Access & Asymmetry in Employment Discrimination Law

Pam Jenoff
ACCESS & ASYMMETRY IN EMPLOYMENT DISCRIMINATION LAW

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Abstract

The federal anti-discrimination claiming system as presently constructed excludes close to one-fifth of the American workforce outright, and prevents even greater numbers of individuals from seeking redress for reasons unrelated to the merits of their claims. Stringent statutory requisites as to covered employers, administrative exhaustion and the limitations period create barriers to access that not only prevent individuals from obtaining relief but permit discrimination to persist on a systemic level, hobbling realization of the anti-discrimination mandate. These problems are further compounded by arbitrary asymmetries in the access requirements of various anti-discrimination statutes.

Recent scholarship in the employment discrimination area has focused upon the normative structure of discrimination claims, i.e., whether the existing framework, required elements of proof and burden-shifting structure are effective in addressing racism, sexism and other biases in the workplace or whether a new, more fluid schema is required to capture the complexities of modern prejudice and its many manifestations. These articles miss the more fundamental question of access to employment discrimination law.

This article contributes to the field by comprehensively rethinking the barriers-to-access problem in anti-discrimination law. Part I examines the evolution of the federal employment statutes and their varying requirements for the minimum number of employees, exhaustion and timeliness. Part II considers the nature of the barriers to access, their merits as well as the problems they create. Part III analyzes the problem of asymmetries among the employment laws with respect to access. Finally, Part IV re-visions the requirements of the anti-discrimination claiming system and offers a proposal whereby: 1) all employees would be covered by the federal anti-discrimination statutes and given access to the Equal Employment Opportunity Commission, which would have adjudicative, rather than merely investigative, authority over claims; 2) individuals employed by larger companies would be permitted to opt out of the EEOC process and proceed directly to federal court; and 3) the access requirements would be harmonized across the anti-discrimination statutes. These reforms would have the benefits of widening access to the anti-discrimination claiming system while eliminating duplication of efforts and ensuring that the system operates more effectively.
INTRODUCTION

The purpose of federal anti-discrimination laws in the United States is to prohibit discrimination against “any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin” or other legally-protected characteristic. In reality, these laws protect only a subset of individuals who work for larger companies. Moreover, only a fraction of those claims brought by covered persons are ever heard on the merits. The rest are excluded by the requirements that would-be plaintiffs bring their claims very quickly and withstand a protracted administrative agency process in order to seek redress in court.

The limited access to the claiming system caused by these barriers has serious consequences. Individuals whose complaints go unanswered must continue to withstand discrimination in the workplace or the loss of work and income without remedy. More broadly,

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the lack of access to federal anti-discrimination protection for a significant percentage of the
American workforce obscures the extent of existing discrimination and allows unlawful conduct
to continue in the workplace.

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normative structure of discrimination claims, i.e., whether the existing frameworks, required
elements of proof and burden-shifting structures are effective in addressing racism, sexism and
other biases in the workplace or whether a new, more fluid schema is required to capture the
complexities of modern prejudice and its many manifestations. These articles, while making
an important contribution to the field, miss the more fundamental question of access to
employment discrimination law. Understanding the extent to which the current system fails to
protect certain individuals and claims and how such exclusions frustrate the purpose and
efficacy of the anti-discrimination claiming system is a necessary precursor to any meaningful
discussion of the internal mechanisms of the statutes.

The federal anti-discrimination statutes, as presently written and interpreted by the
courts, contain three principle barriers to access which prevent individuals from pursuing
claims: 1) the minimum number of employees requirement, or “small business exemption”
which excludes from the purview of the statutes employers who do not employ a threshold

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2 Sandra Sperino, Rethinking Discrimination Law, __ MICHIGAN L. REV. ___ (forthcoming); Anastasia
Niedrich, Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination
Protections, 18 MICH. J. GENDER & LAW 25 (2011); Jessica A. Clarke, Beyond Equality? Against the Universal
Turn in Workplace Protections, 86 IND. L. J. 1219 (2011); Kerri Lynn Stone, From Queen Bees and
Wannabees to Worker Bees: Why Gender Stereotyping Considerations Should Inform the Emerging Law of
Workplace Bullying, 65 N.Y.U. ANN. SURV. AM. L. 35 (2009); Minna J. Kotkin, Diversity and
Discrimination: A Look at Complex Bias, 50 WM. & MARY L. REV. 1439 (2009); Martin J. Katz, Unifying
Disparate Treatment (Really), 59 HASTINGS L. J. 643 (2008).
number of employees\(^3\); 2) the exhaustion requirement, which mandates an employee file a claim with an administrative agency before being able to bring her claims in federal court\(^4\); and 3) the statute of limitations, which excludes claims that have not been filed within a specified period of time.\(^5\) The cumulative effect of these barriers to access is to exclude from coverage a significant percentage of the workforce and dismiss a great number of claims based on technicalities unrelated to the merits.

The barriers-to-access problem is compounded by the fact that these requirements diverge considerably among the employment laws, with varying minimum coverage thresholds, exhaustion requirements and statutes of limitations. These asymmetries, which are largely a result of happenstance and political climate and compromise rather than legislative intent, cause uncertainty and inefficiencies which further frustrate the employment discrimination claiming system. The differing access requirements create an environment in which employees face considerable confusion as to the protections are available and the steps that they must take to preserve their rights and prosecute infringements. Employees may also feel compelled to tailor their claims to fit particular statutory schema, rather than espousing claims based on the discrimination suffered. Additionally, employers are uncertain as to their legal obligations and are often forced to choose the course of action that they perceive as least risky rather than attempting to act without bias. These asymmetries also cause systemic problems, including


duplication of efforts, wasted resources and inconsistent outcomes for claims based on identical facts.

Despite the difficulties presented by these barriers to access and the asymmetries among them, the requirements of employer size, administrative exhaustion and timeliness are not without value. They play a significant gatekeeping function which cannot be dispensed with wholesale if the system is to continue functioning. Properly reconceived to work together, they may serve to widen access to the claiming system and further the goals of the anti-discrimination laws.

This article contributes to the field by comprehensively rethinking the barriers-to-access problem in anti-discrimination law. Part I examines the evolution of the federal employment statutes and their varying requirements for the minimum number of employees, exhaustion and timeliness. Part II considers the nature of the barriers to access, their merits as well as the problems they create. Part III analyzes the problem of asymmetries among the employment laws with respect to access.

Finally, Part IV re-envisions the requirements of the anti-discrimination claiming system. Central to this proposal is the notion that all employees should be afforded some protection under the federal anti-discrimination laws, regardless of employer size. To that end, the article proposes a reconfiguration of the Equal Employment Opportunity Commission, the federal administrative agency which handles the processing of employment discrimination charges, to receive claims of discrimination from all employees. The EEOC should also be given adjudicative, not just investigative authority and would be the primary vehicle for individuals seeking redress from small employers. Employees of larger entities who do have the option of
bringing a law suit in court should be given the option of pursuing administrative adjudication or bypassing the agency and proceeding directly to court in order to avoid duplicative processes and waste of resources. The proposal also includes making the requirements for employer coverage, administrative exhaustion and timeliness uniform across all of the federal employment discrimination statutes in order to eliminate the confusion and inefficiencies created by the asymmetry which exists in the current system.

By reconfiguring the EEOC to serve as an agency that provides access for those who need its assistance, the proposal widens the protection of the anti-discrimination statutes to include all employees while keeping in place the structure necessary for the system to function. Expanding the statutes of limitations and harmonizing other requirements across the statutes will provide the fairness and certainty needed to help the system operate more effectively.

I. THE FEDERAL ANTI-DISCRIMINATION LAWS

In order to understand the barrier-to-access problem and the attendant need for reform, it is first necessary to highlight briefly the evolution of the current employment discrimination claiming system in its historical context.

A. Reconstruction and the Early 20th century

Present day anti-discrimination law originated from the Reconstruction-era legislation that arose after the Civil War in an attempt to protect the rights of the newly freed blacks and begin to integrate them into American society.6 Section 1981 of the Civil Rights Act of 1886 provides:

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All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.\textsuperscript{7}

The language of Section 1981, which prohibits discrimination in the making and enforcement of contracts, has long been interpreted by the courts to include the contractual relationship between employers and employees\textsuperscript{8}, a fact which was codified by Congress in 1991:

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.\textsuperscript{9}

Notwithstanding today's complex anti-discrimination scheme and despite the many statutes which have been passed in the past century, Section 1981 remains a separate and independent basis for bringing a race discrimination claim.\textsuperscript{10} The definition of “race” under Section 1981 has been interpreted broadly by the courts to include ancestry and ethnicity, giving rise to protection for these claims as well.\textsuperscript{11}

Section 1981 provides an attractive option for those who fall within its coverage because the statute’s protections are quite broad and its access requirements considerable less

\textsuperscript{7} 42 U.S.C. § 1981(a).
\textsuperscript{8} Grossman, supra note 6 at 330; see also Lauture v. IBM, 216 F.3d 258, 264 (2d Cir. 2000); Perry v. Woodward, 199 F.3d 1126, 1133 (10th Cir. 1999); Spriggs v. Diamond Glass, 165 F.3d 1015, 1018; Fadeyi v. Planned Parenthood Assn., 160 F.3d 1048 (5th Cir. 1998).
\textsuperscript{11} Johnson v. Riverside Healthcare System LP, 534 F.3d 1116 (9th Cir. 2008) (noting that Section 1981 “...creates a cause of action only for those discriminated against on account of their race or ethnicity.”); Pourghoraishi v. Flying J, Inc., 449 F.3d 751 (7th Cir. 2006) (recognizing Section 1981 claim based on Iranian ancestry).
than most of the other federal anti-discrimination laws.\textsuperscript{12} Section 1981 applies to all employers regardless of size.\textsuperscript{13} Individuals are not required to file a charge with an administrative agency under Section 1981 but can bring a lawsuit directly in federal court.\textsuperscript{14} Section 1981 does not set forth a statute of limitations, but courts have generally held that claims must be filed within four years.\textsuperscript{15} A successful plaintiff may receive unlimited compensatory and punitive damages under Section 1981.\textsuperscript{16}

B. The Civil Rights Era

The passage of Section 1981 did not mark the beginning of widespread statutory protection for employment discrimination claims. Rather, while statutory employment law expanded in areas such as collective bargaining with passage of the National Labor Relations Act\textsuperscript{17} in 1935 and wage-hour with the enactment of the Fair Labor Standards Act\textsuperscript{18} in 1938, discrimination law remained largely static during the first half of the twentieth century.

1. Title VII

More than eighty years after passing Section 1981, Congress enacted the first comprehensive anti-discrimination law, the Civil Rights Act of 1964, which addressed many of the lingering areas of discrimination faced by minorities in the United States, such as public

\textsuperscript{12} However, Section 1981 only covers intentional discrimination and does not recognize disparate impact claims. Brake & Grossman, \textit{The Failure of Title VII as a Rights Claiming System}, 86 N.C. L. REV. 335 (2008).

\textsuperscript{13} Wagner v. Merit Distribution, 445 F.Supp.2d 899 (W.D. Tenn., 2006).

\textsuperscript{14} Surrell v. California Water Service Co., 518 F.3d 1097 (9th Cir. 2008).


\textsuperscript{16} Metoyer v. Chassman, 504 F.3d 919 (9th Cir. 2007).

\textsuperscript{17} 29 U.S.C. § 151 et seq.

\textsuperscript{18} 29 U.S.C. § 201 et seq.
accommodation, school segregation and voting registration.\textsuperscript{19} Title VII of the Act, which includes the provisions related to employment, provides that it shall be unlawful for a covered employer, “... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”\textsuperscript{20}

Now approaching its fiftieth birthday, Title VII has been amended a number of times in the intervening years.\textsuperscript{21} However, its fundamental framework has not changed and it remains the centerpiece of federal anti-discrimination legislation today. There are two principle types of claims under Title VII. The first is a disparate treatment claim whereby an individual alleges that he or she was intentionally discriminated against based upon race or gender or other protected characteristic.\textsuperscript{22} In such a case, a plaintiff must show that he or she: 1) is a member of the class; 2) was qualified for the position; 3) was subject to an adverse action; and that 3) others outside the class were treated more favorably.\textsuperscript{23} The employer must proffer a

\textsuperscript{19}42 U.S.C. § 2000e et seq. Also during this period, President Kennedy signed into law the Equal Pay Act, which required that men and women receive equal pay for work requiring comparable skill, effort and responsibility. 29 U.S.C. § 201 et seq.

\textsuperscript{20}42 U.S.C. § 2000e et seq.

\textsuperscript{21}See e.g., Civil Rights Act of 1991; Equal Employment Opportunity Act of 1972, P.L. 102-166 (providing for compensatory damages for emotional distress and the right to a jury trial), P.L. 92-261 (expanding Title VII to the federal government as an employer). The 1991 Act was a response to decisions by the Supreme Court which attempted to limit the scope of Title VII. Barbara K. Bucholtz, \textit{Father Knows Best: The Court’s Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002-2003 Term}, 39 TULSA L. REV. 75, 90-91 (2003).

\textsuperscript{22}Intentional discrimination claims may also be based on a theory of systemic disparate treatment, claiming that an employer has a “pattern or practice” of discriminating against a protected group. See e.g., \textit{U.S. v. City of Yonkers}, 609 F. Supp. 1281 (S.D.N.Y. 1984).

legitimate, nondiscriminatory reason why the action was taken and then the plaintiff must show that the reason given was a pretext for discrimination.  

Alternatively, claims for discrimination may be brought under a disparate impact theory whereby a plaintiff may challenge an employer’s facially neutral practice or policy as having disproportionate negative effects on a particular protected group. An employer can defend such an allegation by showing that there was not a disparate impact, or that there is a business necessity for the policy or practice.

Title VII has traditionally been used to prohibit discrimination against individuals who belong have been traditionally oppressed such as racial minorities and women. However, the language of Title VII makes clear that it prohibits all discrimination on the protected bases regardless of the group to which an individual belongs. Thus, a number of plaintiffs have purported to bring reverse discrimination claims, arguing that they were discriminated against because of being white, male, etc. These cases most often arise in the context of affirmative action plans, whereby individuals feel that efforts to increase diversity have somehow been taken at their expense. Courts have differed in their approaches to reverse discrimination claims with some claiming that the same prima facie test as regular disparate impact claims,

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24 Id. at 792 (referred to hereinafter as the “McDonnell Douglas framework”).
26 Id. at 424.
30 Peck, supra note 28.
while other courts require a “plus” factor – something to show that it is the unusual case where an employer discriminates against the majority. \textsuperscript{31}

While Title VII overlaps with Section 1981 in its coverage of race claims, the structures of the two laws are very different and Title VII plaintiffs face considerably more barriers to access. Title VII defines an employer as an entity which employs 15 or more individuals for 20 or more weeks in a calendar year. \textsuperscript{32} Thus employers who fall below this threshold are not covered by Title VII. \textsuperscript{33} Title VII has an administrative exhaustion provision, which requires that individual must file a charge with the EEOC or state agency before filing suit in court. \textsuperscript{34} Additionally, Title VII offers much shorter periods of time in which to bring claims. An individual must file his or her administrative charge within 180 days after the alleged unlawful practice occurred unless he or she has first filed a charge with an appropriate state agency, in which case the complainant has the earlier of 300 days from the date of the alleged violation. \textsuperscript{35} Once the agency has dismissed the matter, a plaintiff has 90 days to file a lawsuit in federal court. \textsuperscript{36}

Title VII offers a wide range of remedies for the successful plaintiff. Possible relief includes back pay (wages, salary and fringe benefits the employee would have earned during the period of discrimination from the date of termination or failure to promote to the date of trial), front pay for anticipated future wage losses, compensatory damages for emotional

\textsuperscript{31} Id.  
\textsuperscript{32} 42 U.S.C. § 2000e. 
\textsuperscript{34} 42 U.S.C. § 2000e-5
\textsuperscript{35} Id.  
\textsuperscript{36} Id.
distress, pain and suffering, etc.\textsuperscript{37} punitive damages\textsuperscript{38} and attorney’s fees.\textsuperscript{39} Equitable relief such as reinstatement of an employee is also available.\textsuperscript{40}

2. Age Discrimination in Employment Act

Age is notably excluded from the protected classifications of Title VII. At the time Congress enacted the Civil Rights Act of 1964, it considered including age in the protected classes of Title VII but affirmatively declined to do so.\textsuperscript{41} However, in passing Title VII Congress instructed the secretary of labor to conduct a study with recommendations for “legislation to prevent arbitrary discrimination in employment because of age.”\textsuperscript{42}

Consequently, Secretary W. Willard Wirtz issued a report in 1965, which noted significant differences between age and other forms of discrimination.\textsuperscript{43} It found that the most common form of discrimination against older workers “involves their rejection because of the assumptions about the effect of age on their ability to do a job when there is in fact no basis for

\textsuperscript{37} The Civil Rights Act of 1991 amended Title VII to provide for compensatory damages based upon the size of the employer. The limits on damages are as follows: Up to 100 employees: $50,000; 101-200 employees: $100,000; 201-500 employees: $200,000; 500+ employees: $300,000. Each plaintiff in a class action can be awarded the maximum amount specified for the size of their company. \textit{Id.}

\textsuperscript{38} Punitive Damages are limited to cases where the "employer has engaged in intentional discrimination and has done so with malice or reckless indifference to the federally protected rights of an aggrieved individual." \textit{Kolstad v. American Dental Association}, 526 U.S. 527 (1999). These damages are capped according to the size of the employer and the caps are the same as for compensatory damages. 42 U.S.C. § 2000e-5.

\textsuperscript{39} 42 U.S.C. § 2000e-5.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} Kelli A. Webb, \textit{Learning How to Stand on Its Own: Will The Supreme Court’s Attempt to Distinguish the ADEA from Title VII Save Employers from Increased Litigation?}, 66 OHIO ST L. J. 1375 (2005).


those assumptions." Consequently, the Age Discrimination in Employment Act was enacted in 1967 to prohibit discrimination based on age. It protects those age 40 and older from discrimination with respect to hiring, promotion, compensation, termination and other terms and benefits of employment.\textsuperscript{45}

The ADEA has several key similarities to Title VII, most notably the utilization of Title VII’s \textit{prima facie} case and \textit{McDonnell Douglas} framework.\textsuperscript{46} However, there are a number of significant differences between Title VII and the ADEA. First, the ADEA only protects those over 40 years of age; there is no such thing as a reverse age discrimination claim whereby a younger person can allege he or she was discriminated against.\textsuperscript{47}

Second, once a plaintiff has articulated a \textit{prima facie} case of age discrimination, the employer must articulate a reason for its action based on “reasonable factors other than age” for the employment decision.\textsuperscript{48} Courts have generally interpreted this to be a less onerous a standard than the “legitimate nondiscriminatory reason” an employer must proffer under Title VII and have accepted a wider range of explanations for an employer’s conduct when the claim is one of age discrimination.\textsuperscript{49}

\textsuperscript{44}Webb, supra note 41; George Rutherglen, \textit{From Race to Age: The Expanding Scope of Employment Discrimination Law}, 24 \textit{J. of Leg. St.} 491 (1995)
\textsuperscript{45}29 U.S.C. § 631.
\textsuperscript{46}\textit{Rahlf v. Mo-Tech Corp., Inc.}, 642 F.3d 633 (8\textsuperscript{th} Cir. 2011).
\textsuperscript{47}29 U.S.C. § 631.
\textsuperscript{49}\textit{Smith v. City of Jackson, Miss.}, 544 U.S. 228 (2005).
The remedies offered by the ADEA are also less comprehensive than Title VII. The age statute provides for liquidated damages, but does not allow compensatory or punitive damages, which are among the most significant damages components of Title VII.\textsuperscript{50}

Despite these important substantive differences, the ADEA has adopted very similar access requirements to Title VII. ADEA plaintiffs are required to exhaust with the EEOC or a state or local agency and must comply with the same statutes of limitations as those bringing claims under Title VII.\textsuperscript{51} However, the ADEA only covers employers with 20 or more employees rather than 15.\textsuperscript{52}

\textbf{C. The Era of Positive Rights}

Following the passage of the ADEA, there was a lull in the proliferation of new employment discrimination laws for approximately twenty years. Some earlier laws were modified and strengthened\textsuperscript{53} but coverage was not generally expanded. Beginning in 1990 there was a second wave of anti-discrimination legislation\textsuperscript{54}, beginning with the Americans with Disabilities Act\textsuperscript{55} and continuing with the Family and Medical Leave Act\textsuperscript{56} and Uniformed Services Employment and Reemployment Rights Act.\textsuperscript{57} These statutes offered new or expanded protection to certain groups. However, they differed from their predecessor statutes

\textsuperscript{50} 29 U.S.C. § 626.
\textsuperscript{51} \textit{Id.} Responsibility for enforcing the ADEA was transferred from the Department of Labor to the EEOC in 1979. Michael Schuster and Christopher S. Miller, \textit{An Empirical Assessment of the Age Discrimination in Employment Act}, 38 INDUS. & LAB. REL. REV. 64 (1984).
\textsuperscript{52} 29 U.S.C. § 630(b).
\textsuperscript{55} 42 U.S.C. § 12101 \textit{et seq.}
\textsuperscript{56} 29 U.S.C. § 2601 \textit{et seq.}
\textsuperscript{57} 38 U.S.C. § 4301 \textit{et seq.}
in that they had an affirmative component which required employer action beyond simple non-
discrimination. 58

1. Americans with Disabilities Act

The Americans with Disabilities Act prohibits discrimination with respect to employment
against qualified individuals with a disability. 59 Like the other statutes, the ADA prohibits
discrimination in hiring, firing and other terms and conditions of employment. 60 Additionally
ADA cases utilize the *McDonnell Douglas* framework. 61

Despite these facial similarities, the ADA differs from the previously discussed anti-
discrimination statutes in several ways. First, it goes beyond requiring the absence of
discrimination to require affirmative conduct – that is, an employer must actually take steps to
accommodate an individual’s disability and help her perform the job. 62 For example, an
employer might have to provide adaptive equipment or modify a work schedule or duties. 63

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58 Nielson & Nelson, *supra* note 54 at 674. Also during this period the scope of Title VII was
increased by the Civil Rights Act of 1991 to allow compensatory damages and provided for a right to a

59 A qualified individual with a disability is defined as someone who can perform the essential
functions of a position with or without reasonable accommodation. 42 U.S.C. § 12102. A disability is
defined as having a physical or mental impairment that substantially limits one or more major life
activity (e.g., breathing, seeing, hearing, caring for self, walking); having a record of such an impairment;
or being regarded as having such an impairment. *Id.; see also* Jason Powers, *Employment Discrimination
Claims Under ADA Title II: The Case for Uniform Administrative Exhaustion Requirements*, 76 TEX. L. REV.
1457. The Americans with Disabilities Act Amendments, passed in 2008 in response to a number of
overly-restrictive interpretations of the statute by the Supreme Court, clarified and strengthened many
of the terms contained in the ADA, but left the basic structure of the statute fundamentally intact. Pub.
L. No. 110-325.

60 42 U.S.C. § 12112.
63 29 C.F.R. § 1630.9.
However, an employer may have a defense where accommodating an individual would be an undue hardship (e.g., if the cost would be prohibitive.)\(^{64}\)

The ADA has adopted the same minimum employee threshold (15 employees) and statute of limitations as Title VII\(^{65}\) and also requires administrative exhaustion of claims.\(^{66}\)

2. The Family and Medical Leave Act.

Passed in 1992, the Family and Medical Leave Act provides for 12 weeks of unpaid leave in a 12 month period for eligible employees for the birth or adoption of a child, for the employees own serious health condition or for the serious health condition of a family member.\(^{67}\) The statute prohibits discrimination against anyone who takes or seeks to take leave under the FMLA.\(^{68}\)

Courts generally apply the *McDonnell Douglas* framework to FMLA discrimination claims.\(^{69}\) Beyond this, however, the FMLA differs from the aforementioned anti-discrimination statutes in a number of significant ways. First, the statute applies to all employers who employ 50 or more employees for 20 weeks out of the calendar year, which is a higher threshold and exempts a greater number of employers from coverage.\(^{70}\) The FMLA also has an eligibility

\[^{64}\text{42 U.S.C. § 12112(5)(A); see also Dargis v. Sheahan, 526 F.3d 781 (7th Cir. 2008) (employer not required to manufacture a job to accommodate a disability).}\]

\[^{65}\text{42 U.S.C. §12111(5)(A); Williams v. Thompson Corp., 383 F.3d 789 (8th Cir. 2004).}\]

\[^{66}\text{42 U.S.C. § 12117.}\]

\[^{67}\text{29 U.S.C. § 2612.}\]

\[^{68}\text{29 U.S.C. §§ 2614-2615.}\]


\[^{70}\text{29 U.S.C. § 2611.}\]
requirement, in that an employee must work 1200 hours and 12 months in order to be eligible for leave.\textsuperscript{71}

The FMLA is also significantly different than the aforementioned statutes in that it does not fall within the purview of the EEOC but is enforced by the Department of Labor.\textsuperscript{72} Consequently, the FMLA does not have an administrative exhaustion requirement, which means that aggrieved employees may proceed directly to court without first filing a charge. The statute of limitations is two years, but extends to three years where the alleged conduct was willful.\textsuperscript{73}

Damages also differ. While back pay, attorney’s fees and injunctive relief are available an individual may also receive compensation for actual losses suffered as a result of the denied leave and liquidated damages.\textsuperscript{74} However compensatory and punitive damages are not available.\textsuperscript{75}


The Uniformed Services Employment and Reemployment Rights Act is the statute which protects the rights of employees who leave to serve in the armed forces.\textsuperscript{76} It guarantees certain employment benefits while on military leave and protects the employee’s right to

\textsuperscript{71} 29 U.S.C. § 2612. Moreover, the FMLA has a key employee exemption, whereby the most highly compensated employees may be denied leave under the act. 29 U.S.C. § 2614.
\textsuperscript{72} 29 U.S.C. § 2617.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} 38 U.S.C. § 4301 et seq. This includes active duty as well as service in the Reserve and National Guard. See also Konrad S. Lee, “When Johnny Comes Marching Home Again” Will He Be Welcome at Work? 35 PEPPERDINE L. REV. 247 (2008); Matthew B. Tully & Ariel E. Solomon, Ensuring the Employment Rights of America’s Citizen Soldiers, 35 HUM RTS. 6 (2008).
reinstatement upon return from military service, provided certain eligibility criteria are met.\textsuperscript{77} USERRA prohibits discrimination based on military service.\textsuperscript{78}

To establish a \textit{prima facie} case of discrimination under USERRA, a plaintiff must show by a preponderance of the evidence that his protected status was a motivating factor for an employer not to hire him.\textsuperscript{79} If the employee makes that \textit{prima facie} showing, the employer can avoid liability by demonstrating that it would have taken the same action without regard to the employee's military service.\textsuperscript{80}

USERRA lacks many of the structural requirements of the other statutes. It does not have a minimum number of employees and applies to all employers regardless of size.\textsuperscript{81} Like the FMLA, it is enforced by the Department of Labor rather than the EEOC and it does not have an administrative exhaustion requirement.\textsuperscript{82} USERRA does not include a statute of limitations and courts generally apply the federal “catch all” four-year statute of limitations.\textsuperscript{83}

Remedies under USERRA include back pay and reinstatement. Additionally, where violation is considered willful the court may double any amount due as liquidated damages. The court may not, however, impose any punitive damages under USERRA.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{77} 38 U.S.C. §§ 4312-4313.
\item \textsuperscript{78} 38 U.S.C. § 4311.
\item \textsuperscript{79} \textit{Dominguez v. Miami-Dade County}, 669 F.Supp.2d 1340 (S.D. Fla. 2009).
\item \textsuperscript{80} See 38 U.S.C. § 4311(c)(1). It is significant to note that USERRA differs slightly from the \textit{McDonnell Douglas} framework in that USERRA cases shift the burden of persuasion to the employer to show that the same decision would have been taken in the absence of military service, whereas in Title VII and other \textit{McDonnell Douglas} cases the burden remains with the plaintiff and does not shift. \textit{Sheehan v. Dep't. of Navy}, 240 F.3d 1009 (Fed. Cir. 2001).
\item \textsuperscript{82} 38 U.S.C. § 4322.
\item \textsuperscript{83} \textit{Rogers v. City of San Antonio}, 392 F.3d 758 (5th Cir. 2004).
\item \textsuperscript{84} See 20 CFR §§ 1002.312, 313.
\end{itemize}
II. BARRIERS TO ACCESS

Despite the appearance of a comprehensive federal anti-discrimination scheme, the aforementioned laws provide limited access to the claiming system. A significant percentage of the American workforce – close to one-fifth -- is excluded from protection under these laws completely.\(^85\) Those who are covered must bring their claims very quickly and withstand a protracted administrative exhaustion process.\(^86\)

These barriers to access are not merely procedural requirements, but rather raise deeper theoretical questions about the purpose, scope and effectiveness of anti-discrimination law as a claiming system. Is the intent behind our anti-discrimination laws to provide redress for a limited subset of individuals and claims, or to prevent and remedy discrimination in the American workplace more broadly? Are there types of claims and individuals who should be excluded from coverage, and if so why? Is it possible to widen access to the claiming system while enabling the system to function effectively?

To answer these questions, it is necessary to examine the intent and effect of each of the three principle barriers to access: the minimum employee threshold, the administrative exhaustion requirement and the statute of limitations.

A. The Minimum Employee Threshold

An initial matter in considering access to the anti-discrimination claiming system whether the employer is covered by the law. Simply put, if an employer does not have the

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requisite number of employees it will not be covered by the statute and its employees will not be protected, regardless of how egregious the discriminatory conduct.\textsuperscript{87}

The minimum number of employees requirement for coverage presents tremendous problems for federal anti-discrimination laws. First, small firms employ approximately 19 million individuals.\textsuperscript{88} Their exclusion from the coverage of the anti-discrimination laws means that a significant portion of the American workforce has virtually no protection whatsoever under federal anti-discrimination law.\textsuperscript{89}

Moreover, restricting employment protection to a subset of the workforce is contrary to the legislative purpose and congressional intent of the anti-discrimination laws which is to remedy discrimination in the American workplace.\textsuperscript{90} Excluding a large portion of the workforce frustrates these aims by allowing discrimination to persist unchecked.\textsuperscript{91}

\textsuperscript{87} Generally the minimum number of employees required for coverage is set forth in the definitional section where the term “employer” is set forth. See e.g., 42 U.S.C. § 2000e (defining an employer for Title VII as an organization employing 15 or more employees for 20 work weeks in the calendar year); 42 U.S.C. §12111(5)(A) (same); 29 U.S.C. § 630(b) (defining employer for ADEA as those with 20 or more employees); 29 U.S.C. § 2611 (FMLA covers employers who have 50 or more employees for 20 workweeks out of the calendar year). Some statutes, such as Section 1981 and USERRA, do not specify a minimum number of employees and so all employers are covered. \textit{Wagner v. Merit Distribution}, 445 F.Supp.2d 899 (W.D.Tenn. 2006) (all employers covered by Section 1981); 20 CFR § 1002.34 (“USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.”)

\textsuperscript{88} Carlson, \textit{supra} note 85 at 1198; \textit{see also} Christine Neylon O’Brien & Stephanie Greene, \textit{Employee Threshold on Federal Antidiscrimination Statutes: A Matter of the Merits}, 95 KENTUCKY L. J. 429 (2007)

\textsuperscript{89} Carlson, \textit{supra} note 85 at 1202.

\textsuperscript{90} See H.R. Rep. No. 88-914, at 63 (1964), reprinted in 1964 U.S.C.A.A.N. 2391, 2401 (noting that the purpose of Title VII is to “eliminate, through the utilization of formal and information remedial procedures, discrimination in employment based on race, color, religion, or national origin.”)

These exclusions are also harmful in that they obscure the full extent of discrimination in the workplace. Individuals without legal redress have little incentive to raise complaints where no remedies are available to them.\textsuperscript{92} Second, those who are not covered by the anti-discrimination statutes are similarly not protected by their anti-retaliation provisions and thus will not complain and risk retribution at work.\textsuperscript{93}

Limiting the coverage of the anti-discrimination laws also contains a troubling symbolic message -- that preventing and addressing discrimination in the workplace is not of paramount concern, but is secondary to businesses needs and politics.

The exemption created for those who employers which fall below the minimum employee threshold is not just troubling in that it excludes a large number of workers, but also for the group that it excludes. Those who work at smaller businesses arguably have more need for protection because such businesses are less subject to the public eye. Additionally, in a small workplace there may not be a human resources department or complaint mechanism for an employee to utilize outside of the manager about whom he or she is alleging discriminated. Thus it is even more important for these employees to have access to external remedies.

\textsuperscript{92} More empirical research is needed to understand the effect of exclusion from statutory protection based on employer size on individual complaints. However, studies have shown a correlation between perceptions of inclusion within the protected class and an individual’s willingness to complain. Barry M. Goldman, \textit{Toward An Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice And Social Information Processing Theories}, 54 PERSONNEL PSYCHOLOGY 361 (2001). \textit{See also} Nielsen & Nelson, \textit{supra} note 54 at 674 (discussing an individual’s perceived likelihood of achieving redress as a factor in whether he or she makes a complaint).

\textsuperscript{93} \textit{Id.}
The small business exception has other drawbacks too. Businesses may be less likely to hire more employees or may engage in disingenuous subcontracting arrangements in an attempt to keep their employee numbers low and avoid coverage.94

A number of arguments have traditionally been espoused in favor of excluding small businesses from coverage by discrimination statutes. First, the small business lobby has long argued that it is too expensive for small businesses to comply with anti-discrimination laws.95 Traditionally, most of the small business arguments have focused upon the cost of enforcement, that is, the notion that small business cannot afford to defend expensive litigation.96 However, this argument is based upon a number of flawed assumptions. The scenario that is often given is one in which a small business is sued under an anti-discrimination statute and required to spend hundreds of thousands of dollars in litigation and possibly damages. In reality, however, only a small percentage of employment discrimination litigation makes it to the trial stage.97 Cases are often resolved through alternative dispute resolution procedures, such as mediation, or settled before ever getting to court.98

Additionally, to the extent that employment discrimination cases do reach the courtroom, being a small employer no longer exempts one from the costs of employment discrimination litigation. The minimum number of employees threshold was once considered a

94 Carlson, supra note 85 at 1247.
95 Id. at 1248; Aston, supra note 91 at 308.
96 Carlson, supra note 85 at 1248.
98 Nelson, Nielsen et al. supra note 97 at 29.
jurisdictional requirement. However, in *Arbaugh v. Y& H Corporation*, the Supreme Court held that the minimum number of employees requirement was a substantive element of an employee’s case. Following *Arbaugh*, the minimum number of employees requirement is a question of fact to be raised and argued by the defense during the course of litigation. Thus, small firms may be required to engage in litigation just to have a case dismissed based on their size, a fact which undercuts the “cost of litigation” argument. However, the employee of a small business will still ultimately be precluded from obtaining relief under the statute, resulting in a costly but unproductive lose-lose scenario for both sides.

Beyond the cost of litigation, the small business lobby argues that compliance with employment discrimination statutes is itself too costly. Indeed, many of the mandates of federal anti-discrimination laws today arise prior to any dispute. In the late nineties, the Supreme Court decided a trio of cases, *Faragher v. City of Boca Raton*, *Burlington Industries v. Ellerth* and *Kolstad v. American Dental Association*, which clarified the standards for employer liability for discriminatory acts of its supervisors. The Court held that employers which take measures to prevent, detect and remediate discrimination with affirmative defenses

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100 *546 U.S. 500 (2006).* The Court held that labeling the minimum employees requirement as jurisdictional goes against congressional intent because the fifteen employee requirement is in the definitional section of the statute. Second, the Court held that the matter relies on a disputed fact and should go to a jury. *See also* O’Brien & Greene, *supra note ___ at 429.*
102 *Id.*, at 1247.
103 *Id.*
104 *524 U.S. 780 (1998).*
105 *524 U.S. 747 (1998).*
106 *527 U.S. 526 (1999).*
to liability\textsuperscript{107} and punitive damages.\textsuperscript{108} The effect of these decisions has been to shift much of
the focus of employment discrimination law to preventative measures such as anti-
discrimination policies and training and complaint procedures to detect and remediate it.
Implementing these policies and procedures are straightforward and relatively low-cost. These
measures can and should be adopted by all employers, not only for litigation defense reasons
but also to ensure a workplace that is free of discrimination.\textsuperscript{109}

The cost argument is further undercut by the coverage disparities among the
employment statutes. As described more fully in Section II.A, infra, the different federal
employment statutes have different thresholds for the minimum number of employees
required in order for an employer to be covered. However, these coverage requirements have
no correlation to the extent of expenditure or “cost” an employer is expected to bear under the
statute.\textsuperscript{110} For example, USERRA, a statute which requires employers to provide extended
periods of military leave, often times with benefits, has no small employer exemption.\textsuperscript{111}
Conversely, the FMLA which has a similarly onerous leave requirement only applies to
employers who employee 50 or more employees.\textsuperscript{112} The ADA, which contains some of the

\textsuperscript{107} Faragher, 524 U.S. 780; Ellerth, 524 U.S. 747.
\textsuperscript{108} Kolstad, 526 U.S. 527.
\textsuperscript{109} See Tristin K. Green, A Structural Approach As Anti-Discrimination Mandate: Locating
Employer Wrong, 60 VANDERBILT L. REV. 849 (2007); Susan Sturm, Second Generation Employment
Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence
\textsuperscript{110} Michael C. Falk, Lost in the Language: The Conflict Between the Congressional Purpose and
(noting the discrepancies between statutes which prohibit discrimination and those which require
employers to take affirmative steps in favor of a particular group).
\textsuperscript{111} 20 CFR § 1002.34.
\textsuperscript{112} 29 U.S.C. § 2611.
greatest potential employer costs because it requires employers to take affirmative steps to accommodate individuals with disabilities, has the same minimum employee requirement as Title VII, which in most circumstances only contains the negative prohibition against discrimination. If cost is truly the driver for the small business exemption, then the statutes should be calibrated to make the most costly statutes have the highest minimum employee thresholds.

Even if the arguments of the small business lobby that complying with employment discrimination laws and defending cases that arise under them is costly, there are still compelling arguments against the minimum employees requirement as presently codified. First, it is unclear that cost should be the primary concern or that cost concerns should outweigh the anti-discrimination mandate. Indeed there is no small business exception for other expensive employment laws such as the Occupational Safety and Health Act and environmental regulations because in such cases Congress has decided as a matter of public policy that compliance is sufficiently critical to outweigh cost concerns. Fair and equitable treatment of individuals under the anti-discrimination laws deserves no less.

To the extent that it is true that smaller businesses cannot bear the costs of discrimination laws, it is unclear that the number of employees is the proper metric for determining who should be exempt. Is a business with eight employees and a million dollars in revenue any less able to bear the costs of discrimination laws than a company with eighteen

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114 Carlson, supra note 85 at 1249
employees and half a million dollars in revenue?\textsuperscript{115} Nor is there any empirical basis for the numeric thresholds set forth in the statutes (\textit{i.e.}, 15 employees to be covered by Title VII)\textsuperscript{116} which were a subject of widespread debate with the passage of Title VII and every subsequent amendment.\textsuperscript{117}

Additionally, even if cost is a legitimate consideration with respect to coverage of small businesses by anti-discrimination law, this is not a justification for wholesale exclusion. A number of the statutes which have an affirmative obligation, such as the duty to accommodate a disability under the ADA, or to provide a religious accommodation under Title VII, or to provide leave under the FMLA or USERRA, contain an “undue hardship” exception which an employer may invoke to demonstrate that the obligation is too costly to bear as an excuse from compliance.\textsuperscript{118} Statutory “escape hatches” such as these, if properly drafted and interpreted, provide an appropriate mechanism to take into account the financial constraints faced by small business while still holding such entities accountable for the most essential of anti-discrimination provisions.\textsuperscript{119}

\textsuperscript{115} Carlson, \textit{supra} note 85 at 1247.
\textsuperscript{116} \textit{See} Aston, \textit{supra} note 91 at 290 (noting that the Fair Labor Standards Act covers employers with two or more employees); Carlson, \textit{supra} note 85 at 1198 (noting that the Small Business Administration defines small business as those with 500 or fewer employees).
\textsuperscript{117} \textit{See} Aston, \textit{supra} note 91 at 291 (discussing Congressional debate over the number of employees required for coverage.)
\textsuperscript{118} \textit{Id.} at 68 (holding that employer was not required to accommodate religious needed for Saturdays off when doing so would result in extra staffing cost to employer); 42 U.S.C. § 12112(b)(5)(A); \textit{Barth v. Gelb}, 2 F.3d 1180 (D.D.C. 1993) (hiring a diabetic for overseas posting would have created an undue hardship by requiring transfer of personnel among hardship and non-hardship posts with very limited staffing available); 38 U.S.C. § 4312(d)(1)(B).
Perhaps most fundamentally, the cost argument fails to take into account the price associated with non-compliance and having a workplace where discrimination is allowed to go unchecked. These costs may include difficulty recruiting a diverse workforce, problems with attrition, and poor morale.\(^{120}\)

Beyond cost, a second argument often espoused in favor of the small business exception is that small employers need to rely on personal relationships in hiring and other employment decisions, and for this reason they should not be subject to anti-discrimination mandates.\(^{121}\) This argument is unpersuasive on many levels. First, the notion that small business somehow needs this exemption to maintain collegial relations ignores the fact that personal relationships are not unique to small business.\(^{122}\) Larger workplaces also function based on interpersonal relationships and manage to do so within the parameters of the federal anti-discrimination laws.

Further, even if some personal preferences should be taken into consideration in the small-business context, it is clear that certain behaviors, such as sexual harassment, are never justifiable. The present framework, whereby small employers are completely excluded from the purview of most federal anti-discrimination laws (including the sex discrimination provisions of Title VII) leaves employees of these smaller businesses excluded from protection against egregious harassing conduct.

\(^{120}\) The effect can be seen on the hiring by small businesses, for example blacks constitute 13.3 percent of the workforce generally, but only 7.9% of the workforce in businesses with less than ten employees. Carlson, *supra* note 85 at 1266.

\(^{121}\) *Id.*

\(^{122}\) Aston, *supra* note 91 at 308.
As with the “undue hardship” exception, which may serve as an effective counterbalance to small businesses’ assertion that it should be excluded from coverage, based on cost, there are other ways to address concerns about any purported justifications such entities may have for taking personal relationships into account. Most anti-discrimination laws utilize the *McDonnell Douglas* framework, whereby once a plaintiff sets forth a *prima facie* case, the employer may proffer a legitimate, non-discriminatory reason for the action taken.\(^{123}\) In age discrimination cases, the employer’s burden is slightly modified and an employer may base its decision on “reasonable factors other than age.”\(^{124}\) Allowing small business to justify employment decisions based on personal relationships that are not discriminatory may provide a vehicle for ameliorating this concern without wholesale exclusion from coverage. To the extent that an employer’s decision based on “personal relationships” cannot be distinguished from discriminatory preferences, such actions should be prohibited, as to do otherwise would undercut the purpose of the anti-discrimination laws.

A third principle argument in favor of the small business exemption is that allowing claims by employees against small businesses would open up the litigation floodgates and make the system unworkable.\(^{125}\) Based on the estimate that almost one-fifth of the American workforce is currently excluded from protection and the corresponding possibility that claims could rise as much as twenty percent, the concern is understandable. However, the overburdening argument has been significantly undercut by the Supreme Court’s decision in *Arbaugh* that the minimum number of employees is not a procedural requisite but a question

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\(^{123}\) 411 U.S. 792 (1973).


\(^{125}\) Carlson, *supra* note 85 at 1267.
of fact. As a result, some portion of these cases may already be taxing the system until the point at which a judge or jury decides that the employer is not covered by the statute.

More fundamentally, this “overburdening” argument must not be seen as a roadblock to allowing access to the employment discrimination claiming system. Adopting such an argument – that access to remedies should be limited to a certain group of workers in order to not flood the system -- essentially reflects a value judgment placing the rights of a small subset of individuals above the ability for all to seek redress. This is clearly contrary to the purpose of Title VII to broadly prevent and eradicate workplace discrimination.

Those in support of the small business exception would argue that individuals who are denied access to the federal anti-discrimination claiming system by virtue of their employer’s size are protected in many cases by state or local laws which do not have a minimum employee requirement. This argument does little to ameliorate concerns. First, the coverage of state and local laws vary widely and the effect is to leave some employees with little or no protection. Moreover, the existence of state and local law coverage of small businesses actually cuts against one of the principal arguments for the small business exception: cost. If small businesses have weathered the cost of state and local enforcement, they can be similarly subject to the federal statutes without undue hardship.

In sum, the net effect of the small business exception is to leave a vast segment of the workforce unprotected without compelling justification.

126 Carlson, supra note 85 at 1253.
B. Administrative Exhaustion.

For those employees who are protected by the federal anti-discrimination statutes, the road to court is far from simple. Rather there are a series of roadblocks and hurdles an individual must navigate to gain access to the claiming system. The largest of these is exhaustion of administrative remedies.\(^{127}\)

Exhaustion is the concept that, under the majority of anti-discrimination laws, a putative plaintiff must file a charge with the Equal Employment Opportunity Commission or equivalent state or local agency prior to bringing suit in federal court.\(^{128}\) Title VII, the ADA and the ADEA all require exhaustion.\(^{129}\) Under the exhaustion process, a claimant files a charge with the EEOC or a state or local agency that has been delegated authority to receive such charges by the EEOC.\(^{130}\) An agency staff person investigates the charge, interviewing the complainant and employer representatives and soliciting documents and information.\(^{131}\) The employer is often asked to submit an answer to the charge as well as a position statement setting forth its explanation in greater detail. The agency may also hold a fact-finding conference at which the complainant provides his or her version of the alleged discriminatory events and the employer

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\(^{129}\) Id.


\(^{131}\) 29 C.F.R. § 1601.15. Documents are generally provided to the agency but not shared with the adverse party without the consent of the party which submitted them. 29 C.F.R. § 1601.22.
offers witnesses to provide its explanation for what took place.\textsuperscript{132} The agency will ultimately issue a determination, concluding that there either is or is not probable cause that discrimination occurred.\textsuperscript{133} If the agency finds no probable cause that discrimination took place, it will issue a “right-to-sue” letter and the claimant can then go file a lawsuit in court.\textsuperscript{134} If the agency finds cause then it can opt to pursue the matter further itself or decline to do so and advise the complainant of her right to proceed to court.\textsuperscript{135} Throughout the agency process, the investigator will make attempts to mediate and settle the controversy.\textsuperscript{136} A plaintiff may request a right-to-sue letter and the agency will terminate its investigation.\textsuperscript{137} Perhaps most significant is what happens after the conclusion of the agency process. Whether the agency finds probable cause or not, the complainant may then file a lawsuit in federal court.\textsuperscript{138} The process effectively begins anew, with the employee filing another complaint and the employer responding.\textsuperscript{139} While an EEOC investigator’s finding of probable

\textsuperscript{132} 29 C.F.R. § 1601.15. Conferences are less formal than a hearing and are not recorded or transcribed. Each side is able to hear the other speak.

\textsuperscript{133} 29 C.F.R. §§ 1601.18-19.

\textsuperscript{134} Id.


\textsuperscript{136} 29 C.F.R. §§ 1601.20, 24.

\textsuperscript{137} David C Belt, \textit{Election of Remedies in Employment Discrimination Law: Doorway in the Legal Hall of Mirrors}, 46 CASE W. L. REV. 145 (1995); Nancy Modesitt, \textit{Reinventing the EEOC}, 63 S. METH. UNIV. L. REV. 1237 (2010). Regulations do provide that a claimant may request a right-to-sue letter and that the agency can issue the dismissal letter at any point 180 days or later after the filing of the charge, or at any point sooner than 180 days if the agency concludes that it will be unlikely to complete an investigation within 180 period. However, this argument hardly supports the merits of the agency process. At a minimum the complainant will need to wait weeks or months for the right-to-sue letter to be issued, and will still have had to go through the time and effort of filing a charge without any consideration of the merits. The employer and the agency itself may have already expended resources by this point as well.

\textsuperscript{138} 29 C.F.R. §§ 1601.18, 21.

\textsuperscript{139} See Fed. R. Civ. P. 3, 7.
cause of discrimination may be admitted as probative, testimony and evidence from the administrative agency process are given little or no weight and dismissal letters indicating that the agency did not find probable cause of discrimination are generally inadmissible.\textsuperscript{140} Parties in litigation may subpoena the investigator’s file, however, they will generally only be given the documents submitted to the agency by the parties (which may be obtained from the adverse party through discover anyway.)\textsuperscript{141} The investigator’s notes and internal agency correspondence will not be produced but will be withheld under the governmental deliberative privilege.\textsuperscript{142}

There has been considerable debate as to the merits of the administrative exhaustion requirement and the role and value of the EEOC. The agency, as originally conceived, theoretically has a number of meritorious purposes. First, the EEOC is intended to serve as investigative body, exploring allegations of discrimination and determining whether or not it

\begin{itemize}
\item \textsuperscript{140} Estate of Hamilton v. City of New York, No. 09-4318-cv, 2010 WL 4909676 (2d Cir. Sept. 28, 2010) (probable cause finding was admissible as probative evidence); Cortes v. Maxus Exploration Co., 758 F.Supp. 1182 (S.D.Tex., 1991) (EEOC’s dismissal for lack of probable cause was not admissible); Tulloss v. Near North Montessori School, Inc., 776 F.2d 150 (7th Cir. 1985) (EEOC investigative file not admissible because it was a “mish-mash of self-serving and hearsay statements and records; ... justice requires that the testimony of the witnesses be given in open court, under oath, and subject to cross-examination.”) citing Gillin v. Federal Paper Board Co., 479 F.2d 97, 99 (2d Cir. 1973).
\item \textsuperscript{141} 29 C.F.R. § 1601.16.
\end{itemize}
has taken place.\textsuperscript{143} Properly undertaken, this function can both remedy and deter unlawful behavior in the workplace.\textsuperscript{144}

Second, the agency process is intended to foster legal access to redress, particularly for individuals who cannot find or afford an attorney and who are unable to navigate the legal system on their own.\textsuperscript{145} Anyone can contact the EEOC and file a charge of discrimination, using the agency’s straightforward “check the box” form. The complainant does not have to pay a filing fee and can avail herself of the aid of an agency staffer in filing.\textsuperscript{146} EEOC charges require considerably less specificity than filing a complaint in court, requiring only that the plaintiff sufficiently identify the parties and “describe generally the action or practices complained of.”\textsuperscript{147}

Finally, the administrative process is intended to play a conciliatory role, facilitating resolution of employment disputes without the time and expense of litigation, thereby lessening the workload of the judiciary.\textsuperscript{148} When an employer learns from the EEOC that an

\textsuperscript{143} Originally the powers of the EEOC were limited to investigating and conciliating charges of discrimination. However, the 1972 amendments to Title VII also gave the EEOC power to bring lawsuits either on behalf of an individual or on its own. Selmi, supra note 137 at 6.

\textsuperscript{144} Belt, supra note 137 at 159; see also Macfarlane, supra note 130 at 218 (noting that requiring a plaintiff to first administratively exhaust with the EEOC is in part an attempt to ensure that the agency has a meaningful role in implementing the laws that it was created and empowered to enforce).

\textsuperscript{145} Belt, supra note 137 at 159.

\textsuperscript{146} Selmi, supra note 135 at 5.

\textsuperscript{147} 29 C.F.R. § 1601.12(a). As discussed more fully in Section II.C infra, the gulf between the liberal requirements for an EEOC complaint and the requirements for filing a well-pled complaint in federal court is perhaps more significant in light of the Supreme Court’s recent decisions requiring that plaintiffs plausibly plead a cause of action. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S.Ct. 1973 (2009); see also Charles A. Sullivan, Plausibly Pleading Employment Discrimination, 52 WM. & MARY L. REV. 161 (2011).

employee has filed a charge, this may be the first notice it has of any issue and sometimes the problem may be resolved internally with little or no agency interference. The EEOC also offers a mediation track, which the parties may voluntarily opt to enter prior to investigation of the charge. Other times, disputes may be resolved through the investigative fact-finding process, which may alert an employer to the fact that wrongdoing has taken place and facilitate settlement. The time and effort required to defend a charge can also incent an employer to settle as a business decision, irrespective of the litigation risk. Conversely, the agency process may serve to educate a would-be plaintiff as to the lack of merit to her claims or unlikelihood of succeeding in court. Simply being heard through the charge process can provide sometimes the plaintiff with the redress he or she seeks. In these various ways, exhaustion can be an effective dispute resolution tool.

Detractors point out that, despite the laudable aims of the EEOC, the gulf between the intent and reality of the exhaustion requirement is vast. In practice, the EEOC is a highly overburdened agency. The number of claims filed with the EEOC has increased exponentially in recent years, while the staff and resources to process them have remained relatively

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voluntary compliance during administrative proceedings, which ‘would be defeated if a complainant could litigate a claim not previously presented to and investigated by the EEOC.’”


Selmi, supra note 135 at 51.

unchanged.\textsuperscript{152} As a result, an investigation of a charge can often take many months.\textsuperscript{153} This may present particular problems for the current employee who has exposed him or herself to retaliation or other potentially adverse consequences by virtue of filing a complaint and then must sit in the place of employment during the lengthy agency process. It can also cause issues for the former employee who is now unemployed as a result of the allegedly unlawful workplace discrimination and whose monetary redress is delayed by the administrative process.\textsuperscript{154}

In addition to the length of time for charge processing, a second major criticism of administrative exhaustion is that it in fact offers no relief to the overwhelming majority of individuals who file charges. Most claimants who wait out the agency’s determination simply receive a “right-to-sue” letter indicating that the agency did not find probable cause of discrimination, but that the plaintiff has 90 days to file a lawsuit in federal court. Thus, the plaintiff is left in the same position he or she would have been in without having to exhaust administrative “remedies” – or perhaps a worse position, since all of the witnesses, documents and other evidence needed to prove her case is that much more temporally removed and stale or perhaps unavailable. The length of the EEOC process, coupled with the limited number of cases in which it actually effectuates any meaningful relief, means that the deterrence value of

\textsuperscript{152} Belt, \textit{supra} note 137 at 153.

\textsuperscript{153} The EEOC once required that investigations be concluded within 180 days but the average time to investigate a charge is now 229 days. Macfarlane, \textit{supra} note 130 at 230.

\textsuperscript{154} As of 2008 the agency had a backlog of over 73,000 charges filed by “people who believed they were discriminated against on the job, still waiting for help.” Statements of Members of Congress and Other Interested Individuals and Organization: Hearing on Commerce, Justice, Science and Related Agencies Appropriates for 2010 Before the Subcomm. On Appropriations, 111\textsuperscript{th} Cong. 38 (2009) (statement of Gabrielle Martín, President, National Council of EEOC Locals.)
the agency is also marginal.\textsuperscript{155} As Michael Selmi noted, “these procedures amount to a rather strange and vacuous process- one where thousands of claims are filed at no financial cost to the plaintiff, few are truly investigated, fewer still resolved, and none of which is binding on any of the parties.”\textsuperscript{156}

Critics also question the qualitative value of the agency process. The EEOC investigators are not judges or attorneys, but civil servants without any formal legal training, a fact which gives rise to questions of their capability to assess employment disputes.\textsuperscript{157} There are no formal discovery rules in the agency process and none of the evidentiary rules such as hearsay apply. This lack of training and procedure raises questions as to the validity of the factual investigation and the proper application of the law in these cases.

Once upon a time, administrative complaints were an employee’s first line of defense, external assistance when there was no other option. However, as explained in Section II.A\textsuperscript{supra}, there was a fundamental shift in the American workplace as a result of the Supreme Court’s decisions in \textsl{Faragher}, \textsl{Ellerth} and \textsl{Kolstad} in the late 1990s. Employers now have vast incentives to put processes in place to prevent, detect and remediate discrimination and otherwise demonstrate good-faith efforts to comply with anti-discrimination laws as a means of escaping liability and punitive damages. As a result, companies have developed extensive complaint procedures of which an employee may avail herself. These internal complaint procedures have in some sense supplanted the agency function in that they provide the

\textsuperscript{155} Selmi, \textit{supra} note 135 at 49.
\textsuperscript{156} Id., at 10.
\textsuperscript{157} Investigators are often not trained on new developments in the law or new laws themselves. MacFarlane, \textit{supra} note 130 at 230.
employee with a first avenue of complaint. They also provide notice to the company of potential issues and problems, allowing the employer to perform an investigation and provide redress before a formal dispute ever arises. Indeed employees are expected to exhaust these internal complaint procedures before filing a complaint.\textsuperscript{158} Given the redundancies between internal and agency complaints, it is unclear that mandatory exhaustion is as necessary or relevant in a post Faragher world.\textsuperscript{159}

Aside from the criticisms of the agency process itself, the fact remains that mandatory administrative exhaustion is something of an anomaly in the law. For example, those alleging other types of federal claims do not generally have an administrative exhaustion requirement, nor do those pursuing state law claims such as personal injury or tort claims. The reasons for mandatory exhaustion also seem vague. If the purpose is to assist would-be plaintiffs in gaining access to the law, then requiring all plaintiffs to file charges – even those who are perfectly able to find an attorney and proceed to court – seems counter-intuitive. Hampering their claims from reaching court for an extended period similarly contradicts that purpose.

Conversely, if the purpose of exhaustion is to serve as a gatekeeping function and limit the number of employment discrimination cases entering the court system, there is no

\textsuperscript{158} Nielsen & Nelson, supra note 54 at 686. The standard developed by the Supreme Court in \textit{Faragher} and \textit{Ellerth} requires an employer to show not only that it had processes in place to detect and remedy discrimination but that the employee unreasonably failed to take advantage of those avenues. \textit{Faragher v. City of Boca Raton}, 724 U.S. 747 (1998); \textit{Burlington Indus. V. Ellerth}, 724 U.S. 780 (1998). Thus it is incumbent upon the employee to utilize the complaint mechanism.

\textsuperscript{159} This is not to suggest that a company’s internal investigation would be as objective as that of the EEOC. (Indeed, recognizing the potential for bias among its own employees, some of whom may be been decision-makers, companies often hire external investigators in order to obtain a more impartial investigation.)
evidence that is working either.\textsuperscript{160} Any individual who brings an administrative charge can ultimately receive a right-to-sue letter and proceed to court. Indeed, the rise in employment charges has seen a corollary increase in federal employment discrimination litigation.\textsuperscript{161}

C. Statute of Limitations.

The third barrier to access faced by plaintiffs in employment discrimination lawsuits is the statute of limitations. Statutes of limitations are not unique to employment discrimination law, but rather exist for virtually every type of legal claim. The time period in which a party must bring a claim may be specified within the statute, borrowed from an analogous provision in another federal or state law, or determined by the court as a matter of common law.

The purpose of setting a statute of limitations is to require plaintiffs to act promptly on claims and not “sit on” their rights. It also is intended to make sure defendants such as employers are aware of any potential liability and that claims are adjudicated while memories are fresh and records still being kept. As the Supreme Court explained, the setting of a time period for filing suit “...represents a value judgment by Congress concerning the point at which the interests in favor or protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.”\textsuperscript{162}

While the purpose behind the statute of limitations exists across virtually all areas of the law, the statute of limitations is much shorter for employment discrimination cases than for

\textsuperscript{160} Belt, \textit{supra} note 137 at 146 (noting that “Consequently the EEOC has had to abrogate much of its “filtering” responsibility to the court system, which is, as a result, overburdened with discrimination claims.”)

\textsuperscript{161} Belt, \textit{supra} note 137 at 154.

\textsuperscript{162} \textit{Morris Delaware State College v. Ricks}, 449 U.S. 250 (1980).
other types of claims. Many laws have four or even six year statutes of limitations.\(^{163}\) Most employment discrimination statutes, such as Title VII, the ADA and the ADEA, provide that an employee must bring a claim to the EEOC within 180 days.\(^{164}\) This may be extended to 300 days when there is a work sharing agreement between the EEOC and a state or local agency.\(^{165}\) Then after the agency investigates and issues a right-to-sue a plaintiff must file suit within 90 days or lose the right to do so.

The effect of having such a draconian statute of limitations is to preclude claims. First, an employee may not realize that she was the victim of discriminatory conduct in such a brief period of time. Generally the statute of limitations tolls for each discrete act of discrimination and an employee must file suit with 300 days of that event.\(^{166}\) However, studies have shown that individuals may not perceive conduct as discriminatory until viewed as part of a spectrum of events over time.

The recent *Ledbetter v. Goodyear Tire & Rubber Co.* illustrates this problem.\(^{167}\) Lilly Ledbetter brought suit under Title VII for pay disparities between her and male co-workers and a jury found evidence of discrimination. The Eleventh Circuit held that her claims were untimely because the inequitable pay decisions had been made more than 180 days prior to her

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\(^{163}\) For example, the federal catch-all statute of limitations of four years is generally held to apply to federal statutes which do not contain a statute of limitations. 28 U.S.C. § 1658(a).

\(^{164}\) Longer statutes of limitations are provided for certain other employment discrimination statutes, including Section 1981 and USERRA which borrow the four year statute of limitations, and the FMLA which provides a two year statute of limitations (extended to three years for willful violations). *Jones v. R.R. Donnelly*, 124 S.Ct. 1836 (2004); 29 U.S.C. § 2617.


\(^{166}\) Brake & Grossman, *supra* note 12 at 872. (“...an employee may not realize she has experienced discrimination in time to protect her rights...An employee may be unable to recognize discrimination, and insufficiently motivated to act to challenge it, until the effects of discrimination are felt and accumulated.”)

\(^{167}\) 550 U.S. 618 (2007).
bringing her complaint, and the Supreme Court affirmed this ruling.\textsuperscript{168} The Court rejected her argument that the act of paying her less with each successive paycheck was an individual discriminatory act sufficient to toll the statute of limitations.\textsuperscript{169}

There was a public outcry after the decision in \textit{Ledbetter}, prompting Congress to pass the Lilly Ledbetter Fair Pay Act of 2009.\textsuperscript{170} The Act provides that, “... a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.”\textsuperscript{171} The case and resulting legislation demonstrate the tension between recognizing discriminatory conduct as it manifests itself in the workplace and taking action within the short statute of limitations provided by the employment discrimination laws.

Moreover, even where an individual recognized discrimination and wants to pursue redress, the short statute of limitations period can make it difficult for a plaintiff to marshal sufficient facts and information to bring a claim. While it is true that an individual does not need an attorney to file a charge, he or she at least needs enough information to articulate a claim on the EEOC intake form that provides sufficient information for the agency to commence an investigation.

Additionally, once the agency issues a right-to-sue letter a plaintiff only has the even-shorter 90-day period to bring suit, which may be woefully inadequate to find an attorney. If an

\begin{footnotesize}
\begin{enumerate}
\item[168] \textit{Id.}
\item[169] \textit{Id.}
\item[170] Pub. L. No. 111-2.
\item[171] \textit{Id.} Although the Ledbetter Act has presently been applied only to pay claims, there is a question whether the language is broad enough to extend the limitations period for other types of discrimination claims as well.
\end{enumerate}
\end{footnotesize}
individual cannot find legal counsel, she will either have to forego legal redress or navigate the bramble of the judicial system on her own.

With or without counsel, the short filing period is also problematic for gathering the facts needed to draft a well-pled complaint. The problem of this short filing period is further compounded by the Supreme Court’s recent decisions in Bell Atlantic v. Twombly\(^ {172} \) and Ashcroft v. Iqbal.\(^ {173} \) Prior to Twombly, courts had recognized a more liberal pleading standard of Conley v. Gibson requiring plaintiffs only to plead some set of facts entitling the plaintiff to relief.\(^ {174} \) However, in Twombly, the Court held that a plaintiff is required to plead allegations that plausibly state a claim on the face of the complaint.\(^ {175} \) The Court held that rather than merely taking a quick look at the complaint, district courts should first carefully examine the complaint to separate pure “legal conclusions” resting on the other “factual allegations.”\(^ {176} \) After removing those legal conclusions, district courts should weigh the remaining facts and determine if they are sufficient to render the plaintiff’s claim plausible.\(^ {177} \)

The new standard developed in Twombly and Iqbal has significant implications for the short statute of limitations in employment discrimination cases. It is more important now than ever that a plaintiff has the facts to bring a well-pled complaint or otherwise face dismissal of

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\(^{172} \) Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

\(^{173} \) 355 U.S. 41 (1957).

\(^{174} \) 550 U.S. 618 (2007).

\(^{175} \) Id.

\(^{176} \) Id.

\(^{177} \) Id; Ashcroft v. Iqbal, 129 S.Ct. 1973 (2009). Iqbal further clarified the Twombly standard in a case in which an individual detained by the FBI brought discrimination claims under the First and Fifth Amendment. The Supreme Court reversed the Second Circuit’s decision and held that the plaintiff did not plead sufficiently detailed allegations. Although Iqbal was a constitutional case, the fact that it involved discrimination claims make it likely applicable in the employment law arena. Sullivan, supra note 147.
her claims and plaintiffs need time to do that. Moreover, the short limitations period means a
plaintiff may only be able to bring the allegations which are still timely, resulting in an
incomplete picture of the discrimination which occurred and providing thin evidence which
makes a claim more susceptible to dismissal at the summary judgment stage.\textsuperscript{178}

The legislative history and other background materials on the federal anti-discrimination
statutes fail to demonstrate any compelling basis for this shorter statute of limitations. One
possible rationale is employer notice. Arguably, employment claims by their nature rely more
heavily upon the recollection of witnesses. If a would-be plaintiff waits too long to file a
complaint, memories may become vague or the witnesses themselves may leave the company.
However, these same types of concerns with staleness are present with other types of litigation
as well. Moreover, even if such an argument would support the shorter 300-day statute of
limitations on the front end (\textit{i.e.}, filing with the EEOC), it would not explain the very brief 90-day
period for filing a lawsuit after the agency issues the right-to-sue letter since the filing of the
claim with the EEOC puts the employer on notice of the need to preserve evidence.

Indeed, there is an argument that employment discrimination plaintiffs should be given
a longer statute of limitations than plaintiffs in other types of cases, such as commercial
litigation because they tend to be individuals, less familiar with the law and less able to obtain

\textsuperscript{178} There is a counterargument that employment discrimination plaintiffs do not need a longer
period of time in which to articulate their complaints because they have the many months during which
the claim is pending with the administrative agency. However, many facts may not become available
until the fact-finding process has been completed. Only then will an individual be able to find counsel.
legal assistance than the complainants in commercial litigation which are often times companies with in-house counsel and firms at their disposal.\textsuperscript{179}

Finally, there is an inherent tension between the requirement under \textit{Faragher-Ellerth} that one take advantage of internal complaint mechanisms and the requirement to file quickly. The effects of pursuing a formal internal complaint procedure can be to render an EEOC claim untimely as the internal procedure does not toll the statute of limitations.\textsuperscript{180}

In sum, the very short statutes of limitations provided by most anti-discrimination laws combined with the requirements to exhaust internally and bring an administrative charge results in a large number of claims being dismissed as untimely. Legislation has been introduced on a number of occasions to extend to two years to make it more consistent with other federal laws but they have been defeated or vetoed for political reasons.\textsuperscript{181}

\textbf{III. ASYMMETRIES AMONG THE BARRIERS TO ACCESS}

The barriers-to-access problem in the employment discrimination claiming system is compounded by the fact that here is tremendous discord among the access requirements contained in the various statutes. For example, the minimum number of employees required to be considered an employer for purposes of the statute ranges from zero employees (all employers are covered) under USERRA and Section 1981, to statutes that require an employer

\begin{footnotesize}
\begin{enumerate}
\item Brake & Grossman, \textit{supra} note 12 at 885. The Title VII statute of limitations framework was modeled after that of the National Labor Relations Act, under which union members have 180 or 300 days to bring an unfair labor practices charge. However, a complainant to the National Labor Relations Board generally has the assistance of his or her union and its legal counsel.
\item Brake & Grossman, \textit{supra} note 12 at 869.
\end{enumerate}
\end{footnotesize}
to have 15 employees in order to be covered such as Title VII and the ADA, to those such as the ADA and FMLA which have still higher numbers (20 and 50 employees, respectively.)

The exhaustion requirement is in similar disarray. Claims brought under Title VII, the ADEA, and the ADEA fall within the jurisdiction of the EEOC and would-be plaintiffs are obligated to file charges with the agency or a state or local equivalent before bringing suit in court. Claims brought under Section 1981, USERRA and the FMLA have no exhaustion requirement and plaintiffs can proceed directly to court.

Finally, the statutes of limitations vary widely under the various anti-discrimination laws. The shortest is for Title VII, the ADA and the ADEA which provide 300 days to file with the agency and 90 days to file a lawsuit after receiving a right-to-sue letter. The FMLA may run two or three years while USERRA and Section 1981 plaintiffs have for years.

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182 42 U.S.C. § 2000e; 42 U.S.C. §12111(5)(A) (same); 29 U.S.C. § 630(b); 29 U.S.C. § 2611; Wagner v. Merit Distribution, 445 F.Supp.2d 899 (W.D. Tenn., 2006) (all employers covered by Section 1981); 20 CFR § 1002.34 (“USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.”)

The following chart summarizing the access requirement demonstrates the asymmetries among them:

<table>
<thead>
<tr>
<th>Law/Protected Trait</th>
<th>Minimum Employees</th>
<th>Exhaustion</th>
<th>Statute of Limitation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title VII (Race, sex, nat’l origin, religion)</td>
<td>15</td>
<td>Required</td>
<td>300 days to file with EEOC; 90 days after right-to-sue letter</td>
</tr>
<tr>
<td>Section 1981 (Race, ethnicity, ancestry)</td>
<td>1</td>
<td>Not required</td>
<td>4 years</td>
</tr>
<tr>
<td>ADEA (Age)</td>
<td>20</td>
<td>Required</td>
<td>300 days to file with EEOC; 90 days after right-to-sue letter</td>
</tr>
<tr>
<td>ADA (Disability)</td>
<td>15</td>
<td>Required</td>
<td>300 days to file with EEOC; 90 days after right-to-sue letter</td>
</tr>
<tr>
<td>FMLA (Taking family or medical leave)</td>
<td>50</td>
<td>Not required</td>
<td>2 years; 3 years if willful</td>
</tr>
<tr>
<td>USERRA (Military service)</td>
<td>1</td>
<td>Not required</td>
<td>4 years</td>
</tr>
</tbody>
</table>

Asymmetry in access to the employment discrimination claiming system is not a “lawyer’s problem” best left to those who must figure out a way to get a plaintiff into court. These disparities cause considerable confusion and inefficiencies which hamper the functioning of the system and its ability to remedy discrimination in the workplace. They also raise deeper theoretical questions about the purposes and priorities of the anti-discrimination claiming system.
The employment discrimination claiming system aims to eliminate workplace discrimination by providing remedies for those who have been victims of discrimination and deterring employers from engaging in discriminatory conduct. Thus, the system if properly conceived and executed should incent both entities and individuals to act in ways that are consistent with the anti-discrimination mandate.\(^{184}\) However, the asymmetry among the access requirements of the various anti-discrimination laws creates confusion that prevents the system from operating properly.

First, the asymmetries prevent individuals from pursuing their claims. The differing access requirements cause considerable confusion for would-be plaintiffs who may not comprehend the complex and differing rules of the game. They may be protected against some forms of discrimination but not against others. Or, as the size of the business fluctuates, they may be protected against certain types of discrimination at one point in time but not another.

Even for employees who work for covered entities, the confusion of varying statutes of limitations and exhaustion requirements is significant. They may not understand that that the statute of limitations on one type of claim has run while another is still valid or that exhaustion is required for one type of claim but not another. The problem is particularly acute for plaintiffs who are pursuing multiple causes of action. For example, if a plaintiff has a disability claim

\(^{184}\) There is considerable debate among scholars as to whether anti-discrimination law is itself market efficient. For example, some scholars argue that discrimination is efficient and that those who do not discriminate enjoy lower labor costs and a competitive advantage and that anti-discrimination laws accelerate this process by imposing a penalty that helps to squeeze discrimination out of the market. John Donahue, *Is Title VII Efficient?* 134, U. PA. L. Rev. 1411 (1986). However, there is a counterargument that the costs of regulating and implementing anti-discrimination law will outweigh this benefit. Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. Rev. 513 (1987). The debate is beyond the scope of this article, which does not purport to justify the employment discrimination claiming system strictly on economic grounds but rather asserts that the asymmetries in the access requirements impede the proper functioning of the statute.
under the ADA and a medical leave discrimination claim under the FMLA, he will be required to bring his ADA claim within 300 days and his FMLA claim within two or three years and will be required to exhaust the former but not the latter. Such confusion may result in a plaintiff failing to bring a claim within the required time period, rendering it time-barred, or in having a complaint dismissed due to failure to exhaust administrative remedies. Such uncertainty may also cause individuals to remain silent rather than to bring complaints because they fear the complaints will go unanswered. This lack of clarity impedes utilization of the employment discrimination claiming system.

Another consequence of the asymmetry problem is that plaintiffs are forced to cast their claims in a way that fits within the procedural structure (i.e., pleading only those claims which are timely; pleading only allegations that are within the scope of the administrative charge) rather than the actual discrimination that took place. Take for example the case of Rita, a Mexican-American woman who has suffered comments and missed promotions at her office for the past two years and now decides that she wants to bring a lawsuit. Rita’s primary damages stem from a position she did not get eighteen months ago. Rita believes that she was discriminated against on the basis of her national origin. However, because her principle claim would be untimely under Title VII, she opts instead to file a Section 1981 claim for discrimination based on ancestry and ethnicity and in doing so also avoids Title VII’s administrative exhaustion requirement.

This miscasting of claims is problematic on a number of levels. First, by essentially forcing Rita to mischaracterize her claim in order to get into court, the system is denying her redress on the actual form of discrimination or harm suffered. Moreover, forcing a plaintiff to
shoehorn factual allegations into an artificial legal construct may prove to be an ill-fit and the facts may not support this type of claim, making dismissal more likely. More fundamentally, miscasting the claim obscures the true nature of discrimination in this particular workplace. This prevents the employer from understanding the actual problem that is taking place and the attendant opportunity for reform and potentially withholds assistance from others who are facing similar types of discrimination. Miscasting the nature of the discrimination also distorts the true picture of what is transpiring in the American workplace. Characterizing the claim in a way that avoids EEOC enforcement, denying the true picture of discrimination and the opportunity for reform.\footnote{Caroline R. Fredrickson, \textit{The Misreading of Patterson v. McLean Credit Union: The Diminishing Scope of Section 1981}, 91 \textit{Columbia L. Rev.} 891 (1991) (noting that part of the problem with the Title VII and Section 1981 overlap is that plaintiffs can bypass the conciliation mandates of Title VII.)}

The disparate access requirements of the various employment statutes may also influence employer behavior in ways that the law did not intend.\footnote{Green, \textit{supra} note 11.} As a preliminary matter, it is significant to note that the asymmetries in the access requirements for the anti-discrimination claiming system may cause considerable confusion among employers as well as employees. For example, with respect to the minimum employees threshold some employers will be covered by a given statute while others will not. An employer may be covered at one point in time but not another as its number of employees fluctuate. Employers may also face uncertainty as to their liability under the various statutes based on timeliness and whether they will have to withstand a protracted agency investigation. Uncertainty as to when and whether various types of claims may be brought may also cause confusion as to recordkeeping and the
need to preserve documents and information for possible future claims. The confusion is likely to be most pronounced for small businesses, which may not have the legal resources of big companies to navigate through the maze of anti-discrimination laws.

Beyond the confusion they create, the asymmetries in access may influence employer behavior in ways which are inimical to the laws’ anti-discrimination mandate. First, an employer may attempt to keep its employee numbers low to avoid coverage of certain statutes through joint employer or contractor arrangements. Such subterfuge not only has the potential to obscure the true extent of discrimination in the workplace, but may also deny individuals the benefits they would receive if the company was recognizing them as true employees.

Additionally, while it may be an overstatement to say that employers would consciously choose to discriminate against a group or individual based on the relative scope of the statutes and potential for liability there under, most employers engage in some sort of risk analysis when making employment decisions. For example, an employer may look at the demographics of employees who are laid off as part of a reduction of force or perform a disparate impact analysis on compensation or promotion data. Or an employer may consider the risk of litigation when taking disciplinary action against or terminating an employee. To the extent that a particular individual is more likely to be protected by a statute and have redress than another this may affect an employment decision. ¹⁸⁷ Unconscious bias in employment decisions may

also result from the assumption that some employees have better access to the claiming system than others and are perhaps more likely to bring a law suit.

The asymmetries in access to the employment discrimination claiming system present problems not only for the individuals seeking redress and the employers attempting to defend against claims but also for the system itself. The first significant issue is that such asymmetries undercut the effectiveness of the enforcement regime by allowing plaintiffs to bypass the enforcement agency or other requirements and proceed directly into court. If Congress intends for race plaintiffs not to have to comply with these requirements, then it should make Section 1981 the remedy. If they intend for the requirements to be uniform then the Section 1981 loophole is an anomaly and should be corrected.

The asymmetries may also add to the workload of the judicial system. Plaintiffs who believe they may not be able to proceed on a particular claim, may throw in a litany of other claims that have longer statutes of limitations or no exhaustion requirements in the hopes that something will stick. This may result in more protracted and burdensome litigation as the parties engage in needless discovery and work through a host of additional allegations in order to get to the true nature of the claims.

The asymmetry with regard to exhaustion of remedies also presents another inefficiency, that of duplicative work among governmental agencies. Some statutes such as Title VII and the ADA are enforced by the EEOC while others such as the FMLA and USERRA are enforced by the Department of Labor. Thus, different agencies may be investigating and expending resources upon investigating the same set of allegations where multiple statutory violations are alleged.
Perhaps most fundamentally, the asymmetries in access to the employment discrimination system themselves result in a kind of inequality, by which some complaints are protected more rigorously than others. Take for example the case of an African-American female and a Caucasian female both alleging identical discrimination claims. If they were employed by a smaller company and Title VII was not applicable, only the African-American employee would be protected because she would be covered under Section 1981 to the extent she brought a claim based on race. If the allegedly discriminatory incident took place fifteen months ago, only the African-American claimant would be able to invoke the longer statute of limitations period of Section 1981; the white female’s complaint would be time-barred. Moreover, to the extent the African-American employee chose to only file a Section 1981 claim, she could go directly to federal court without filing a charge. Such asymmetries send a mixed message – that some types of discrimination in the workplace are more prohibited or wrong than others.

The asymmetries between the access requirements of the various anti-discrimination statutes do not serve any purpose or reflect conscious intent but are rather a byproduct of political negotiations and the climate at a time a particular statute was passed. Indeed, over the past two decades, there has been a decided trend toward uniformity in the substantive elements of employment discrimination claims. For example, the courts adopting similar proof structures and types of claims in cases brought under the different statutes. Additionally, there has been attempts to harmonize some of the substantive disparities between statutes, such as
Title VII and Section 1981, by making the damages available under each comparable.\textsuperscript{188} The persistence of asymmetry in the access requirements remains an anomaly without conscious intent.

IV. PROPOSAL

The present landscape of employment litigation excludes a significant number of individuals and an even larger number of claims from ever being heard on the merits. Further, the inconsistent requirements among the various anti-discrimination statutes further frustrate the efficiency of employment discrimination laws. It is simply not possible to effectively remedy workplace discrimination and further the mandate of equality in employment with a system that recognizes claims in such an arbitrary and piecemeal fashion.

Despite the magnitude and severity of the problem, very little has been written or studied on the subject. Current scholarship focuses on the ways in which claims are cast within the courts, focusing on whether the \textit{McDonnell Douglas} burden shifting framework adequate encompasses the kinds of bias seem in the workplace or whether the rigid constructs of the system exclude intersectional and other types of claims. However, the literature does not acknowledge the fact that the claiming system excludes many potentially valid claims from access to redress entirely. Very few articles have been written about the harsh and exclusionary nature of the small business exemption, administrative exhaustion requirement and statutes of limitations in employment discrimination law and nothing has been written about the ways in which these operate together to exclude a great number of claims, or about

the asymmetries among the laws with respect to each of these elements and their consequences.

Given the lack of forethought that underpins the current system, it is necessary to begin with a conceptual analysis of the goals of the anti-discrimination claiming system. The ultimate goal is elimination of discrimination in the American workplace, which can best be achieved through a system which incorporates redress and deterrence. Both of these require that claims be heard on their merits and that access to the system be made as wide as possible while enabling the system to function effectively.

Despite the problems presented by the barriers to access, such requirements cannot be eliminated wholesale. First, as discussed in their respective sections above, these structures do have some value. For example, the administrative exhaustion requirement if properly conceived can play a role in mediating and conciliating disputes. Similarly a statute of limitations requirement prevents claimants from unduly sitting on their rights and then bringing stale claims about which the employer has had no notice or ability to preserve documents and witnesses and other evidence.

Moreover, complete elimination of these access requirements would in itself have adverse consequences. Most notably, any liberalization of these requirements would result in significantly more litigation in the courts and this additional workload would impede judicial efficiency and prevent many cases from being heard. There are two primary variables in assessing access to justice. The first is the number of people who can see redress under the system which is one of the primary concerns of this article in focusing upon those excluded from coverage. However there is a second factor – whether once folks have access to the
system they can have their claims heard. If the system is so overwhelmed that it takes years to be heard, then the system will be effective for none.

The overburdening argument should not be used an excuse to keep people wholesale out of the system which would reflect a value judgment favoring some individuals while saying that others should receive no protection at all. Indeed those against liberalization of the employment discrimination claiming system would argue that such reform would open up the floodgates and make the system unworkable. Adopting such an argument – that access to remedies should be limited in order to not flood the system, essentially reflects a value judgment that would place the rights of a small subset of individuals above the ability for all to seek redress. This is clearly contrary to the purpose of Title VII.

However, any proposed structural reform must be made with an eye toward the larger implications for the court system. The question then is how can the system be reconceived in a way that provides widespread access while enabling the system to function effectively?

The solution to the access problem lies not in elimination of these requirements, but in making them work together in a way that makes sense. Reform of the anti-discrimination claiming system needs to begin with the simple premise that workplace discrimination is unacceptable and must be eradicated. Consistent with this, the statutory definition of “employer” for purposes of Title VII and the other anti-discrimination statutes should be amended to include all employers, regardless of size, thereby bringing all employers within the purview of the statutes and their prohibitions against discrimination. However, to address at least in part the concerns of the small business lobby regarding the cost of litigation, individuals

189 Selmi, supra note 135.
working for employers which fall below the 15-employee threshold should be required to pursue claims exclusively through the EEOC.

The feasibility of such a proposal turns upon reform of the EEOC. The administrative process has become little more than a bureaucratic roadblock on the inevitable road to court. However, there is a role to be played by the EEOC in the modern anti-discrimination claiming system. The EEOC needs to return to its original mandate – to provide access to those who cannot find legal representation or otherwise need help. Ironically the administrative process could be most useful for those who presently do not have access to it because they are excluded from the scope of Title VII. Indeed these individuals most need the assistance of the EEOC because they work for small companies that are least likely to have their own complaints procedures or where the alleged perpetrator of the discrimination may stand in the way of the internal complaint route.\(^{190}\)

The notion of reforming the EEOC is not a novel one.\(^{191}\) A number of scholars have looked at the gap between the intent and actuality of the agency and its inability to fulfill its mandate and suggested reforms. Some have suggested a refined role for the EEOC, such as focusing only on certain high impact cases while leaving other individuals to seek private attorneys to pursue their claims.\(^{192}\) While such a proposal would reduce agency workload, it is

\(^{190}\) Nielsen & Nelson, \textit{supra} note 55 at 709.
\(^{191}\) The proposal contained in this paper conceptualizes the EEOC within a traditional regulatory model. However, there is important debate beyond the scope of this paper as to whether this model fails to achieve agency goals and whether new models, such as responsive regulation or collaborative governance should be employed. Modesitt, \textit{supra} note 127 at 1257.
\(^{192}\) \textit{Id.}
contrary to one of the EEOC’s most important mandates – providing access to this claiming system.  

More compelling are the proposals which would empower the EEOC to adjudicate claims. For example, in 1995 the Committee on Long Range Planning of the Judiciary Conference of the United States issued a report recommending that Congress empower administrative agencies as a means of reducing the judicial caseload. The report stated, “Congress and the agencies concerned should be encouraged to take measures to broaden and strengthen the administrative hearing and review process for disputes assigned to agency jurisdiction...”

Consistent with this recommendation, the agency should be given adjudicative power with respect to these claims and their decisions should have the force of arbitral rulings. Claims brought by individuals who work for small businesses could then be heard exclusively by the EEOC.

Clearly this additional role would be a significant additional workload for the agency and more funding and resources would be needed. However, in order to reshape the role of the EEOC, the agency’s function with respect to larger businesses should be revamped. Instead of requiring mandatory exhaustion of all claims before going to federal court, employees of those employers with 15 or more employees should have the option of either filing a charge and

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193 There is also a significant question as to whether private attorneys, who would be reluctant to take on low value cases, would have a deterring effect employer’s potentially discriminatory conduct. Selmi, supra note 135.
195 Id.
pursuing the agency route exclusively or proceeding directly to federal court (essentially an
election of remedies.)\textsuperscript{197}

The revamping of the EEOC would have a number of powerful effects: first, it would
ensure that every employee has access to some form of redress within the employment
discrimination claiming system regardless of employer size. Second, it would relieve those
plaintiffs who do not need the agency’s assistance in bringing a claim from onerous and
pointless exhaustion requirements.

Finally it would avoid overburdening the agency by relieving some of the present
caseload and allowing the agency to focus its resources where its assistance is most needed and
beneficial. This would eliminate duplication between the agency and the judiciary because
claimants would have to elect one forum to pursue claims, rather than taxing the resources of
both. As the Report of the Committee for Long Range Judicial Planning noted, “The limited
resources of the federal courts can be conserved, in part, by reducing the court time devoted to
fact-finding and review of administrative determinations that often turn on factual issues.”\textsuperscript{198}

There are a number of corollary steps that should be taken as part of this reform. First,
in order to improve the functioning of the system, the requirements among statutes should be
made uniform across statutes. All of the employment discrimination statutes should be given
the same threshold for whether an employer may be sued in federal court (\textit{i.e.}, fifteen
employees). This will not only eliminate much of the confusion caused by the present

\textsuperscript{197} Indeed, some state systems which do not require administrative exhaustion of discrimination
claims essentially offer election of remedies whereby claimants have the opportunity to pursue
remedies in an administrative forum rather than going to court. Belt, \textit{supra} note 137 at 167.

\textsuperscript{198} Committee on Long Range Planning of the Judicial Conference of the United States, Proposed
asymmetries but will be an essential reform for the election of remedies model so that plaintiffs can bring all of their claims in one forum.

Second, all of the employment statutes should be brought within the purview of the Equal Employment Opportunity Commission. All of the employment statutes should be brought within the purview of the EEOC. The resources presently at DOL to enforce these types of claims should be shifted to the EEOC. The agency has the expertise and having all claims investigated at one agency would eliminate duplication, increase efficiency and economies of scale.

This proposal would include a uniform two-year statute of limitations period for all employment discrimination claims. Making the period for bringing a claim timely would eliminate many of the problems caused by the asymmetries described above. This would give long enough for employees to recognize claims and gather facts and information and secure an attorney if possible and desired. However, it is not so long as to unfairly prejudice employers with the staleness or loss of witnesses and evidence.

The proposal is not without its detractors. One criticism is that by limiting certain claims to agency-only adjudication that some plaintiffs are essentially being relegated to second class justice. However, for those individuals who receive no protection whatsoever in the employment discrimination claiming system, access to the EEOC for redress would be a vast improvement.

A second potential issue is feasibility. Sweeping reforms such as those proposed by this article cannot take place without legislative reform. The problem, of course, is whether or not such reform is possible, particularly in an era of economic hardship and a conservative Congress
which may not be willing to open the floodgates to more litigation and government expenditure at the expense of business.\textsuperscript{199} However, the reforms are not as anathema to business interests as they may seem. First, it is important not to confuse the interests of the small business lobby with the concerns of business overall. Subjecting all business to some form of anti-discrimination law will level the playing field and remedy the current situation whereby small businesses are getting a free pass from anti-discrimination regulatory constraints, which may have appeal to big business. Second, the proposed reforms which would allow plaintiffs in larger organizations to bypass the administrative process and proceed directly to court would actually result in cost savings for larger businesses because they would not have to go through duplicative proceedings at the agency and in court.

Finally this is not opening the floodgates or increasing government regulation but rather a redistributing of avenues for redress. Indeed, in some cases the changes proposed in order to bring uniformity to the access requirements are more restrictive (e.g., the two year statute of limitations would be shorter than the present time period for claims under Section 1981, USERRA and the FMLA where the misconduct is willful.)

CONCLUSION

The employment discrimination claiming system as presently structured excludes a large number of individuals and claims for reasons other than their merits by imposing arbitrary and overly stringent barriers to access including employer size, administrative exhaustion and the

\textsuperscript{199} “A general misperception, one that has been fueled by the popular anti-employment discrimination rhetoric often financed by conservative interest groups...” Michael Selmi, \textit{Why are Employment Discrimination Cases So Hard to Win?} 61 \textit{L. Rev.} 555 (2001).
statute of limitations. As such, it cannot fulfill the promise of eradicating discrimination in the workplace. The access requirements, which have some merit, should be reconfigured to provide access rather than restrict it.

The anti-discrimination laws should be revised to protect all individuals and those who work for small employers should be given remedy in an EEOC strengthened to adjudicate claims. Other individuals should be able to elect between the assistance of the EEOC and opting out of the administrative process to proceed directly to court. The access requirements should also be unified across all of the anti-discrimination statutes. These proposals will ensure access for all, avoid duplication of governmental resources and further the goal of eliminating discrimination in the American workplace.