, these "smoking gun" statements are considered direct proof of the decisionmaker's animus toward a protected group. See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 187-88 (1997). Though such statements no doubt are still made, they are today increasingly

when a plaintiff hires an expert to prepare a report on conditions at a particular work site.<sup>175</sup> Nonetheless, not all parties are equal in their ability to attract and produce the evidence necessary to sustain their claims.<sup>176</sup> In fact, people and organizations with “elevated social status” and “extensive social ties” have significant evidentiary advantages.<sup>177</sup>

Understanding evidence as the creation of human labor and as being affected by the litigants’ social attributes highlights the advantages held by management attorneys and their clients. Employment discrimination cases are unique in that employers typically possess most of the documents bearing on liability. As one practitioner notes, “[t]he single biggest advantage an employer has in employment discrimination litigation is control over the facts. By contrast to the typical commercial litigation, in an employment case the defense generally controls almost all, if not all, the documents relevant to liability.”<sup>178</sup> Significantly, these records, including the employee’s personnel file, are considered the employer’s property.<sup>179</sup> Thus, before litigation is commenced access to them by the employee may be severely limited.<sup>180</sup>

Moreover, documents may be created years in advance of any litigation. Therefore, in a dispute, the records can be used by manage-

rare. See Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1, 16 (1986) (noting that direct evidence of discriminatory intent is seldom available).

175. Plaintiffs have effectively used experts in discrimination suits involving stereotyping and glass ceiling issues. See, e.g., *Hopkins v. Price Waterhouse*, 825 F.2d 458, 467 (D.C. Cir. 1987), *rev’d and remanded on other grounds*, 490 U.S. 228, 295 (1989); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991); *Valdez v. Church’s Fried Chicken, Inc.*, 683 F. Supp. 596, 611 (W.D. Tex. 1988); see also Donna M. Ryu, *Practice Pointers for Litigating Glass Ceiling Class Actions*, 1998 NINTH ANNUAL CONVENTION 823, 838 (NELA, 1998) (discussing the use of experts to expose stereotyping and bias in defendant’s practices).

176. See Mark Cooney, *Evidence as Partisanship*, 28 L. & SOC’Y REV. 833, 834 (1994).

177. *Id.*

178. Martin, *supra* note 124, at 873.

179. See Barbara A. Caulfield, *Employment Law: No “Self-Help” Discovery Allowed*, CAL. LAW., Jan. 1998, at 32; see also Peter M. Panken & Stacey B. Babson, *Creating the Personnel Paper Trail: Personnel Manuals*, in RESOURCE MATERIALS: EMPLOYMENT & LABOR LAW 5, 36 (ALI-ABA Course of Study, 7th ed. 1995) (providing an example of corporate record policy that prohibits both unsupervised access to personnel records by employee and record duplication).

180. Employee advocates Paul Tobias and Susan Sauter caution prospective plaintiffs to resist the temptation to take company records without authorization.

An employee’s personnel files, including hiring or firing information, salary information, letters to clients, and internal memoranda are the property of the company. You do not have the right to take them with you when you go. Except in [17 states], you do not have the legal right to look at the information in your file. Your employer may have a policy allowing access or may honor a request to review the file. Be persistent in your request to copy [the] file, but realize that your employer may be under no legal obligation to allow you to do so.

See TOBIAS & SAUTER, *supra* note 132, at 20-21.

ment to reconstruct what happened years before.<sup>181</sup> And if prepared properly, these records can significantly affect the outcome of a lawsuit.<sup>182</sup>

Employers are also advantaged in obtaining favorable testimonial evidence. Mark Cooney notes that the willingness of witnesses to come forward and the partisanship of their testimony tend to increase with the status of the party requesting the evidentiary assistance.<sup>183</sup> This phenomenon certainly appears operative in employment discrimination litigation, where corporate entities appear to outrank employees. One advocate observes:

The defense . . . generally controls almost all, if not all, the witnesses other than the plaintiff. One reason for this is that the witnesses with knowledge of facts that occurred in the workplace tend to have allegiance to the employer. It is not unusual in an employment discrimination case for the plaintiff not to be able to call a single witness other than himself on liability and, indeed, for the plaintiff to have to call defense witnesses on his case-in-chief in order to avoid a directed verdict.<sup>184</sup>

Access to witnesses provides the defense with several evidentiary advantages.<sup>185</sup> Obviously, it enables the employer to enlarge the universe of supportive evidence. For example, one attorney suggests in discharge cases that "defense counsel must work with the witnesses to recall as many specific factual examples of the traits being criti-

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181. See Paskoff, *supra* note 164, at 2.

182. See AUGUST BEQUAL, EVERY MANAGER'S LEGAL GUIDE TO FIRING 57 (1991) ("Records can make or break a wrongful discharge case."); Ralph H. Baxter, Jr. & Thomas P. Klein, *Protecting Against Exposure*, NAT'L L.J., Feb. 28, 1994, at S1 (noting that the way documents are prepared "can have a significant effect on the outcome of a [suit]"). Employees, too, may create records years before a dispute arises. Unlike employers, however, no one is training them to do so.

183. See Cooney, *supra* note 176, at 843.

184. Martin, *supra* note 124, at 873; see also Vicki Lafer Abrahamson, *Trying a Large Damages Employment Discrimination Case*, in THE THIRD ANNUAL EMPLOYMENT LAW & LITIGATION CONFERENCE 727, 736 (Law Journal Seminars Press, 1994). Abrahamson, a plaintiffs' attorney, facetiously notes that highly regimented employers, such as large corporations, "often employ plenty of individuals eager to display loyalty to the employer by serving as defense witnesses." *Id.* Another plaintiffs' attorney, now a federal district court judge, complained several years ago that large employers often have "numerous adverse witnesses who wish to retain their employment and promotional opportunities by being the employer's 'team players.'" Janet Bond Arterton, *Case Selection, Negotiation, Settlement and Ethical Considerations*, in 1994 FIFTH ANNUAL CONVENTION §17 (NELA, 1994).

185. The plaintiff's attorney's access to witnesses is, in contrast, fraught with limitations. The ABA Model Rules of Professional Conduct prohibit *ex parte* contacts between the plaintiff's lawyer and present employees of the defendant who are managers, or whose actions may be imputed to the employer, or whose statements might constitute an admission of the employer. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 4 (1998); see also Robert B. Fitzpatrick, *Ex Parte Communications with Current and Former Employees*, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 137, 141 (ALI-ABA Course of Study, July 17-19, 1997). A few courts even limit *ex parte* access to certain categories of former employees. See *id.* at 141-42.

cized as possible.”<sup>186</sup> This can, she notes, “make the defense story much more believable.”<sup>187</sup> Furthermore, access to cooperative witnesses enables the defense to review and correct inconsistencies between documentary and testimonial evidence, thus bolstering the employer’s version of the facts. Finally, by working with favorable witnesses, defense attorneys may help increase their testimonial abilities. This intervention may prevent the plaintiff’s attorney from undermining the probative value of the paper trail by interrogating on the stand an inarticulate employer witness.<sup>188</sup>

None of these advantages, however, necessarily mean that defense attorneys will promote symbolic shows of compliance to civil rights law rather than actual substantive change for the groups those laws are designed to protect. In fact, some of the advice might promote symbols and substance simultaneously. The literature I reviewed, however, focused far more on appearance than it did on reality. Specifically, it emphasized: (1) the ways to produce favorable evidence; (2) the importance of timing in employment decision making; and (3) the necessity of achieving the proper tone regarding actions taken. These topics will be discussed respectively in the following sections.

### 1. *Ensuring the Continual Production of Favorable Evidence*

The prototypical employment discrimination case proceeds under a theory of disparate treatment.<sup>189</sup> Employees maintaining these suits assert that the employer treated some people less favorably than others because of a protected characteristic, like race, sex, national origin, religion, age, or disability.<sup>190</sup> Employer motivation is the critical question in such litigation.<sup>191</sup> A plaintiff must convince the fact finder, be it a judge or jury, that bias against a protected

186. Martin, *supra* note 124, at 874; see also Nancy L. Abell et al., *Selected Tips for Defending Employment Cases*, in EMPLOYMENT DISCRIMINATION LITIGATION 215, 230 (PLI, 1994) (instructing defense attorneys interviewing witnesses, “not [to] leave the time block until all details necessary to recreate the scene have been established”).

187. Martin, *supra* note 124, at 874.

188. See Stephen L. Brischetto, *Shredding the Paper Trail: Or Strategies for Attacking in Paper Cases*, in 1994 FIFTH ANNUAL CONVENTION § 14, at 7 (NELA, 1994) (discussing a case in which the author demonstrated that defense witnesses “didn’t take their own reasons seriously”).

189. As previously noted, there are two major theories of discrimination in civil rights law: disparate treatment and disparate impact. See *supra* note 30.

190. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (citing *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

191. See Brodin, *supra* note 174, at 187; Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 100 (1994). This model of discrimination has been extensively critiqued. See, e.g., Krieger, *supra* note 28; Lawrence, *supra* note 28.

group was a reason for an employment decision.<sup>192</sup> To make the requisite showing, the employee must marshal sufficient evidence of the employer's state of mind. Evidence may include so-called direct proof or "smoking gun" statements that reflect the decisionmaker's animus toward the protected group.<sup>193</sup> Or it may, as is frequently the case, consist of circumstantial evidence that allows the fact finder to infer the discriminatory animus.<sup>194</sup>

Because motive is critical in disparate treatment suits, employers frequently defend themselves by proffering evidence of a legitimate and nondiscriminatory reason for their employment decision.<sup>195</sup> Most litigation prevention advice anticipates the need to mount such a defense and recommends implementing systems that will continually generate favorable documentary evidence. The following advice is illustrative:

One of the most effective ways for an employer to defend against employment-related claims is to have a clearly established "paper trail" which can be used as documentary evidence to support management decisions which are subsequently the source of litigation. When determining whether or not an employer has sufficient documentation of all employment-related decisions, the employer should analyze this issue from the standpoint of an "employment cycle." This cycle includes all aspects of an employment relationship—interviewing, hiring, employee performance, and termination. Each employer must be assured it can adequately document each decision made at any point during the employment cycle.<sup>196</sup>

In other words, protection from suit can be achieved by making the most of the employer's evidentiary advantage.

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192. In system-wide pattern and practice discrimination cases, the named plaintiffs must prove that bias is the employer's "standard operating procedure—the regular rather than the unusual practice." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

193. See *supra* note 174 and accompanying text.

194. A good example of persuasive evidence of discriminatory intent is when similarly situated employees outside of the protected class are treated more favorably or are more leniently disciplined. See Adam C. Wit, *The "Similarly Situated Individual": Evidence of Comparable Employees and Its Application in Employment Discrimination Litigation*, 23 EMPLOYEE RELS. L.J. 31, 32-33 (1997). The Supreme Court has devised an elaborate and rather inelegant framework for evaluating circumstantial evidence. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-12 (1993).

195. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 260 (1981) (explaining that after plaintiff establishes prima facie case, the burden of production shifts to the employer to offer a legitimate, nondiscriminatory reason for its action).

196. Patrick H. Hicks & Neil M. Alexander, *The Five Biggest Mistakes Employers Make*, NEVADA LAW., June 1996, at 12, available in WESTLAW, 4-JUN NEV. LAW. 12, at \*5; see also Paskoff, *supra* note 164, at 2 (advising employers to "keep thorough, accurate, contemporaneous records").

The records produced, however, are only helpful to the extent that their contents reflect nondiscriminatory decision making. Therefore, many management attorneys recommend techniques designed to create supportive documentation. While the procedures suggested primarily apply to the employer's performance evaluation and termination processes, some defense lawyers recommend regular inspection of employment records. One law firm advises:

Personnel files should be "sanitized," *i.e.*, they should be reviewed periodically to make sure that the information contained in such files is not outdated or inaccurate. State and federal statutes prescribe time periods for keeping various types of personnel records. Once these time periods have elapsed, potentially misleading or harmful documents should be weeded out.<sup>197</sup>

Another defense attorney similarly suggests that employers "[m]aintain well-kept 'clean' personnel files; [and] eliminate unnecessary references to sex, age, etc."<sup>198</sup>

#### (a) *Performance Review as a Preventative Tool*

Establishing a standard performance review system is a preferred method for generating favorable documentation.<sup>199</sup> Attorneys view evaluations as crucial documentary evidence because the issue of performance is often paramount in employment litigation.<sup>200</sup> Management lawyers caution, however, that a poorly administered re-

197. GERALD S. HARTMAN ET AL., CURRENT EMPLOYMENT LAW AND RELATED LITIGATION ISSUES 358 (Wake Forest University School of Law, 1994).

198. Douglas L. Williams, *Handling the EEOC Investigation*, in ALI-ABA RESOURCE MATERIALS: EMPLOYMENT & LABOR LAW 1123, 1145 (7th ed. 1995); see also Baxter & Klein, *supra* note 182, at S1 (recommending "periodic internal audits").

199. See RICHARD H. BLOCK ET AL., AVOIDING LIABILITY IN THE WORKPLACE 58 (Federal Publications, 1994); Robert B. Fitzpatrick, *Reducing Management's Litigation Exposure Through Appropriate Personnel Practices and Procedures*, in ADVANCED EMPLOYMENT LAW AND LITIGATION 691, 698 (ALI-ABA Course of Study, Dec. 7-9, 1995) ("Employees should be evaluated periodically."); HARTMAN ET AL., *supra* note 197, at 358 ("Performance reviews should be done regularly and accurately."); Hicks & Alexander, *supra* note 196, at \*7 ("In the present litigious environment for employment-related claims, it is imperative that employers honestly, accurately, and fairly evaluate employee conduct."); Ruffino, *supra* note 113, at 9 (advising that "[i]t's best to hold reviews on a quarterly basis, but they should be done at least once a year").

200. See BEQUAI, *supra* note 182, at 58 ("[E]valuations eventually become crucial documentary evidence for employers and employees alike."); Harry N. Turk, *Questions and Answers*, EMPL. REL. TODAY, Winter 1997, at 105, 105-06 ("[P]erformance reviews documenting an employee's performance are critical in defending any performance related employment termination."). Plaintiffs' attorneys also note the centrality of performance documentation. See Elaine C. Bredehoft, *Discovery Issues in Employment Discrimination Litigation*, in TWELFTH ANNUAL MULTI-STATE LABOR AND EMPLOYMENT LAW SEMINAR at B3 (Southern Methodist University School of Law, 1994) (noting that the issue of job performance is "central"); Abrahamson, *supra* note 184, at 738 ("The performance evaluation has been deemed by many management colleagues as *the* critical exhibit in these cases.").

view system can do more harm than good.<sup>201</sup> Inconsistent evaluations or highly laudatory reviews cast doubt on the employer's proffered explanations for adverse employment actions. As these management advocates note:

An employer will have great difficulty convincing a jury that an employee was terminated for poor performance if the employee's personnel file contains years of consistently superior or even merely satisfactory performance appraisals. A terminated employee can even use non-committal appraisals, either to undermine the credibility of the employer's proffered reason for the termination or to persuade a jury that the employer did not deal fairly with the employee because the appraisals failed to point out the employee's shortcomings.<sup>202</sup>

Two other lawyers explain that "[g]ood evaluations do not prove illegal discrimination . . . [but] terminating those with *better* evaluations implies a hidden agenda."<sup>203</sup>

A number of steps are recommended to ensure that the appraisal process produces supportive documentation. The first is that supervisors be carefully trained to conduct performance evaluations.<sup>204</sup> Defense attorneys perceive many supervisors as "overly generous" in their appraisals, "gloss[ing] over defects in the work of their subordinates."<sup>205</sup> They see supervisors as reluctant to confront subordi-

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201. See, e.g., Nathan Aaron Rosen, *Performance Appraisals and Staff Evaluations: A Reemerging Management Tool or a Legal Mine Field*, in MANAGING THE PRIVATE LAW LIBRARY 1993: MANAGING IN A CHANGING ECONOMY 265, 282 (PLI, 1993) ("The performance appraisal can be a two-edged sword. It is useful if done right, but damaging if done poorly or not done at all."); Millicent N. Sanchez, *Hiring, Disciplining, and Firing Employees: Covering Your Assets*, COMPLEAT L., Fall 1997, at 25, 27 ("It is better for an employer to have no performance review system than to have dishonest reviews.").

202. Baxter & Klein, *supra* note 182, at S1.

203. Peter M. Panken & Michael Starr, *Terminations Without Tears: Avoiding Litigation Risks in Reductions in Force*, in RESOURCE MATERIALS: EMPLOYMENT AND LABOR LAW 1111, 1119 (ALI-ABA, 7th ed. 1997).

204. See, e.g., BEQUAI, *supra* note 182, at 100 (recommending that employers "[m]ake sure that supervisors understand the company's goals"); KAHN ET AL., *supra* note 112, at 6-28 (recommending supervisor training); David A. Cathcart & Kathleen Vanderziel, *Employment Options for the Employer in Transition: Age Discrimination, OWBPA, WARN Act, and NLRA Issues*, in RESOURCE MATERIALS: EMPLOYMENT & LABOR LAW 1171, 1238 (ALI-ABA, 7th ed. 1997) (recommending that supervisors be given guidelines and briefed); Baxter & Klein, *supra* note 182, at S1 (arguing that supervisor training is essential); HARTMAN ET AL., *supra* note 197, at 359 (recommending that supervisors be provided with written guidelines); Jonathan A. Segal, *Evaluating the Evaluators*, HR MAG., Oct. 1995, at 46 ("All supervisors should receive training on how to conduct performance appraisals.").

205. HARTMAN ET AL., *supra* note 197, at 358; see also Martin, *supra* note 124, at 874 (describing some supervisors as "constitutionally incapable of writing bad performance reviews, even when clearly warranted"); Panken & Babson, *supra* note 164, at 76 (lamenting that "[d]efending discrimination charges often involves cringing over the writings of supervisors and company officials who are neither trained nor astute in the dangers of discrimination litigation"); Hicks & Alexander, *supra* note 196, at \*7 (warning against "evaluation inflation" and "diluted performance criticism").

nates with negative feedback<sup>206</sup> and to take away from the time necessary to handle more pressing workplace matters.<sup>207</sup> Training, however, is designed to overcome supervisor hesitancy regarding performance review by stressing the importance of this task to the employer's litigation prevention effort. Two management lawyers suggest accomplishing this by telling supervisors that their own "performance will be rated, in part, based on how well they handle this responsibility."<sup>208</sup> Other attorneys advise that instruction emphasize the evidentiary value of the documents to be produced.<sup>209</sup>

A review of the literature indicates that a defensible performance review contains several components. It should, for example, contain a listing of employee strengths and weaknesses.<sup>210</sup> To come up with that list, management attorneys often recommend that supervisors evaluate employee performance using "objective, job-related criteria," though they do not say much about what those criteria might

206. See BLOCK ET AL., *supra* note 199, at 58 (noting that supervisors fail to document performance problems because they "want to avoid the confrontation"); Cathcart, *supra* note 164, at 393 (positing that supervisors "fail to identify job performance problems" because they wish "not to 'upset' an employee" or "interfere with a friendship or with an employee's advancement"); Rosen, *supra* note 201, at 269 (noting that many managers and employees find the process "distasteful"); Baxter & Klein, *supra* note 182, at S1 (noting that "supervisors often are reluctant to criticize the employees under them"); Sanchez, *supra* note 201, at 27 ("[S]upervisors may feel it is easier to rate an employee as 'acceptable' than to rate the employee as 'below requirements' or 'unacceptable.'").

207. See BLOCK ET AL., *supra* note 199, at 58 (noting review "inconsistencies or lack of documentation often arise because supervisors . . . are too busy to write an accurate or detailed account of a performance problem"); Rosen, *supra* note 201, at 272 ("For some managers, the performance appraisal process seems like a once-a-year nuisance which takes time away from more productive activities.").

208. Baxter & Klein, *supra* note 182, at S1.

209. See BLOCK ET AL., *supra* note 199, at 58 ("Supervisors should be apprised of the potential evidentiary value of these documents."); Lynne C. Hermle, *Fighting the Personnel Fires: Dealing with Employment Issues Arising from Mergers and Acquisitions in a High Tech Environment*, in HANDLING MERGERS & ACQUISITIONS IN HIGH-TECH AND EMERGING GROWTH ENVIRONMENTS 333, 402 (PLI, 1998) (stressing the need for performance review training and noting "[m]anagers must be made fully aware of the substantial liability arising from discrimination suits—especially when 'smoking guns' exist"); Hicks & Alexander, *supra* note 196, at \*15 ("Supervisors must understand the importance of accurate evaluations in order to ensure an efficient and productive work force and to avoid problems that can arise in the context of employment litigation when evaluations have not been properly conducted."); Ellen M. Martin, *Discrimination Claims Against Law Firms*, N.Y. L.J., July 24, 1995, at 7 ("[T]he firm should also remind evaluators of the importance of giving candid assessments. If evaluators are not candid, their words may come back to haunt them."); HARTMAN ET AL., *supra* note 197, at 358 (noting that "generosity [in evaluation] can come back to haunt the company").

210. See *Employment Audits*, *supra* note 113, at 16 (recommending "the evaluation list both the employee's strengths and weaknesses"); Baxter & Klein, *supra* note 182, at S1 (stating that "the appraisal document always should provide a space for the evaluator to list the employee's principal strengths and weaknesses"); Ruffino, *supra* note 113, at 9 ("[R]eviews should focus on what the employee has accomplished and what areas he or she needs to work on.").



be.<sup>211</sup> Some suggest that appraisals be based on job content, but only vaguely suggest how one might determine the makeup of a particular job.<sup>212</sup> That management attorneys fail to discuss in detail tasks that are more appropriately within the expertise of human resource professionals is not surprising. The invocation of "objective criteria" as a mechanism for avoiding discrimination, however, is notable and should be evaluated.

The term "objective criteria" presumably refers to factors subject to quantification, such as number of absences, sales statistics, and specific examples of work results achieved.<sup>213</sup> These items are seen as being relatively immune to the effects of bias. Objective measures stand in contrast to "subjective criteria" or employee traits that defy simple measurement, such as "common sense, good judgment, originality, ambition, loyalty, and tact."<sup>214</sup> The ambiguity inherent in these factors makes them susceptible to discriminatory impulses.

Despite the seemingly straightforward distinction between objective and subjective criteria, the line between the categories often blurs. In other words, "[o]stensibly objective criteria can often become subjective in nature."<sup>215</sup> For example, one might establish objective standards for associate attorneys by evaluating them in terms of the number of cases handled. However, because some cases are more difficult than others are, the objectivity of the standard is questionable.<sup>216</sup> Likewise, salespersons may be evaluated in terms of the dollars they produce for their employers. Yet, the way a sales region is defined can greatly impact sales results, casting suspicion on the standard's objectivity.<sup>217</sup> Thus, it is far from clear, despite defense at-

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211. See *Employment Audits*, *supra* note 113, at 16 (stating that "performance evaluations [must be] based on objective, job-related criteria"); Hicks & Alexander, *supra* note 196, at \*13 ("[I]t is critical that the evaluator present an objective and accurate analysis."); Ruffino, *supra* note 113, at 9 ("You can also outline future goals (concentrating on objective, job-related criteria), along with a specific time frame for achieving them."). *But cf.* Rosen, *supra* note 201, at 289 (noting that it is "very important to have clearly defined objectives and measurable criteria" and providing examples of common measures).

212. See Baxter & Klein, *supra* note 182, at S2 (suggesting employers determine "[p]recisely what . . . the employee [is] expected to do, and what sort of conduct or result constitutes good performance"); Martin, *supra* note 209, at 7 (suggesting that the evaluations be "based on the qualifications used to evaluate [employees] for retention and promotion").

213. See Gerald V. Barrett & Mary C. Kernan, *Performance Appraisal and Terminations: A Review of Court Decisions Since Brito v. Zia with Implications for Personnel Practices*, 40 PERSONNEL PSYCHOL. 489, 491 (1987).

214. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (portion of opinion joined by plurality).

215. Barrett & Kernan, *supra* note 213, at 495.

216. See *id.* (noting that in one case a senior EEOC investigator was assigned more difficult cases than those ostensibly similarly situated).

217. See Arterton, *supra* note 184, § 16 (noting the potential for "sales managers and supervisors [to] manipulate regions to favor or disfavor certain employees").

torneys' assumptions, that objective standards are a panacea for workplace bias.

Perhaps the overlap between the categories explains why those who recommend the use of "objective criteria" do not belabor the distinction. A more probable explanation is that the distinction is unnecessary because courts frequently accept an employer's assertions that "certain factors are important to job performance . . . as long as the factors appear logical."<sup>218</sup>

In any case, management lawyers see the performance deficiency list as very important and not terribly difficult to compile. As one pair of management lawyers note, "Nearly all employees have at least some room for improvement."<sup>219</sup> Defense attorneys also recommend that supervisors be instructed to provide examples of the poor performance they record.<sup>220</sup> Specific examples are useful because they "add weight to the evaluator's judgment if it is later challenged."<sup>221</sup> Defense attorneys also suggest a description of areas for improvement<sup>222</sup> because "[w]hen faced with a discrimination and/or wrongful termination lawsuit, it is helpful if the employer can show that a terminated employee did not meet objective performance standards."<sup>223</sup>

218. Peter A. Veglahn, *Key Issues in Performance Appraisal Challenges: Evidence from Court and Arbitration Decisions*, 44 LAB. L.J. 595, 597 (1993); see *infra* notes 364-72 and accompanying text (discussing courts' concerns that appraisal systems appear fair and noting the lack of interest in system accuracy).

219. Baxter & Klein, *supra* note 182, at S1.

220. See Panken & Starr, *supra* note 203, at 1120 (noting that when reviewing performance appraisals, one should "[a]sk for . . . specific examples of incompetent, inadequate, unimaginative or unsatisfactory work."); Hicks & Alexander, *supra* note 196, at \*13 ("Employers should teach their supervisors to make evaluations 'fact oriented' . . . For example, an employee is not just a 'bad employee,' but rather, the 'employee fails to arrive at work on time and is less productive than other employees' . . ."); Martin, *supra* note 209, at 7 ("[T]he firm should encourage evaluators to give specific examples to back up their evaluations, particular [sic] in areas where the review is negative.")

221. Martin, *supra* note 209, at 7 (noting that specific examples also help the employee to improve.); see also Baxter & Klein, *supra* note 182, at S1 ("[C]andid and careful performance appraisals can provide important evidence in support of an employer's termination decision, especially if the appraisals contain specific indications of the employer's dissatisfaction with a particular facet of the employee's performance.")

222. See BLOCK ET AL., *supra* note 199, at 58 ("A performance appraisal should not only contain an accurate description of an employee's performance but it should also describe areas where improvement is necessary."); Reginald C. Govan, *Employment Issues in RIFS, Layoffs, and Restructurings*, in HANDLING MERGERS & ACQUISITIONS IN HIGH-TECH AND EMERGING GROWTH ENVIRONMENTS 215, 245 (PLI, 1998) ("Reasonable time should be allowed to improve performance, but the consequences of failure to achieve objectives should be expressed."); Hicks & Alexander, *supra* note 196, at \*13 ("It is also a good practice to describe and set performance goals while providing practical suggestions to accomplish these objectives."); Ruffino, *supra* note 113, at 9 (noting that areas for improvement and "future goals" can be incorporated).

223. Hicks & Alexander, *supra* note 196, at \*14.

Interestingly, most of the advice on supervisor training proceeds on the implicit assumption that supervisors typically do not evaluate employees through biased lenses.<sup>224</sup> There is almost no discussion of how to train supervisors to avoid stereotyping when evaluating employees who are members of protected groups, although I did find two notable exceptions. One commentator suggests that “[t]raining should remind supervisors not to allow their judgement to be affected by legally impermissible factors and to *be aware of subtle influences*.”<sup>225</sup> As I will discuss more thoroughly below, this recommendation very closely follows what social scientists deem necessary for overcoming cognitive biases that all people manifest.<sup>226</sup> In contrast, in the reduction-in-force context, one author suggests, “Instruct all management/supervisory personnel that age is not a factor to be taken into account in determining who stays and who goes; further instruct them to think and be careful about what they say, lest they create bullets for potential plaintiffs.”<sup>227</sup> This advice is not very helpful and runs counter to what social psychologists deem necessary to avoid stereotyping. They argue that ignoring protected characteristics will not eliminate bias.<sup>228</sup>

In addition to supervisor training, defense attorneys see oversight of the appraisal process as essential to producing documentation that

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224. *But cf.* Hermle, *supra* note 209, at 402 (“There should be careful training in this [performance review] process, because this is an area in which bias or unfairness frequently arise.”).

225. Rosen, *supra* note 201, at 293 (emphasis added); *see also* David A. Copus, *Age Bias, Age Stereotypes and Reduction-in-Force*, in *EMPLOYMENT LAW: THE BIG CASE* 699, 710 (ALI-ABA Course of Study, Oct. 31-Nov. 1996) (suggesting that “[a]dequate human resource policies contain numerous safeguards to prevent/ameliorate the operation of negative age stereotypes”); Jackie Hughie Smith & Rick Thaler, *Sex Discrimination in the Workplace: Some Guidelines for Employers and Legal Update*, in *RESOURCE MATERIALS: EMPLOYMENT AND LABOR LAW*, 135, 153 (ALI-ABA, 7th ed. 1995) (recommending that “the company must train its employees to avoid sexual stereotyping,” though not specifically in the context of evaluation). Recently, a few management attorneys have recommended general diversity training. *See, e.g.*, C. Geoffrey Weirich et al., *Employer Strategies for Avoiding the Mega-Verdict: Learning from Recent High-Profile Employment Discrimination Lawsuits*, in *26TH ANNUAL INSTITUTE ON EMPLOYMENT LAW* 31, 41 (PLI, 1997); Gary R. Siniscalco & Jeffrey D. Wohl, *Employment Law: Discrimination Can Be Costly: Avoiding the Texaco Problem*, *CAL. LAW.*, Nov. 1997, at 27. The possible effects of this sensitivity training, including trainee backlash, remain controversial and in dispute. *See* Seth Lubove, *Damned if You Do, Damned if You Don't*, *FORBES*, Dec. 15, 1997, at 122-28 (warning about backlash and describing diversity training as “moneymaking opportunities for armies of quacks”). One defense lawyer recently cautioned that diversity training could inadvertently end up producing evidence that may be used by employees in subsequent discrimination suits. *See* Michael Delikat, *The Texaco Case and Lessons to Learn: How Can Corporations Manage Diversity Effectively?* in *LITIGATING EMPLOYMENT DISCRIMINATION CASES 1997*, at 181, 232-33 (PLI, 1997) (warning that “employers should realize that there is a very real possibility that materials relating to a diversity program . . . may be discoverable and admissible as evidence against the employer in subsequent employment litigation”).

226. *See infra* notes 338-48 and accompanying text.

227. Govan, *supra* note 222, at 240.

228. *See infra* notes 338-48 and accompanying text.

will support employer decision making.<sup>229</sup> They typically recommend that either the evaluator's supervisor or some central screening authority review all completed appraisals.<sup>230</sup> Management lawyers stress that evaluations be checked for inappropriate comments connoting stereotyping or other bias.<sup>231</sup> Yet the recommended steps to take when such comments are found are less clear. Some attorneys are conspicuously silent on the point.<sup>232</sup> Others note that someone in management can do any editing necessary.<sup>233</sup> One attorney indicates that if the comments were unfortunately chosen rather than actually biased, the evaluator can "expand upon or clarify the review."<sup>234</sup> However, she also counsels that if true bias is detected, the employer should exclude the evaluator's review.<sup>235</sup>

A final step is necessary to make the performance appraisal as supportive a document as possible. Once a review has been completed, it must be presented to the employee in a face-to-face encounter.<sup>236</sup> As these management advocates note, "Not only will this make it more likely that the employee will regard the appraisal as a significant event, it will make it easier to convince a jury that the employer was engaged in a good-faith effort to communicate its views of

229. See Cathcart & Vanderziel, *supra* note 204, at 1238 ("Safeguards against arbitrary evaluations may include review of evaluations by higher level supervisors."); Fitzpatrick, *supra* note 199, at 699 ("The evaluation should be reviewed by the supervisor's superior."); Govan, *supra* note 222, at 246 (recommending "[m]eaningful second-tier review by next-level supervisor"); Baxter & Klein, *supra* note 182, at S1 ("[A]n evaluator should never present the results of the evaluation to an employee without discussing the evaluation with the supervisor at the next-highest level."); Hicks & Alexander, *supra* note 196, at \*14 ("[I]t is common for a human resources department or other similar administrator to review performance evaluations before they are actually presented to employees."); Martin, *supra* note 209, at 7 (suggesting that "evaluations should be scrutinized" before presented); Segal, *supra* note 204, at 46 ("Before evaluations are finalized, a designated management oversight committee should review each one.").

230. See Govan, *supra* note 222, at 246; Segal, *supra* note 204, at 46.

231. See Fitzpatrick, *supra* note 199, at 700 ("Evaluation forms should be reviewed for unlawful or otherwise inappropriate inquiries."); Hicks & Alexander, *supra* note 196, at \*14-15 ("Such a review will . . . allow for the detection of any inappropriate consideration of or reference to protected classes . . ."); Martin, *supra* note 209, at 7 ("[E]valuations should be scrutinized for comments that could be construed as evidence of stereotyping or other bias.").

232. See Fitzpatrick, *supra* note 199, at 699; Hicks & Alexander, *supra* note 196, at \*14-15.

233. See Baxter & Klein, *supra* note 182, at S1 ("[A]n initial working draft . . . can . . . be reviewed and, if appropriate, edited by someone else in management.").

234. Martin, *supra* note 209, at 7.

235. See *id.*

236. See BLOCK ET AL., *supra* note 199, at 58 ("Evaluations should be discussed with the employee."); Cathcart, *supra* note 164, at 393 (noting that "[a]n effective and defensible appraisal process" includes "[a]n oral interview with the employee"); Baxter & Klein, *supra* note 182, at S1 ("Evaluators should present performance appraisals to employees in a face-to-face meeting."); Martin, *supra* note 209, at 7 ("The firm should also convey the results of the evaluation to the [employee] evaluated."); Turk, *supra* note 200, at 106 ("Supervisors should discuss the performance review in detail with the employee.").

the employee's performance to the employee."<sup>237</sup> When the review is particularly negative, these same attorneys suggest bringing another witness to the meeting.<sup>238</sup> However, realizing that potential defamation claims are possible where such bad news is delivered, another lawyer advises that discussion be limited to the employee's evaluating supervisor, that supervisor's immediate supervisor, and the appropriate human resources manager.<sup>239</sup>

Management lawyers counsel employers to provide the employee with the opportunity to ask questions and to offer oral and written comments.<sup>240</sup> One attorney explains that if no disagreement is expressed, "later complaints that the review was without basis will be less credible."<sup>241</sup> However, when objections are raised, the employer can investigate and take any remedial actions necessary "before it is faced with a discrimination suit."<sup>242</sup> A last routine suggestion is that the employee should sign the form, acknowledging that he or she received the review at the end of the review session.<sup>243</sup>

Several aspects of performance review advice are worth noting. First there is tremendous uniformity in the recommendations. This

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237. Baxter & Klein, *supra* note 182, at S1.

238. *See id.*

239. *See* Fitzpatrick, *supra* note 199, at 700.

240. *See* BLOCK ET AL., *supra* note 199, at 58-59 ("The employee should be given an opportunity to respond to the evaluation in person or if the employee prefers, in writing."); Fitzpatrick, *supra* note 199, at 700 ("The employee should have the opportunity to make written comments."); HARTMAN ET AL., *supra* note 197, at 359 (employers should "allow employees to review evaluation [and] comment on them"); KAHN ET AL., *supra* note 112, at 6-29 (employers should "allow employees to record on the appraisal their reactions and suggestions"); Baxter & Klein, *supra* note 182, at S1 ("[T]he comment process increases fairness and the likelihood that a jury will be persuaded that the employer acted fairly."); Martin, *supra* note 209, at 7 (advising that employers give employees "the opportunity to comment on the review"); Turk, *supra* note 200, at 106 ("The review should contain an 'employee comments' section to record any comments or suggestions employees have concerning the review.").

241. Martin, *supra* note 209, at 7; *see also* Veglahn, *supra* note 218, at 598 (court decisions indicate that "any problem the employee has with a performance appraisal should be raised at the time of the appraisal, not at a later date"); Baxter & Klein, *supra* note 182, at S1 ("[I]f the employee does not object to the review, it will be more difficult for the employee to convince a jury that a negative appraisal was inaccurate.").

242. Martin, *supra* note 209, at 7; *see also* KAHN ET AL., *supra* note 112, at 6-29 ("If the employee indicates a belief that the appraisal is inaccurate, the allegations should be pursued before litigation is commenced."); Govan, *supra* note 222, at 247 (advising that if the employee disagrees with the evaluation, there should be "a subsequent investigation or discussion regarding the employee's comments"); Baxter & Klein, *supra* note 182, at S1 (noting where the employee disagrees "it gives the employer an opportunity to review—and, when appropriate, to modify—the initial determination"); Hicks & Alexander, *supra* note 196, at \*14 ("[I]f the employee has a disagreement with the performance assessment, the employee should be permitted to explain and discuss any such disagreement with the appropriate manager or supervisor.").

243. *See* BLOCK ET AL., *supra* note 199, at 59; HARTMAN ET AL., *supra* note 197, at 359; Cathcart, *supra* note 163, at 393; Fitzpatrick, *supra* note 199, at 699; Baxter & Klein, *supra* note 182, at S1; Sanchez, *supra* note 201, at 27; Turk, *supra* note 200, at 106.

indicates that a kind of consensus has developed among defense attorneys as to the proper way to produce supportive documentation. Next, one should consider that the attorneys quite explicitly promote performance review as a form of evidence creation. Indeed, they convey to managers a sense of exactly how that proof can be used should the need arise.

Recognizing the employer's evidentiary advantage regarding document production is also important. Employee evaluations, for the most part, are not created when litigation seems a possible threat. Rather, they function as a long-term insurance policy safeguarding future employment decisions from potential challenge. Further, much of this advice simply assumes that employers need not worry about employment discrimination if they follow the lawyers' evidentiary prescriptions. In other words, if one cannot find legal evidence of discrimination, it must not be there. After reviewing the rest of the content analysis results, this last point will be more carefully considered below.<sup>244</sup>

*(b) Producing Favorable Evidence for the Problem Case*

The advice on handling employee discipline and discharge that management attorneys offer to employers focuses on creating supportive evidence. To that end, these advisors routinely recommend three components: the production of written documentation, the need for progressive discipline,<sup>245</sup> and the oversight of the discipline and discharge process.

Management attorneys strongly advise that employers produce supportive documentation as part of the their discipline and discharge procedure. Indeed, the mantra of defense lawyers is *docu-*

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244. One might argue that the steps described above reduce evaluation bias as a matter of course. Research demonstrates that training managers, holding managers accountable for their decisions, and rewarding managers when their actions positively affect equal employment opportunity can minimize stereotyping. See M. Acker & M. Manis, *Irrepressible Stereotypes*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 13 (1996); see also Jennifer L. Eberhardt & Susan T. Fiske, *Motivating Individuals to Change: What is a Target to Do?*, in STEREOTYPES AND STEREOTYPING 369, 390-91 (C. Neil Macrae et al. eds., 1996); William T. Bielby, *Can I Get a Witness? Framing Expert Opinion on Employment Discrimination in the Post-Proposition 209 Era*, at 4-5 (1998) (unpublished paper, on file with author). In a sense, the defense literature recommends the following key components: training, accountability, and rewards. The preventative recommendations, however, do not by and large suggest adopting the kinds of proactive, affirmative action-oriented strategies proffered by those seeking to eradicate stereotyping and further opportunities for minorities and women. Thus, I question whether the two strategies—one affirmative, the other preventative—affect managers similarly. Nevertheless, I believe that empirical research on litigation prevention training and corporate preventative activities in general is sorely needed to answer this question definitively. See *infra* Part VI.

245. Progressive discipline provides "notice to an employee of his or her shortcomings and one or more opportunities to correct them." Baxter & Klein, *supra* note 182, at S1.

ment, document, document.<sup>246</sup> The emphasis on producing a written record is evident in the following advice:

An employee who is unsatisfactory should be terminated before he or she becomes a long-term employee and therefore accrues an unintended employment entitlement. Where there is a problem, the employee should be warned of a problem in writing, [and] told of the consequences of failing to correct it. The employee's success or failure should be confirmed in writing by his or her supervisor and higher management.<sup>247</sup>

Another attorney similarly notes that "[i]t is vital that each disciplinary step be documented and that information regarding the date, time, location, and witnesses of misconduct or examples of poor performance be preserved."<sup>248</sup>

By recommending the careful documentation of such decisions, management attorneys signal their recognition of the evidentiary advantage that employers enjoy. One attorney envisions the ultimate maximization of that advantage by describing what employers can gain by consulting with a lawyer before taking action against women, minorities, and members of other protected classes. As she observes:

[I]t is becoming increasingly common for clients to consult defense counsel before making adverse employment decisions affecting members of protected groups. When counsel is consulted before the decision is made, counsel has the rare chance to shape the facts and create the record before litigation is commenced. This is an excellent opportunity to plan for summary judgment, for example by ensuring that adverse action is not taken until there is convincing evidence that the plaintiff has performed unsatisfactorily, including objective evidence and documentation of the same.<sup>249</sup>

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246. See, e.g., Myers, *supra* note 113, at 7 ("Keep a detailed paper trail; you never know when you'll need documentation."); Paul J. Siegel, *Workplace Misconduct: The In-House Counsel's Role in Handling Complaints and Investigations*, in TRENDS IN EMPLOYMENT LITIGATION, *supra* note 116, at 14 (advising in the "Ten Commandments of Effective Discharge" that employers "[d]ocument thoroughly"); Williams, *supra* note 198, at 1145 (advising employers to "[m]aintain documentation of [the] bases for decisions"); Hicks & Alexander, *supra* note 196, at \*21 (suggesting that the employer make sure "there [are] documented reasons for the decision to terminate"); Sanchez, *supra* note 201, at 28 (advising that in discharge or discipline cases "there should be a documented history of counseling and honest criticism"); Paskoff, *supra* note 164, at 2 ("[W]hen a manager has difficulty with an employee, or is required to initiate discipline, he/she should accurately and contemporaneously document the matter.").

247. Fitzpatrick, *supra* note 199, at 700.

248. HARTMAN ET AL., *supra* note 197, at 359.

249. Martin, *supra* note 124, at 873-74. In a checklist of questions to consider before discharge, two attorneys include: "Should I get outside employment counsel involved prior to the decision to terminate?" Hicks & Alexander, *supra* note 196, at \*21-22; see also Sanchez,

Management lawyers view progressive discipline as essential to an employer's discipline and discharge protocol.<sup>250</sup> In this regard, attorneys stress that counseling and documentation of those efforts "establishes a record of fairness."<sup>251</sup> As with performance reviews, management lawyers continuously emphasize the evidentiary value of the documents created. This advice is illustrative:

[I]f a manager has to testify in court, he/she can rely on such records to reconstruct what happened about an event which may have occurred years earlier. Such records can be admitted into evidence and examined by a judge or jury bolstering management's position and credibility. A supervisor who has taken the time and effort to document a problem can demonstrate that he/she did not act arbitrarily. Without such information, it is possible that a legitimate decision will look unfair, inconsistent or improperly motivated. *Since judges and juries expect to see such records from employers, managers should take the time to prepare them as significant employment events occur.*<sup>252</sup>

Management attorneys also recommend extensive oversight of the discipline and discharge process.<sup>253</sup> They see supervision as a pri-

*supra* note 201, at 29 ("A procedure for the utilization of legal counsel during the discipline or discharge process should be established.")

250. See Cathcart, *supra* note 164, at 391 (arguing that due process, and "where appropriate, progressive discipline," are advisable); Fitzpatrick, *supra* note 199, at 700 (noting, among other things, that "progressive discipline . . . increases the likelihood of the employer prevailing."); HARTMAN ET AL., *supra* note 197, at 359 ("It is advisable to use progressive discipline . . . . Such a procedure will supply documentation which will justify a just cause discharge if necessary."); Baxter & Klein, *supra* note 182, at S1 ("[A] progressive discipline system will provide significant evidence that the stated reason for the termination is the real reason."); Sanchez, *supra* note 201, at 28 (suggesting that in the general case, "counseling" should take place before termination); see also Siegel, *supra* note 246, at 17-18 (describing in great detail model progressive discipline policy and documentation accompanying each step).

251. Baxter & Klein, *supra* note 182, at S1; see also HARTMAN ET AL., *supra* note 197, at 359-60 (noting the importance of "fair" treatment); Sanchez, *supra* note 201, at 28 ("[A] history of counseling and criticism . . . will be very helpful in establishing that the employee was treated fairly.")

Some attorneys also note that progressive discipline may provide the opportunity for the employee to correct the performance deficiencies. See Fitzpatrick, *supra* note 199, at 700 (noting "[p]rogressive discipline . . . prevents unnecessary termination when performance is corrected"); HARTMAN ET AL., *supra* note 197, at 359 (noting that "[p]rogressive discipline 'preserve[s] the possibility that an employee will change his ways'); Baxter & Klein, *supra* note 182, at S1 (stating that progressive discipline "may enable an unsatisfactory employee to improve"); Martin, *supra* note 209, at 7 (opining that providing specific examples of deficiencies helps the employee to improve).

252. Paskoff, *supra* note 164, at 2. This attorney further warns against creating false documentation and back-dating documents, noting that "[t]his practice is fraudulent." *Id.*

253. See Fitzpatrick, *supra* note 199, at 700 ("The authority to fire should not rest with the employee's immediate supervisor, but with higher level management in consultation with the personnel department and, where appropriate . . . with legal counsel."); Williams, *supra* note 198, at 1145 (noting that supervisory decisions should be reviewed); Baxter & Klein, *supra* note 182, at S1 ("The most important single procedure an employer can institute to avoid wrongful termination litigation is a system for the independent review of all



mary way to ensure that legal claims are not created and that bias does not infect any given discharge.<sup>254</sup> The overseeing authority, which one attorney refers to as a “termination czar,”<sup>255</sup> must execute a number of steps before granting termination approval. First, he or she must review the employee’s personnel file and records.<sup>256</sup> The overseeing authority must assess the strength of the documentation in those files.<sup>257</sup> Next, the overseer must ensure that reviewers are complying with company policies.<sup>258</sup> Two management advocates note in this respect that “[r]eviewers should be concerned about appearances of discrimination as well as actual discrimination—either can lead to litigation.”<sup>259</sup> Reviewers must determine how other “similarly situated” employees have been treated for the same reasons.<sup>260</sup>

Finally, the employer must interview witnesses.<sup>261</sup> One management attorney emphasizes that corroboration between witness testi-

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termination decisions before they are carried out.”); Ruffino, *supra* note 113, at 9 (“[S]end a memo to all supervisors stipulating that they must obtain prior approval from either the director of human resources or another top executive before firing anyone.”); Siegel, *supra* note 248, at 14 (“Have a trained human resources person review all discipline prior to implementation.”); Paskoff, *supra* note 164, at 3 (“Before taking action, managers should consult with others, including representatives of the Human Resources Department . . .”).

254. See Baxter & Klein, *supra* note 182, at S1 (“The reviewer should look for any indication that unlawful discrimination or some other statutory violation is associated with the termination.”); Ruffino, *supra* note 113, at 9 (noting that oversight can “cut down on unjustified firings and the discrimination suits that typically follow”); Paskoff, *supra* note 164, at 3 (“A key issue in discrimination and other employment based litigation is whether the complaining employee received fair, even-handed treatment. Only by checking with other sources can managers be certain their actions are consistent and in compliance with their company’s policy.”).

255. Fitzpatrick, *supra* note 199, at 701.

256. See Cathcart, *supra* note 163, at 393-95; Fitzpatrick, *supra* note 199, at 702; Baxter & Klein, *supra* note 182, at S1; Sanchez, *supra* note 201, at 28.

257. See Cathcart, *supra* note 163, at 395 (noting that employers should determine how “strong . . . the documentation [is]”); Baxter & Klein, *supra* note 182, at S1 (noting that “[t]he better and longer the employee’s service record, the more reluctant the reviewer should be to approve the termination”).

258. See Cathcart, *supra* note 163, at 394-95 (noting that review should ensure that “decision makers followed the company’s own contractual, policy, and/or employee handbook procedures”); Fitzpatrick, *supra* note 199, at 702 (advising that “[t]he authority should review the employee’s personnel file to determine whether company policies have been followed”); Baxter & Klein, *supra* note 182, at S1 (“The reviewer should check carefully to make sure the employer’s treatment of the employee and the proposed termination comply both with the employer’s current personnel policies and with past practices.”); Hicks & Alexander, *supra* note 196, at \*21 (listing as an item on the termination checklist “Is the decision to terminate consistent with company policy?”).

259. Baxter & Klein, *supra* note 182, at S1.

260. See Cathcart, *supra* note 163, at 394; Fitzpatrick, *supra* note 199, at 702; Siegel, *supra* note 246, at 14; Baxter & Klein, *supra* note 182, at S1; Hicks & Alexander, *supra* note 196, at \*14-15; Sanchez, *supra* note 201, at 27; Paskoff, *supra* note 164, at 3.

261. See Cathcart & Vanderziel, *supra* note 204, at 394; Martin, *supra* note 124, at 874-75; see also Jo Backer Laird, *Conducting a Discrimination or Harassment Investigation*, in RESOURCE MATERIALS: EMPLOYMENT AND LABOR LAW 1085, 1090 (ALI-ABA, 7th ed. 1995) (suggesting ways to pose questions to witnesses in the context of discrimination investigations).

mony and existing documentary evidence is essential.<sup>262</sup> Two management lawyers, however, recommend a skeptical approach to the interview process. They caution that even if the reviewer cannot believe that the supervisor in question would discriminate, he or she must remember that any ensuing litigation could end up before a jury.<sup>263</sup> Thus, “[i]f the supervisor or other personnel involved cannot explain the problem to the satisfaction of the reviewer, there is little hope they will be able to explain it to a jury.”<sup>264</sup>

A notable difference exists between these suggestions and those regarding performance review. With respect to the latter, the assumption is that trained supervisors preparing evaluations based on “objective criteria” generally are not biased.<sup>265</sup> In contrast, suggestions regarding discipline and discharge take a more skeptical stance on supervisory decision making. Management attorneys actively attempt to facilitate nondiscriminatory decision making through an independent, searching review of the proposed employment action.

One must wonder, however, whether the independent review accomplishes that goal. To my knowledge, no one has studied this question. Therefore, my discussion will be admittedly speculative. However, it seems clear that as with the discrimination complaint handling procedures studied by Lauren Edelman and her colleagues, the effectiveness of the review will depend greatly on the individuals who undertake it.<sup>266</sup>

It is notable that defense lawyers frequently recommend that human resource professionals oversee the process.<sup>267</sup> Those individuals, who occupy relatively peripheral positions in the corporate structure,<sup>268</sup> are likely subject to the same constraints as Edelman’s

262. See Martin, *supra* note 124, at 875 (advising defense attorneys to “review any apparent inconsistencies between witness recollections and the documents and to attempt to reconcile any true discrepancies”); see also Abell et al., *supra* note 186, at 228–29 (urging in the post-termination context that defense attorneys meet with witnesses to review key documents, and “[c]onfront the witness[es] with and iron out inconsistencies”); Darrel S. Gay et al., *How to Plan and Prepare for Critical Depositions*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 17, 54 (PLI, 1997) (noting in the post termination context that defense counsel must “[t]horoughly review all documents or statements prepared by the witness to ensure they are consistent”); Peter M. Panken et al., *Age Discrimination: Selected Current Topics—Early Retirement, Reductions in Force, Validity of Releases, Damages, and Class Actions*, in EMPLOYMENT & LAB. L. 157, 173 (ALI-ABA, 7th ed., 1995) (advising employers to make sure personnel documents “do not contradict the employer’s articulated reason for hiring employees, when those employees will be involved in a force reduction by the employer”).

263. See Baxter & Klein, *supra* note 182, at S1.

264. *Id.*

265. For example, the literature only rarely addressed the issue of stereotyping in evaluation. See *supra* notes 224–28, and accompanying discussion.

266. See Edelman et al., *supra* note 78, at 501.

267. See *supra* note 253.

268. See Edelman et al., *supra* note 59, at 74–76.

complaint handlers. Notwithstanding a commitment to equal employment opportunity, their ability to bring about significant change is hampered by their concern for their own positions within the organization.<sup>269</sup> Logically, *facilitating* the objectives of managers, rather than *obstructing* them, might better enhance a personnel specialist's career.

This insight does not suggest that, where company policy has been disregarded or similarly situated employees are treated more favorably, a discharge will be rubber-stamped. When discrimination manifests itself in smoking gun statements or extreme forms of harassment or retaliation, most reviewers will no doubt forcefully intervene. When bias influences decisions subtly or invisibly, however, reviewers confronted with facts disadvantageous to employers may instruct supervisors on how to bulletproof their decisions.<sup>270</sup>

In fact, if reviewers act like Edelman's complaint handlers, they may view many problems they encounter as personality clashes or management difficulties rather than instances of discrimination.<sup>271</sup> The reviewers may feel entirely justified in recommending a course of action that allows a supervisor to accomplish the sought after goal, never realizing that the objective is impermissibly motivated. Obviously, such actions promote symbolic rather than substantive compliance with civil rights law and hamper the ability to discern workplace discrimination.

If the independent investigation finds that the record sufficiently supports a termination or adverse action, defense lawyers advise that authorization be given. Even at this stage, the literature displays a preoccupation with evidence creation. For example, one lawyer warns that at this point potential litigation is still a threat.<sup>272</sup> Thus, the actual termination meeting must be handled carefully, not only for the sake of the employee, "but to avoid creating tort claims."<sup>273</sup> He suggests a videotaped rehearsal of the termination interview with someone playing the role of the employee to "help iron out the bugs and the discomfort and make it easier and less cumbersome in the actual termination meeting."<sup>274</sup> Another attorney counsels the supervisor that "when firing someone, speak as though your

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269. See Edelman et al., *supra* note 78, at 501.

270. The defense literature is silent on how employers should proceed after permission for an adverse employment action has been denied. Because trained reviewers understand the importance of evidence creation, it is logical that where reviewers fail to perceive discrimination, they will assist supervisors in bulletproofing decisions.

271. See Edelman et al., *supra* note 78, at 515-16.

272. See Fitzpatrick, *supra* note 199, at 702.

273. *Id.*

274. *Id.* at 703. This advice implies that the supervisor would review the videotape and correct any elements that might prove useful to a plaintiff in subsequent litigation.

conversation is being taped for later use in court.”<sup>275</sup> Thus, from start to finish, ensuring the production of favorable evidence is a central focus of litigation prevention advice.

## 2. *The Importance of Timing in Employment Decision Making*

Another prevalent theme in the defense literature is the need for attentiveness to the timing of adverse employment decisions. One attorney advises that “[i]f a good reason exists to terminate, but the timing might appear suspect either to the employee or to a jury, delay the termination if possible.”<sup>276</sup> Situations that create timing difficulties for employers include when the employee “has just been on jury duty, returned from sick, disability or maternity leave, or filed a worker’s compensation claim.”<sup>277</sup> Two other attorneys note that among the issues that should “raise a red flag” to reviewers are proposed terminations “that occur after an employee has exercised a legal right, satisfied a legal obligation, [or] complained to an outside agency.”<sup>278</sup> Delay is important in these instances because the temporal proximity of those events to a discharge can constitute circumstantial evidence of discrimination or otherwise unlawful motivation.<sup>279</sup> Moreover, if the employee files suit, the events themselves “can generate substantial jury sympathy, even if there is legitimate reason for the termination.”<sup>280</sup>

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275. Ruffino, *supra* note 113, at 9. The theme that anything a supervisor says can be used in court is pervasive in the defense literature. See, e.g., Christopher H. Mills, *Selected Issues Regarding RIFs: Releases, Discovery, “Smoking Guns,” and Statistics in Age Discrimination Challenges to Downsizing and Layoffs*, in EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 189, 242 (ALI-ABA Course of Study, June 3-5, 1993) (“[A]fter years of age discrimination litigation, repeated RIFs and frequent legal advice that all managers and executives need to ‘watch their language,’ age discrimination plaintiffs continue to come up with—or accurately relate—statements by managers . . . or recollections of conversations with supervisors . . . in which ‘charged statements’ reflective of age-discriminatory motivation were made.”); Paskoff, *supra* note 164, at 3 (“[A]nything a supervisor says about an employee or, in some instances, others may be admissible in court and cause a judge or a jury to sympathize with a complainant even though a challenged personnel action was legitimately initiated.”); see also Tristan Brown, *The Dirty Words of Corporate Downsizing: Impermissible Statements of Intent in Reduction-in-Force Cases*, 48 LAB. L.J. 214 (1997) (providing guidance for employers on statements constituting direct evidence of discrimination).

276. Fitzpatrick, *supra* note 199, at 702.

277. *Id.*

278. Baxter & Klein, *supra* note 182, at S1.

279. As two plaintiffs’ attorneys explain to prospective plaintiffs:

The most difficult part of a retaliation claim is showing a causal connection between your protected conduct and the adverse action taken against you. Timing can be evidence of a causal connection. If your employer fires you shortly after you file a charge of discrimination, one can infer that your protected conduct was the real reason for your termination.

TOBIAS & SAUTER, *supra* note 132, at 93-94.

280. Sanchez, *supra* note 201, at 28.

The issue of timing also underlies the advice to employers that they implement and carefully monitor a regular performance review system. The sudden dismissal of an employee before proper documentation has been prepared is an occurrence to be avoided.<sup>281</sup> Particularly suspect are “terminations recommended by a new supervisor who has a less favorable view of the employee’s performance than the prior supervisor.”<sup>282</sup> Taking the time to ensure the employer’s position is defensible can avoid the implication that the firing was illegally motivated.

The defense’s emphasis on careful timing seemingly bolsters my argument in the previous section that independent review of the termination decision may mask, rather than eliminate, conditions of inequality.<sup>283</sup> When reviewers miss instances of unconscious bias, perhaps because someone has previously edited the performance documentation,<sup>284</sup> they may suggest delaying the desired action rather than vetoing the entire decision. Outside forces reviewing the subsequent termination will lack strong evidence of discrimination due to these compliance practices and may, therefore, wrongly conclude that none took place.<sup>285</sup>

### 3. *The Need to Maintain the Proper Tone Regarding Actions Taken*

The final important area in litigation prevention advice is the matter of tone. Management attorneys stress the importance not only of what is said to employees, but also the pitch at which it is conveyed. As one lawyer notes regarding equal opportunity policies generally:

When your employee brings a discrimination or harassment complaint to a government agency, one of the first things that an investigator will do is review your company’s EEO policy. A policy with well-constructed content and tone will create a favorable first impression. If the content and tone don’t pass muster, you may be in for trouble.<sup>286</sup>

A similar concern for tone is evident in discussions concerning performance evaluation preparation. Defense lawyers note the im-

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281. See Martin, *supra* note 124, at 873-74; Turk, *supra* note 200, at 106 (noting regular performance reviews should be conducted so “employers will not be tempted . . . to create last-minute performance reviews . . . that may be viewed as pretext for terminating the employee on other grounds”).

282. Baxter & Klein, *supra* note 182, at S1.

283. See *supra* notes 253-71 and accompanying text.

284. Recall that one defense recommendation is that performance evaluations be reviewed and, if necessary, edited. See *supra* notes 229-35 and accompanying text.

285. See Edelman et al., *supra* note 78, at 530.

286. Segal, *supra* note 113, at 109.

portance of candor when recording the employee's weaknesses in these reviews.<sup>287</sup> Yet in expressing candor, the attorneys warn evaluators not to be overzealous.<sup>288</sup> As one advocate notes, "petty and inconsequential evaluations can taint an employer's position."<sup>289</sup>

Another situation where pitch is considered vital is the area of discipline and discharge. Attorneys counsel supervisors to "avoid emotional responses to personnel problems."<sup>290</sup> These suggestions illustrate the appropriate tonal parameters of a termination meeting: "Employers should state reasons consistent with the documentation in its [sic] files; should be direct, honest, and firm; should avoid argument; should not sugarcoat the real reasons for termination; should be humane; but should not be apologetic."<sup>291</sup> Following such an approach can help the employer demonstrate that it acted fairly under the circumstances.<sup>292</sup>

No doubt bad news delivered sensitively is a gain for employees. A poor performance review, discipline, and discharge are all traumatic occurrences. By achieving the proper tone, an employer can help the employee face the inevitable with equanimity.

Nonetheless, might there be ways that a fair sounding adverse action could mask discriminatory conditions? One management lawyer may provide an answer:

287. See Fitzpatrick, *supra* note 199, at 699 ("Be accurate and candid."); Hermle, *supra* note 209, at 403 (bemoaning the fact that "[m]anagers are more often than not less candid in performance reviews than they could be"); Baxter & Klein, *supra* note 182, at S1 ("It is essential for employers to stress to supervisors the expectation and need for candid performance evaluations."); Hicks & Alexander, *supra* note 196, at \*12 (advising that employers "honestly" and "accurately" evaluate employee conduct); Martin, *supra* note 209, at 7 ("[T]he firm should also remind evaluators of the importance of giving candid assessments."); Ruffino, *supra* note 113, at 9 ("[S]tress to managers the importance of giving honest review . . ."); Sanchez, *supra* note 201, at 27 ("Performance reviews should be honest.").

288. See KAHN ET AL., *supra* note 112, at 6-15 ("Negative over documentation of one employee can support a finding of intentional discrimination."); Hicks & Alexander, *supra* note 196, at \*13 ("Evaluators should . . . avoid insulting, defamatory or inflammatory language.").

289. BLOCK ET AL., *supra* note 199, at 58; see also Gay et al., *supra* note 262, at 52-53 ("[A]void presenting a 'laundry list' of reasons for an employee's termination or other adverse employment action. The more reasons an employer gives, the more opportunity a plaintiff has to create an issue of fact."); Martin, *supra* note 124, at 874 ("Assuming there is a relatively complete written record of plaintiff's performance, the best strategy . . . is generally to admit plaintiff has the strengths documented and to stress the deficiencies noted in the documents and explain why those deficiencies are significant."); Segal, *supra* note 113, at 109 ("[I]f the comments are too specific, it may appear that the employer is 'nickel and diming' the employee in the hope of driving the employee from the organization.").

290. Paskoff, *supra* note 164, at 5; see also Sanchez, *supra* note 201, at 27 ("The discipline should always be given privately and not in anger.").

291. Fitzpatrick, *supra* note 199, at 703; see also Cathcart & Vanderziel, *supra* note 204, at 1240 (instructing employers in reduction-in-force contexts to "[c]ommunicate the decision humanely").

292. See Fitzpatrick, *supra* note 199, at 703; see also Paskoff, *supra* note 164, at 5 ("[I]f litigation does arise, by following this rule, the employer can better demonstrate fair treatment.").

An ugly termination may come back to haunt your company. Treat all terminated employees—even those who were terminated for cause—with respect. . . . [D]on't humiliate the employee. And always spell out precisely why he or she is being terminated. *Remember, the employee who's been humiliated is the one who's most likely to sue.*<sup>293</sup>

If one accepts the idea that managers may fail to discern conditions of inequality in the workplace because they view disputes as personality clashes rather than potential instances of discrimination,<sup>294</sup> the problem becomes clear. An employer deserving of a lawsuit may avoid litigation by treating an employee nicely. In other words, this type of compliance mechanism may encourage employees not to take legal action where there may be grounds for it.<sup>295</sup>

This argument may make sense in the context of termination meetings. Yet, can achieving the proper tone in one's documentation forestall a worthy lawsuit? I do not doubt that it can. As the attorney quoted above notes, "[I]f the employee knows you've got good documentation, there's less incentive to launch a suit."<sup>296</sup> Furthermore, even if the employee decides to seek legal counsel, "[a] fully documented personnel file may discourage a former employee's attorney from filing prospective litigation."<sup>297</sup>

#### IV. THE IMPLICATIONS OF SCRIPTING

The discussion thus far has focused on the content of the compliance strategies that management attorneys offer to safeguard employment decisions from legal challenge. As noted above, litigation-prevention advice places much greater emphasis on symbolic shows of compliance with civil rights law than on true substantive change for the groups that this law is designed to protect. The preoccupation with maximizing employers' evidentiary advantages displays an overriding concern for producing the trappings of an equal opportunity workplace without a concomitant commitment to taking concrete steps to achieve it.

No doubt most defense lawyers hope that by following their bulletproofing prescriptions employers will eliminate actual workplace bias along with its fingerprints. In extreme cases, where a pattern of retaliation or harassment is clear, these suggestions are likely to work. Oversight of the discipline and discharge process can detect such problems and ensure that appropriate punishment is meted out

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293. Myers, *supra* note 113, at 7 (emphasis added).

294. See Edelman et al., *supra* note 78, at 515-16.

295. See *id.* at 528.

296. Myers, *supra* note 113, at 7.

297. Hicks & Alexander, *supra* note 196, at \*17.

to perpetrators. Moreover, in cases where an employee is a horrible performer, deserving of bad reviews and adverse employment action, the steps recommended by employer advocates can forestall frivolous litigation. Thus, the symbolic actions endorsed by defense lawyers are hardly inconsequential. Both employers and employees may benefit from them.

Yet, there are ways in which these same actions may actually mask conditions of inequality furthering the misperception that employment discrimination is not a pervasive problem.<sup>298</sup> This masking phenomenon likely occurs with respect to employment decisions influenced by subtle or unconscious bias. The difficulty that human beings experience in detecting bias<sup>299</sup> may lead to the bulletproofing of decisions that would otherwise be viable claims. For example, to the extent that a human resource professional reviewing a proposed termination characterizes the problem as a “personality conflict,” rather than a manifestation of discrimination,<sup>300</sup> the person will suggest a way to accomplish the adverse action that arouses the least amount of suspicion. Lack of evidence may then affect the actions of the employee in question or an attorney reviewing the facts to determine whether grounds for suit exist.<sup>301</sup>

Part of this problem, as previously discussed, is sociologically based. Organizations wish to honor equal employment opportunity principles in ways that are the least disruptive of management prerogative.<sup>302</sup> However, the problem also has a psychological aspect that becomes apparent when one focuses on a central litigation avoidance strategy—the extensive use of neutral evaluation devices. Defense attorneys recommend liberal use of these tools, advising employers to turn their attention away from immutable characteristics such as sex and race.<sup>303</sup> For example, they recommend that employers complete performance evaluations by comparing impartial observations of employee conduct against objective, job-related criteria.<sup>304</sup> Yet, some empirical research indicates that these so-called neutral devices may be subject to pernicious, unconscious influences that disadvantage women, minorities, and members of other protected groups. Thus, maybe management lawyers are merely teaching employers how to write and talk about the decisions they make

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298. See discussion *supra* note 2 (describing empirical studies on discrimination).

299. See discussion *supra* notes 28 & 33.

300. See Edelman et al., *supra*, note 78, at 517; see also notes 84-90 and accompanying text.

301. See, e.g., Hicks & Alexander, *supra* note 196, at \*16-17.

302. See *supra* notes 83-91 and accompanying text.

303. See *supra* notes 224-28 and accompanying text.

304. See *supra* notes 210-11 and accompanying text.



in neutral terms without actually altering the impulses that motivate them.

### A. *Sex and Race Bias in Performance Evaluation*

Over two decades of study on the effects of sex and race bias in performance evaluation has yielded somewhat mixed results.<sup>305</sup> In the area of gender, for example, some studies detect anti female bias in evaluation, particularly in male-dominated occupations.<sup>306</sup> Other studies find that gender has no effect on evaluation.<sup>307</sup> Yet, others discern more favorable treatment of women than men.<sup>308</sup> These conflicting results do not indicate that bias against women is nonexistent. Rather, they demonstrate that evaluation bias is more salient under some conditions than others.<sup>309</sup>

Classic laboratory studies demonstrate that work product, résumés, and performance data receive higher ratings when raters are told that the creators were men.<sup>310</sup> Other studies find bias against women in causal attribution: when women perform well, for example, their success is attributed to factors such as luck, rather than ability.<sup>311</sup> Bias against women also tends to appear when the task being evaluated is perceived to be masculine.<sup>312</sup>

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305. See Robert D. Bretz et al., *The Current State of Performance Appraisal Research and Practice: Concerns, Directions, and Implications*, 18 J. MGMT. 321, 324-25 (1992). There have been far fewer studies of the effect on evaluation of ratee age. See *id.* at 325 (noting "[r]atee age received limited research attention"). At least one study found that nursing supervisors rated younger subordinates more highly than older subordinates. See Gerald R. Ferris et al., *The Influence of Subordinate Age on Performance Ratings and Causal Attribution*, 38 PERSONNEL PSYCHOL. 545, 548-55 (1985). However, a recent study of sales managers found that older employees performed better with respect to objective measures and subjective evaluation. See Robert C. Liden et al., *The Effects of Supervisor and Subordinate Age on Objective Performance and Subjective Performance Ratings*, 49 HUM. REL. 327, 327 (1996).

306. See Jacqueline Landau, *The Relationship of Race and Gender to Managers' Rating of Promotion Potential*, 16 J. ORG'L BEHAV. 391, 392 (1995); Gregory B. Lewis, *Race, Sex, and Performance Ratings in Federal Service*, 57 PUB. ADMIN. REV. 479 (1997), available in 1997 WL 10129659, at \*7-12. See generally Ted H. Shore, *Subtle Gender Bias in the Assessment of Managerial Potential*, 27 SEX ROLES 499 (1992) (noting that some studies indicated a pro-male bias, some indicated a pro-female bias, and still others indicated no bias at all).

307. See Shore, *supra* note 306.

308. See *id.*

309. See Veronica F. Nieva & Barbara A. Gutek, *Sex Effects on Evaluation*, 5 ACAD. MGMT. REV. 267, 273 (1980).

310. See Lewis, *supra* note 306, at \*7-12; Nieva & Gutek, *supra* note 309, at 268.

311. See Robert L. Dipboye, *Some Neglected Variables in Research on Discrimination in Appraisals*, 10 ACAD. MGMT. REV. 116, 119 (1985); Nieva & Gutek, *supra* note 309, at 269-70.

312. See Nieva & Gutek, *supra* note 309, at 271-73 ("[B]ehaviors that violate societal sex-role expectations tend to be negatively regarded."); Michele A. Paludi & Lisa A. Strayer, *What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name*, 12 SEX ROLES 353, 359 (1985).

Critics of these studies argue that the settings in which the studies were conducted, primarily laboratory settings, do not fairly reflect the way evaluation is performed in real-world environments.<sup>313</sup> Indeed, numerous field studies indicate that gender is not a strong evaluative influence.<sup>314</sup> These results are thought to be due, in part, to the fact that field study evaluators typically possess much information about the performance of the individuals being rated. Because raters need infer less about ratees in those situations, bias in the form of stereotypic assumptions is reduced.<sup>315</sup>

If these field studies were the end of the matter, my argument would be far less important. To the extent supervisors observe and recall significant amounts of information about their subordinates, gender bias in evaluation should not be a significant problem.<sup>316</sup> However, recent field studies argue against complacency. For example, the purpose for which a review is performed is found to be a relevant factor. A number of studies find pro-male bias evident when appraisals are conducted for promotion or compensation purposes.<sup>317</sup> In contrast, evaluations done purely for feedback purposes do not seem as prone to this effect.<sup>318</sup> Thus, where an employer's performance review program is tied to compensation and/or promotion practices, it is not clear that facially neutral reviews will be free from bias.

Like the studies on gender, studies of the effect of race on evaluation conflict. Unlike gender studies, however, greater racial bias ap-

313. See Dipboye, *supra* note 311, at 119-20; Lewis, *supra* note 306, at \*7-12.

314. See Landau, *supra* note 306, at 392; Lewis, *supra* note 306, at \*7-12.

315. See Lewis, *supra* note 306, at \*7-12; Nieva & Gutek, *supra* note 309, at 270-71.

316. Voluminous literature exists concerning evaluation biases caused by raters' knowledge of ratees' prior performance, the order in which good or poor performance is perceived, raters' expectations, and memory decay. See Bretz et al., *supra* note 305, at 323-24. These factors potentially affect the performance ratings of all employees. See *id.*

317. See Gregory H. Dobbins et al., *The Effects of Purpose of Appraisal and Individual Differences in Stereotypes of Women on Sex Differences in Performance Ratings: A Laboratory and Field Study*, 73 J. APPLIED PSYCHOL. 551, 556-57 (1988) (finding female ratees evaluated less accurately than men where purpose of evaluation was promotion and pay); Landau, *supra* note 306, at 397 (finding both gender and race are significantly related to promotion potential ratings); Shore, *supra* note 306, at 508-12 (finding subtle gender bias affects evaluations of managerial potential and subsequent promotion decisions) Tokenism—the condition when the proportion of women in a workgroup is small—has also been found to depress female evaluation. See generally Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences in Performance Ratings*, 76 J. APPLIED PSYCHOL. 263 (1991) (reporting the results of a study investigating the difference in ratings of males and females in 486 work groups).

318. See Landau, *supra* note 306, at 392-93 (noting that potential for biased perceptions may be greater for the promotion potential rating); Nieva & Gutek, *supra* note 309, at 270 (“Greater evaluation bias was found in studies on the evaluation of qualifications and on the causal attributions of performance than in the studies focusing on past performance”).

pears evident in field studies as compared with laboratory studies.<sup>319</sup> Nevertheless, one meta-analysis concluded that in both laboratory and field studies racial bias is unmistakable.<sup>320</sup> More specifically, the analysis found that in sixty-eight of seventy-four studies reviewed, white raters rated the performance of whites higher than that of blacks.<sup>321</sup> Moreover, ratings bias may influence both the evaluation of past performance and promotional promise. One recent study determined that being African-American or Asian negatively influenced ratings of promotion potential.<sup>322</sup> There are, however, some contrary findings. For example, two recent studies found the magnitude of the effect of race on evaluation to be minimal.<sup>323</sup>

In some cases, status as affirmative action beneficiaries is an additional factor that may affect the evaluation of minorities and women.<sup>324</sup> Studies demonstrate that association with affirmative action programs produces stigma; specifically, program participants are inferred to be incompetent.<sup>325</sup> One recent study examined whether this presumption could be overcome with information about successful performance.<sup>326</sup> The results were mixed. When raters were provided clear, unambiguous information about performance effectiveness, the negative competence inferences were overridden.<sup>327</sup> However, more ambiguous success information did not produce a

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319. See Lewis, *supra* note 306, at \*7-12.

320. See generally Kurt Kraiger & J. Kevin Ford, *A Meta-Analysis of Rater Race Effects in Performance Ratings*, 70 J. APPLIED PSYCHOL. 56 (1985). These findings are likely due to the significant barriers to advancement faced by people of color in American society. See generally Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41 (1987) (discussing barriers to African-American advancement).

321. See Kraiger & Ford, *supra* note 320, at 60. One difficulty is determining how much of the differential in rating is due to bias and how much is due to actual differences in performance. See Lewis, *supra* note 306, at \*9 (noting that while prejudice could be affecting evaluation, "[r]atings differences could also signal real differences in performance").

322. See Landau, *supra* note 306, at 397.

323. See generally Elaine D. Pulakos et al., *Examination of Race and Sex Effects on Performance Ratings*, 74 J. APPLIED PSYCHOL. 770 (1989) (finding through a study of U.S. army supervisors and new enlistees that race and sex had minimal effect on evaluation); David A. Waldman & Bruce J. Avolio, *Race Effects in Performance Evaluations: Controlling for Ability, Education, and Experience*, 78 J. APPLIED PSYCHOL. 897 (1991) (finding only minor effects of race on evaluation).

324. See Garcia et al., *The Effect of Affirmative Action on Attributions About Minority Group Members*, 49 J. PERSONALITY 427, 436 (1981); Pettigrew & Martin, *supra* note 320, at 57-60. See generally Madeline E. Heilman et al., *Presumed Incompetent? Stigmatization and Affirmative Action Efforts*, 77 J. APPLIED PSYCHOL. 536 (1992) (reporting the results of two studies demonstrating negative perceptions of the competence and career progress of individuals labeled as affirmative action beneficiaries).

325. See Heilman et al., *supra* note 324.

326. See Madeline E. Heilman et al., *The Affirmative Action Stigma of Incompetence: Effects of Performance Information Ambiguity*, 40 ACAD. MGMT. J. 603, 603-05 (1997).

327. See *id.* at 609. Subjects were told that a supervisor rated the ratee's performance within the top five percent range.

disconfirming effect.<sup>328</sup> The study authors voiced concern about these findings, noting that precise performance information is not available in many work settings, especially when people work in teams.<sup>329</sup>

In light of the above-described empirical findings, the argument that race and sex bias may taint performance evaluation appears persuasive. A recent turn in the direction of performance review research provides additional cause for concern. In 1985 Robert Dipboye challenged the research community to turn its attention to the behavioral and social determinants of appraisal bias.<sup>330</sup> He admonished his colleagues to be mindful that evaluation does not take place in a vacuum. Rather, supervisors and subordinates “typically interact face-to-face, and in the process of interacting they form relationships that vary in intimacy and attachment.”<sup>331</sup>

Those relationships can profoundly impact performance appraisal. Rating bias may occur, for example, because the supervisor is ambivalent toward a minority subordinate and hesitates to provide feedback necessary for improvement.<sup>332</sup> Subtle bias may also manifest itself in the behavior of a rater toward a subordinate, thereby affecting the performance of the underling.<sup>333</sup> These sorts of effects, argued Dipboye, were not captured by much of the appraisal bias research.

Since then, a number of studies have examined the social and situational factors that influence performance ratings. Not surprisingly, the studies find that the quality of the relationship between a supervisor and subordinate can have a significant effect.<sup>334</sup> One particular study highlights the potential implications of this research. It found that demographic similarity between a supervisor and subordinate positively influences the impressions the superior has of the underling.<sup>335</sup> That impression, or affect, “exerted a significant, albeit

328. See *id.* Subjects were told that a supervisor rated the ratee's performance as within the top 50%, the highest rating category available.

329. See *id.*

330. See generally Dipboye, *supra* note 311, at 120-24.

331. *Id.* at 120.

332. See *id.* at 123.

333. See *id.* at 120-21.

334. See, e.g., Neville T. Duarte et al., *Effects of Dyadic Quality and Duration on Performance Appraisal*, 37 ACAD. MGMT. J. 499 (1994) (finding that the employee performance is generally rated high when the supervisor-subordinate relationship is good, regardless of objective performance); Timothy A. Judge & Gerald R. Ferris, *Social Context of Performance Evaluation Decisions*, 36 ACAD. MGMT. J. 80 (1993) (finding that a close supervisor-subordinate work relationship positively influences ratings); Barry R. Nathan et al., *Interpersonal Relations as a Context for the Effects of Appraisal Interviews on Performance and Satisfaction: A Longitudinal Study*, 34 ACAD. MGMT. J. 352 (1991) (finding that subordinate reactions to performance review are affected by interpersonal relations).

335. See Judge & Ferris, *supra* note 334, at 97-98.

modest, indirect effect on performance rating."<sup>336</sup> Thus, when white male managers view their demographically similar white male subordinates as the "in group," one might expect to find a negative influence on the ratings of outsiders.<sup>337</sup>

### B. *Trying to Eliminate Bias by Ignoring It*

The discussion thus far makes clear that a central litigation prevention mechanism, the evaluation device, is actually vulnerable to the pernicious influence of largely unconscious race and sex bias. To the extent that compliance strategies obscure the actions of those forces in the ways described above, conditions of inequality will remain without legal remedy. Moreover, public perception that employment discrimination is no longer a significant problem may be influenced as well.

Further adding to the potential that management attorneys' advice may mask discriminatory conditions is the implicit suggestion that managers can eliminate discriminatory impulses by ignoring the immutable characteristics of the subordinates they evaluate.<sup>338</sup> Linda Hamilton Krieger has recently argued that the colorblind approach to decision making advocated by the foes of affirmative action cannot eliminate discriminatory decisions produced by unconscious bias.<sup>339</sup> Drawing from the work of Timothy Wilson and Nancy Brekke,<sup>340</sup> Krieger notes that four steps are necessary to correct "biases caused by emotional discomfort, the subconscious effects of stereotypes, [or] causal attribution."<sup>341</sup> First, the rater must be aware of the mental process that produces the bias. Second, the rater must want to correct for the unwanted influence. Third, the rater must discern the magnitude of the bias to avoid "overcorrecting" for it. Finally, the rater must be able to sufficiently control his or her mental processes to execute the correction.<sup>342</sup> As this enumeration amply demonstrates, "one *must* think about race in order *not* to discriminate."<sup>343</sup> Ironically, then, litigation prevention advice may simultaneously ensure that subconscious bias will not be eliminated from

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336. *Id.* at 98.

337. See Dipboye, *supra* note 311, at 121 ("[W]hite male managers have been found to treat white male subordinates as the "in-group.").

338. See *supra* note 224-228 and accompanying text.

339. See Krieger, *supra* note 5, at 1276-77.

340. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgements and Evaluations*, 116 PSYCH. BULL. 117 (1994).

341. Krieger, *supra* note 5, at 1286.

342. See *id.*

343. *Id.* at 1288.

employment decision making and inoculate decision making from challenge as biased.

Patricia Devine's work also stresses the necessity of conscious effort to reduce bias. She and her colleagues developed the "disassociation model" to explain unconscious prejudice and stereotyping.<sup>344</sup> This model distinguishes between cultural stereotypes, which are learned in childhood and are activated automatically, and personal beliefs, which often express egalitarian norms.<sup>345</sup> Both high- and low-prejudice individuals experience conflict between these intra-psychic forces.<sup>346</sup> However, low-prejudice individuals experience guilt that motivates a *conscious* process of prejudice reduction.<sup>347</sup> The important point to note here is the requirement of consciousness as a prerequisite to the elimination of stereotypical responses.<sup>348</sup> Defense attorneys incorporate no such notion in their litigation prevention advice. Rather, as noted above, they dispense their advice with the implicit assumption that one eliminates prejudice by ignoring it and focusing instead on neutral, job-related criteria.

Again, I do not question that many of the suggestions proffered by defense lawyers are well intentioned. Rather, my concern is that by teaching employers how to script the story of an adverse employment action, management attorneys are unwittingly instructing them on how to mask the biases they presumably seek to eliminate. The next section considers the impact that these practices might have on discrimination claims generally by focusing on the effects of paper records and other compliance strategies on plaintiffs' attorneys.

## V. RESPONSE OF THE PLAINTIFFS' BAR

One way to evaluate the efficacy of litigation prevention strategies is to examine published case law and assess the reactions of

344. Eberhardt & Fiske, *supra* note 244, at 378-81 (explaining the model).

345. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6-7 (1989).

346. See Patricia G. Devine & M.J. Monteith, *The Role of Discrepancy-Associated Affect in Prejudice Reduction*, in AFFECT, COGNITION, AND STEREOTYPING: INTERACTIVE PROCESSES IN GROUP PERCEPTION 317, 323 (Diane M. Mackie & David L. Hamilton eds., 1993).

347. See *id.* at 324-26.

348. A recent study examined the relationship between "identity blind" personnel policies, which scrupulously avoid consideration of immutable characteristics, and the employment status of women and people of color in the organizations that use such policies. See Alison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 ACAD. MGMT. REV. 787 (1995). The study found that "identity conscious" policies, like affirmative action programs, were positively associated with the employment status of women and minorities. See *id.* at 805-07. However, "identity blind" structures, including performance review programs, were not. See *id.* The study authors posit that "identity-conscious structures are needed to ameliorate the biases of decisionmakers and reward systems." *Id.* at 807.

judges to the documentary and testimonial evidence proffered by employers.<sup>349</sup> This approach, however, overlooks a significant fact: many employment disputes fail to become formal legal proceedings. In fact, litigation encompasses a mere fraction of the events that actually might mature into bona fide legal disputes.<sup>350</sup> The problems employees experience are anything but static. Perceptions of employment disputes change over time. Many an aggrieved employee decides to take the lumps and move on.

Lawyers, the gatekeepers of legal institutions, play an essential role in this process of dispute transformation.<sup>351</sup> They do so by helping those they accept as clients understand their problems as formal legal claims. By the same token, attorneys may arrest dispute development when they reject the pleas of individuals seeking legal assistance.<sup>352</sup>

With these precepts in mind, the plaintiffs' bar would seem a logical place to begin to gauge the impact of the defense strategies described above. To challenge an employment decision in court, an employee must generally obtain the assistance of an attorney; that is the employee must get a lawyer to believe in and accept the case. Thus, it is vitally important to consider how plaintiffs' attorneys evaluate and react to the techniques advocated by management lawyers.

How does performance-based documentary evidence impact the case selection process? Does such evidence affect the tactics that will be used if a case is accepted? Can plaintiffs' lawyers turn litigation prevention strategies against employers? I developed and distributed a survey to a sample of plaintiffs' attorneys to explore these and other, related questions.<sup>353</sup>

The survey results cannot demonstrate as empirical fact the central concern of this Article: that litigation prevention advice may mask workplace bias. Nor can they directly measure the influence of compliance mechanisms on the plaintiffs' bar. However, they can provide a window on the thinking of a large group of plaintiffs' lawyers. Moreover, that collective estimation of the state of discrimination law practice can be compared against the themes contained in

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349. See *infra* notes 364-72 and accompanying text (discussing recent study of federal circuit court decisions involving performance reviews). Post-trial jury interviews are another way to gauge the impact of defense strategies.

350. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 636 (1980) (discussing an analytical framework for understanding the emergence and transformation of disputes).

351. See *id.* at 645 ("Of all of the agents of dispute transformation lawyers are probably the most important.")

352. See *id.* at 646.

353. The survey questions are reproduced *infra* Appendix I.

the defense literature. To the extent that the views of the plaintiffs' and defense bars coincide, one gains a sense of the efficacy of the compliance mechanisms recommended by management lawyers.

The greater the similarity of viewpoints between the two sides, the more potent the techniques would appear to be. In other words, if the employment bar as a whole shares a set of analytical constructs that are used to distinguish between viable and fruitless discrimination claims, then litigation prevention methods, by drawing from those constructs, should be relatively effective. Although more research should be done in this area, it is my hope that this Article makes evident the need for such work.

An analysis of the survey data reveals that plaintiffs' lawyers conceptualize claim viability in ways strikingly similar to the defense bar. Plaintiffs' lawyers not only agree with management attorneys that employers possess the evidentiary advantage in employment cases, they articulate the parameters of that advantage using the same lexicon. The themes that predominate are those that were present in the defense literature: (1) the value to employers of ongoing evidence production; (2) the significance of the timing of employment decisions; and (3) the consequence of tone. These similarities demonstrate the integral part that compliance principles play in employment discrimination law practice today.

After a brief discussion of the survey data and design, the sections below provide my analysis of the respondents' perspectives on these issues. Thereafter, Part V.D. considers the strategies plaintiffs' attorneys use in order to re-script the stories of the adverse actions suffered by their clients. There are many ways in which this task can be accomplished, as the survey results illustrate. Even so, the superiority of the defense position should be kept in mind because it may limit the extent to which employee counternarratives are capable of success.

#### A. *Survey Data and Design*

The data for the analysis below are drawn from a survey of members of the National Employment Lawyers Association (NELA), a nationwide organization representing more than 3500 plaintiffs' employment lawyers. A geographically stratified sample was achieved by dividing NELA's membership list by federal circuit and selecting from each circuit every third name. Out of 1213 surveys mailed, 479 responses were received.<sup>354</sup> This represents a thirty-nine percent response rate—a rate considered favorable by social scientists.<sup>355</sup>

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354. Due to limitations on the type of data the National Employment Lawyers Association (NELA) kept on its members at the time of the survey, I cannot demonstrate that the



The survey was three pages long and was divided into two sections. Its first section solicited general information from each respondent. Some of the information sought included: law firm size, years of experience in legal practice, the percentage of the attorney's caseload devoted to representing employees, whether the attorney has represented employers, and whether the attorney ever consults with employees before adverse action is taken against them. The results of that section are summarized in Appendix II.

The second section of the survey was designed to elicit information about the impact of written performance-related documentation and other defense strategies. Attorneys were asked to rate how important documentation is to a decision to accept or reject a case. They were also asked to evaluate a series of statements about documentary evidence; to appraise the ability of various factors to undercut an employer's explanation for an adverse action; and to describe, in textual form, how effective performance-related documentation is as a defense strategy in litigation. I now turn to the results of this section.

### *B. Giving Voice to the Plaintiffs' Bar*

Perhaps the most revealing part of the survey results were the answers to a question allowing for extended written response. The survey asked whether the respondents considered the proffer of performance-related documentation to be an effective defense strategy in litigation. There was very little disagreement on the matter. Most of the respondents indicated that when documentation of poor performance is prepared properly, it is extremely persuasive. Respondents also evidenced fairly uniform views about the factors impacting the strategy's effectiveness. Moreover, those opinions correspond with the defense literature on the steps that can be taken to reduce employer vulnerability to suit.<sup>356</sup> These findings indicate shared

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demographic characteristics of the respondent population approximate those of the membership at-large. This does not represent a flaw in the study because I make no claim that the results are representative of that organization. The survey's goal was to gain a sense of how plaintiffs' attorneys evaluate claims and react to defense strategies. The striking similarity between the survey results and the content analysis described above strongly suggest a conception of claim viability that is shared by members of both the plaintiffs' and defense bars.

355. See Sutton et al., *The Legalization of the Workplace*, *supra* note 39, at 952-53 (discussing response rates for several organizational studies, all of which fell between 35% and 54%).

356. The same phenomenon was present regarding the results from other portions of the survey. For example, 97% of the respondents expressed agreement with the statement that specific examples of performance deficiencies bolster an employer's explanation for an adverse employment action. Similarly, 97% agreed with the statement that evidence of progressive discipline bolsters an employer's explanation. Both factors appear in defense literature as steps employers should take to reduce their vulnerability to litigation.

thinking about these issues by the practicing employment bar as a whole.

The commentary contained various recurring topics. Thematically, these subjects fall into the three categories emphasized by the preventative literature: (1) the strength of evidence produced in an ongoing, regular fashion; (2) the significance of timing; and (3) the importance of tone. Because emphasis was placed on timing, I will discuss that theme first.

### 1. *The Significance of Timing*

Many respondents emphasized that timing is linked to the efficacy of performance documentation as a defense strategy. Specifically, they noted that documentation is most effective as a defense weapon when prepared as part of an ongoing review process over a long period of time. "Any employer which can document consistent criticism of an employee's performance over time has a strong defense," noted one respondent. Another remarked, "[A] consistent record of poor performance throughout a career may be a strong defense tool." Yet, another opined, "If the documentation is consistently done over a considerable length of time, then it is probably the most problematic defense strategy." A fourth wrote: "A series of low evaluations or a record of disciplinary incidents is very effective. I would not represent an employee with such a record."

Notably, plaintiffs' bar publications describing case intake factors echo these sentiments. For example, one attorney notes: "[A] well-documented personnel file showing repeated warnings of misconduct or substandard performance is a major deterrent to accepting the case for litigation . . . . A history of marginal or substandard performance can rarely be overcome in a courtroom."<sup>357</sup> Thus, the defense bar's repeated suggestions that litigation can be avoided by adopting and carefully administering an ongoing performance review system appear, at least in general, to be sound.

In comments that comport with litigation prevention advice, many survey respondents stated that negative documentation prepared too close to the time of the adverse action is suspect and subject to attack. One attorney noted that performance documentation "can backfire with a long-term employee who has a history of good reviews and suddenly receives several horrible ones." A second at-

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357. Joseph A. Golden, *Pre-Complaint Activity in a Wrongful Discharge Claim*, in 1997 SEVENTH ANNUAL CONVENTION 539, 543 (NELA, 1997); see also Wayne N. Outten, *Evaluating Plaintiff's Case and Settlement Opportunities: Plaintiff's Perspective*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 7, 14 (PLI, 1996) (listing questions to ask prospective clients including, "What are the worst things the employer may say about the employee or his/her work?").

torney suggested that “great reviews for a long time make a sudden decline highly suspicious.” Another wrote that documentation of performance is “least effective when a plaintiff has consistently positive evaluations and then the evaluations drop drastically at the same time that he or she complains about adverse treatment.” If the review was done “close in time to the discharge, then it is subject to attack as calculated to build a case against the plaintiff, especially if it was out of line with past evaluations,” noted a fourth.

Again, the plaintiff’s bar provides similar advice regarding case intake:

[A] series of above standard evaluations followed by a sudden drop in performance rating raises additional questions. Was there a change in supervision? Was there a change in the performance standards while the potential client’s performance remained constant? Did something happen to the potential client which affected her ability to meet the standards of the job?<sup>358</sup>

The attorney goes on to suggest that if analysis fails to establish a plausible explanation for the adverse action, one can consider accepting the case.<sup>359</sup>

Interestingly, in focusing on timing, the attorneys seem to be looking for patterns or story lines into which they can fit a given complaint. Neither pattern described above, however, necessarily indicates the presence or absence of discrimination. A supervisor who stereotypes may produce years of critical performance documentation. Likewise, there may be a drop in an employee’s performance ratings because a new supervisor pays more attention to preparing evaluations than did his or her predecessor. That new boss may be entirely unbiased. Yet the search for symbols of fidelity (or lack of fidelity) to equal employment opportunity principles continues apace. One cannot fault the attorneys for this, however. As will be described more fully below, the judiciary seems to respond to symbols.

## 2. *The Value to Employers of Ongoing Evidence Production*

A great deal of the defense literature emphasizes the importance of the continual production of favorable evidence. For example, a common refrain is that employers can safeguard the decisions they make by creating “paper trails.”<sup>360</sup> The steps necessary for bulletproofing decisions, from regular performance reviews to termination meeting rehearsals, are often provided in detail. Respondents to my survey discussed the value this evidence production has to employers

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358. Golden, *supra* note 357, at 543.

359. *See id.* at 544.

360. *See supra* note 196 and accompanying text; *see also generally supra* Part III.C.1.

and referenced many of the steps described in the litigation prevention advice. Their comments seem to affirm the validity of the prescriptions dispensed by management attorneys.

Many respondents noted the difficulty of refuting negative performance documentation. "Such a strategy is extremely effective because it forces the plaintiff to address and refute often numerous and diverse allegations of faulty performance," observed one. Another noted, "It is an important aspect of defense strategy because it bolsters 'for cause' termination and makes the plaintiffs' burden more difficult." A third respondent asserted, "A thick personnel file with lots of warnings can hurt the plaintiff badly, even if the warnings are disputed or minor because it puts he/she [sic] in the position of having to defend many things." Yet another noted that negative performance documentation "forces plaintiff to expend time and energy defending performance rather than proving discrimination."<sup>361</sup>

In a related theme, a number of respondents referenced the credibility that attaches to writings. "[P]eople tend to believe 'the written word,' even if it is a totally 'written lie,'" noted one. Another opined, "Pieces of paper are given more weight than testimonial evidence." A third offered that proffering negative performance documentation "is a useful defense tool because juries like things they can touch." "Jurors like to see a paper trail—as long as it appears to be genuine," said yet another. Another noted cynically: "[E]veryone knows what 'CYA'<sup>362</sup> means these days, in management especially. The greater the effort to produce 'CYA' documentation, the more effective it is in their defense."

As noted above, the survey respondents directly and indirectly referenced several of the procedural steps recommended by management attorneys. For example, evidence of progressive discipline is perceived as enhancing the effectiveness of performance-related documentation as a defense tool. One respondent declared, for example, that documentation is a powerful defense tool "if it shows a rea-

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361. Of course, document trails can be turned against employers where they are not prepared properly, a point made extensively by management lawyers. This theme appears in the plaintiffs' bar's literature as well. See Richard T. Seymour, *Summary Judgment Motions After Hicks*, in *ADVANCED EMPLOYMENT LAW AND LITIGATION* 167, 174 (ALI-ABA Course of Study, Dec. 1-3, 1993) (noting that a "laundry-list approach usually means that some of the stated reasons [for termination] will be thin, maximizing the plaintiffs' opportunity to prove pretext"); Kent Spriggs, *Probative Value of Statistical Proof*, in *EMPLOYMENT LAW: THE BIG CASE* 505, 512 (ALI-ABA Course of Study, Oct. 31-Nov. 2, 1996) ("The document trail of personnel records and employment policies is generally of great value in examining the decision makers in the employment process.").

362. "CYA" presumably an abbreviation for the term "cover your ass," a slang term for the process that involves creating written memoranda that explain and provide a rationale for one's actions. The writings memorializing decisions represent an effort to forestall challenge to those actions.

sonable amount of concern to give the employee a chance to improve." This attorney added, "I will not even consider taking a case if the documentation, on its face, shows such consideration by the employer." Another wrote that performance documentation "can be very effective, especially when detailed with supporting documentation, such as memos of counseling and discussion showing the employer's attempts to 'help' the employee." "Evidence of a history of progressive discipline, warnings and employee admissions of shortcomings can be very persuasive," said another.

Like their defense counterparts, a number of survey respondents said that it is essential that negative performance reviews be presented directly to employees. "[Performance documentation] is useless if the employer never shared his concerns with the employee," noted an attorney. Several respondents also opined that an employee signature and lack of formal protest enhances a document's value to the employer. One wrote that negative performance documentation is an effective defense strategy, "especially when the employee signs a form agreeing with the negative aspects of the evaluation." "It is very effective," said another, "if there is no response filed by the employee." "If the employee did not oppose the performance related issues before he/she agreed to the performance review," said yet another respondent, "the employer's explanation, though pretextual, may seem legitimate."

Additionally, survey respondent commentary underscored the defense advice that employers interview witnesses before authorizing a termination. Those remarks described the link between document strength and witness testimony. As noted by one respondent: "[Negative performance documentation] is important if it is corroborated by supervisor and coworker testimony. If it looks 'cooked,' the plaintiff has an opportunity to demonstrate inconsistencies and obvious fraud or manipulation." Another wrote: "[The value of documentation] depends on the overall credibility of the presenting witnesses. A supervisor with an apparent axe to grind can ruin otherwise good documentation." A third astutely noted that documentary evidence can assist the employer in the development of testimonial evidence that will corroborate it: "[Performance documentation is] effective in providing employer witnesses with 'script' for testimony."

Finally, some respondents commented that performance documentation is often crucial to judges' decisions to grant defense motions for summary judgment, preventing disputes from ever reaching a jury through case dismissal. "Timely, well-documented negative performance evaluations are very effective in getting summary judgments in favor of the defense," said one. Another noted that "[performance documentation] is more effective with judges on sum-

mary judgment motions than with the jury at trial, which tends to take it with a grain of salt." A third wrote, "If the documentation appears legitimate, it can be a nearly conclusive defense to discrimination at the summary judgment stage." "It is very effective in the Fifth Circuit if [the documentation] is negative," remarked a respondent, "[because] the Fifth Circuit looks for any reason to throw out these cases." A final respondent opined: "Unfortunately, I see it as being very effective because judges are so anxious to reduce their caseload. Given any excuse, they will throw cases out on summary judgment."<sup>363</sup>

What is one to make of this last set of comments? Some might characterize them as merely the frustrated expressions of disappointed advocates. Yet there may well be truth in the remarks if judges are more responsive to the symbols of equal opportunity than they are to substance. A recent study of judicial decisions involving performance appraisal provides a partial answer.<sup>364</sup> Although it examined decisions at the appellate level, rather than the trial level where motions for summary judgment are heard, it offers some fascinating conclusions about the factors that motivate those who sit on the bench.

Jon Werner and Mark Bolino examined 295 U.S. circuit court employment discrimination cases decided between 1980 and 1995.<sup>365</sup> All of these cases mentioned either the term "performance appraisal" or "performance evaluation."<sup>366</sup> The study used the court's decision as its dependent variable, either favorable to the plaintiff or favorable to the defendant.<sup>367</sup> A number of variables were then examined to determine their potential influence on case outcome.<sup>368</sup>

363. While these quotes indicate that judges are more likely than jurors to accept documentation at face value, a split of opinion on this issue appeared in answer to a question in a different portion of the survey. Asked whether judges are more likely than jurors to credit performance-related documentation, 58% expressed agreement, while 32.4% indicated disagreement. These opinions are, no doubt, the products of individual personal experience.

364. See Jon M. Werner & Mark C. Bolino, *Explaining U.S. Courts of Appeals Decisions Involving Performance Appraisal: Accuracy, Fairness, and Validation*, 50 PERSONNEL PSYCHOL. 1 (1997).

365. See *id.* at 8-9.

366. See *id.* at 8.

367. See *id.* at 9. In all, 58.6% of the cases were decided in favor of defendants. See *id.* at 12. Circuit variation was evident. The First, Fourth, and Fifth Circuits had the highest win rates for defendants (88%, 68%, and 71% respectively). See *id.* at 13. The D.C. Circuit had the lowest success rate for employers (44%). See *id.*

368. The control variables included: organization type; race and sex of evaluators; geographic location of the suit; appraisal purpose; decision year; whether the suit used disparate treatment or impact theory; whether the suit was an individual claim or class action; the protected category forming the basis of the suit (e.g. race, sex, age, disability); the circuit in which the decision was rendered; and whether information was presented concerning the reliability of the appraisal system. See *id.* at 9-11.

Of particular interest for the purpose of this Article were the study's findings on the performance appraisal system factors that were significantly related to employer success. The authors noted that "defendants were more likely to win their cases when: (a) [t]hey had conducted job analysis and included written rater instructions; (b) they had allowed employees the opportunity to review appraisal results; and (c) there was evidence that more than one rater concurred with the performance assessment."<sup>369</sup> The existence of rater training also approached statistical significance.<sup>370</sup>

The performance system variables considered strongest in their predictive ability were those affecting procedural fairness.<sup>371</sup> In fact, a key variable relevant to appraisal system accuracy and potential bias was not significantly related to case outcome. Specifically, whether the appraisal system emphasized employee traits (considered prone to inaccuracy and bias) versus employee behaviors and results (recommended to increase accuracy and reduce bias) did not influence the judges.<sup>372</sup>

Thus, it does appear that judges are far more persuaded by symbols and process than they are by substance. Furthermore, while procedural fairness can be considered a gain for employees, it does not guarantee substantive change for the members of groups that civil rights law is designed to protect.

### 3. *The Importance of Tone*

Given the penchant of the judiciary for symbols, it is not surprising that survey commentary referred to the issue of tone. Tone, it should be recalled, was also an area of emphasis in the defense literature. Many respondents perceive the effectiveness of negative performance documentation to depend, in part, upon the language used in the reviews themselves. Performance documentation is an effective defense strategy when "neutral language is used making it appear to be balanced and fair," stated a respondent. One attorney noted that "[c]learly biased evaluations are bad for the employer." Another weighed in with, "[I]t is excellent if it is not exaggerated." A fourth opined that "jurors, in particular, are suspicious of documentation that is too self-serving."

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369. *Id.* at 16.

370. However, the authors noted that the small sample size regarding this factor was a study limitation. *See id.* at 17.

371. *See id.* at 17-18. Job analysis, which enhances rater accuracy, was found to be weaker in predictive ability than employee review and concurrence by multiple raters. *See id.* at 17.

372. *See id.* at 18-19.

These comments lend credence to the defense advice that employers use care in formulating performance criticism. A plaintiff's attorney can use documentation that appears immoderate to turn the jury against the employer. As one practitioner noted: "To the extent that the defendant can be portrayed as someone who is looking to find fault and going out of their way to criticize, they effectively commit suicide. The more they trash the plaintiff, the more they undermine their case."<sup>373</sup> Once again, the thinking of plaintiffs' attorneys on this matter mirrors the thinking of their management counterparts.

### C. *Assessing the Evidentiary Advantage of Employers*

Up to this point, the survey analysis has implied that plaintiffs' attorneys see employers as systematically advantaged in their ability to create narratives that will be accepted as true. This section reviews the survey results that highlight the respondents' perceptions of the evidentiary imbalance in employment discrimination litigation. It then considers whether current doctrinal frameworks for evaluating evidence account for that imbalance.

As noted above, one possible effect of litigation prevention advice is that it may mask bias, thereby affecting employees' access to legal representation. Because the employment bar as a whole conceptualizes claim viability so similarly, employee advocates may consider bulletproofed employment decisions groundless or very difficult to challenge.<sup>374</sup> The survey sought the perceptions of plaintiffs' lawyers on this matter by asking them whether performance-related documentation, a central focus of the compliance literature, affects the decision to accept or reject a case. Not surprisingly, the respondents overwhelmingly report that it does: 41.3% said documentation has a strong influence on the decision; 49.5% reported that it has a moderate influence.

The survey results cannot empirically demonstrate the strength of the effect on the plaintiffs' bar, a topic worthy of further study. Nonetheless, this finding does suggest the potential power of litigation prevention strategies. Employers that deploy such techniques effectively may prevent the transformation of employee complaints into formal legal claims by influencing the responses of plaintiffs' attorneys to potential clients.

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373. Jeffrey L. Needle, *The Overzealous Defendant or Trashing the Plaintiff*, in 1994 FIFTH ANNUAL CONVENTION § 14, at 3 (NELA, 1994).

374. Indeed, this was suggested by the survey's textual responses described in the previous section. See *supra* Part V.B.



Employers not only hold the evidentiary edge in terms of documentary evidence. They are also advantaged in litigation by their greater access to witnesses. Corporate defendants in employment cases can generally rely on their supervisors to provide testimonial support for their employment decisions.<sup>375</sup> Moreover, cautious employers and their attorneys will work to ensure that supervisors' testimonial evidence comports with performance-related documentary evidence.<sup>376</sup>

Employees, on the other hand, may encounter difficulty in attracting witnesses, a fact noted by the literature of both the defense and plaintiffs' bars and confirmed by the survey. The reasons for this result are not difficult to surmise. As one employee advocate notes:

The plaintiff in a discrimination case often faces [an] immense problem in that fact witnesses who are fellow employees may still be subject to the 'command influence' because of their employee status with the defendant company. Even if not threatened, they may feel very constrained against testifying candidly for the plaintiff if such testimony would injure the company's litigation position. It is only natural for them to be concerned that they not anger management and injure their chance for promotion or, worse, be deemed a 'troublemaker' who is seen by management as being a natural object for discipline.<sup>377</sup>

To gauge the feelings of plaintiffs' attorneys on the matter, they were asked to respond to the statement that current employees are reluctant to testify. The bulk of the respondents agreed with the statement: 50.9% strongly agreed with the assertion; 45.5% indicated simple agreement. This is not to say that plaintiffs never attract helpful witnesses, but that there is a systemic imbalance in the litigation playing field.

Do plaintiffs' attorneys perceive the overall evidentiary disparity that this Article has attempted to demonstrate? The defense literature discussed previously exhibited both a sense of employer vulnerability to suit and the recognition that this weakness could be overcome through preventative strategies.<sup>378</sup> Most of the survey respon-

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375. Employers may experience problems in this respect where a supervisor has left the employ of the company.

376. See *supra* notes 185-88 and accompanying text.

377. Spriggs, *supra* note 361, at 511; see also John D. Sloan, Jr. & John Graves, *Age Discrimination: A Trial Lawyer's Guide for Bringing Suit*, TRIAL, Mar. 1995, at 48, 50 ("[P]eople who still work for the defendant may be reluctant to tell all they know because they may fear losing their jobs.")

378. See, e.g., Baxter & Klein, *supra* note 182, at S1 (noting that if oversight steps are followed "the prospects for a successful defense are likely to be good"); Hicks & Alexander, *supra* note 196, at \*22 (noting that if you can answer the questions in a termination "check-list" the employer "will be able to avoid employment-related litigation or, at the very least, significantly minimize its exposure"); Myers, *supra* note 113, at 7 ("It's impossible to shield a

dents do see employers as having the upper hand. Asked to respond to the statement that employers have the evidentiary advantage in discrimination cases, 55.9% strongly agreed and 37.8% expressed agreement.

While some of the advantage is clearly due to factors discussed above, most of the plaintiffs' attorneys agreed that a more insidious factor is sometimes in play. About 80% of the respondents signaled their agreement with the statement that employers withhold important documentary evidence in discovery.<sup>379</sup> Whether this perception is grounded in real experience or in much less easily validated folk wisdom remains to be seen. However, it is interesting that some defense attorneys in the wake of the Texaco debacle<sup>380</sup> have specifically cautioned employers about document destruction.<sup>381</sup>

Of course, plaintiffs might also obtain valuable employer-created documents from the investigative files of the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Employees must exhaust their administrative remedies before filing suit under these statutes.<sup>382</sup> As part of its investigation into a charge of discrimination, an agent of the agency can request and obtain documentary evidence, which in theory is available to the employee.<sup>383</sup> To determine whether plaintiffs' attorneys believe that in practice this is so, the survey asked for a response to the statement that documents are routinely available

company from the risk—but a well-informed company that maintains good records may be just too efficient for the angry employee with an axe to grind.”); Sanchez, *supra* note 201, at 29 (“With proper planning, it is highly probable that litigation can be avoided.”). While one might initially assume that these optimistic claims are exaggerations, Werner and Bolino’s case law study underscores the potential effectiveness of preventative techniques. See *supra* notes 365-72 and accompanying text.

379. See generally William J. Talbott & Alvin I. Goldman, *Games Lawyers Play: Legal Discovery and Social Epistemology*, 4 LEGAL THEORY 93 (1998) (using game theory to explain why lawyers are motivated to “duck and dodge” discovery requests for important, known negative evidence).

380. See *supra* note 3 (describing the allegations of document tampering against the company).

381. See, e.g., Susan McGolrick, *Attorneys Stress Preventative Steps in Aftermath of Charges at Texaco*, Daily Lab. Rep. (BNA) C1 (Mar. 28, 1997) (quoting management attorney Joyce Margulies who notes that after a claim is made steps must be taken to preserve documents); Weirich et al., *supra* note 225, at 42 (“Once a claim is made, relevant documents should be collected and protected from destruction.”).

382. See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 1078-80 (1997) (describing administrative procedures for enforcing anti-discrimination law).

383. In fact, the plaintiffs' bar literature routinely counsels employee advocates to request EEOC and other administrative files. See, e.g., Robert B. Fitzpatrick, *Plaintiff's Pre-Trial Strategies*, in BASIC EMPLOYMENT AND LABOR LAW—IN-DEPTH 75, 80 (ALI-ABA Course of Study, July 8-12, 1996) (advising plaintiffs' attorneys to obtain investigative files from EEOC and other agencies); Truhlar, *supra* note 124, at 144-45 (recommending that evidence be obtained from antidiscrimination and other agencies).

from the EEOC and other agency files. That question produced a strong split of opinion. Close to 50% agreed with the statement (3.8% strongly), while about 50% disagreed with the statement (6.5% strongly).

This finding is interesting because the evidentiary burden-shifting framework in disparate treatment cases is in part justified by the assumption that employees are able to obtain evidence from the EEOC's files. Once the plaintiff establishes a prima facie case of discrimination, the employer's evidentiary obligation is limited to a burden of production rather than persuasion. In setting forth this standard, the Supreme Court noted that "the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint."<sup>384</sup> The response to this portion of the survey may bring that assumption into question.<sup>385</sup>

Moreover, the overall evidentiary advantage of employers casts doubt on the Supreme Court's controversial decision in *St. Mary's Honor Center v. Hicks*.<sup>386</sup> That much criticized decision addressed the question of the inference to be drawn when a plaintiff successfully demonstrates that the employer's proffered reason for an employment decision is not true. Rejecting the plaintiff's argument that disproving the employer's explanation is tantamount to proving discrimination, the Court held that such a finding does not compel judgment for the plaintiff. While it may in some cases suffice to prove discrimination, the determination is best left to the discretion of the fact finder.<sup>387</sup>

Justice Antonin Scalia's majority opinion expressed a view of employer practices distinctly at odds with that of this Article. To ex-

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384. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

385. A report funded by the Federal Glass Ceiling Commission notes that, historically, the EEOC has been inundated with employee complaints and "has never had sufficient manpower or budget to investigate these complaints thoroughly." JONATHAN S. LEONARD, *USE OF ENFORCEMENT TECHNIQUES ELIMINATING GLASS CEILING BARRIERS 3* (Apr. 1994) (report funded by U.S. Department of Labor, Glass Ceiling Commission).

386. 509 U.S. 502 (1993). For critiques of *Hicks*, see Brodin, *supra* note 174; Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994); William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from McKennon and Hicks*, 30 GA. L. REV. 305, 342-58 (1996); Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385 (1994); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 328-34 (1997). *But see generally* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1993) (defending the *Hicks* decision as sound).

387. *See Hicks*, 509 U.S. at 511.

plain the rationale for the decision, Scalia offered a hypothetical in which a rejected minority job applicant sues an employer whose workforce is overwhelmingly made up of minorities.<sup>388</sup> The hiring officer who rejected the plaintiff—a member of the same minority group—has been fired, leaving this “now antagonistic former employee” as the employer’s only source of information for the applicant’s rejection.<sup>389</sup> Were the majority to rule as the plaintiff argued, Scalia mused, the jury would be instructed to find for the plaintiff if it disbelieved the hiring officer “whether or not they believe[d] the company was guilty of racial discrimination.”<sup>390</sup> That the employer might keep records on applicants that it did not hire seemed to the majority to be “highly fanciful—or for the sake of American business we hope it is.”<sup>391</sup>

Leaving aside for a moment the fact that hiring discrimination claims are fairly uncommon,<sup>392</sup> this notion of an employer being at a loss for evidence is quite extraordinary. Indeed, Justice David Souter in dissent noted:

Most companies, of course, keep personnel records, and such records generally are admissible under Rule 803(6) of the Federal Rules of Evidence. Even those employers who do not keep records of their decisions will have other means of discovering the likely reasons for a personnel action by, for example, interviewing co-workers, examining employment records, and identifying standard personnel policies.<sup>393</sup>

To base Supreme Court precedent on a hypothetical that bears little resemblance to reality is strikingly ill advised.

A careful look at the evidentiary imbalance in discrimination cases makes the outcome in *Hicks* hard to justify. Employers in these suits typically create and control most of the relevant documents.<sup>394</sup> They also generally count on the allegiance and/or cooperation of most witnesses.<sup>395</sup> The superiority of employers in these respects is conceded by management attorneys and acknowledged by the plaintiffs’ bar. When the defendant is in such a dominant position re-

388. See *id.* at 513.

389. *Id.* at 513-14.

390. *Id.* at 514.

391. *Id.* at 514 n.5.

392. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1014-16 (1991) (noting a dramatic shift in the types of discrimination cases being filed from hiring challenges to termination challenges).

393. *Hicks*, 509 U.S. at 539 n.12 (citations omitted).

394. See *supra* notes 178-80 and accompanying text.

395. See *supra* note 184 and accompanying text.

garding evidence, a plaintiff who demonstrates that the evidence is not credible should win as a matter of law.

Had Melvin Hicks prevailed, however, there would still be cause for concern with Justice Scalia's hypothetical suit. Both Scalia and Souter assume that personnel records, to the extent they are available, embody "true" reasons for the applicant's rejection. This Article has tried to demonstrate that such faith may be misplaced. Employers practicing litigation avoidance techniques, including the production of documentary evidence, may unwittingly mask conditions of inequality. If we assume for the sake of argument that the hypothetical hiring officer was both subconsciously biased<sup>396</sup> and litigation prevention savvy, plaintiffs' attorneys and judges may well regard the applicant's claim as groundless because adequate documentation for the refusal to hire has been created.

#### D. *Undermining the Employer's Explanation*

While employers and their representatives are advantaged opponents in employment discrimination litigation, plaintiffs' attorneys are by no means powerless. They are active agents who seek to create counternarratives on behalf of their clients. In fact, a majority of the respondents voiced agreement with the statement that plaintiff credibility is the most important determinant of success in an employment discrimination case: 48% expressed agreement; 35.7% expressed strong agreement. Only 13.8% disagreed. This finding is notable because plaintiff credibility is not a factor within the control of the employer. Instead, through the client selection process, plaintiffs' attorneys attempt to choose clients who present themselves in a forthright and believable manner.

Indeed, literature of the plaintiffs' bar repeatedly stresses the need for advocates to select clients who score high on credibility. As one commentator notes: "Ultimately, the plaintiff's case is going to rest upon the impression the plaintiff makes with the jury. Therefore, it is important for an attorney to feel comfortable with a client, and to trust that a jury will be favorably impressed with the plaintiff."<sup>397</sup> Another suggests that the attorney formulate an opinion about "the client's ability to articulate, follow directions, cooperate,

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396. Just because the hiring officer was a minority from the same group as the plaintiff does not mean that the rejection was bias-free. See *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (refusing to adopt a categorical rule that the perpetrator of sexual harassment cannot be of the same sex as the victim).

397. Kyle M. Francis, *What a Plaintiff's Lawyer Looks for When Evaluating a Potential Lawsuit*, in *AVOIDING WORKPLACE LITIGATION: STRATEGIES FOR LAWYERS AND HUMAN RESOURCE PROFESSIONALS* 9, 20 (PLI, 1997).

and generally make a good appearance.”<sup>398</sup> These subjective factors are not subject to the bulletproofing efforts of employers.

Of course, there is more to creating a counternarrative than selecting a credible client. To determine how employee advocates accomplish this, the survey asked them to rate the ability of a number of factors to undercut the employer’s explanation for an adverse action. Four possible ratings were available for each factor: (1) great ability to undercut the explanation; (2) some ability to undercut the explanation; (3) little ability to undercut the explanation; and (4) no ability to undercut the explanation. The respondents were also asked to list other factors of use in weakening the employer’s account.

Even more interesting than the respondents’ ratings is the fact that most of the factors that the plaintiffs’ attorneys deemed effective are within the initial control of employers. Moreover, litigation prevention techniques seek to guard against the creation of evidence useful to plaintiffs. Yet, as noted above, a lack of viable evidence does not necessarily represent an absence of bias. In short, the efficacy of any given factor must be viewed with the imbalance in the litigation playing field and the implications of that disparity in mind.

The factor that was rated most effective at undermining the employer’s story was inconsistency between performance-related documentation and supervisor testimony: 68.1% of the respondents rated it as great; almost 30% rated it as having some ability to undermine the company’s explanation.

Inconsistency can occur in two ways. First, the documents may indicate that the employee’s performance was satisfactory while the supervisor’s testimony is that performance was poor. When this is the case, the plaintiffs’ attorney can use the reviews and memoranda themselves to impugn the supervisor’s credibility and give credence to the counternarrative. In other words, if the plaintiff truly performed so poorly, documents surely would have been created to substantiate that fact. Since they were not, the employer must be offering an explanation that is a pretext for discrimination.<sup>399</sup>

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398. William J. Smith, *SEC Harassment Litigation, A Plaintiff’s Perspective*, in CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 519, 521 (ALI-ABA Course of Study, July 25-27, 1996); see also Fitzpatrick, *supra* note 384, at 78 (“Is your client convincing? likeable? credible? sympathetic? endearing? attractive? articulate? Does she present well? Would you (do you?) believe her if you were the judge or jury?”). The emphasis on the impression the potential client will make with a jury or judge has a troubling side. Class, race, and ethnic biases on the part of judges or jurors may make it more difficult for poor, minority plaintiffs to obtain compensation for their injuries in comparison to more affluent, white plaintiffs. See Spriggs, *supra* note 361, at 511 (noting that jurors and judges may favor witnesses who are “like them”); Brown, *supra* note 275, at 215 (noting that jurors may view evidence through cognitively biased lenses).

399. See Turk, *supra* note 200, at 106 (“[A]n employer’s reason for discharge may appear pretextual if the former employee consistently received satisfactory or good perform-

On the other hand, the documents may describe the performance as poor and the supervisor might testify to the contrary or offer a conflicting account of the facts. One respondent noted in written commentary that while performance documentation is generally an effective defense tool, "one honest supervisor can burst that bubble in a hurry." Supervisor testimony in this situation makes the paper trail appear fabricated, increasing the likelihood that the employee's story will be believed.

Inconsistency between documentary and testimonial evidence is useful in advancing a plaintiff's claim. However, the availability of this technique should be assessed in light of the defense bar's bullet-proofing prescriptions. Supervisors taught and required to describe employee weaknesses are less likely to create useful documentation for potential plaintiffs.<sup>400</sup> Additionally, properly functioning performance review oversight can catch and correct any appraisal deficiencies when supervisors err.<sup>401</sup> Finally, oversight of the discharge and discipline procedure is specifically designed to avoid inconsistency between supervisor testimony and documentary evidence.<sup>402</sup>

These steps, however, are not guaranteed to ferret out and eliminate discrimination. In fact, they may mask conditions of inequality where subtle, unconscious influences are operative. Thus, the plaintiff's position in creating a counternarrative is essentially reactive: to the extent that employers neglect their evidentiary advantage, their carelessness can be used against them.<sup>403</sup>

Rated next in effectiveness was inconsistent treatment of the plaintiff and similarly evaluated coworkers: 53.7% gave this factor a great rating; almost 40% said it had some value; and only 5.2% rated it as being of little value. If the difference between the plaintiff and the coworkers is that the plaintiff is of a different race, sex, or age, for example, this is strong circumstantial evidence of discrimination.

This factor, too, must be evaluated with litigation prevention advice in mind. Defense attorneys specifically instruct employers not to take adverse action against an employee until the treatment of similarly situated employees has been considered.<sup>404</sup> In truly flagrant

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ance reviews."). One defense attorney offers the following hypothetical cross-examination of a supervisor: "You have indicated that the employee was discharged for substandard performance, yet you gave her stellar performance appraisals. In terms of her performance, were you lying then or now?" Segal, *supra* note 204, at 47. The supervisor's credibility is damaged no matter which way that question is answered.

400. See *supra* notes 204-23 and accompanying text.

401. See *supra* notes 229-35 and accompanying text.

402. See *supra* notes 253-64 and accompanying text.

403. I do not doubt that many employers do make such mistakes. Clearly, plaintiffs' attorneys continue to find clients with grounds for suit.

404. See Hicks & Alexander, *supra* note 196, at \*21 (advising that employers should determine whether "actions taken against this employee [are] consistent with treatment ac-

cases of discrimination, such a review may prevent a biased discharge. However, in subtle cases, where individuals experience difficulty detecting bias (and events are easily characterized as “personality difficulties”), the individual responsible for oversight may counsel a supervisor to bulletproof the decision.

The supervisor might, for example, be told to continue a program of progressive discipline until the employee no longer appears similarly situated to others. At that point, the errant employee may be characterized as having a significant number of warnings about poor performance, making discharge seem justified.<sup>405</sup> Or, perhaps, the supervisor will be told that before termination is approved, a particular company rule or policy must be followed because that is how the situation was handled in the past. The point here is that either of these suggestions may make the employee appear to be similarly situated to some employees and different from others, but neither symbolic gesture will obliterate unconscious discriminatory influences that may have influenced the supervisor’s perceptions in the first place.

Internally inconsistent performance-related documentation was judged the next most helpful factor: 41% rated its usefulness as great; 51.8% rated it as being somewhat useful; and 5.2% said it had little ability to undercut the employer’s explanation. Discrepancies may appear within a specific document. In such cases, the document itself can be made to appear of dubious validity. Many respondents, however, noted another kind of inconsistency: a sudden change in review ratings after years of positive reviews, sometimes accompanied by the appearance of a new supervisor or after the plaintiff complains about discrimination. The argument to make in these circumstances was aptly put by one respondent: “[H]ow could a 15 year employee turn into the worst employee in the company?”

Still, while apparently a helpful factor in demonstrating that a given decision was made with a discriminatory state of mind, this kind of evidence may be on the wane. Employers that practice litigation prevention may avoid making the kind of mistake that accrues to the plaintiff’s advantage. For example, oversight of the employee evaluation process may catch internal inconsistencies within a single document. Additionally, requiring the regular documentation of employee weaknesses or areas for improvement may forestall drastic changes in performance ratings from evaluation to evaluation. Finally, instituting a policy of management approval of discipline and

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corded other employees”); Paskoff, *supra* note 164, at 4 (recommending that supervisors consult with human resource representatives who “may have knowledge concerning how other similar situations were handled”).

405. See *supra* note 249 and accompanying text.



discharge may prevent the timing of punitive action from becoming an issue.

Following internally inconsistent performance-related documentation in effectiveness was inconsistency between performance-related documentation and written policies relevant to the employment decision: 33.6% rated this factor as great at undermining the employer's story, 57% said it had some ability, and 8% rated it as being of little value. The fact that an employee in a protected class is subject to treatment contrary to company policy may give rise to an inference of discriminatory animus. An employer who ignores its policies is certainly likely to be put on the defensive. Once again, however, only a negligent employer will find its rationale for an adverse action subject to vigorous challenge. As noted above, the employer who implements a discharge and discipline oversight procedure should avoid such a blunder entirely.

The next most effective factor was inconsistency between performance-related documentation and current coworker testimony: almost 26% gave it a great rating; 61.4% rated it as having some value; and 10.4% found it of little use. This factor may be viewed as effective because it takes courage for a coworker to get involved in a discrimination suit. While an employer does not control the plaintiff's coworkers, there clearly are disincentives to speaking out. Furthermore, the infrequency with which such testimony is available should be considered.<sup>406</sup> As previously noted, the respondents overwhelmingly expressed agreement with the statement that coworkers are reluctant to testify.<sup>407</sup> Thus, this admittedly useful factor should not be viewed as a standard tool in the employee advocate's arsenal.

Of much less usefulness was inaccurate objective information, such as dates, names, and job titles: only 13.2% viewed such information as great; 45.7% said it was somewhat useful; 34.4% rated it as of little use; and 4% said it had no value. This factor is obviously under the initial control of the employer. Routine oversight of the evaluation process should be able to avoid this problem altogether.

Somewhat similarly situated on the value scale was inconsistency between performance-related documentation and former coworker testimony: 10.9% gave it a great rating; 64.5% rated it as having some ability to undercut the employer's explanation; 21.3% saw it as of little value; and 1.3% rated it as having no use whatsoever.<sup>408</sup> A

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406. A number of respondents noted that the testimony of current satisfied customers could be useful to the plaintiff's case. I did not ask about the general availability of such individuals.

407. See *supra* note 377 and accompanying text.

408. One plaintiffs' lawyer writes that employers "dread the appearance of former employees' names on the plaintiff's witness list." Ruth M. Benien, *When to Initiate Settlement in Employment Cases*, TRIAL, June 1996, at 34, 36.

few respondents noted that the value of such testimony depends upon the circumstances under which the individual left the defendant's employ. Discharged employees, for example, have limited credibility; they may be characterized as disgruntled individuals with distorted views or a motive to lie. Former supervisors who left voluntarily, on the other hand, can provide useful testimony that supports the plaintiff's account.

The very bottom ratings went to two rather revealing factors. Respondents saw little utility in the fact that performance-related documentation is prepared by the adverse party in the litigation: 6% rated it as of great use; 36.7% found it to be of some value; 48.2% said it was of little use; and 5.2% rated it as useless. This is significant for even though many employers prepare documentation to forestall litigation, that fact is not generally perceived as very useful in impugning the validity of this evidence.

Close in its relatively limited ability to provide significant support for the plaintiffs' story is inconsistency between the performance-related documentation and the plaintiff's testimony. A mere 4% rated it as of great use; almost 46% said it was of some value; 43.8% found it to be of little value; and 2.7% gave it the no value score. This factor stands in contrast to the previous one. Performance documentation generated by a party to forestall litigation is generally not seen by the respondents as rendering it suspect, unless of course there are inconsistencies as noted above. Yet testimony by a plaintiff that attempts to counter that documentation is perceived of as fairly limited in value. Implicit here is the notion that an employee may be viewed by judges and juries as a poor source of information on his or her own performance.<sup>409</sup>

In sum, a review of the techniques used by plaintiffs' lawyers to construct counternarratives for their clients provides an interesting counterpoint to the defense bar's litigation prevention advice. On one hand, it demonstrates that employers do not hold all the cards in discrimination litigation. The playing field, though uneven, is obviously not insurmountable. On the other, analysis reveals that many of the factors deemed effective by employee advocates are subject to employers' bulletproofing efforts.

## VI. CONCLUSION

The results of my content analysis and survey represent the first step in describing what could be a significant limitation on the effi-

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409. A number of respondents did note that employees could counter poor performance evaluations by pointing to objective performance measures such as sales statistics or the receipt of salary increases and bonuses.

cacy of antidiscrimination law: that the largely well-meaning actions of management lawyers and their clients result in masking rather than eliminating workplace bias. This troubling assessment of the ability of formal law to address the problem of workplace discrimination raises a host of questions deserving of further study.

How the systems recommended by defense attorneys actually work is paramount among subjects ripe for investigation. An empirical investigation of corporate discharge and discipline oversight procedures, akin to Lauren Edelman's study of complaint handling procedures, would shed light on the phenomenon this Article has delineated. Such a study could determine the extent to which oversight identifies truly biased decision making and the steps taken when discrimination is discerned. A finding that oversight functions as a truly corrective mechanism would significantly undermine my thesis. If, on the other hand, oversight tends to obscure systemic problems that would otherwise be evident, the assertions in this Article would be strengthened.

An investigation of the effects on managers of litigation prevention training sessions would also be helpful in evaluating the validity of my contentions. That study should focus on whether teaching supervisors to consider their actions as potential evidence improves their ability to impartially evaluate their subordinates. Moreover, any study should consider the implications of recommending that supervisors ignore the immutable traits of their subordinates such as race and sex. Is discrimination thereby eliminated or merely masked? Do the sessions themselves produce a kind of supervisory backlash against women, minorities, and members of other protected groups?

Finally, because attorneys and jurists appear to conceptualize claim viability in symbolic terms, field studies of corporate environments should be done to interrogate those symbols. These studies might examine the extent to which one can conflate neutral documentation and testimonial evidence with what a social scientist would consider nondiscriminatory workplace conditions. There is clearly an overlap between symbolic and substantive compliance. The problem is determining the extent of that overlap.

Before such empirical work is completed, I am loath to propose sweeping changes in substantive law to address the problem this Article has identified. Ultimately, restructuring the burden-shifting framework of antidiscrimination law might be advisable. I might recommend, for example, that once the employee establishes that bulletproofing efforts were taken with regard to an adverse action, the burden of proof rather than production would shift to the employer to demonstrate that the action was motivated by a legitimate,

nondiscriminatory reason. One might also address the problem by creating a rebuttable presumption of invalidity for evidence produced as part of a litigation avoidance effort. Such undoubtedly controversial suggestions would only be appropriate if there is a firm empirical basis for my thesis.

In future work, I will focus more intently on another phenomenon identified by this project. The employment bar as a whole has produced a series of story lines, some of which symbolize discriminatory decision making, some that are equated with nondiscrimination. The soundness and implications of evaluating claims through a process of pattern recognition will be examined. Why should one assume, for example, that a sudden drop in performance evaluation represents bias on the part of a new supervisor? Is it not equally possible that prior managers refused to document true performance deficiencies?

It is necessary to shake up current understandings of how discrimination evidences itself in the workplace. Perhaps one can begin to erode the advantage held by employers by challenging the symbols themselves. It is certainly possible that bias affected an employment decision memorialized in years of "neutral" documentation. It is also possible that there is no prejudice involved in the negative evaluations of a new supervisor whose estimation of an employee differs markedly from that of his or her predecessor.

What counts more than the symbols themselves, are the work environments in which they are produced. Sociological research demonstrates that firm culture tends to become "indelibly imprinted" on organizational policies and practices.<sup>410</sup> These personnel practices, once entrenched, come to be taken for granted as natural and inevitable.<sup>411</sup> Thus, discriminatory conditions like job segregation, bolstered through seemingly neutral practices, are quite resistant to change without extensive management intervention.<sup>412</sup> Even when formal policies are altered to eliminate biased conditions, the pace of job integration is often quite slow due to organizational inertia.<sup>413</sup>

Likewise, experience indicates that corporate glass ceilings can be difficult to eliminate. To be successful, corporate glass ceiling initiatives require both strong, sustained support from senior executives

410. See James N. Baron, *Organizational Evidence of Ascription in Labor Markets*, in NEW APPROACHES TO ECONOMIC AND SOCIAL ANALYSES OF DISCRIMINATION 113, 125 (R. Comwall & P. Wunnava eds., 1991).

411. See *id.* at 125-26; William T. Bielby, *The Structure and Process of Sex Segregation*, in NEW APPROACHES TO ECONOMIC AND SOCIAL ANALYSES OF DISCRIMINATION, *supra* note 410, at 97, 105-06.

412. See Baron, *supra* note 410, at 125-27; William T. Bielby, *Modern Prejudice and Institutional Barriers to Equal Employment Opportunity for Minorities*, 43 J. SOC. ISSUES 79, 81 (1987); Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 255 (1993).

413. See Reskin, *supra* note 412, at 256.

and supervisor accountability.<sup>414</sup> Organizations that lack a commitment to integrating the workplace, that, for example, exhibit job segregation or glass ceilings, may produce neutral-looking documentation. We should not allow the documentary evidence to convince us that these work environments are truly nondiscriminatory.<sup>415</sup>

Many plaintiffs' attorneys undoubtedly realize that workplace culture is an important element in employment decision making. My hope is that in the everyday rush of legal practice, they not reflexively discern discrimination only by way of symbols and story lines. Making social science evidence on discrimination more readily available to practicing lawyers might assist them in fashioning legal arguments. A solution might be for psychologists and sociologists to establish a data bank of current research.<sup>416</sup> I do not suggest that the generalized information in the data bank be admissible at trial on the issue of employer liability.<sup>417</sup> Rather, my goal is to afford attorneys access to different ways of conceptualizing the phenomenon of discrimination.<sup>418</sup>

Moreover, plaintiffs' attorneys should approach client representation with a sound appreciation of how employers produce neutral documentary and testimonial evidence. This recommendation does not imply that employee advocates at present ignore this fact entirely. Instead, I suggest they be mindful of the panoply of litigation prevention techniques described herein. These defensive strategies may in some cases prove useful fodder for fashioning a plaintiff's counternarrative. The fact that performance reviews are scrutinized

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414. See, e.g., FEDERAL GLASS CEILING COMM'N, *supra* note 2, at 39-46.

415. In order to identify culturally biased organizations, plaintiffs' attorneys must make use of statistical proof. See Spriggs, *supra* note 361, at 508 ("[P]atterns of employer behavior should always be discovered and examined in each case."). One difficulty a plaintiff may confront, however, is the defense argument that "statistical evidence in a disparate treatment case . . . rarely suffices to rebut an employer's legitimate non-discriminatory rationale for its decision to dismiss an individual employee." Mills, *supra* note 275, at 253.

416. This idea is an extension of the neutral expert assistance that a few judges have relied on in scientifically complex cases. See Justice Breyer Calls for Experts to Aid Courts in Complex Cases, N.Y. TIMES, Feb. 17, 1998, at A17.

417. See Brown et al., *supra* note 2, at 1513 (noting that a proposed jury instruction on racial stereotyping "may be criticized for allowing generalized social guilt to serve as a foundation for individual liability"); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

418. NELA encourages plaintiffs' attorneys to "think out of the box" by inviting social scientists to serve on educational panels at the organization's annual convention and seminars. For example, sociologist William Bielby presented a paper on social science expertise in glass ceiling suits at NELA's 1998 convention. See William T. Bielby, *Social Science Expertise in Glass Ceiling Litigation*, in 1998 NINTH ANNUAL CONVENTION 843 (NELA, 1998). Psychologist Barbara Gutek addressed "empirically-demonstrated facts and some myths" relevant to sex harassment and discrimination claims at the 1996 Convention. See Barbara A. Gutek, *Bibliography of Books and Articles*, in 1996 SEVENTH ANNUAL CONVENTION 897 (NELA, 1996).

for comments connoting stereotyping and then edited to remove those remarks might significantly undermine the validity of the documents.<sup>419</sup> That a termination meeting was rehearsed on videotape before the plaintiff was informed of the discharge might be effectively used in the cross-examination of a supervisor. In short, it may be possible to turn litigation avoidance against those who practice it.

These suggestions may do little to correct the evidentiary imbalance that this Article has described. Thus, my final suggestion focuses on employees themselves. Employers have access to preventative legal advice that allows them to maximize their evidentiary advantage. Most employees, in contrast, lack a basic understanding of how employment law functions. Indeed a recent study by Pauline Kim found that workers greatly overestimate the protection that employment law affords them.<sup>420</sup> One way to address the information asymmetry is to provide training classes to employees. The Detroit Chapter of the National Lawyers' Guild has sponsored an employee rights seminar that, if replicated extensively elsewhere, may represent at least a partial antidote to the problem.<sup>421</sup>

In closing, I should note that it is entirely natural for employers subject to civil rights law to endeavor to demonstrate their compliance with it. As a policy matter, however, it is vital to scrutinize the forms that legal conformity takes. Antidiscrimination law compliance must be substantive as well as symbolic. A society that allows symbol to stand for substance surely avoids the appearance of inequity without changing the conditions that produce it.

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419. Imagine, for a moment, challenging as untrustworthy an entire corporate performance evaluation system because it generates documents prepared in anticipation of litigation! Courts, under FRE 803(6), have discretion to exclude business records on such grounds. See *Hoffman v. Palmer*, 129 F.2d 976, 983 (2d Cir. 1942); GLEN WEISSENBERGER, *FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* 485-86 (1997).

420. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 *CORNELL L. REV.* 105, 106 (1997).

421. See Tammy Joyner, *People's 'Law School' Answers Workers' Questions About Rights*, *DETROIT NEWS*, Apr. 11, 1994, at 8.

APPENDIX I  
BEST PRACTICES & PERFORMANCE-RELATED  
DOCUMENTATION SURVEY

*General Information*

1. Which best describes your principal position?  
(check all that apply)
  - a.  Private Law Practice    Solo    Partner    Associate

Firm size:    2-5 lawyers    6-19 lawyers    20-49 lawyers  
                   50-100 lawyers    Over 100 lawyers

  - b.  Non-profit or public interest organization
  - c.  Federal, state or local government
  - d.  Law School or academic setting
  - e.  Other (explain)\_\_\_\_\_
  
2. How many years have you practiced law?  
 less than one year       1-5 years       6-10 years  
 11-20 years       21-30 years       over 30 years
  
3. Indicate the percentage of your caseload that is devoted to:  
Employment law matters representing *employees*:  
 0%    1-10%    11-50%    51-90%    91-100%  
Employment law matters representing *employers*:  
 0%    1-10%    11-50%    51-90%    91-100%  
Other matters:  
 0%    1-10%    11-50%    51-90%    91-100%
  
4. If you do not currently represent *employers*, have you ever represented them in the past?  
 Yes       No
  
5. Do you ever advise *employees* before adverse action is taken against them?  
 Frequently    Occasionally    Rarely    Never

*Impact of Documentation and Other Factors*

6. On average, how important is performance-related documentation (e.g., performance evaluation and disciplinary memos) to your decision to accept or reject an employment discrimination case?

- strong influence       moderate influence  
 slight influence       no influence

7. Evaluate the following statements regarding employers based on your experience:

*Strongly Agree*      *Agree*      *Disagree*      *Strongly Disagree*

- Employers have the evidentiary advantage in employment discrimination cases
- Employers withhold important documentary evidence in discovery.
- The quality of the documentary evidence affects an employer's willingness to settle.
- Employers are increasingly unwilling to settle employment discrimination cases.
- The existence of specific examples in performance-related documentation is likely to bolster the employer's explanation for the adverse action.
- Documents evidencing efforts at progressive discipline are likely to bolster the employer's explanation for the adverse action.
- Large employers produce performance-related documentation that is less vulnerable to challenge than documentation produced by small employers.

8. Evaluate the following statements based on your experience:

*Strongly Agree*      *Agree*      *Disagree*      *Strongly Disagree*

- Judges are more likely than jurors to credit performance-related documentation.
- Current employees are reluctant to testify on behalf of plaintiffs.
- The plaintiff's own diary notes, letters, or memorandum discussing the dispute are persuasive evidence in employment discrimination cases.
- Many employer-created documents are routinely available from EEOC and other agency investigative files.
- The most important determinant of success in an employment discrimination case is the credibility of the plaintiff.





to be interviewed, please include your name, address, and telephone number below.

## APPENDIX II

## THE DEMOGRAPHIC CHARACTERISTICS OF SURVEY RESPONDENTS

As a group, the respondents have significant practice experience. Almost 70% have practiced 11 years or more: 42.2% have practiced 11-20 years; 23.2% have practiced 21-30 years; and 3.5% have practiced over 30 years. While it is reassuring to know that my data embodies the perceptions of a group of skilled, experienced practitioners, there is a troubling side to the numbers: they may confirm the conventional wisdom of the plaintiffs' bar that young lawyers are not choosing this type of work. Of course, the numbers may simply indicate that NELA members, in general, are very experienced attorneys. Another possible explanation is that less experienced lawyers did not feel as compelled to respond to the survey as their more seasoned counterparts.

The respondents, by and large, practice in small firm settings. The vast majority are either solo practitioners or practice in firms with nine or fewer lawyers: 30.2% are solo practitioners; 46.6% work in firms of between two to five attorneys; 17.9% work in firms of between six to nine attorneys. These numbers are important, for they reveal a potential imbalance in the litigation playing field.

Large corporate firms, which frequently house labor and employment law departments representing management, have tremendous resources that may be deployed on behalf of their clients.<sup>422</sup> The same is generally true for management-oriented labor and employment law boutique firms<sup>423</sup> and in-house attorneys tending to the employment needs of their corporate employers.<sup>424</sup> Indeed, because delay in litigation often accrues to the benefit of the defendant, there is an incentive for employers to use legal services when a dispute has become formal. In contrast, a small plaintiff's-side practice, which relies on contingency fees to make ends meet, is under tremendous pressure to conserve resources.<sup>425</sup>

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422. Large firms offer to their clients "one stop" shopping for all their legal needs. See Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905, 909 (1994).

423. Boutique firms are small firms that specialize in specific substantive areas of law and often rely on large firms for business referral. See *id.* at 916-17. They frequently model their style of practice on that of the large law firm. See *id.* at 909.

424. Many in-house departments are modeled on large law firm principles. See *id.* at 923.

425. As one commentator noted:

Large firms take care of many if not most of the basic requirements that enable lawyers to practice law. They hire associates, secretaries and messengers. They come equipped with phone systems, supplies, the newest technology and software and research capabilities . . . They obtain malpractice, health and life insurance. They even typically complete the biennial registration form required of

The survey respondents have significant exposure to representing employees in employment law matters. Almost 70% report that employee representation comprises more than half of their caseload, with 25% indicating that over 90% of their legal work is on behalf of employees. A significant number practice law in other areas as well. Close to 70% report that they handle other types of legal work.

A surprisingly large percentage of the respondents are experienced in representing employers as well as employees: 44.9% report that between 1-10% of their caseload is devoted to handling employment matters for employers; an additional 7.5% indicate that such matters make up between 11-50% of their work. This finding is intriguing because NELA, as an organization, is very much ideologically committed to the representation of employees. That commitment often expresses itself in overtly political terms. Be that as it may, the exposure of plaintiffs' attorneys to employer representation may provide insight into defense strategies that can be turned to the advantage of employee clients. It might also explain, in part, why members of the defense and plaintiffs' bars hold strikingly similar views on employment discrimination litigation.<sup>426</sup>

Another surprise was the number of respondents who report consulting with employees before adverse action is taken against them. I had assumed that this was one area where employers clearly are advantaged; i.e., they have access to lawyers before an employment decision is made.<sup>427</sup> Yet 37.8% of the attorneys said that they frequently advise employees in such circumstances, and 52.6% reported occasionally advising employees before action is taken. This may well be an illustration of the increasing legal sophistication of employees. Thus, when one's head appears to be on the chopping block, it may appear prudent to visit an attorney to discuss how to extricate oneself with a minimum level of damage.

Nevertheless, the fact that an employee seeks counsel in advance of an adverse decision does not mean that his or her ability to affect the direction of the case is commensurate with the employer's ability. Employees may harbor imperfect or unrealistic beliefs about the ex-

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every lawyer by the Office of Court Administration. When lawyers go out on their own, though, they have to plan for these issues.

Steven A. Meyerowitz, *How to Go from a Big Firm to a Solo Practice*, N.Y. L.J., Oct. 28, 1997, at 5.

426. One could use regression analysis to determine whether experience representing employers constitutes a significant influence on the response of those surveyed. That question, however, is beyond the scope of my study.

427. Indeed, I made that point expressly in a recent article. See Bisom-Rapp, *supra* note 29, at 359. ("Unlike employers, employees typically do not retain counsel to advise them years in advance of litigation. Rather, they hire lawyers after adverse actions have been taken against them.")

tent of protection the law affords them.<sup>428</sup> A consultation with an attorney may significantly alter those perceptions. Many attorneys may decline, for example, to accept a client who has years of poor performance reviews.

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428. As noted above, Pauline Kim has concluded that workers greatly overestimate the degree of job protection afforded by law. See Kim, *supra* note 420, at 133-46.