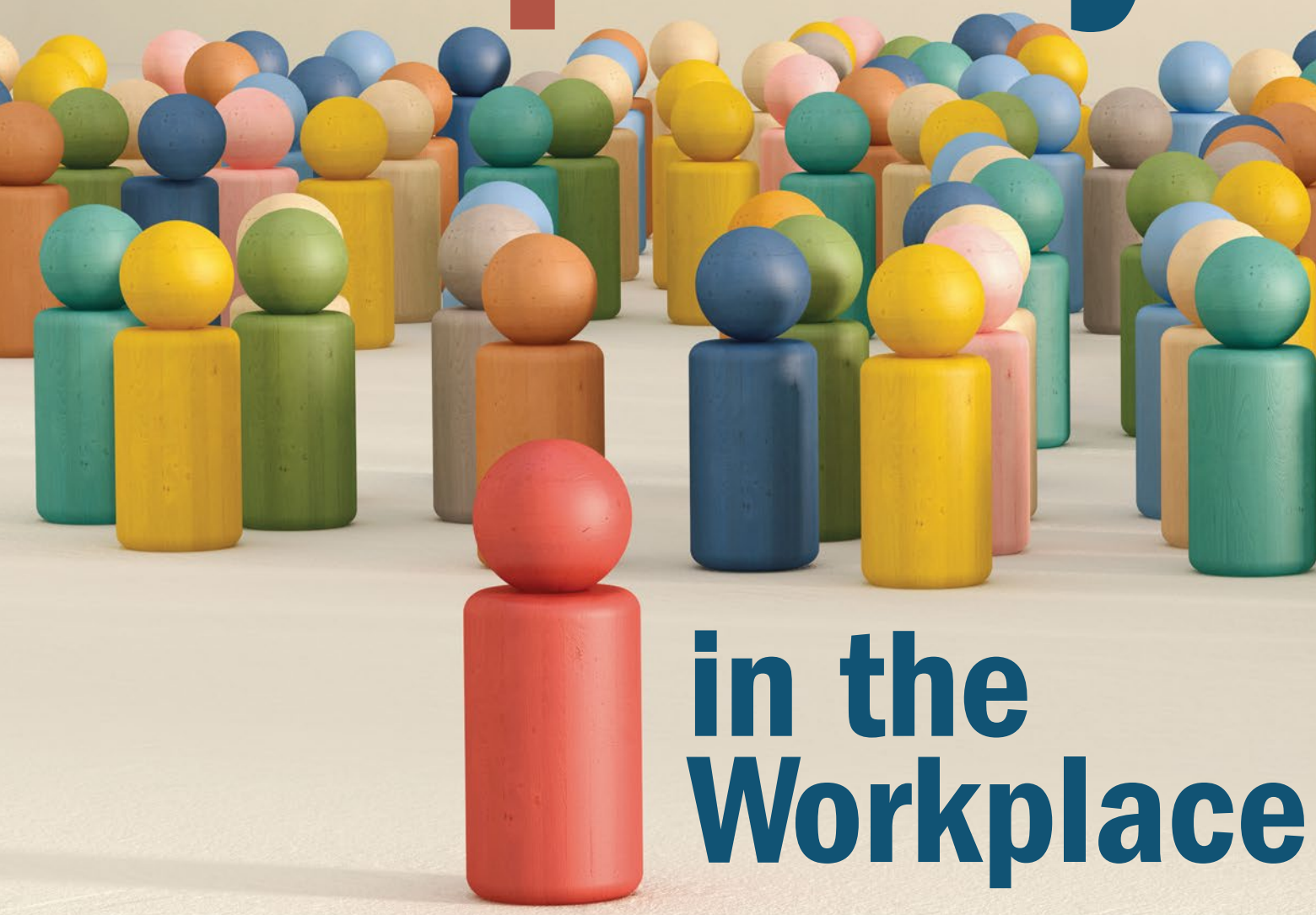
Disparity in the Workplace



By || **Tamarah Prevost**

When large corporations discriminate against people of color, it often is based on broader, systemic biases. Here are seven things to know when taking these cases.

There can be no legitimate dispute that systemic discrimination exists in almost every sector of modern society.[1] Predictably, these systemic biases also exist in the workplace and result in a host of adverse consequences for employees of color, ranging from ongoing microaggressions to unjustified decreases in compensation to ceilings on advancement. These effects often starkly contradict public commitments to increasing diversity, equity, and inclusion expressed by large corporations. And they can be harder for plaintiff attorneys to detect and prove in employment race discrimination cases.

Handling these cases against large entities requires, unsurprisingly, an understanding of the substantive and procedural law. But grasping the broader impacts of systemic discrimination and tapping into the potential of public pressure also can advance your client's case. Knowing the discriminatory effects that certain policies can have and harnessing the right tools will pave the path to success in bringing these claims. Here are seven tips to get started.

1. Know the two main liability theories.

Title VII of the Civil Rights Act of 1964 protects people from workplace discrimination at companies with 15 or more employees, and the statute deems race as a protected class.[2] Race discrimination employment claims can be pursued under two main theories: disparate treatment and disparate impact.[3] While distinct, both theories are fueled by a common understanding that employees should not be disadvantaged in the workplace on account of their race.

Race discrimination encompasses employment decisions or harassment based on stereotypes and assumptions about abilities, traits, or the performance of individuals who are members of certain racial groups.[4] A disparate treatment claim arises when an employer, substantially motivated by race, discriminates against an employee.[5] Usually, direct evidence of this, such as comments, photos, or emails, is levied to prove an employer's racist intent and that a worker was subject to adverse action because of discrimination.

If direct evidence is not available, circumstantial evidence can be used to prove that an employer's intent is discriminatory. For example, if an employer affords favorable treatment (such as job perks, opportunities for advancement, or invitations to exclusive events) to your client's white counterparts for no legitimate reason, coupled with other evidence, this could support a claim of racially discriminatory intent.

Conversely, disparate impact claims do not require an element of racial animus. Employees must instead identify a facially "neutral" policy or practice that has adversely impacted them as people of color. To cite a very early example, in *Griggs v. Duke Power Co.*, a power plant's requirement that applicants hold a high school education or pass a standardized general intelligence test was deemed unlawful, because both requirements operated to disqualify Black employees at a substantially higher rate than white applicants, and neither standard was shown to be significantly related to successful job performance.[6]

The rationale behind disparate impact cases is that some employment practices, adopted without a deliberately discriminatory motive, may operate as the functional equivalent of intentional discrimination.[7]

But a disparate impact claim is not available under Title VII if the plaintiff's employer can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[8] In *Griggs*, for example, the employer could not make this showing because it was largely hiring laborer positions, and formal academic education was not deemed job related.[9]

Regardless, "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability" cannot be redeemed by an employer's "good intent."[10] Congress, in enacting Title VII, and the U.S. Supreme Court, in interpreting it, have understood that discrimination can occur as a result of systemic biases, irrespective of the employers' stated motivations.[11]

2. Disparate treatment on account of race is (still) widespread.

Contrary to what some may believe, racial discrimination in employment still exists nationwide in all industries. In the last five years alone, over 120,000 charges have been filed with the U.S. Equal Employment Opportunity Commission (EEOC) for employment race discrimination, a figure that does not even account for any other charges filed with state agencies.[12]

The EEOC has resolved more than one dozen cases against employers for egregiously racist workplaces involving racial slurs, denial of apprenticeship positions on account of race, nooses hanging at the workplace, and refusals to hire Black employees.[13]

3. Disparate impact may not be as obvious, but it is still common.

Even if blatant discriminatory conduct does not present itself, be prepared to look deeper. A demonstrable, direct act of racism such as a hate crime or racial slur is easily identified. But sometimes the disparate impacts that people of color experience in the workplace are less immediately clear and do not

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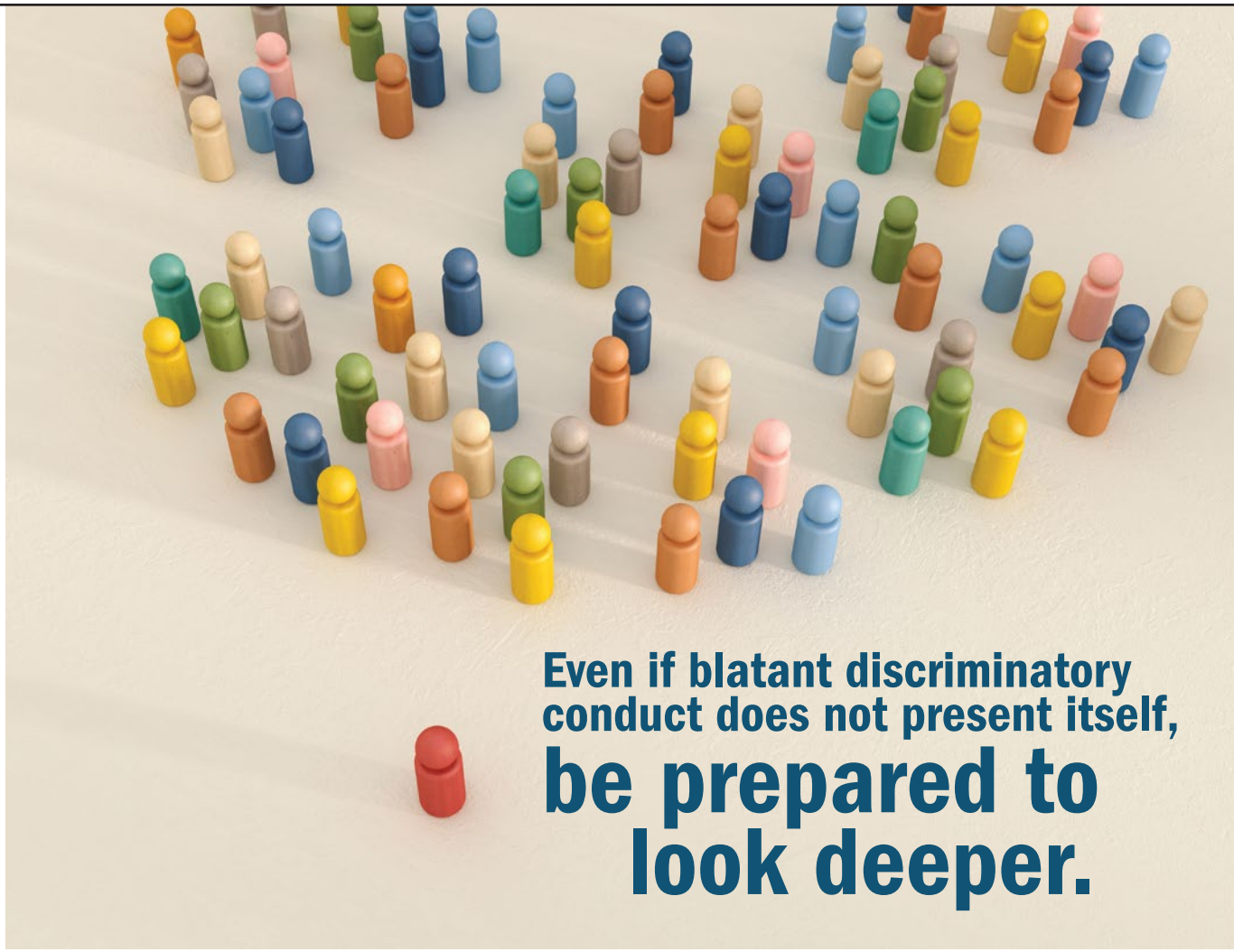

present as explicitly racist conduct.[14]

Perform a searching inquiry of the way your client's workplace operates to stifle employees' chances for success on account of their race. Disparate impacts are undoubtedly present, particularly in large companies that may rely on flawed algorithms or other systematized measures to administer or inform their employees' positions within the company. The human resources or other department of a company responsible for the technology, programs, or policies that determine salary levels for the company's employees may have evidence of unequal pay on account of race, which would be ripe for a disparate impact claim.

4. Learn the substantive law.

As the Supreme Court has pointed out, disparate treatment cases involve "the most easily understood type of discrimination."[15] Disparate impact claims, however, can be harder to immediately perceive—but the Court has addressed this in long-standing case law. A good place to start is with the *Griggs* case discussed earlier.[16]

In another case, *International Brotherhood of Teamsters v. United States*, the defendant freight company engaged in a pattern or practice of discriminating against minorities by exacting differential treatment toward Black and Spanish-surnamed people.[17] After these employees were hired, they were given "lower paying, less desirable jobs . . . and were . . . discriminated against with respect to promotions and transfers."[18]

And in *Watson v. Fort Worth Bank and Trust*, a bank had not developed formal criteria for evaluating candidates for the positions for which the Black plaintiff unsuccessfully applied.[19] It relied instead on the subjective judgment of supervisors who, it turned out, were acquainted with the other candidates.[20] The plaintiff was denied four separate promotions by different white supervisors.[21] This case arose from what is now a well-known phenomenon of systemic discrimination: implicit bias in job interviews.[22]

These cases reveal that disparate impact along racial lines takes different forms and is not industry specific. Be aware of the precedents in your states, and be prepared to creatively frame your claims.

5. Consider the procedural hurdles.

Many large corporate employers have forced arbitration provisions in their employment agreements, depriving

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plaintiffs of the right to a jury trial while allowing them to litigate privately and avoid pressure from investors, shareholders, and consumers. And the AAA has reported that 88% of its arbitrators self-identified as white—which some have argued further undermines a victim's right to have a case heard by their peers, an especially relevant issue in a race discrimination case.[23]

Recent extraordinary advances that amended the Federal Arbitration Act (led tirelessly by AAJ over many years) have now prohibited forced arbitration of claims by survivors of workplace sexual harassment or sexual assault.[24] If a victim of race discrimination also has sexual harassment or assault claims, there is a high likelihood that the entire case can avoid arbitration under this new federal law. Unfortunately though, because racial discrimination is not specifically covered under this federal arbitration ban, clients with standalone race claims likely will be compelled to arbitrate them if their employment agreement so provides.[25]

6. Harness the media, as appropriate.

Even if it may not be possible to keep your case publicly litigated in court, you can still harness the power of the media to tell your client's story, apply some degree of public pressure to the corporation, and contribute to the broader conversation about race. While taking care to protect your client's best interests and comply with any ethical duties, securing positive media treatment can be beneficial in an employment race discrimination case against a large defendant entity:

- It notifies potential witnesses of the wrongful conduct. Witnesses who have suffered similar discrimination often contact me after reading a story about my client's case. This can be enormously helpful if they agree to testify, as other witnesses may still work for the defendant employer and be unwilling to provide favorable testimony for fear of retribution.
- It can make clients feel that their story is being told. Especially if forced to arbitrate, a client unable to tell their story to a jury can find press coverage extremely validating.
- It can add a valuable contribution to the public dialogue around race in our country. Reporting on racist conduct that continues to pervade our workplaces raises awareness. And educating the public about the disparate impacts that facially neutral policies have on people of color is more important now than ever, especially while education in schools on these topics is being consistently attacked.

Despite these potential benefits, take extreme care to avoid pitfalls specific to these cases. For example, clients terminated and looking for work should consider the reputational harm that could accompany media representations of them as employees suing their former employers. It is unlawful for an employer to refuse to interview or hire an employee because of a civil legal claim, but it happens. And media attention can add another level of "re-victimizing" a plaintiff who is already being re-victimized through the litigation process. Our clients should be in the driver's seat in deciding the level of media exposure, if any, that they are subjected to.

Also review the scope of the litigation privilege in your state.[26] My firm shares a complaint with the press only after it has been filed with the court and file-endorsed (marked as received and officially filed by the court). You don't want to risk a defamation claim against your client or your firm. What you disclose to the media must be truthful and expressed in terms of the allegations in your client's complaint. And ultimately, your client should make the final decision to harness the media as a co-advocate.

7. Recognize the systemic biases.

Undertaking this work requires recognizing that adverse impacts in the workplace on account of race arise from historic roots of oppression. And even outside of the employment context, explicit racist intent is not necessary for a system to have pervasive and damaging discriminatory impacts. This phenomenon is widespread and statistically supported in our education,[27] housing,[28] criminal justice,[29] home ownership,[30] financial,[31] and health care systems.[32] Worse, they appear neutral while underrepresenting, underserving, or outright excluding people of color. The purported neutrality of these systems obscures their discriminatory effects. Disparate impact employment claims are a microcosm of the same discrimination occurring in other areas of our society.

Understanding the machinations of systemic discrimination in our country makes us better litigators when representing victims of race discrimination in the workplace. These cases do not happen in a vacuum. Our work, aside from representing clients, is to understand the inequalities in our system so we can actively focus on changing them.

Tamarah Prevost *is a partner at Cotchett, Pitre & McCarthy in Burlingame, Calif., and can be reached at tprevost@cpmlegal.com.*

Notes

1. There is ample statistical proof of discriminatory impacts on people of color in education, housing, the criminal justice system, home ownership, lifetime earning potential, and health care. *See, e.g.*, NAACP, *Education Innovation*, https://www.naacp.

org/issues/education-innovation; NAACP, *Inclusive Economy*, https://www.naacp.org/issues/inclusive-economy; NAACP, *Criminal Justice Fact Sheet*, https://www.naacp.org/criminal-justice-fact-sheet/; Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, Am. Bar Ass'n, https://tinyurl.com/3xhwaj4m; Ctrs. for Disease Control & Prevention, *COVID-19 in Racial and Ethnic Minority Groups*, https://tinyurl.com/mtyv75p2; Ctrs. for Disease Control & Prevention, *What Is Health Equity?*, https://www.cdc.gov/healthequity/whatis/index.html.

2. 42 U.S.C. §2000e et seq.
3. *Id.*
4. *See generally* U.S. Equal Emp. Opportunity Comm'n, *Questions and Answers About Race and Color Discrimination in Employment*, https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment.
5. *See, e.g.*, *Cottman v. Rubin*, 35 Fed. App'x 53 (4th Cir. 2002); *Cicalese v. Univ. of Texas Med. Branch*, 924 F.3d 762 (5th Cir. 2019) (national origin discrimination).
6. 401 U.S. 424 (1971).
7. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
8. 42 U.S.C. §2000e-2(k)(1)(A)(i).
9. *Griggs*, 401 U.S. at 431 (1971).
10. *Id.* at 432.
11. As a separate basis for relief outside the scope of this article, federal law also prohibits retaliating against any employee for exercising their right to be free from discrimination and harassment in the workplace. *See* 42 U.S.C. §2000e-3(a).
12. See U.S. Equal Emp. Opportunity Comm'n, *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, https://tinyurl.com/rejp6jk3.
13. *See* U.S. Equal Emp. Opportunity Comm'n, *Significant EEOC Race/Color Cases (Covering Private and Federal Sectors)*, https://tinyurl.com/3bw3zsva.
14. There are countless examples of this phenomenon. One study found that Black men had the largest "uncontrolled pay gap" relative to white men, when comparing the average earnings of Black men and white men in the United States. On average, the study found, Black men earned 87 cents for every dollar a white man earned. Male Hispanic workers had the next largest gap, earning 91 cents for every dollar earned by white men. *See* Jackson Gruver, *Racial Wage Gap for Men*, Payscale, May 7, 2019, https://www.payscale.com/research-and-insights/racial-wage-gap-for-men/.
15. *Watson*, 487 U.S. at 986 (quoting *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977)).
16. 401 U.S. 424.
17. 431 U.S. at 329–330.
18. *Id.*
19. 487 U.S. 977, 982 (1988).
20. *Id.*
21. *Id.*
22. Some courts have noted that implicit bias may be a form of intentional discrimination sufficient to support a disparate treatment claim, though the law is far from developed on that point. *See, e.g., Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999) ("Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias."). I posit that one reason to pursue these cases is, hopefully, to make more good law that recognizes this form of discrimination.
23. AAA, *Arbitrator Demographic Data*, https://tinyurl.com/2p949wkh; *see also* Am. Ass'n for Justice, *Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities*, June 2021, https://www.justice.org/resources/research/forced-arbitration-hurts-women-and-minorities.
24. *See* 9 U.S.C.A. §402 (West through Pub. L. 117-90).
25. There may be other arguments for overcoming an arbitration agreement, depending on the state's contractual law (and whether the FAA preempts it), such as unconscionability and lack of mutuality or mutual assent. For more, see Menaka N. Fernando & Jennifer S. Schwartz, *Chipping Away at Workers Rights: Tackling Forced Arbitration*, Trial, Sept. 2018, at 31.
26. In California, for example, the litigation privilege is statutory and expounded on by courts. *See* Cal. Civ. Code §47 (West 2021); *Kashian v. Harriman*, 120 Cal. Rptr. 2d 576 (2002) (noting the broad scope of the litigation privilege).
27. *See, e.g.*, NAACP, *Education Innovation*, *supra* note 1.
28. *See, e.g.*, NAACP, *Inclusive Economy*, *supra* note 1.
29. *See, e.g.*, NAACP, *Criminal Justice Fact Sheet*, *supra* note 1.
30. *See, e.g.*, NAACP, *Inclusive Economy*, *supra* note 1.
31. *See, e.g.*, *id.*
32. *See, e.g.*, Bridges, *supra* note 1.