
Bakke at 40: How Diversity Matters in the Employment Context

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INTRODUCTION

In 1978 in a tortured decision, the U.S. Supreme Court in *Regents of the University of California v. Bakke* let the guillotine fall on strong forms of affirmative action in education, declaring quotas a violation of the Equal Protection Clause while simultaneously declaring a compelling state interest in *diversity*.¹ In the forty years that have passed since that famous decision in *Regents of the University of California v. Bakke*, the formal law has limited the possibilities for affirmative action, but diversity as a social value has become firmly entrenched in society — and in the world of business. Virtually all organizations today claim to embrace diversity as well as, in recent years, equity and inclusion.² It is difficult to find a corporate webpage that does not include some form of commitment to diversity. Large organizations almost universally have diversity officers and offer (and sometimes require) diversity training programs for their supervisory employees.³ Diversity consulting is a multi-billion dollar industry.

In this Article, we explore the meaning of diversity forty years after *Bakke* in employment, the workplace and in the courts. Although *Bakke* was a decision about affirmative action and diversity in higher education, our analysis of diversity — and the ways in which courts and private parties value and devalue diversity in employment and other contexts — speaks to the broader impact of *Bakke* for several reasons. First, the United States Supreme Court has identified the business interest in diversity as a key rationale for allowing some (albeit weak) forms of affirmative action in higher education.⁴ Second, U.S. businesses and business associations have argued for diversity in education as critical for providing the types of diversity business requires.⁵ Third, as the social institution that largely determines social class, wealth, and power in America, diversity in employment has

¹ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J.) (“The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.”) (emphasis added).

² See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 138-40 (2016) [hereinafter *WORKING LAW*].

³ See *id.* at 146.

⁴ See *Bakke*, 438 U.S. at 312 (Powell, J.); *id.* at 348-49 (Brennan, J., concurring).

⁵ See, e.g., Brief of Fortune-100 et al. as Amici Curiae in Support of Respondents, *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013) (No. 14-981), 2015 WL 6735839.

critical implications for the lives of minorities and women.⁶ Fourth, our examination of how structures that symbolize diversity and the protection of equal opportunity can subtly work to undermine diversity provides important insights and lessons regarding the need for a critical examination of how diversity symbolism is displayed and deployed throughout the workplace and beyond.⁷ Fifth, given the widespread presence of diversity structures created in American colleges and universities specifically in response to the need for more diversity and fairness in higher education — from Title IX offices to academic administrators and offices in charge of diversity and inclusion and beyond⁸ — our work at the intersection of law, employment, and diversity has important implications for evaluating the effectiveness of structures that symbolize diversity in higher education.

We argue that the attention given to diversity in the business world is more symbolic than substantive. Workplace policies that symbolize diversity — such as diversity statements, diversity training programs, and diversity policies — may be widespread, but in many cases they exist alongside workplace practices that perpetuate the advantages of white men and the disadvantages of men of color, white women and women of color, those outside of the gender binary, and other minority groups.⁹ Yet these “diversity structures” have become widely accepted indicia of compliance with civil rights laws, irrespective of their effectiveness.¹⁰ Using data collected by coding 1,188 federal judicial opinions in equal employment opportunity (“EEO”) cases, we show that diversity structures have become so institutionalized as indicia of compliance with civil rights law that judges frequently take those indicia as evidence of compliance without adequate scrutiny of whether those structures in fact inhibited (or tolerated) discrimination in the case at hand. We show empirically how judges have become increasingly likely to defer to the mere presence of these structures

⁶ See Nancy DiTomaso et al., *Workforce Diversity and Inequality: Power, Status, and Numbers*, 33 ANN. REV. SOC. 473, 490-92 (2007).

⁷ See generally EDELMAN, WORKING LAW, *supra* note 2, at 218-25 (describing the ways in which, for example, diversity structures in one organization may not be effective in another and noting that deference to symbolic structures without sufficient examination can “create an illusion of fairness”).

⁸ See, e.g., Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 122 (2016).

⁹ See generally EDELMAN, WORKING LAW, *supra* note 2, at 168-215 (discussing how symbolic attention to diversity by businesses is widespread).

¹⁰ See *id.* at 168-215.

over time, in particular — since 2000 — in cases involving allegations of hostile environment harassment and in summary judgment cases.

We begin with a brief comparison of how the Supreme Court has treated diversity in the employment realm relative to the *Bakke* decision in education. But we suggest that, at least in employment, the Supreme Court is not the right place to look to understand the real legal meaning of diversity. Instead, it is critical to look at how businesses and then the lower federal courts have made diversity a symbolic gesture rather than a meaningful commitment to the employment status of minority groups.

In addition, we suggest avenues for future research, scholarly attention, and public policy considerations regarding the efficacy of symbolic diversity structures — and dispute resolution structures more broadly — in the workplace, classroom, and beyond.

I. DIVERSITY AS A COMPELLING STATE INTEREST IN EDUCATION; IN EMPLOYMENT, NOT SO MUCH

If one were to look only at U.S. Supreme Court doctrine, it would appear that diversity is afforded far greater significance in the realm of education than it is in the realm of employment. Although the 1978 *Bakke* case is perhaps best known for declaring quotas an unconstitutional violation of the Equal Protection Amendment, it is in fact a strange compilation of views. Justice Powell wrote the majority opinion, which declared quotas unconstitutional but found a compelling state interest in diversity and therefore allowed race to be used as a “plus factor” in admissions.¹¹ The liberal bloc (Justices Brennan, White, Marshall, and Blackmun) concurred in the part of the opinion that allowed race to be considered on the grounds that both Title VI and the Constitution permit race to be used as a means to remedy past disadvantages that result from racial prejudice.¹² The conservative bloc (Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger) concurred in the part of the decision ordering Bakke admitted to Davis but did so on the grounds that it violated Title VI of the Civil Rights Act of 1964 and did not evaluate the constitutionality of the program.¹³ Justice Powell joined the conservative bloc in

¹¹ See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (“To be narrowly tailored, a race-conscious admissions program cannot use a quota system Instead, a university may consider race or ethnicity only as a “plus” in a particular applicant’s file” (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-16 (1978))).

¹² See *Bakke*, 438 U.S. at 325 (Brennan, J., concurring).

¹³ See *id.* at 420-21 (Stevens, J., concurring).

striking down the UC Davis Medical School's use of quotas but did so on constitutional grounds. He argued that strict scrutiny was the appropriate standard to evaluate distinctions based on race,¹⁴ but found that there was a compelling state interest in diversity.¹⁵ He rejected the quota system as a violation of the Constitution because nonminority students were completely blocked from the seats reserved for minorities, however Justice Powell did state that race could be used as one factor among many since doing so would not constitute an absolute barrier to any group of students.¹⁶

In twin cases from 2003, the Court applied the strained logic that allowed some consideration of race, so long as it was not the definitive factor in the admissions decision. The first case, *Grutter v. Bollinger*,¹⁷ involved an affirmative action program that took race into account at the University of Michigan Law School and reaffirmed the idea that diversity in higher education was a compelling state interest, holding that Michigan Law School could consider race in evaluating its candidates. The second case, *Gratz v. Bollinger*, disallowed the use of bonus points for minorities in the admissions process but nonetheless reaffirmed the principle that race could be considered.¹⁸ In 2013, the Supreme Court again grappled with affirmative action in *Fisher v. University of Texas at Austin*, and tried anew to walk a tightrope, holding that strict scrutiny applies to all racial classifications, yet that strict scrutiny must be neither "fatal in fact" nor "feeble in fact."¹⁹

Diversity, then, has survived Supreme Court jurisprudence in education in a weakened state. The principle that diversity is a compelling state interest stands, yet institutions of higher education must perform semantic gymnastics to ensure that their efforts to diversify incoming classes are not overly successful where their success may run the risk of working so well as to be characterized as a forbidden quota.²⁰

Somewhat curiously, the compelling state interest in diversity has never been invoked or even addressed in the employment realm. In three Supreme Court cases decided in the 1980s and 1990s, thus after *Bakke* but before *Grutter*, the Supreme Court rejected the idea that

¹⁴ See *id.* at 291 (Powell, J.).

¹⁵ See *id.* at 312.

¹⁶ *Id.* at 317.

¹⁷ 539 U.S. 306 (2003).

¹⁸ *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

¹⁹ *Fisher I*, 570 U.S. 297, 314 (2013).

²⁰ See *Gratz*, 539 U.S. at 271-72 (criticizing the use of a points-based system as failing to provide individualized consideration of a particular applicant).

discrimination in society generally could justify race-conscious employment practices. In *Wygant v. Jackson Board of Education* decided in 1986,²¹ *City of Richmond v. J.A. Croson Company* decided in 1989,²² and *Adarand Constructors, Inc. v. Pena* decided in 1995,²³ the Supreme Court articulated the standard for affirmative action in employment. In these cases, the Supreme Court did not reiterate Justice Powell's finding of a compelling state interest in diversity but rather allowed race-conscious policies only when designed to remedy past discriminatory practices in the particular company.²⁴ Thus the Court never extended Powell's finding of a compelling state interest in diversity to the employment context.

The distinction between the education and employment realms with respect to recognizing a compelling state interest in diversity is particularly curious given that both Justice Powell in *Bakke* and Justice O'Connor in *Grutter* justified affirmative action in education — albeit in a weak form — by arguing that diversity is good for business.²⁵ In *Bakke*, Powell tied diversity in education to diversity in employment arguing that “the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples,”²⁶ and that diversity among the student body would “better equip its graduates to render with understanding their vital service to humanity.”²⁷ In the 2003 *Grutter* case, Justice O'Connor again tied diversity in education to diversity in employment by recognizing “entrepreneurial diversity,” which she argued would have real benefits for American businesses.²⁸ She based that argument in part on amicus briefs submitted by sixty-five American businesses,²⁹ including the General Motors Corporation³⁰

²¹ 476 U.S. 267 (1986).

²² 488 U.S. 469 (1989).

²³ 515 U.S. 200 (1995).

²⁴ See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220-21 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986).

²⁵ See David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1554-55 (2004).

²⁶ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.) (internal quotation marks omitted).

²⁷ *Id.* at 314.

²⁸ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

²⁹ Brief for Amici Curiae Sixty-Five Leading American Businesses in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399056.

and former high-ranking officers and civilian leaders of the U.S. Military.³¹

The vast majority of employment cases are brought under civil rights statutes, particularly Title VII of the Civil Rights Act of 1964, rather than under the Constitution.³² In the Title VII context, courts have considered the legality of affirmative action but have not explicitly recognized an interest in diversity.³³ The Supreme Court has identified limited circumstances under which voluntary affirmative action efforts are permitted. In *United Steelworkers of America v. Weber* in 1979, the Court found that a collective bargaining agreement that reserved fifty percent of places in a training program until the percentage of Black skilled craftworkers in the employer's facility approximated the percentage of Blacks in the local labor force was legal because it was narrowly tailored to correct racial imbalances, did not completely bar whites from the program or replace white workers with Black workers, and was temporary.³⁴ Seven years later, in *Johnson v. Transportation Agency* in 1987, the Court pointed to social conditions and attitudes that had virtually excluded women from skilled craftworker positions in condoning the Agency's affirmative efforts to hire women.³⁵ Neither of these cases used the language of diversity but both appear to accept implicitly the lack of societal diversity as a justification for limited voluntary affirmative action.

The issue of whether diversity could be a justification for affirmative action in the absence of a showing of past discrimination did come up in a 1996 Third Circuit case, *Taxman v. Board of Education of the Township of Piscataway*.³⁶ When the school board had to reduce their teaching staff in a high school business department by one person,

³⁰ Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 399096.

³¹ Consolidated Brief of Lieutenant General Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 1787554.

³² See LAURA BETH NIELSEN ET AL., AM. BAR. ASS'N, *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003* fig. 2.9, at 9 (2008).

³³ See, e.g., Goodwin H. Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 392-93 (1998).

³⁴ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208-09 (1979).

³⁵ See *Johnson v. Transp. Agency*, 480 U.S. 616, 640-42 (1987).

³⁶ 91 F.3d 1547 (3d Cir. 1996) (en banc), cert. granted, 521 U.S. 1117 (1997), cert. dismissed sub nom; *Piscataway Twp. Bd. of Educ. v. Taxman*, 521 U.S. 1117 (1997).

they chose to retain a Black teacher and to terminate a white employee with equal seniority to retain the only African-American teacher in the department.³⁷ The school board argued that the action was justified in order to preserve some diversity in the department. The Third Circuit stated that the board's diversity-based action violated Title VII.³⁸ The school board filed a petition for certiorari to the Supreme Court, which was granted.³⁹ However, the Clinton administration urged the Court not to hear the *Taxman* case, fearing a decision that would foreclose the possibility of affirmative action to advance diversity.⁴⁰ Ultimately, the case was settled prior to oral argument when a civil rights coalition offered to pay seventy percent of the judgment.⁴¹

That there is no equivalent in the Title VII cases to Justice Powell's use of diversity as a rationale for affirmative action is curious given that there has been widespread acceptance in the business world that diversity is good for business. In fact, the amicus briefs that the former high-ranking officials and civilian leaders of the U.S. Army and many businesses submitted in support of diversity in suggests that when *Grutter* was decided in 2003, diversity had been widely accepted in the business community.⁴² Is the business world, then, far ahead of the law? Has business embraced the notion of diversity even when the courts have not?

In the remainder of this Article, we turn to the question of what diversity really means in the business context and how the institutionalization of diversity in the business context has influenced the courts. The story we tell suggests that the notion of diversity that Justice Powell promoted in *Bakke* has been incorporated into both businesses and the courts but in a way that fundamentally undermines racial and gender equality in the workplace. We conclude the Article

³⁷ See *Taxman*, 91 F.3d at 1551-52.

³⁸ *Id.* at 1559.

³⁹ *Taxman*, 521 U.S. 1117.

⁴⁰ See Joan Biskupic & Peter Baker, *Administration Shifts Stand on Diversity Case*, WASH. POST, June 6, 1997, at A1.

⁴¹ Brendan M. Lee, Note, *The Argument for Faculty Diversity: Recommendations After Taxman v. Board of Education*, 27 STETSON L. REV. 739, 743 (1997).

⁴² EDELMAN, WORKING LAW, *supra* note 2, at 142-44. See generally Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (providing examples from the business literature that illustrate how managers and compliance professionals promoted diversity, arguing that it would provide access to new markets and greater profits); David B. Wilkins, *supra* note 25, at 1555-56 (arguing that law firms use market-based arguments to justify hiring Black lawyers).

by discussing several implications of this finding for higher education and beyond.

II. PUBLIC-FACING SYMBOLISM AND COMMITMENTS TO DIVERSITY IN THE WORKPLACE AND HIGHER EDUCATION

Diversity is a booming industry. Numerous consulting companies offer diversity training, help in recruiting diverse employees, and instruction in how to write diversity policies.⁴³ Nearly every company brochure and website emphasizes the firm's commitment to diversity, equity, and inclusion. Images of employees on these brochures nearly always feature a group that is diverse on the basis of gender, race, and ethnicity.⁴⁴ Even firms with relatively poor diversity statistics produce diversity reports that highlight the progress they have made. Facebook's 2018 diversity report, titled "Facebook 2018 Diversity Report: Reflecting on Our Journey,"⁴⁵ shows that Black employees are at 4%, up from 2% in 2014, Hispanic employees are at 5%, up from 4% in 2014, and women represent 22% of all technical employees but that is an improvement from 15% in 2014. Apple is only slightly better: their 2017 Inclusion & Diversity Report the current workforce is 32% female, 9% Black, and 13% Hispanic.⁴⁶ The tech industry, with its appalling diversity numbers, is perhaps ahead of other sectors though, in that it publishes statistics. Most company websites include only mottos, slogans, or commitments to diversity. For example, U.S. Steel Corporation, using the motto "Together We are One,"⁴⁷ announces that it is "committed to attracting, developing, and retaining a workforce of talented diverse people" but provides no workforce diversity statistics, at least on its website. The Marriott Corporation

⁴³ See EDELMAN, *WORKING LAW*, *supra* note 2, at 98-99; Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 *BERKELEY J. EMP. & LAB. L.* 1, 15-17 (2001); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Practice*, 26 *FLA. ST. U. L. REV.* 959, 977-78 (1999); Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 *U. ARK. LITTLE ROCK L. REV.* 147, 147-48 (2001).

⁴⁴ See EDELMAN, *WORKING LAW*, *supra* note 2, at 146.

⁴⁵ MAXINE WILLIAMS, FACEBOOK NEWSROOM, FACEBOOK 2018 DIVERSITY REPORT: REFLECTING ON OUR JOURNEY (July 12, 2018), <https://newsroom.fb.com/news/2018/07/diversity-report/>.

⁴⁶ See *Inclusion & Diversity*, APPLE, <https://www.apple.com/diversity/> (last visited Nov. 21, 2018).

⁴⁷ *Diversity & Inclusion*, U.S. STEEL, <https://www.ussteel.com/work/diversity-inclusion> (last visited Nov. 21, 2018).

includes a photo that depicts mostly non-white employees and tells us that it has valued diversity and inclusion since 1927 but does not disclose its workforce diversity statistics.⁴⁸

The same is true of higher education. Nearly every college or university website, brochure, and advertisement also emphasizes a commitment to diversity, equity, and inclusion. This is true across a broad spectrum of institutions of higher education. This includes, for example, specialized minority recruitment programs at a diverse range of private universities from Harvard University⁴⁹ to George Mason University⁵⁰ to Regent University.⁵¹ This also includes public universities from the University of Mississippi⁵² to the University of California, Davis,⁵³ which has been barred by California's Proposition 209 from "granting preferential treatment" to any individual or group on the basis of race, sex, color, ethnicity, or national origin since 1996.⁵⁴ Colleges and universities have created structures designed to advance the goals of diversity and inclusion, including assembling standing faculty committees⁵⁵ and specific high-level administrative

⁴⁸ See *About Marriott: Diversity & Inclusion*, MARRIOTT, <https://www.marriott.com/diversity/diversity-and-inclusion.mi> (last visited Nov. 21, 2018).

⁴⁹ *Multicultural Diversity*, HARV. UNIV., <https://college.harvard.edu/admissions/hear-our-students/multicultural-diversity> (last visited Nov. 21, 2018) (emphasizing Harvard's "diverse campus community" and its "Undergraduate Minority Recruitment Program").

⁵⁰ *Diversity at Mason*, GEO. MASON UNIV., <https://www2.gmu.edu/about-mason/diversity-mason> (last visited Nov. 21, 2018) (explaining that "[d]iversity is one of our core values; everyone is welcome here").

⁵¹ *Culture & Diversity*, REGENT UNIV., https://www.regent.edu/admin/stusrv/community_life/culture_diversity.cfm (last visited Nov. 21, 2018) (listing "each semester's offerings of diversity programs" including, among others, "Black Heritage," "Asian-American," and "Hispanic Heritage" months).

⁵² *Action Plan: Diversity Initiatives at the University of Mississippi — Action Plan Update*, OFF. CHANCELLOR (June 13, 2016), <http://chancellor.olemiss.edu/category/action-plan/> (detailing a commitment to "providing leadership on race issues" and touting the school's dramatic "success in improving diversity within the faculty and student body").

⁵³ *Value Statements*, UC DAVIS, <https://diversity.ucdavis.edu/about/value-statements> (last visited Nov. 21, 2018) (touting a commitment to "diversity" as part of value statements that serve as the "most important guides to conduct and our shared aspirations").

⁵⁴ UNIV. OF CAL. OFFICE OF THE GEN. COUNSEL, GUIDELINES FOR ADDRESSING RACE AND GENDER EQUITY IN ACADEMIC PROGRAMS IN COMPLIANCE WITH PROPOSITION 209, at 1 (2015), https://www.ucop.edu/general-counsel/_files/guidelines-equity.pdf.

⁵⁵ See, e.g., *Faculty Diversity and Excellence*, NW. UNIV. OFFICE OF THE PROVOST, <https://www.northwestern.edu/provost/faculty-resources/faculty-diversity-excellence/index.html> (last visited Nov. 21, 2018) (describing a "Faculty Diversity and Excellence Group" that meets quarterly "to foster faculty diversity and excellence").

posts, such as a Vice Chancellor for Equity & Inclusion.⁵⁶ In addition, federal regulations such as Title IX of the Education Amendments of 1972, have mandated the creation of specific coordinators charged with protecting students, educators, and school employees from sex or gender discrimination with the aim of preventing discrimination on that basis in higher education.⁵⁷

When we see company brochures that highlight their diverse workforces, or university websites that emphasize their commitment to equity and inclusion, we tend to think of those organizations as fair and nondiscriminatory. This is the case even though we know little about whether men and women of color and white women have equal access to management and professional positions or are subject to harassment that makes it difficult for them to succeed. Yet too often, corporations and courts alike measure diversity through symbolic metrics — that is, workplace structures that symbolize diversity — rather than through more substantive metrics of diversity such as the workforce representation of women and people of color or the real work opportunities afforded to groups that have traditionally been disadvantaged.⁵⁸

Symbolic metrics of diversity — so-called diversity structures — include corporations' visible commitments to diversity, equal employment opportunity (“EEO”), or fair governance such as: diversity training programs, diversity mission statements, antidiscrimination or anti-harassment policies, complaint procedures, and more generally, formalized organizational structures that are associated with fair governance such as progressive discipline policies, formal evaluation procedures, and multi-person decision making panels.⁵⁹

Diversity structures became increasingly common over the twentieth century. In her 2016 book, Edelman has shown that

⁵⁶ See, e.g., *Diversity*, UC BERKELEY, <https://diversity.berkeley.edu/about/vice-chancellor-oscar-dub%C3%B3n-jr> (last visited Nov. 21, 2018) (describing the duties of the university's Vice Chancellor of Equity & Inclusion including *inter alia* leading “campus-wide efforts through the Division of Equity & Inclusion to broaden the participation of all members of the campus community, particularly those who have been historically underrepresented and/or unwelcomed”).

⁵⁷ See *Title IX and Sex Discrimination*, U.S. DEPT' EDUC. OFFICE FOR CIVIL RIGHTS (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (explaining that Title IX covers approximately “7,000 postsecondary institutions” and “protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance”).

⁵⁸ See EDELMAN, *WORKING LAW*, *supra* note 2, at 5-6, 100-01, 122-23.

⁵⁹ See *id.* at 11, 101-02.

employers responded to the ambiguity of Title VII and other civil rights legislation of the 1960s with a variety of *symbolic structures* designed to symbolize attention to civil rights ideals.⁶⁰ Structures such as policies banning discrimination and later sexual harassment, grievance procedures, affirmative action offices and officers, and affirmative action recruitment and training programs quickly diffused throughout organizational fields.⁶¹ Later, as the term “diversity” came to replace attention to “equal employment opportunity,” many organizations created diversity training programs, diversity offices, and diversity policies.⁶²

Virtually every organization now has a public commitment to diversity and inclusion as well as policies that purport to prohibit discrimination and harassment and complaint procedures that allow employees to complain about instances of discrimination or harassment.⁶³ Many organizations have created anti-harassment or diversity training programs and indeed some states mandate the use of these programs.⁶⁴ Compliance professionals, professional organizations such as the Society for Human Resource Management (“SHRM”), management consulting firms, and insurance companies that sell employment practices liability insurance all strongly urge firms to have standard and standardized diversity structures in place.⁶⁵ In the twenty-first century, diversity commitments and policies are standard and firms that lack such structures look suspect.⁶⁶

In some cases, these symbolic metrics have helped organizations achieve substantive diversity by offering more and better employment opportunities to those who were disadvantaged by earlier discrimination, by reducing discrimination, or by encouraging more

⁶⁰ See *id.* at 112-23.

⁶¹ See *id.* at 117-23.

⁶² *Id.* at 138-40. See generally Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (demonstrating empirically that the market emphasis on diversity was associated with a transformation in the meaning of diversity as the term was increasingly disassociated from its legal origins and associated with nonlegal forms of diversity).

⁶³ See EDELMAN, WORKING LAW, *supra* note 2, at 17-18, 146-49.

⁶⁴ See, e.g., Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 63 (2018); Soohan Kim, Alexandra Kalev & Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171, 191, 196-204 (2012); see also *supra* note 43 and accompanying text.

⁶⁵ EDELMAN, WORKING LAW, *supra* note 2, at 77-82.

⁶⁶ See *id.* at 146.

inclusive workplaces.⁶⁷ But in other cases, workplace diversity policies are empty symbols that coexist with informal organizational practices that continue to place women, people of color, and other minorities at a disadvantage relative to white men.⁶⁸ In these organizations, diversity structures serve to mask, rather than to substantively combat, discrimination and harassment.⁶⁹

Despite the substantial variation in the extent to which workplace diversity structures actually constrain discrimination and inequality, courts tend to view the mere presence of these structures as evidence of good faith efforts to achieve racial and gender diversity.⁷⁰ When courts measure diversity by the mere presence of organizational policies and practices without serious scrutiny of the effectiveness of these structures, they unwittingly perpetuate a lack of substantive diversity.⁷¹

We build on Edelman's earlier work on judicial deference to symbolic structures⁷² by focusing on the changes that have occurred in judicial deference to diversity structures since 2000 and by using case examples to show how and why those changes have occurred. In particular, we show how the assumptions that judges make about standards of proof and the drawing of inferences make judges more likely to defer to diversity structures and, therefore, place employment discrimination plaintiffs at a significant and unwarranted disadvantage.

III. WHY DIVERSITY STRUCTURES ARE NOT EVIDENCE OF A DIVERSE WORKFORCE OR A NONDISCRIMINATORY WORKPLACE

Diversity structures are symbolic in that they are imbued with meaning; they invoke a sense of compliance and of the ideals underlying civil rights law.⁷³ The creation of diversity structures is only the beginning of the process through which organizations define the meaning of compliance.⁷⁴ Once in place, diversity structures become the sites in which the requirements and meaning of law are

⁶⁷ *Id.* at 137-38.

⁶⁸ *See id.* at 137, 156-57.

⁶⁹ *See id.* at 156-57.

⁷⁰ *See id.* at 170-71.

⁷¹ *Id.* at 173.

⁷² *See* EDELMAN, WORKING LAW, *supra* note 2; Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888 (2011) [hereinafter *When Organizations Rule*].

⁷³ *See* EDELMAN, WORKING LAW, *supra* note 2, at 168-69.

⁷⁴ *Id.* at 100.

confronted and negotiated in the context of everyday organizational events.⁷⁵ Where legal ideals conflict with business goals, compliance professionals tend to interpret the meaning of legal requirements in ways that render law closer to business values and managerial prerogatives.⁷⁶ Over time, the meaning of law tends to be understood in ways that incorporate managerial logic, values, and ways of understanding the world.⁷⁷

In some cases, compliance professionals are enthusiastic proponents of legal ideals, sometimes becoming activists who often confront organizational officials or employees who appear to be violating the law.⁷⁸ Where compliance professionals are granted authority and autonomy, and where these structures are designed to achieve specific goals, diversity structures may be catalysts that engender the institutionalization of legal values within organizations.⁷⁹ In some such cases, organizational efforts at compliance may even exceed what was envisioned by proponents of the law.⁸⁰ In many other cases, however, compliance professionals who are steeped in the logic of organizational fields are likely to resolve conflicts between legal and organizational logics in ways that subtly introduce business logic into the meaning of law.⁸¹ In her 2016 work, Edelman argues that as this occurs, law becomes *managerialized* within organizations and diversity structures move further from substance and closer to pure symbolism.⁸² The transformation is gradual and subtle, and rarely involves conscious decisions to circumvent the law.⁸³

In Edelman's 2016 work, she defined managerialization as the gradual infusion of managerial or business ideals into understandings of law.⁸⁴ Managerialization can result from intentional efforts to circumvent legal requirements but it is more often the unintentional

⁷⁵ See *id.* at 140-45.

⁷⁶ *Id.* at 146.

⁷⁷ See *id.* at 142-46.

⁷⁸ See *id.* at 82, 124.

⁷⁹ See *id.* at 137. See generally Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Compliance Reviews and Lawsuits over Time*, 71 AM. SOC. REV. 589 (2006) [hereinafter *Best Practices or Best Guesses?*].

⁸⁰ Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RES. SOC. STRATIFICATION & MOBILITY 107, 129-31 (1999). See generally Kalev, Dobbin & Kelly, *Best Practices or Best Guesses?*, *supra* note 79.

⁸¹ EDELMAN, *WORKING LAW*, *supra* note 2, at 34.

⁸² *Id.* at 33-37, 124-50.

⁸³ *Id.* at 34.

⁸⁴ *Id.* at 124.

result of addressing everyday problems in ways that subtly infuse law with managerial values and objectives.⁸⁵ As compliance professionals use professional networks to fill in the details that law has left ambiguous, “law” within organizations acquires a managerial flavor that may differ in important ways from law within the public legal order.⁸⁶ Law, in other words, becomes managerialized or infused with managerial values and interests.⁸⁷

As managerialization occurs within organizations, diversity structures may become less effective and may coexist with informal practices that diverge from organizations’ diversity commitments and formal antidiscrimination policies.⁸⁸ Edelman has specified four ways in which managerialization can weaken diversity structures: (1) internalizing dispute resolution; (2) legislating, contracting, or managing away legal risk; (3) decoupling legal rules from organizational activities; and (4) rhetorically reframing legal ideals.⁸⁹ These four forms of managerialization may coexist within particular organizations, and certainly coexist within organizational fields.⁹⁰

One of the most common diversity structures today is the complaint procedure.⁹¹ In theory, complaint procedures provide notice to employers that potential legal problems exist and allow employers to respond to those problems swiftly and effectively.⁹² When employers take their complaint procedures seriously, they can often resolve complaints quickly and avoid litigation.⁹³ Yet there are numerous instances where employer threats or organizational culture lead employees to fear retaliation and therefore to avoid complaining.⁹⁴ Although it now violates EEOC guidelines, some employers’ complaint procedures require employees to file a complaint first with their immediate supervisor, who is often the perpetrator of harassment or discrimination.⁹⁵ In other cases, complaints — even when filed correctly — are ignored or evaluated in a cursory or biased manner.⁹⁶

⁸⁵ *Id.* at 34.

⁸⁶ *Id.* at 124-25.

⁸⁷ *Id.* at 125.

⁸⁸ *Id.* at 136-38.

⁸⁹ *Id.* at 125.

⁹⁰ *Id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.* at 122, 125-28.

⁹⁴ *Id.* at 158-59.

⁹⁵ *E.g.*, *Meritor Savings Bank, FSB v. Mechelle Vison et al.*, 477 U.S. 57, 73 (1986).

⁹⁶ *E.g.*, *id.*; *see also* EDELMAN, *WORKING LAW*, *supra* note 2, at 160-61, 172 (arguing

Internal complaint procedures tend to managerialize the law as complaint handlers subtly reframe law as consistent with good management and complaints of rights violations as instances of poor management.⁹⁷ Thus, even when corporations take complaints seriously, they rarely recognize employees' legal rights or take action to avoid future rights violations.⁹⁸

Complaint handlers, for example, frequently treat allegations of sexual harassment as instances of poor management or complaints of gender discrimination as evidence of personality problems.⁹⁹ They take action to resolve the problem but do so under the rubric of remedying personality conflicts or providing counseling rather than of eliminating discrimination or harassment from the workplace.¹⁰⁰ This orientation tends to deemphasize law and rights, and often leads even employees to view their problems as workplace problems rather than as violations of their legal rights.¹⁰¹

Another form of managerialization occurs as compliance professionals navigate around legal assumptions or standards, in a manner somewhat akin to taking advantage of a tax loophole.¹⁰² Organizations may revise their rules or employment contracts to navigate around legal risk through pre-dispute mandatory arbitration clauses in their employment contracts or employment handbooks, which require employees to waive their right to sue for certain types of

that managers often discourage or reframe employees' complaints).

⁹⁷ EDELMAN, WORKING LAW, *supra* note 2, at 128-33.

⁹⁸ *Id.* at 133.

⁹⁹ *Id.* at 128-33.

¹⁰⁰ Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497, 515-19 (1993) [hereinafter *Internal Dispute Resolution*]; see also Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 L. & SOC. INQUIRY 659, 676-77, 685 (2003) [hereinafter *Injustice Frames*].

¹⁰¹ *Tuli v. Brigham & Women's Hosp., Inc.*, 566 F. Supp. 2d 32, 36, 36 n.2 (D. Mass. 2008) (citing Edelman et al., *Internal Dispute Resolution*, *supra* note 100 and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989)); 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, 217-19 (1997); Edelman et al., *Internal Dispute Resolution*, *supra* note 100, at 515-19; see Marshall, *Injustice Frames*, *supra* note 100, at 659, 676-77; cf. Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83 (2005). See generally Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 L. & SOC. INQUIRY 1151 (2000) (empirically demonstrating the mechanisms that lead women to avoid naming sexually harassing behaviors as legal injuries).

¹⁰² EDELMAN, WORKING LAW, *supra* note 2, at 34-35.

violations.¹⁰³ In some cases, employers navigate around legal risk by insuring against the risk of legal liability.¹⁰⁴ Strategies of this type tend to be adopted quickly by other organizations as compliance professionals come to see them as successful ways of circumventing liability.

Perhaps the most common form of managerialization is “decoupling,” or disconnecting organizational practices from formal organizational policies.¹⁰⁵ This occurs where organizations have formal commitments to diversity or formal policies that ban discrimination or harassment yet fail to implement those commitments or policies into the everyday operations of the organization.¹⁰⁶ Managers may overtly ignore the policies on the books, or decoupling may be more subtle, occurring through subjective standards for hiring or promotion that tend to favor whites or males or those members of minority groups who most successfully assimilate to white society.¹⁰⁷

The subtlest form of managerialization is through the rhetorical reframing of legal ideals. As law is imported into the organizational setting, managers may reframe legal constructs in ways that alter their meaning in important ways.¹⁰⁸ Through rhetorical reframing, ambiguous or politically-charged legal constructs may be subtly reshaped in ways that render law less challenging to traditional managerial prerogatives or business practices.¹⁰⁹ The very concept of diversity is a form of rhetorical reframing. From the passage of the

¹⁰³ Judith Reznik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2839-40 (2015); Elizabeth A. Roma, Comment, *Mandatory Arbitration Clauses in Employment Contracts and the Need for Meaningful Judicial Review*, 12 AM. U. J. GENDER, SOC. POL'Y & L. 519, 525-33, 542-44 (2004); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036-41 (1996).

¹⁰⁴ Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 13, 57-78 (1997); Shauhin A. Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Antidiscrimination Laws*, 37 L. & POL'Y 209, 210-11, 218-21 (2015).

¹⁰⁵ EDELMAN, WORKING LAW, *supra* note 2, at 136-38. See generally Karl E. Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. Q. 1 (1976) (arguing that various parts of organizations may be loosely coupled and thus operate somewhat independently, which facilitates their survival by insulating certain parts of the organization from their environments).

¹⁰⁶ See EDELMAN, WORKING LAW, *supra* note 2, at 136.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 125-33.

¹⁰⁹ *Id.* at 128.

1964 Civil Rights Act until about the late 1980s, the language of managerial compliance efforts centered around the meaning of civil rights, equal employment opportunity, and affirmative action.¹¹⁰ In the late 1980s, however, talk among managerial professionals began to shift from equal employment opportunity and affirmative action to diversity.¹¹¹ Importantly, moreover, diversity rhetoric shifted the focus from race and gender equality to a focus on managerial rhetoric in a way that substantially deemphasized race civil rights law and race and gender equality.¹¹² Managerial articles on diversity deemphasize the focus on civil rights law and on race and gender equality and instead began to define diversity along other, nonlegal, dimensions such as culture, geographic location, dress style, and lifestyle.¹¹³

All of these forms of managerialization tend to render organizational diversity structures less effective, that is to move them closer to becoming merely symbolic and further from substantively achieving legal ideals.¹¹⁴ There is, of course, substantial variation across organizations. In some organizations, leaders and managers work hard to reduce discrimination and bias and to provide real opportunity for men and women of color and white women as well as other disadvantaged groups.¹¹⁵ But importantly, a substantial body of research now shows that, in part due to managerialization, diversity structures are often ineffective and may undermine legal ideals.¹¹⁶

IV. HOW JUDGES ARE INFLUENCED BY DIVERSITY STRUCTURES

Judges — just like employers, employees, and compliance professionals — over time come to equate the diversity structures that organizations create in response to civil rights law with the achievement of civil rights in organizations.¹¹⁷ Even though judges are in theory selected because of their expertise at law and critical thinking, judges are not immune to institutionalized ideas about diversity structures. Research by social psychologists shows that

¹¹⁰ *Id.* at 139.

¹¹¹ *Id.*

¹¹² *Id.* at 140-42.

¹¹³ *Id.* at 142. See generally ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015) (using qualitative fieldwork to illustrate the varying meanings of diversity across multiple social contexts).

¹¹⁴ EDELMAN, *WORKING LAW*, *supra* note 2, at 149-50.

¹¹⁵ *Id.* at 150.

¹¹⁶ E.g., Kalev, Dobbin & Kelly, *Best Practices or Best Guesses?*, *supra* note 79, at 602, 610-11; see also EDELMAN, *WORKING LAW*, *supra* note 2, at 161.

¹¹⁷ EDELMAN, *WORKING LAW*, *supra* note 2, at 168-215.

judges employ two types of reasoning.¹¹⁸ The first type of reasoning is intuitive, quick, and based upon heuristics, whereas the second is deliberative, slower, and based upon rules.¹¹⁹ The first type “facilitates fast decisions but is subject to error; the second type is “more accurate but requires more time, effort, and motivation.”¹²⁰ Judges are predominantly intuitive decision makers, and because intuitive decisions tend to be quick, automatic, and heuristic based, these decisions are highly subject to error.¹²¹

Diversity structures provide a heuristic for judges, which facilitate the intuitive assessment that all is in order, and that there is no discriminatory behavior. In a series of studies, Cheryl Kaiser and Brenda Major have shown that the presence of diversity structures has a strong influence on whether people believe an organization to be fair.¹²² Importantly, their research shows that even when subjects are explicitly told that women or minorities are unfairly disadvantaged in an organization, the mere presence of diversity structures creates an illusion of fairness that causes most people to overlook evidence of unfair treatment.¹²³ To show that their findings had implications outside of the laboratory, Kaiser and Major replicated their studies using a sample of organizational managers.¹²⁴ These managers were asked to list either diversity structures or structures related to environmental sustainability at their organizations and then were asked to review claims of race discrimination filed by African-American employees.¹²⁵ Managers who had been primed to think about diversity structures ranked the race discrimination claims as less legitimate than did managers who had been primed to think about environmental structures.¹²⁶ These experiments show that the presence of diversity structures and organizations causes most people to view organizations as fair and to overlook evidence of injustice or discrimination.¹²⁷

¹¹⁸ *Id.* at 170.

¹¹⁹ *Id.*; Chris Guthrie et al, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6, 29-30 (2007); Jeffrey J. Rachlinski, *Processing, Pleadings and the Psychology of Prejudgements*, 60 DEPAUL L. REV. 413, 414-18 (2011).

¹²⁰ EDELMAN, WORKING LAW, *supra* note 2, at 170.

¹²¹ *Id.* at 170-71.

¹²² *Id.* at 155-57.

¹²³ *Id.* at 156.

¹²⁴ *Id.* at 156-57.

¹²⁵ *Id.*

¹²⁶ *Id.* at 157.

¹²⁷ *Id.*

Kaiser and Major's research suggests that the mere presence of diversity structures is likely to cause judges to overlook evidence of discrimination, including evidence that organizational practices deviate from antidiscrimination policies, that organizations have cultures that promote bias or harassment, or that internal dispute resolution processes are unfair.¹²⁸ Participants in these studies were more likely to believe that organizations were fair even when they were presented with evidence of discrimination against women or minorities.¹²⁹ Further, white male participants were especially likely to believe that diversity structures indicated fairness.¹³⁰ Similar studies have not yet been conducted on judges, and it may be that judges are more able than those without judicial experience to avoid the "illusions of fairness" that arose from the presence of diversity structures. However, it also may be that since most judges are disproportionately high status individuals and most are white males, that they are especially susceptible to these illusions.

Both management lawyers and plaintiffs' lawyers contribute to the heuristic, making it more likely that judges will infer nondiscrimination from the mere presence of diversity structures rather than engaging in careful scrutiny of their effectiveness.¹³¹ Management lawyers help to create and to reinforce assumptions about the fairness and rationality of diversity structures when they point to their clients' diversity structures as evidence of good faith, and of an absence of intent to discriminate, and when they cite judicial precedent that legitimates those structures.¹³² The more management lawyers rely on diversity structures as evidence of compliance, the more judges are exposed to the idea that these structures advance civil rights values.¹³³

One might expect that plaintiffs' lawyers would challenge the effectiveness of diversity structures, which might lead judges to become skeptical about the effectiveness of these structures, or at least more aware these structures may not protect employees' civil rights in all organizations. However, plaintiffs' lawyers too rarely challenge the effectiveness of diversity structures, in part because they also tend to accept the symbolic value of those structures and in part because they view organizations with diversity structures in place as difficult targets

¹²⁸ *Id.* at 156-57, 170-71.

¹²⁹ *Id.*

¹³⁰ *Id.* at 156, 171.

¹³¹ *Id.* at 172.

¹³² *Id.* at 171-72.

¹³³ *Id.* at 172.

of litigation precisely because they look fair.¹³⁴ Thus plaintiffs' lawyers may, largely inadvertently, discourage employees from pursuing litigation even in cases where managerialization renders diversity structures ineffective.

Even where plaintiffs' lawyers do challenge ineffective diversity structures and even where judges are skeptical of these structures, moreover, managerialization may be difficult to detect in a courtroom. Both plaintiffs' lawyers and judges are generally unaware of the extent to which organizations decouple their practices from formal structures that appear to protect employees from discrimination.¹³⁵ Decoupling can be very difficult to prove because discrimination that occurs through subjective decision making or through on the ground practices of lower level supervisors is far less visible than are the organizations' formal policies prohibiting discrimination.¹³⁶ Similarly, the subtle ways in which internal complaint handlers discourage complaints, favor supervisors, or handle complaints in ways that undermine employee's legal rights are far less visible to judges than the fact that the organization has a diversity mission statement, an anti-harassment policy, or a complaint procedure in place.¹³⁷ Diversity training programs and diversity officers make organizations look responsible, but judges are unlikely to be aware of the way in which diversity rhetoric subtly shifts the focus from race and gender equality to differences across a wide variety of dimensions or of research showing that these programs are often ineffective. Of course, judges do not see those disputes in which organizations manage to avoid litigation through mandatory arbitration or the use of contractual language that manages away legal rights.

V. SYMBOLIC METRICS IN COURT

To observe the extent to which diversity structures have become symbolic metrics in courts, we analyzed judicial decision making in federal civil rights opinions with particular attention to whether and how judges evaluate diversity structures in organizations. As noted above, we define 'diversity structure' broadly to include any organizational structure that courts might interpret as evidence of an organization's commitment to fair treatment.¹³⁸ Some of these

¹³⁴ *Id.*

¹³⁵ *Id.* at 15, 38, 182.

¹³⁶ *Id.* at 172.

¹³⁷ *Id.*

¹³⁸ *See supra* Part II.

structures are explicitly geared toward diversity, such as diversity or equal employment opportunity policies or complaint procedures. Others are more generic structures that are often taken as indicia of fair governance such as progressive discipline policies, evaluation procedures, and multi-person decision-making structures. Our reading of civil rights opinions suggests that judges frequently understand these more generic structures as indicia of organizational rationality and fair governance.

A. *Sample and Data*

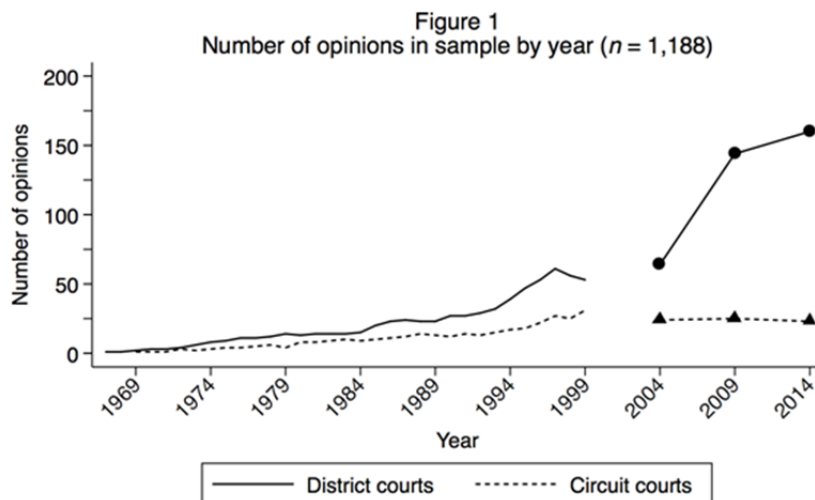
We draw on two samples of federal civil rights opinions in the district and circuit courts. The first sample, collected by Lauren Edelman and Linda Krieger, is a representative sample of opinions from 1965 through 1999.¹³⁹ Edelman and Krieger selected a 2% sample consisting of 1,024 opinions, stratified by year and by district or circuit court. I refer to this as the pre-2000 sample. The second sample, which we collected in order to update the original data, is a representative sample of opinions in 2004, 2009, and 2014. We selected a 0.5% sample of district court cases and a 2% sample of circuit court cases for each of the three years, yielding a final post-2000 sample of 164 cases.¹⁴⁰ Both samples include opinions reported in Westlaw that result from cases brought under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (“ADEA”), the Equal Pay Act of 1963 (“EPA”), and two post-Civil War civil rights statutes: 42 U.S.C. § 1981 and 42 U.S.C. § 1983.¹⁴¹ We did not include Supreme Court opinions for two reasons. First, because there are relatively few decisions, and second, so that we

¹³⁹ The pre-2000 sample used the Westlaw search term: (“title vii”) (“age discrimination”) (“employment act”) (“rehabilitation act”) (“equal pay act”) (“american!”/3 “disabilit!/1 act”) (“famil!/3 “medical leave act”) (“fmla % (marin! lien))) & DA(aft 1-1-1965 & bef 12-31-1999). This search was performed separately in Westlaw’s Court of Appeals database and in its District Court database and was restricted to cases that were decided between January 1, 1965 and December 31, 1999. The search yielded 34,578 district court opinions and 16,604 circuit court opinions.

¹⁴⁰ For the post-2000 study, we used the same Westlaw search term to generate a universe of cases for the years 2004, 2009, and 2014. The search produced 18,305 district court cases and 3,588 circuit court cases for those three years. We selected a 0.5% sample of district court cases and a 2% sample of circuit court cases for each of the three years, yielding a final post-2000 sample of 92 district court cases and 72 circuit court cases (for a total of 164 cases).

¹⁴¹ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17; Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634; Equal Pay Act of 1963 (EPA), 29 U.S.C. §§ 206(d)-262; 42 U.S.C. §§ 1981, 1983 (2018).

could treat important Supreme Court cases as independent variables that might influence judicial reasoning in the circuit and district courts. Figure 1¹⁴² shows the number of opinions over time in our combined samples.



Note: The pre-2000 sample is based on a 2.0 percent sample of all opinions in Westlaw for the years 1965–1999. The post-2000 sample is based on a 2.0 percent sample of circuit court opinions and a 0.5 percent sample of district court opinions in Westlaw for the years 2004, 2009, and 2014. The post-2000 district court sample was multiplied by four to make it comparable to the remainder of the sample.

B. *Judicial Deference to Diversity Structures over Time*

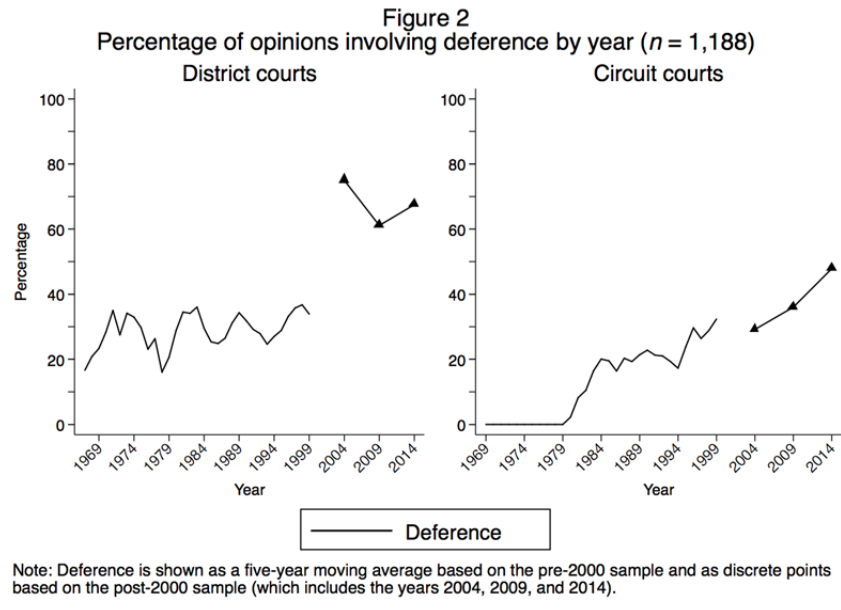
We define judicial deference to diversity structures as occurring where the opinion reflects that at least one diversity structure was considered relevant to the question of whether discrimination occurred and any one of the following three conditions existed: (1) the opinion reflects no attention to the adequacy or effectiveness of the diversity structure at all; (2) the opinion states that the diversity structure was ineffective but that the effectiveness of the structure was irrelevant to whether discrimination occurred; or (3) the opinion states that the diversity structure was adequate even though there is also substantial discussion of inadequacies of the structure.¹⁴³ An example of the third condition would be if the opinion discusses the fact that a supervisor told an employee that she could not or should not use a complaint procedure and the court then penalizes the

¹⁴² Figure 1 was previously published in EDELMAN, *WORKING LAW*, *supra* note 2, at 179.

¹⁴³ See also Edelman et al., *When Organizations Rule*, *supra* note 72, at 893-95, 916.

employee for failing to use that complaint procedure. If the opinion stated that the diversity structure was adequate, that opinion would not be coded as involving judicial deference unless there was strong evidence presented that pointed to the inadequacy of the structure.

Figure 2¹⁴⁴ shows the percentage of opinions for district and circuit courts that involved at least one instance of judicial deference to diversity structures without adequate scrutiny. Figure 2 shows a gradual increase over time in the likelihood that judges would defer to diversity structures without adequate scrutiny through about 1999 and then a substantial increase after 2000. By 2014, judges defer without adequate scrutiny in about 75% of district court cases and 49% of circuit court cases. The dramatic rise in judicial deference without adequate scrutiny indicates that these structures have become, in and of themselves, symbols of organizations' commitment to diversity. Diversity structures have acquired an aura of legality, irrespective of their effectiveness.



¹⁴⁴ A variant of Figure 2 was previously published in EDELMAN, WORKING LAW, *supra* note 2, at 186.

VI. WHY JUDGES HAVE BECOME MORE LIKELY TO ACCEPT DIVERSITY
STRUCTURES AS SYMBOLIC METRICS OF DIVERSITY

In this section, we offer two key reasons for the rise in judicial deference to diversity structures irrespective of their effectiveness since 2000. The first has to do with the rise of employers' grants of summary judgments in the federal district courts and a concomitant reticence to review those decisions in the federal circuit courts. The second is a result of two U.S. Supreme Court decisions in 1998 that created an affirmative defense to hostile work environment sexual harassment: *Faragher v. City of Boca Raton*¹⁴⁵ and *Burlington Industries, Inc. v. Ellerth*¹⁴⁶. Below, we provide examples of cases involving judicial deference in the contexts of racial, religious, and gender-based discrimination.

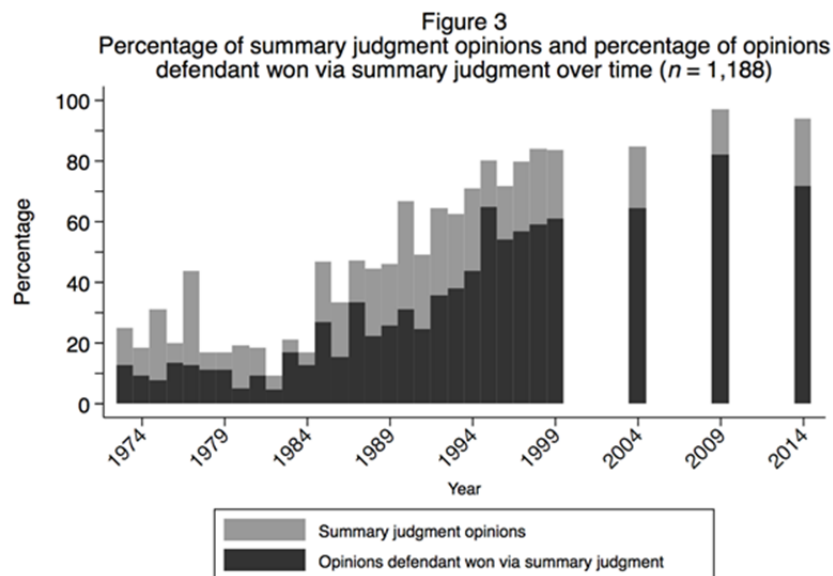
A. *The Rise in Grants of Summary Judgment to Employers*

The period since about 1990 has seen a significant increase in the proportion of civil rights cases terminated through grants of employers' motions for summary judgments and, in the circuit courts, denials of appeals of district court grants of summary judgment. Figure 3¹⁴⁷ shows that summary judgment cases have increased dramatically over time in both the district and circuit courts. Summary judgment is an increasingly important and frequent manner of case disposition in employment discrimination cases.

¹⁴⁵ 524 U.S. 775, 775 (1998).

¹⁴⁶ 524 U.S. 742, 745-46 (1998).

¹⁴⁷ Figure 3 was previously published in EDELMAN, *WORKING LAW*, *supra* note 2, at 67.



Catherine Albiston argues that employers use summary judgment as a rulemaking opportunity.¹⁴⁸ Pointing out that summary judgment permits piecemeal resolution of the case such as establishing liability without determining damages, she argues that employers use motions for summary judgment strategically to ensure that the early weight of authority addressing a new law will benefit employers.¹⁴⁹ They can do so by settling those cases where employees might be most likely to win in order to avoid precedent that could potentially harm employers' future interests.¹⁵⁰ In addition, as Albiston's argument suggests, because plaintiffs can only prevail on summary judgment if they are able to show that *no* disputed material facts remain *and* they are entitled to judgment as a matter of law on *each and every* element of their claims, plaintiffs' victories on summary judgment are necessarily rare and so are decisions laying down interpretations of the law favorable to plaintiffs.¹⁵¹ By contrast, in order to prevail on summary judgment, defendants need only show, as to a *single* element of plaintiffs' claims, that they are entitled to judgment as a matter of law

¹⁴⁸ Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 L. & SOC'Y REV. 869, 877-83 (1999).

¹⁴⁹ *Id.* at 882.

¹⁵⁰ *Id.* at 873-77.

¹⁵¹ See also FED. R. CIV. P. 56.

and that no material disputed facts remain.¹⁵² This substantial asymmetry in the burden of proof and persuasion between plaintiffs and defendants is significant in explaining the frequency of summary judgment motions by and victories for defendants relative to plaintiffs.

Retired federal judge Nancy Gertner offers further insights into the judicial tendency to grant summary judgments, particularly in employment discrimination cases.¹⁵³ First, she argues that judges are encouraged to write detailed decisions when granting summary judgment but not to write decisions when denying it, which leads judges to see a skewed distribution of employment cases and hence to trivialize plaintiffs' claims.¹⁵⁴ Second, building on Albiston's observation that employers settle those cases where plaintiffs have a strong argument,¹⁵⁵ Gertner suggests that because judges rarely see the strongest claims by plaintiffs, they tend to see most employee claims as unjustified and to sympathize with employers.¹⁵⁶ Third, echoing an argument originally made by Linda Krieger,¹⁵⁷ Gertner argues that judges tend to look for explicitly discriminatory policies or biased actors but that they fail to understand the many forms of structural and implicit bias that characterize today's workplace.¹⁵⁸ Finally, while the standard of review for summary judgment orders at the appellate court is *de novo*, Gertner argues that appellate courts rarely reverse district court decisions.¹⁵⁹

B. *Judicial Deference to Diversity Structures in Summary Judgment Cases*

Based on the legal standard, one would actually expect less judicial deference to diversity structures in summary judgment cases than in cases that go to trial on the merits. The legal standard for summary judgment requires the court to evaluate the facts and to draw all reasonable inferences in the light most favorable to the nonmoving party, which in civil rights cases is almost always the employee.¹⁶⁰

¹⁵² Albiston, *supra* note 148, at 882.

¹⁵³ Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 114-15 (2012).

¹⁵⁴ *Id.* at 113-14.

¹⁵⁵ Albiston, *supra* note 148, at 873-77.

¹⁵⁶ Gertner, *supra* note 153, at 114-15.

¹⁵⁷ See Linda Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164, 1179-80 (1995).

¹⁵⁸ Gertner, *supra* note 153, at 110-12.

¹⁵⁹ *Id.* at 114; see EDELMAN, *WORKING LAW*, *supra* note 2, at 5-11.

¹⁶⁰ See Gertner, *supra* note 153, at 121 n.52.

Because deference involves drawing an inference in favor of the employer on the basis of diversity structures, one would expect less deference in summary judgment actions than in cases resulting in a full trial on the merits. In fact, however, as deference to diversity structures has become more common, judges appear to defer to diversity structures more in summary judgment cases than in fully adjudicated cases.¹⁶¹

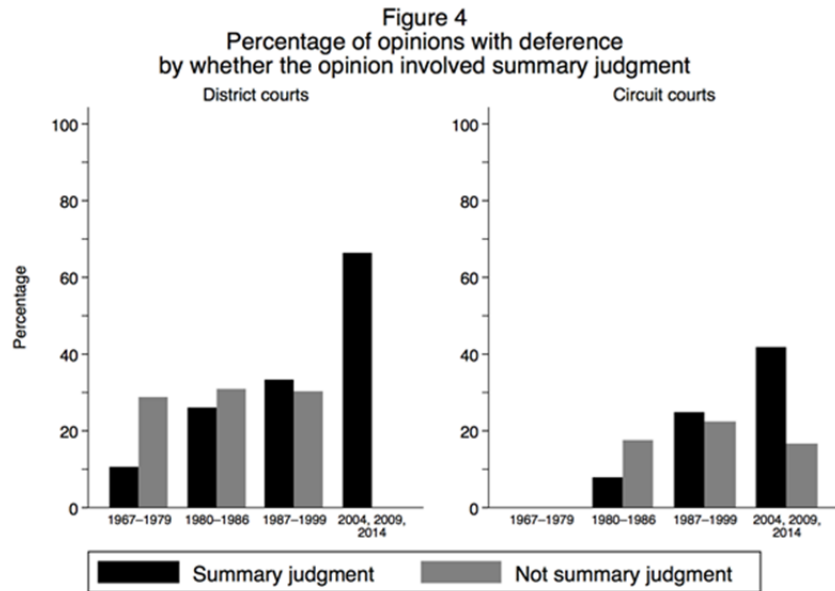
Figure 4¹⁶² shows the percentage of opinions involving deference to diversity structures in summary judgment and non-summary judgment cases over time. After 1986, judges deferred to diversity structures more in opinions involving summary judgment than in opinions that did not involve summary judgment. In the circuit courts, there were relatively few summary judgment cases prior to 1986, when the *Celotex* trilogy¹⁶³ made it easier for employers to prevail in a motion for summary judgment.¹⁶⁴ Because there is less opportunity for judicial attention to the facts in summary judgment cases, judges are more likely to use the mere presence of diversity structures as a heuristic to infer that employers are rational and hence nondiscriminatory. After 2000, deference in summary judgment cases rose significantly, and notably, our random sample of federal district court civil rights opinions included *only summary judgment opinions*, which is why there is no column for non-summary judgment cases in the district courts after 2000. This finding also points to the difficulty plaintiffs face in surviving motions for summary judgment in the district courts.

¹⁶¹ See *id.* at 114.

¹⁶² Figure 4 was previously published in EDELMAN, WORKING LAW, *supra* note 2.

¹⁶³ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

¹⁶⁴ EDELMAN, WORKING LAW, *supra* note 2, at 66-68.



Why do judges defer so frequently to diversity structures in summary judgment cases? We think judges use diversity structures as a heuristic for proper governance. It seems that in summary judgment cases, judges draw inferences of fair treatment from diversity structures. While likely inadvertent, such inference drawing amounts to a failure to take seriously the rule articulated by the Supreme Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*¹⁶⁵ which requires judges to draw all inferences in the light most favorable to the nonmoving party. Judges frequently fail to say anything about how they draw inferences, and they appear frequently to be drawing inferences in favor of the employer, who is in virtually every case the moving party. When judges defer to employers' diversity structures without adequate scrutiny of those structures, they are erroneously drawing inferences in favor of the moving party in violation of the rule articulated in *Matsushita*.

¹⁶⁵ *Matsushita Elec. Indus. Co.*, 475 U.S. at 587-88.

C. *Deference in the Context of Disparate Treatment on the Basis of Religion in Summary Judgment: The Example of Serlin v. Alexander Dawson School*

Consider, for example, *Serlin v. Alexander Dawson School*,¹⁶⁶ a case in which the judge misperceived the summary judgment standard and deferred to a company's diversity structure without any discussion of its adequacy.

Cheri Serlin was a fifty-eight-year-old elementary school teacher.¹⁶⁷ She had been a teacher for eighteen years¹⁶⁸ and had taught for four years at Alexander Dawson School, a private school that includes preschool through eighth-grade school in Las Vegas, Nevada¹⁶⁹ In 2016, the school noted that its average student to faculty ratio was eight to one.¹⁷⁰ The tuition for fifth-grade in the 2016–2017 school year was \$23,000.¹⁷¹

Serlin was diagnosed with breast cancer in 2009 and underwent eighteen weeks of chemotherapy while she continued to work at Dawson.¹⁷² Serlin's breast cancer "required her to undergo a bilateral double mastectomy and caused interstitial cystitis."¹⁷³ Serlin therefore had to use the bathroom approximately ten to twenty times per day as a result of her mastectomy.¹⁷⁴

Serlin took some leave under the Family and Medical Leave Act ("FMLA") beginning in 2009, but apparently continued to work for part of that time.¹⁷⁵ Serlin alleged that in 2010, she was harassed and bullied by another faculty member, Julie Tognoni.¹⁷⁶ Serlin said that

¹⁶⁶ *Serlin v. Alexander Dawson Sch.*, No. 2:12-CV-1431 JCM (GWF), 2014 WL 1573535 (D. Nev. Apr. 17, 2014).

¹⁶⁷ *Id.* at *1.

¹⁶⁸ *Id.*

¹⁶⁹ *Dawson's Mission, Core Beliefs & History*, ALEXANDER DAWSON SCH. RAINBOW MOUNTAIN, <https://www.adsrcm.org/page/about-dawson/our-mission—history> (last visited Jan. 21, 2018).

¹⁷⁰ *About Dawson: Who We Are*, ALEXANDER DAWSON SCH. RAINBOW MOUNTAIN, <https://web.archive.org/web/20161019144518/http://www.adsrcm.org/page/about-dawson> (last visited Nov. 25, 2016).

¹⁷¹ *Tuition & Fees*, ALEXANDER DAWSON SCH. RAINBOW MOUNTAIN, <https://web.archive.org/web/20160321054538/http://www.adsrcm.org/Page/Admissions/Tuition—Fees/Tuition—Fees> (last visited Nov. 25, 2016) (listing "2016-17 Tuition & Fees" at \$23,000 for fifth grade).

¹⁷² *Serlin*, 2014 WL 1573535, at *1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

she was chastised by her co-workers, Tognoni and another co-worker in particular, for her frequent bathroom use, use of leave, and her inability to perform certain tasks that required some degree of physical exertion.¹⁷⁷ Serlin alleged that Tonogi made derogatory comments about her religion as well as ethnic slurs, including repeated references to Serlin being from the “Bagel Belt,” which Serlin interpreted as an anti-Semitic remark.¹⁷⁸ Tonogi allegedly knew Serlin was from Skokie, Illinois, where a large population of Jews and other Eastern Europeans lived.¹⁷⁹

Serlin filed a written complaint, contending that the term “Bagel Belt” constituted an insulting ethnic slur.¹⁸⁰ She then met with her supervisor, Russell Smith,¹⁸¹ who told her that because he could not find “Bagel Belt” on the internet he did not believe it to be derogatory.¹⁸² According to Serlin, during the meeting, Smith “raised his voice sternly and intimidated [plaintiff] by saying ‘do you really want to make something out of this?’”¹⁸³ Serlin’s FMLA leave was renewed in February 2011.¹⁸⁴ One month later, in March 2011, Serlin was told that her teaching contract would not be renewed. Serlin’s replacement was twenty-nine-year-old ten-year veteran teacher, Angie Vetter.¹⁸⁵

Serlin filed suit against Dawson and its affiliated entities in August 2012 alleging: interference with and unlawful retaliation under the Family and Medical Leave Act, 28 U.S.C. § 2615(a)(1), (a)(2), and (b); violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12111 *et seq.*; religious discrimination and hostile work environment based on religion in violation of Title VII; retaliation in violation of Title VII; age discrimination in violation of the Age Discrimination in Employment Act (“ADEA”), 26 U.S.C. § 621 *et seq.*; and two Nevada state law claims for unlawful blacklisting and wrongful termination in violation of Nevada public policy.¹⁸⁶ As our

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *2. Serlin also made allegations under the analogous Nevada state statutes as to Serlin’s disability, religion, and age discrimination claims. The district court analyzed these claims “under the framework provided by the ADA, Title VII, and the ADEA as they operate under the same guiding principles.” *Id.* at *2 n.1.

emphasis is on the effects of judicial deference to employment structures, we focus on Title VII and ADEA claims. We do not discuss the ADA and FMLA claims in depth because the procedural and doctrinal strictures involved in those claims are somewhat more varied and idiosyncratic.

Dawson moved for summary judgment.¹⁸⁷ In her opposition to the motion for summary judgment, Serlin's attorney submitted excerpts of Smith's deposition.¹⁸⁸ In his deposition, Smith admits that Serlin told him that the "Bagel Belt" comments upset her and that she "viewed it as a derogatory comment or an ethnic slur."¹⁸⁹ Smith also stated that Dawson School had an anti-harassment policy and that the policy covered "derogatory comments and slurs."¹⁹⁰ Finally, Smith admitted that Serlin "explained . . . that it was an ethnic slur towards Jews" and that, after Serlin's explanation, that he had "the impression that it was derogatory."¹⁹¹

Serlin's attorney also submitted three positive Annual Performance Reviews of Serlin by Dawson.¹⁹² The 2008 review praised Serlin's performance. The 2008 evaluation, prepared by Smith, stated that he "enthusiastically recommend[ed] [Serlin] be offered a contract for the 2008-9 school year."¹⁹³ The 2009 review, also prepared by Smith, contained only positive comments and remarked upon Serlin as "always professional in her dealings with students and parents."¹⁹⁴ Finally, Smith's 2010 evaluation of Serlin contained no negative remarks on her professionalism or ability to interact and work with her colleagues and, by contrast, again noted that she "is always professional in her dealings with students and parents."¹⁹⁵ Strikingly, Smith also wrote that activities Serlin and "Tonogi have developed

¹⁸⁷ *Id.* at *1.

¹⁸⁸ *See, e.g.*, Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 38, *Serlin v. Alexander Dawson Sch.*, No. 2:12-CV-01431 (D. Nev. Oct. 17, 2013), 2013 WL 12320613.

¹⁸⁹ Deposition of Russell A. Smith at 38, *Serlin v. Alexander Dawson Sch.*, No. 2:12-CV-01431 (D. Nev. Oct. 17, 2013), 2013 WL 12320613 (Exhibit 4).

¹⁹⁰ *Id.* at 38-39.

¹⁹¹ *Id.* at 40.

¹⁹² *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 38, *Serlin v. Alexander Dawson Sch.*, No. 2:12-CV-01431 (D. Nev. Oct. 17, 2013), 2013 WL 12320613 (Exhibits 17-19).

¹⁹³ *Id.* (Exhibit 17).

¹⁹⁴ *Id.* (Exhibit 18).

¹⁹⁵ *Id.* (Exhibit 19).

bring real value to the students' education, and the parents enjoy seeing their children excited to learn."¹⁹⁶

In response to Serlin's hostile work environment and retaliation claims, Dawson replied that it hired Vetter, and declined to renew Serlin's contract, for two reasons.¹⁹⁷ First, Dawson claimed that in 2011, it had considered a new requirement that all fifth grade teachers be capable of teaching math and that Serlin was unwilling or unable to do so.¹⁹⁸ Second, Dawson claimed that Serlin's alleged inability to get along with Tognoni and another teacher was an additional factor in its decision.¹⁹⁹

Despite Smith's admission that he had considered Tognoni's behavior derogatory and a violation of the company's antiharassment policy, the district court granted summary judgment to the employer.²⁰⁰ Notably, in its "Legal Standard" section, the district court failed to include a critical portion and well-established statement of the summary judgment standard.²⁰¹ Nowhere in this section did the court indicate that, as the Supreme Court has required, "the inferences to be drawn from the underlying facts . . . *must* be viewed in the light most favorable to the party opposing the motion."²⁰² Regardless of the district court's reason for omitting one aspect of the summary judgment standard, what followed was a deferential analysis and cursory examination of the adequacy of the employer's antidiscrimination structures that followed.

After making quick work of Serlin's FMLA and ADA claims, the district court moved to Serlin's Title VII claims. In three brief sentences regarding her Title VII religious discrimination claim, the district court, without citing to any facts, concluded that Serlin "has provided no evidence that the named defendants discriminated against her because of her Jewish faith."²⁰³ The court discounted Serlin's version of events with respect to her meeting with Smith and concluded: "Candidly, the court is unconvinced that insinuating one

¹⁹⁶ *Id.*

¹⁹⁷ *Serlin v. Alexander Dawson Sch.*, No. 2:12-CV-01431, 2014 WL 1573535, at *1 (D. Nev. Apr. 17, 2014).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at *5.

²⁰¹ *Id.* at *2-3.

²⁰² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (emphasis added) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

²⁰³ *Serlin*, 2014 WL 1573535, at *5.

likes bagels may constitute the type of harassment contemplated by Title VII and actionable under law.”²⁰⁴

As to Serlin’s hostile work environment claim, the court found Serlin’s claim lacking because it concluded, again without reference any witness’s or party’s testimony, that Tognoni’s conduct was simply not severe or pervasive enough to create an objectively hostile or “abusive work environment.”²⁰⁵ The court concluded: “While Tognoni’s comments implying that plaintiff enjoys bagels by virtue of her Jewish faith may have engendered offensive feelings, a reasonable person would not find that those comments created a hostile or abusive work environment.”²⁰⁶

The court then also concluded that Serlin’s retaliation claim was without merit, explaining that Serlin had failed to establish a sufficient causal link between her complaint to Smith and failure to renew her contract.²⁰⁷ In addition to citing no facts, the court failed to even begin to consider whether Dawson’s complaint procedure regarding written complaints was adequate or sensible. Interestingly, the court made no mention of Smith’s admissions regarding the existence of Dawson’s anti-harassment policy and the fact that Tognoni’s repeated “Bagel Belt” comments could easily have constituted the very “derogatory comments and slurs” that the policy forbade. Instead, the court accepted the validity and propriety of Dawson’s complaint procedures and, without discussion, assumed that it was valid on the way to granting Dawson’s summary judgment motion. The court privileged one diversity structure, Dawson’s complaint procedure, over another, Dawson’s anti-harassment policy. In doing so, the court made a substantive choice, one properly allocated to the jury, in choosing to find implicitly credible the diversity structure that bolstered Dawson’s case for summary judgment.

Finally, in evaluating Serlin’s ADEA claim, the district court overlooked significant testimonial evidence from Serlin and documentary evidence in the form of positive teaching evaluations written by Smith in accepting Dawson’s claim that Serlin did not “get along” with the other fifth-grade teachers.

The district court appeared to overlook evidence of harassment, retaliation, and discrimination in granting summary judgment to the employer while paying attention to the employer’s anti-harassment

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *6.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

policy and complaint procedure. The opinion makes no mention of the standard it used to review the facts and appears to have drawn inferences in a light favorable to the employer, in direct contrast to the Supreme Court's direction to do the opposite.

Unfortunately, nothing changed for Serlin on appeal. On July 28, 2016, the Ninth Circuit affirmed the district court's grant of summary judgment for Dawson.²⁰⁸ In a brief, unpublished, five-page memorandum disposition, the Ninth Circuit affirmed the trial court's reasoning and disposition of the case.²⁰⁹

The Ninth Circuit, like the district court, made no mention of the standard that requires courts to view the facts in the light most favorable to Serlin. This lack of mention of this key evidentiary aspect of the summary judgment standard is strange when considering that, as the Ninth Circuit explicitly held as recently as 2009, in reviewing summary judgment grants: "[W]e are governed by the same principles as the district court: whether, with the evidence viewed in the light most favorable to the non-moving party, there are no genuine issues of material fact, so that the moving party is entitled to a judgment as a matter of law."²¹⁰

As with the district court's decision, the Ninth Circuit's omission of a key evidentiary standard in its evaluation of the summary judgment motion led, quickly and inexorably, to the conclusion that the district court's deference was proper and that its summary judgment decision was correct. The Ninth Circuit swiftly disposed of Serlin's religious discrimination claim, concluding that even in the face of evidence that Dawson declined to renew other Jewish teachers' contracts, no triable issue of fact remained on this point.²¹¹ The Ninth Circuit further held that the alleged "Bagel Belt" comments failed to create a hostile work environment as the comments were, in the court's opinion and without citation to any portion of the record, simply "not of a physically threatening or humiliating nature" and that they were therefore insufficiently severe, pervasive, or offensively objective to be actionable under Title VII.²¹²

In its decision, the Ninth Circuit deferred to several diversity structures, most implicitly but one explicitly. The court made no mention of the adequacy of Dawson's complaint procedure, instead

²⁰⁸ Serlin v. Alexander Dawson Sch., 656 F. App'x 853, 856 (9th Cir. 2016).

²⁰⁹ *Id.*

²¹⁰ San Diego Police Officers' Ass'n v. San Diego City Emps. Ret. Sys., 568 F.3d 725, 733 (9th Cir. 2009).

²¹¹ See Serlin, 656 F. App'x at 855-56.

²¹² *Id.* at 855.

recasting and sanitizing Serlin’s written complaint as “the informal complaint she made regarding a coworker’s comments” and finding that she did not demonstrate that the complaint was a but-for cause of Dawson’s decision not to renew Serlin’s contract, thus implicitly finding that the structure must be adequate.²¹³ The court also made no mention of Dawson’s antiharassment policy and whether the policy would have categorized the “Bagel Belt” comments as harassment, thus implicitly deferring to the adequate application of that policy by Dawson through Smith’s inaction. Finally, the court explicitly found that Dawson’s hiring policies with respect to Serlin’s ADEA claim were adequate and proper. The court concluded: “[T]he decision makers’ statements that they desired creative and ‘dynamic’ teachers who have an ‘energized way of teaching’ and who will integrate technology into lessons are ‘at best weak circumstantial evidence of discriminatory animus’” based on age.”²¹⁴

The Serlin case exemplifies courts’ tendencies to overlook the legal standard that requires deference to the nonmoving party and to defer to the mere presence of the employer’s diversity structures. While *Serlin* is a case that, on its facts, is less shocking than the *City of Robertsdale* case discussed below, it is a useful example of a more subtle way in which the interplay between the legal evidentiary standard on summary judgment and judicial deference can combine to the significant disadvantage of a plaintiff.

D. *The Rise in Grants of Summary Judgment to Employers*

Sexual harassment was not expressly prohibited by the 1964 Civil Rights Act. In the early years of Title VII litigation, sexual harassment cases were brought as disparate treatment cases involving sex discrimination, but they were often dismissed, either because courts did not see sex discrimination as including sexual harassment or because courts were reluctant to hold employers liable for sexual harassment by individual supervisors or coworkers.²¹⁵ In response to feminist activism, however, courts began in the 1970s and 1980s to hold that sexual harassment was a form of sex discrimination. The first sexual harassment case to reach the U.S. Supreme Court was *Meritor Savings Bank v. Vinson* in 1986. Citing the EEOC guidelines, the Court established what is now known as hostile environment sexual harassment by holding that Title VII covers harassment that

²¹³ See *id.* at 855-56.

²¹⁴ *Id.* at 856.

²¹⁵ EDELMAN, WORKING LAW, *supra* note 2, at 60.

creates a hostile environment irrespective of whether there is a tangible economic loss.²¹⁶

The Court in *Meritor* also laid the foundation for employers to avoid liability by creating diversity structures, in particular anti-harassment policies and grievance procedures. Until 1986 no Supreme Court cases had explicitly stated that organizational structures might protect employers from liability in the context of a Title VII case. In most areas of civil rights law, that is still the case.²¹⁷ But when the Supreme Court defined hostile work environment sexual harassment in *Meritor*, the Court for the first time suggested that an effective anti-harassment policy and a grievance procedure *might* protect an employer from liability when a supervisor harasses an employee.²¹⁸ The *Meritor* decision led management consultants and human resource professionals to encourage employers to create these procedures and also dramatically increased the rate at which employers pointed to their diversity structures as evidence that they had taken reasonable measures to avoid sexual, and also racial, harassment.²¹⁹ Over the next twelve years, judges became increasingly likely to defer to these structures.²²⁰

Then in 1998, *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court formalized the defense that *Meritor* had hinted at which created the affirmative defense that the *Meritor* Court had hinted at. Society for Human Resource Management (“SHRM”) and other organizations representing employers’ interests had submitted amicus briefs contending that the presence of anti-harassment policies and complaint procedures for employees should always protect employers from liability.²²¹ The Equal Employment Opportunity Commission (“EEOC”) supports this contention, albeit only in the context of hostile environment claims where there was no tangible economic loss and only where these procedures were shown to be effective.²²² Other organizations representing employees’ interests objected, contending that such a policy would allow employers to escape liability simply by creating diversity structures.²²³

²¹⁶ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-69 (1986).

²¹⁷ EDELMAN, WORKING LAW, *supra* note 2, at 61.

²¹⁸ *See Meritor*, 477 U.S. at 72-73.

²¹⁹ *See* EDELMAN, WORKING LAW, *supra* note 2, at 202-03.

²²⁰ *Id.* at 165-66.

²²¹ *Id.* at 198-200.

²²² *Id.* at 205-06.

²²³ *Id.* at 204-05.

The Supreme Court followed the advice of the EEOC, establishing an affirmative defense in hostile work environment cases. The two-pronged affirmative defense, set forth in both *Faragher* and *Ellerth*, requires that employers prove:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.²²⁴

The opinions explicitly suggest, moreover, that antiharassment policies and complaint procedures would, in most cases, allow the employer to escape liability.

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.²²⁵

E. Judicial Deference to Diversity Structures in Hostile Work Environment Harassment Cases

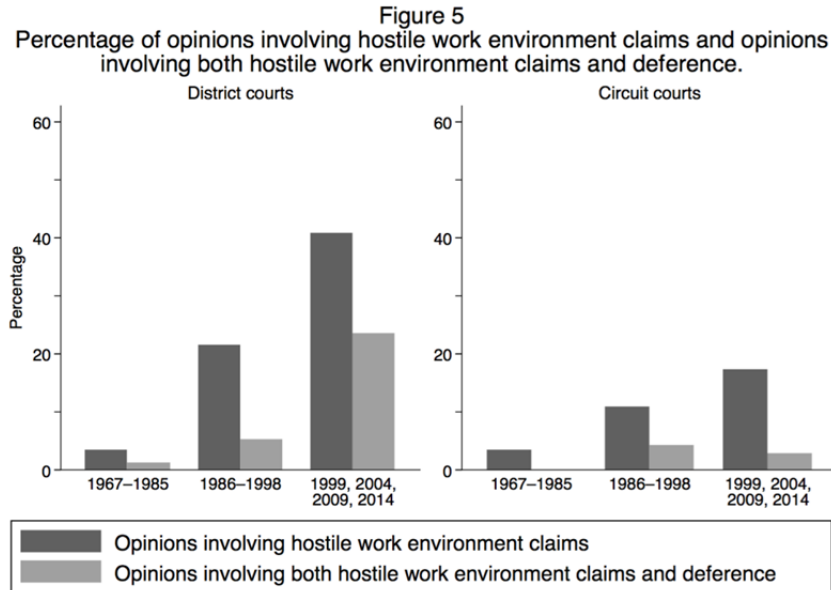
Following the *Faragher* and *Ellerth* decisions, judicial deference to the presence of diversity structures increased dramatically in hostile work environment cases, especially in the district courts. Figure 5²²⁶ shows both the increase in cases involving hostile work environment claims and the dramatic increase in judicial deference, first after the *Meritor* decision in 1986 and then after the *Faragher* and *Ellerth* decisions in 1998. In the district courts, during the twelve years prior to *Faragher* and *Ellerth*, deference occurred in only about 24% of

²²⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

²²⁵ *Ellerth*, 524 U.S. at 745; *Faragher*, 524 U.S. at 778.

²²⁶ Figure 5 was originally published in EDELMAN, *WORKING LAW*, *supra* note 2, at 185.

opinions involving hostile work environment.²²⁷ After *Faragher* and *Ellerth*, deference occurred in about 58% of those opinions.²²⁸ In the latter period, nearly all hostile work environment harassment cases are decided via summary judgment.



Judicial deference in hostile work environment cases is not entirely due to the Supreme Court's *Faragher* and *Ellerth* decisions. As was shown in Figure 2, the trend toward judicial deference to diversity structures began in the lower courts decades prior to these decisions. As Edelman et al. show, courts found diversity structures were more likely to be relevant in hostile work environment cases than in most other types of cases long before *Faragher* and *Ellerth*.²²⁹ But the Supreme Court's affirmation of the affirmative defense and specific mention of anti-harassment policies and complaint procedures certainly spurred lower courts to defer to diversity structures.

Importantly, however, nothing in the Supreme Court decision should have been taken as a directive for lower courts to defer to diversity structures without considering the efficacy of these structures. Evidence that the policy is effective or that employers ignore their own policies would seem to violate the Supreme Court's

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Edelman et al., *When Organizations Rule*, *supra* note 72, at 907-09.

presumption that a policy indicates that an employer took reasonable care to avoid harm. Similarly, efforts by an employer to preclude employees from using complaint procedures by threatening retaliation or evidence that complaint procedures are unfairly biased in favor of the employer would suggest that an employee's failure to make use of the complaint procedure was not necessarily unreasonable. Yet a reading of these cases indicates that judges regularly fail to evaluate the efficacy of these structures. Instead, judges defer to the mere existence of a harassment policy without any analysis of whether these policies are effectively implemented within organizations.

F. Deference in the Context of Disparate Treatment on the Basis of Race: The Example of Sanchez v. Board of County Commissioners of El Paso County

The example of *Sanchez v. Board of County Commissioners of El Paso County*²³⁰ is instructive. *Sanchez* is a case in which a Colorado federal district judge considered the defendant's motion for summary judgment on the plaintiff's Title VII hostile work environment, retaliation, and constructive discharge claims.²³¹ The *Sanchez* court granted the summary motion despite the presence of several troubling undisputed facts and the mandate on summary judgment to construe all facts in the light most favorable to the plaintiff as the non-moving party.

The plaintiff in *Sanchez* was Carlos Sanchez, a man of Mexican descent who worked for El Paso County from May 1986 to January 1994 and began work for the County's sheriff's office in December 1990.²³² At the time of his termination, Sanchez was a deputy sheriff.²³³ As the district court recognized, "[t]he problems began in December 1990, when Sanchez was accepted as a deputy in the County's training office" where "[s]hortly after arriving," then-Sheriff Bernard Barry "began referring to Sanchez, often publicly, as 'wetback,'" including Barry introducing Sanchez "as his 'token wetback'" at a new deputy graduation ceremony.²³⁴ Despite notifying his immediate supervisor, who "relayed the concern up the chain of

²³⁰ 948 F. Supp. 950 (D. Colo. 1996).

²³¹ *Id.* at 953-55.

²³² *Id.* at 952-53.

²³³ *Id.* at 952.

²³⁴ *Id.* at 953.

command,” Barry “continued to refer to Sanchez as ‘wetback’ until October 1992.”²³⁵

In addition to enduring racial slurs from the Sheriff, Sanchez claimed that he was treated differently than similarly situated white deputies, including the imposition of a one-day suspension for using profanity during a training while white deputies “routinely used profanity without any discipline,” that he was transferred back to detention — which Sanchez considered a demotion because it was last on his list of preferred positions, that while working in detention he was told to remove a cappuccino machine by his commander despite the ability of non-Hispanic officers to keep their cappuccino machines, and receiving a one day suspension “for providing inaccurate information to a superior” while Sanchez testified at his deposition that the real reason he was suspended was that he reported that same superior’s personal use of the County carwash.²³⁶ Ultimately, after enduring all of these slurs and allegedly discriminatory actions by County supervisory personnel, Sanchez resigned because he believed the “working conditions at the County became intolerable.”²³⁷ All of these allegedly discriminatory acts (and several more) — other than the one-day suspension for using profanity during training — occurred prior to November 15, 1992, 300 days before Sanchez filed his EEOC charge. The 300-day figure is significant in that, at the time *Sanchez* was decided, an employee had to file a discrimination charge within 300 days of the alleged discriminatory act.²³⁸

The district court held that unless Sanchez could invoke the continuing violations exception or that the County had a policy of discrimination, under the then-binding Tenth Circuit precedent of *Purrington v. University of Utah*,²³⁹ it had to entirely disregard *any* act occurring prior to November 15, 1992 — including all of the “wetback” comments and the one-day suspension for using profanity during a training — unless those acts constituted either a series of related acts in a “dogged pattern” of discrimination or were part of the maintenance of a company policy.²⁴⁰ The district court’s rigid application of a November 15 cutoff for *any* relevant facts was the first stop on the way to deferring to the County and its dispute resolution and internal appeals processes.

²³⁵ *Id.*

²³⁶ *Id.* at 953-54.

²³⁷ *Id.* at 953.

²³⁸ *Id.* (citing 42 U.S.C. § 2000e-5(e) (2018)).

²³⁹ *Purrington v. Univ. of Utah*, 996 F.2d 1025 (10th Cir. 1993).

²⁴⁰ *Sanchez*, 948 F. Supp. at 953-54.

In *Purrington*, the Tenth Circuit clarified its view of the then-existing continuing violation doctrine²⁴¹ after considering a hostile work environment claim in which the supervisor engaged in several alleged acts of sexual harassment.²⁴² The central factual issue in *Purrington* was the Tenth Circuit's decision to agree with the Fifth Circuit that once the alleged harasser leaves the job (as did the alleged harasser in *Purrington*), the harassment ends and any acts prior to the harasser's departure may not necessarily be linked to subsequent acts such that a court could find that a continuing violation occurred.²⁴³ By contrast, Sanchez's ultimate supervisor, Sherriff Barry, who continuously called Sanchez a "wetback," remained employed throughout the entirety of Sanchez's time as a trainee and deputy sheriff.²⁴⁴ In addition, while *Purrington* held that "[e]vidence of a general work atmosphere" as well as "evidence of specific hostility directed toward the plaintiff" were "important factor[s]" in evaluating a hostile work environment claim,²⁴⁵ the district court failed to mention any of these aspects of the *Purrington* decision.

In deferring to the County and its discipline, appeals, and transfer decision-making processes, the *Sanchez* court applied a rigid bright-line rule in stripping any context from the post-November 15 acts — even where it was undisputed that Barry was still the sheriff and still the authority to whom Sanchez was forced to appeal (and who held ultimate supervisory authority over him)²⁴⁶ — finding that even when considering *all* of the post-November 15 acts, summary judgment was still appropriate as to his hostile work environment claim because Sanchez had failed to prove a series of related acts.²⁴⁷ In addition, the court, in a short two paragraph discussion dismissed Sanchez's

²⁴¹ Notably, in an opinion by Justice Thomas, the Supreme Court later overruled the Tenth's Circuit's decision in *Purrington* in holding that pre-limitations period acts are considered as part of a single hostile work environment — so long as at least one act constituting a hostile work environment occurred within the limitations period. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-18 (2002). The Tenth Circuit has recognized that *Morgan* has overruled *Purrington*. *Boyer v. Cordant Techs., Inc.*, 316 F.3d 1137, 1139-40 (10th Cir. 2003) (citing *Morgan*, 536 U.S. at 117-18).

²⁴² *Purrington*, 996 F.2d at 1027-28.

²⁴³ See *id.* at 1028-29.

²⁴⁴ *Sanchez*, 948 F. Supp. at 952-54.

²⁴⁵ *Purrington*, 996 F.2d at 1029.

²⁴⁶ *Sanchez*, 948 F. Supp. at 954 (explaining that Sanchez was forced to appeal his one day suspension "for providing inaccurate information to a superior" to Barry who "apologized" yet "[d]uring the apology," accordingly to Sanchez, "Barry angrily shook his finger at him and demanded that Sanchez respect him").

²⁴⁷ *Id.*

alternative claim that the County had a policy of discrimination.²⁴⁸ Curiously, the court held that “[b]y Sanchez’ own admission, Barry’s offensive conduct was brought to his attention and the references to Sanchez as ‘wetback’ ceased in October 1992.”²⁴⁹ This explanation is dubious as the court earlier explained that in March 1991, Sanchez “complained to his immediate supervisor” who then “relayed the concern up the chain of command” yet Barry continued to refer to Sanchez as a “wetback” until October 1992,²⁵⁰ meaning that Barry had made racially derogatory slurs to and about Sanchez for a total of twenty-two months, including nineteen months between when Sanchez complained about the comments and when they stopped.

Ultimately, through the inflexible — and questionable, particularly on summary judgment — application of now-obsolete legal doctrine, even considering only post-November 15 acts, the *Sanchez* court found the county’s procedures worthy of deference. Even the district court itself noted that Barry’s “pre-November 15” actions “would create an issue of triable fact as to a hostile work environment” and that “if not for the three hundred day filing requirement,” the “people of El Paso County may have been saddled with a sizeable judgment for Sanchez’s hostile work environment.”²⁵¹ As with many employment discrimination cases, *Sanchez* was settled and never appealed.²⁵²

G. Deference in the Context of Gender-Based Harassment: The Example of *Howard v. City of Robertsedale*

Consider, for example, *Howard v. City of Robertsedale*,²⁵³ a case in which an Alabama federal district court considered whether to grant summary judgment for the City of Robertsedale on the plaintiff’s Title VII hostile work environment sexual harassment claims and equal protection and due process Fourteenth Amendment claims pursuant to 42 U.S.C. § 1983.²⁵⁴

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 953.

²⁵¹ *Id.* at 954, 956.

²⁵² See Order Granting Motion to Dismiss, *Sanchez v. Bd. of Cty. Comm’rs*, No. 1:96-CV-00170 (D. Colo. Dec. 6, 1996) (Dkt. No. 66) (granting a stipulated motion to dismiss with prejudice with each party to pay its own costs and fees).

²⁵³ *Howard v. City of Robertsedale*, No. 03-0770-BH-C, 2004 WL 5551812, at *2 (S.D. Ala. Dec. 9, 2004), *aff’d*, 168 Fed. App’x 883 (11th Cir. 2006).

²⁵⁴ See *id.* at *4-10.

Elizabeth J. Howard was the plaintiff in *City of Robertsdale*.²⁵⁵ Howard began her career as the secretary and administrative assistant to the Chief of Police, Alan Lassiter, in May 1999.²⁵⁶ In this case, the defendant, *City of Robertsdale* actually conceded that shortly after Howard was hired, Lassiter engaged in frequent instances of sexual harassment of Howard.²⁵⁷ The opinion reveals that: “He grabbed her breasts and pinched her buttocks on a weekly basis”; “On multiple occasions he poked her between the legs with the antenna of his police radio”; “He grabbed her and attempted to kiss her multiple times per week”; “He would pull open her blouse and look at her breasts multiple times per week”; and “He made countless sexual comments towards Howard regarding her body and his desire to have sex with her.”²⁵⁸

The City had an anti-harassment policy and a complaint procedure in place, which stated:

All employees are responsible for helping to assure that we avoid harassment. If you feel you have experienced or witnessed harassment, you are to notify immediately (preferably within 24 hours) your immediate supervisor, personnel department, and/or the Mayor.²⁵⁹

Howard did not initially file a complaint, however, contending that she was “scared to death of [Lassiter]” and that he had prohibited his employees from going over his head to the Mayor.²⁶⁰

Beginning in December 20, 1999, Howard sought promotion to the position of Chief Dispatcher.²⁶¹ On April 6, 2000, another woman, Katrina Griffin, was appointed to that position.²⁶² Howard claimed that Lassiter told her that she was more qualified than Griffin but that “he would not promote her because he wished to keep her as his administrative assistant.”²⁶³ In 2002, Lassiter suspended Howard without pay for half a day after she complained about his harassing behavior toward another employee.²⁶⁴

²⁵⁵ *Id.* at *1.

²⁵⁶ *Id.*

²⁵⁷ *See id.* at *1-2.

²⁵⁸ *Id.* at *1.

²⁵⁹ *Id.* at *2.

²⁶⁰ *Howard v. City of Robertsdale*, 168 Fed. App'x 883, 885 (11th Cir. 2006).

²⁶¹ *Howard*, 2004 WL 5551812, at *1.

²⁶² *Id.* at *1.

²⁶³ *Id.*

²⁶⁴ *Id.* at *1.

In April 2002, Howard did approach Chief Dispatcher Katrina Griffin to complain about Lassiter's behavior but Griffin never reported the complaint.²⁶⁵ On May 27, 2002, Howard and her husband finally complained about the sexual harassment to the town's mayor, Charles H. Murphy.²⁶⁶ After Murphy received Howard's complaint, he contacted the City Attorney to investigate the situation.²⁶⁷ The City Attorney conducted an investigation and reported the results to Murphy on August 23, 2003.²⁶⁸ A disciplinary process was then initiated and Lassiter was terminated as Chief of Police on October 24, 2002 and was subsequently terminated by the City Council on November 4, 2002 for "lewd and immoral conduct" and "sexual harassment of a female subordinate."²⁶⁹ As of December 9, 2004, Howard remained employed by the City as an administrative assistant for the City's police department.²⁷⁰

In October, 2002, Howard filed a discrimination complaint with the EEOC and obtained a right to sue letter.²⁷¹ She filed a complaint against the City of Robertsdale, alleging a hostile work environment in violation of Title VII and section 1983.²⁷² Robertsdale filed a motion for summary judgment.²⁷³ The district court articulated the proper evidentiary standard on summary judgment and recognized that it must "resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences" in the non-moving party's favor.²⁷⁴ Nonetheless, the court ultimately deferred to the city's reporting policy and awarded summary judgment on all claims to the City.²⁷⁵

The district court's decision turned on Howard's failure to follow the strictures of the City's reporting policy. The court viewed the facts as analogous to the Eleventh Circuit's decision in *Madray v. Publix Supermarkets, Inc.*, in which the Eleventh Circuit held: "[O]nce an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees,

²⁶⁵ *Howard*, 168 Fed. App'x at 885.

²⁶⁶ *Howard*, 2004 WL 5551812, at *1.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at *2.

²⁷⁰ *Id.*

²⁷¹ *Id.* at *6.

²⁷² *Id.* at *3.

²⁷³ *Id.* at *1.

²⁷⁴ *Id.* at *2.

²⁷⁵ *See id.* at *10.

then it is incumbent on the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances.”²⁷⁶ The district court discounted Howard’s complaint to Griffin by pointing to another holding in *Madray* that “informal complaints to individuals not designated to receive or process sexual harassment complaints” were insufficient to put the defendant on notice of sexual harassment.²⁷⁷ And even though the City procedure’s requirement that Howard complain to her direct supervisor — the perpetrator of the harassment — violated EEOC guidelines, the district court, without further examination, implicitly accepted the propriety of the city’s reporting policy and its interpretation of its own definition of “immediate supervisor.”²⁷⁸

Further, the district court found that there were no triable issues of fact with respect to direct liability and actual knowledge on the part of anyone who could be construed to be Howard’s immediate supervisor even though Howard had asserted that a number of supervisory personnel, including the Chief Dispatcher, a police lieutenant and sergeant, all had *actual* knowledge of Lassiter’s verbal harassment.²⁷⁹ As to whether the city had constructive knowledge of Lassiter’s repeated and severe sexual harassment, the court again deferred to the reasonableness and adequacy of the city’s reporting policy.²⁸⁰

Howard’s hostile work environment claims likewise suffered defeat-by-deference. Using the *Faragher-Ellerth* affirmative defense, the city pointed to its anti-harassment policy and grievance procedure as evidence that it had taken reasonable steps to prevent and correct sexual harassment.²⁸¹ Although Howard presented substantial evidence that the anti-harassment policy was ineffective and that the complaint procedure would have required her to complain directly to her perpetrator, and even though Howard presented testimony from Sergeant Middleton’s deposition that “Police Chief Lassitter [sic] communicated a conflicting policy within his department that “he prohibited the employees in his department from going over his head and speaking with the Mayor,”²⁸² the court accepted the affirmative

²⁷⁶ *Id.* at *4 (citing *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11th Cir. 2000)).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at *4.

²⁷⁹ *See id.* at *4.

²⁸⁰ *See id.* at *4-6.

²⁸¹ *See id.* at *4-6.

²⁸² Initial Brief of Appellant at 14, *Howard v. City of Robertsedale*, 168 F. App’x 883 (11th Cir. 2006) (No. 05-10023).

defense, pointing to the fact that Howard had “allowed the harassment to continue for approximately two and a half years without reporting it to any of the parties designated to handle such complaints under the policy.”²⁸³ In failing to consider evidence pointing to clear inadequacies in both the antiharassment policy and the complaint procedure, the district court appears to have drawn an inference in favor of the moving party (the employer).

Finally, the court granted summary judgment for the City on Howard’s section 1983 claim in which it deferred to the formal language of the City’s anti-harassment policy. The court simply found, as to formal policy: “The City of Robertsdale certainly does not have an official policy condoning or encouraging these inappropriate acts by Mr. Lassiter. Rather, the City has a comprehensive anti-sexual harassment policy and reporting guidelines.”²⁸⁴ It then concluded, without analysis, that “[t]here is also no evidence of an unofficial custom or practice permitting such actions by the City.”²⁸⁵

As in *Serlin*, Howard, as plaintiff and appellant, fared no better on appeal. In an unpublished decision, the Eleventh Circuit found Howard’s delay in reporting Lassiter’s behavior unreasonable and found that the City properly supported its *Ellerth-Faragher* defense.²⁸⁶ The Eleventh Circuit, in failing to examine the adequacy of the City’s policy and instead using it to doom her case, placed Howard in a fatal Catch-22 — it notes that Howard “contends she never complained to the Mayor because Lassiter prohibited his employees from going to the Mayor” but that her “own actions . . . contradict this assertion” because she eventually did complain to Murphy.²⁸⁷ Howard’s initial fear and hesitation of violating a policy laid down by her direct supervisor and department head were rendered per se unreasonable because she chose to *eventually* complain to another individual in violation of that policy.

In affirming the district court’s grant of summary judgment as to direct liability, the Eleventh Circuit first dismissed Howard’s direct liability complaint by finding that “Title VII is not a general civility code” and that Lassiter’s “frequent remarks about female employees’ bodies and sex lives” simply “do not rise to the level of discrimination under Title VII and cannot serve as the basis for constructive

²⁸³ *Howard*, 2004 WL 5551812, at *8.

²⁸⁴ *Id.* at *9.

²⁸⁵ *Id.*

²⁸⁶ See *Howard v. City of Robertsdale*, 168 Fed. App’x 883, 888 (11th Cir. 2006).

²⁸⁷ *Id.* at 887.

knowledge.”²⁸⁸ It also affirmed the grant of summary judgment as to Howard’s section 1983 claims as it deferred to the adequacy of the City’s policy in finding that “[t]he record instead reveals a comprehensive sexual harassment policy, of which all employees were aware”²⁸⁹

In sum, *City of Robertson* is an example of deference by a trial and appellate court to the formal language of an antiharassment policy and reporting structure without consideration, as otherwise mandated by Supreme Court precedent in summary judgment cases, of the facts as presented by the plaintiff that tend to show the inadequacy and ineffectiveness of the reporting policy.

H. Symbolic Metrics, Judicial Politics, and Case Outcome

One might reasonably ask whether the rise in judicial deference to symbolic metrics of diversity might be attributable to conservative trends in the judiciary over the past half century. It is certainly true that the federal judiciary has become more conservative over time²⁹⁰ and that conservative judges are generally more likely to rule in favor of employers.²⁹¹ It is not the case, however, that conservative judges are more likely than liberal judges to defer to symbolic metrics of diversity. In fact, in her 2015 work, Krieger and her co-authors report that there is little difference in the likelihood of deference based on judicial politics in the district courts and that in the circuit courts, liberal judges are actually more likely than conservative judges to defer to diversity structures, perhaps because liberal judges are more impressed by the trappings of due process and rational governance.²⁹²

Judicial deference to diversity structures alone, moreover, does not guarantee that an employer will prevail because many other factors come into play in employment discrimination cases. Nonetheless, all else equal, judicial deference does make it much more likely that

²⁸⁸ *Id.* at 889.

²⁸⁹ *Id.* at 889-90.

²⁹⁰ See EDELMAN, WORKING LAW, *supra* note 2, at 190; Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 151-52 (2002).

²⁹¹ EDELMAN, WORKING LAW, *supra* note 2, at 70-72, 194; see also Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When “Best Practices” Win, Employees Lose: Symbolic Compliance and Judicial Interference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQUIRY 843, 859 (2006) [hereinafter *When “Best Practices” Win*].

²⁹² Krieger, Best & Edelman, *When “Best Practices” Win*, *supra* note 291, at 860.

employers will win employment discrimination cases.²⁹³ When judges adequately scrutinize diversity structures, the outcome of cases depends largely on whether the judge rules that the structures are adequate (in which case the employer generally wins) or inadequate (in which case the employee generally wins).²⁹⁴ When judges defer to diversity structures without adequate scrutiny, however, employers win at nearly the same rate as is the case when judges ruled that the structures are adequate.²⁹⁵

VII. THE LOGIC OF JUDICIAL DEFERENCE

We see judicial deference to diversity structures as part of a broader judicial reticence to review employers' personnel decisions. This logic is particularly evident in a phrase that we saw repeatedly in employment discrimination cases. With slight variations, the phrase suggested that courts should not act as "super-personnel departments."²⁹⁶ The phrase was typically used in a sentence like: "This court has repeatedly stated that it is not a super-personnel department that second-guesses employer policies that are facially legitimate."²⁹⁷

The increasing frequency with which the term "super-personnel department" is used illustrates the resonance of the idea that courts prefer to stay out of business decisions. Figure 6²⁹⁸, based on a Westlaw search for the term *super-personnel department* in Title VII opinions involving grievance procedures, anti-harassment policies, or diversity policies, shows the percentage of opinions that use the term over time. The figure suggests that judicial reluctance to second-guess employers' business and personnel decisions was becoming more common at the same time that judicial deference to diversity structures was rising.²⁹⁹ As of 2014, the term had been used in 498

²⁹³ See *id.* at 861.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 844, 858.

²⁹⁶ E.g., *Pina v. Children's Place*, 740 F.3d 785, 798 (1st Cir. 2014); *Abraham v. N.Y. City Dep't of Educ.*, 398 F. App'x 633, 635 (2d Cir. 2010); *Torlowei v. Target*, 401 F.3d 933, 935 (8th Cir. 2005); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999); *Perfetti v. First Nat'l Bank of Chi.*, 950 F.2d 449, 455 n.6 (7th Cir. 1991).

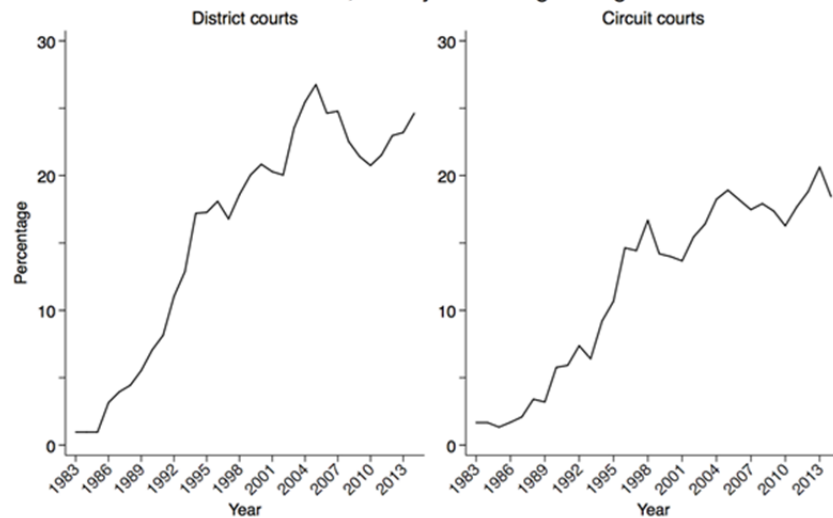
²⁹⁷ See, e.g., *Widmar v. Sun Chem. Corp.*, 772 F.3d 457, 464 (7th Cir. 2014).

²⁹⁸ Figure 6 was originally published in EDELMAN, *WORKING LAW*, *supra* note 2, at 192.

²⁹⁹ We searched the Westlaw CTA and DCT databases, separately, for "super-personnel department" "super personnel department" ((super /3 person!) /3 department) within cases located through a Westlaw search for ("title vii") &

circuit court opinions and in 2,855 district court opinions involving grievance procedures, anti-harassment policies, or diversity policies. This term actually appears in only a small proportion of all EEO opinions in which judges defer to diversity structures, but it illustrates the general reticence of judges to second guess employers' personnel actions and helps to explain why judges so often give little weight to evidence that suggests that employers' diversity policies may be merely symbolic rather than both symbolic and substantive.

Figure 6
Percentage of opinions with the phrase *super-personnel department*, 1983 to 2014, three-year moving average



CONCLUSION

Diversity structures have become, to a great extent, symbolic metrics of diversity. If diversity structures were uniformly effective, this trend would not be problematic. But when judges defer to diversity structures without adequate attention to the adequacy of these structures, they undermine rather than protect civil rights in the

((grievance appeals complaint /3 polic!) ("open door policy" ombud!)) ((anti! /3 polic!) (harass! /3 polic!) (divers! /3 polic!)). The percentage of cases in which the term "super-personnel department" appeared was calculated by dividing the number of such cases by the total number of cases found through the Westlaw search for Title VII cases involving grievance procedures, anti-harassment policies, or diversity policies. Figure 6 starts in 1983, when the first instance of that term appears in *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983).

workplace. We have presented quantitative evidence showing that judicial deference to diversity structures has become the norm since 2000, especially in cases involving motions for summary judgment and in cases alleging hostile work environment harassment. We have also presented three case examples, *Serlin*, *Sanchez*, and *City of Robertson*, which illustrate how deference and the subtle use of different standards of proof can work together to the significant disadvantage of employment discrimination plaintiffs. The graphs, based on quantitative analyses of a representative sample of federal trial and appellate cases from 1964 through 2014, suggest that the deference illustrated in these three cases is becoming more typical in civil rights adjudication generally.

Many diversity structures in today's corporations and in higher education do promote greater equality and inclusion for women, people of color, and other protected groups. But it is critical that lawyers, judges, and policymakers recognize that the diversity structures that have become a commonplace feature of the American corporate workplace are not always evidence of nondiscrimination.

In hostile work environment cases, for example, where employers invoke the *Faragher-Ellerth* affirmative defense, judges should recognize that Justice Kennedy's presumption in *Ellerth* and *Faragher* that anti-harassment policies and complaint procedures provide evidence that the employer took reasonable care to prevent and correct harassing behavior does not fit the reality of many workplaces. Social science evidence shows that everyday practices may discriminate against employees even where policies prohibiting such discrimination exist and that informal threats or organizational culture may lead employees reasonably to fear using employers' complaint procedures.³⁰⁰ Thus judges should take very seriously evidence suggesting that diversity policies are ineffective or inadequate in light of workplace culture.

Similarly, judges should recognize in summary judgment cases that any presumption that the presence of diversity structures automatically indicates an employers' good faith effort to comply with Title VII or other civil rights laws, especially in light of evidence of the inadequacies of those structures, may constitute drawing an inference in a light favorable to the *moving party*, in contravention of the rule articulated by the Supreme Court in *Matsushita Elec. Indus. Co. v.*

³⁰⁰ EDELMAN, WORKING LAW, *supra* note 2, at 37; *see also, e.g.*, KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 91 (1988).

Zenith Radio Corp.,³⁰¹ which specifies that judges should draw all inferences in the light most favorable to the nonmoving party.

The *Bakke* case in 1978 articulated a compelling state interest in diversity and help to bring the term “diversity” into the public lexicon. The U.S. Supreme Court never carried the compelling state interest logic from the *Bakke* decision into the employment realm, but the term has nonetheless become a central mantra in employment and education. An army of diversity consultants, human resource specialists, and management consultants alike recommend that companies have diversity mission statements, diversity policies, and in many cases, diversity training. Companies sing the praises of diversity as a strategy for expansion and for profit. Institutions of higher education have likewise brought the rhetoric of diversity to the forefront of their recruitment and on-campus programming.

But the corporate interest in diversity does not always translate into a workforce that has more women or minorities in high level positions. Business executives know that purely symbolic diversity structures will serve as well as effective structures in avoiding legal liability. The same is true for higher education — touting diversity as a university’s watchword does not automatically result in a diversity faculty, student body, or staff (and does not guarantee success for all students regardless of background after schooling is complete).

Judges, for their part, operate largely in a check-the-box fashion, looking for the presence of a diversity policy together with some sort of complaint procedure but rarely looking at the workplace disadvantages that co-exist with these policies. The implications of failing to move beyond this approach in evaluating discrimination claims are profound. As a result, forty years after *Bakke*, diversity is more myth than reality.

³⁰¹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).