COMMENT

CAN THERE BE HARMONY?: WORD OF MOUTH HIRING PRACTICES AFTER SEPTEMBER 11, 2001*

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I. IMMIGRATION IN THE UNITED STATES: A LONG, IMPORTANT HISTORY

A. *Prevalence of Immigration in the United States Today*

Statistics from the United States Department of Justice Immigration and Naturalization Service show that 1,064,318 legal immigrants were granted permanent residence in the United States during the 2001 fiscal year.[1] This number has increased from 849,807 legal immigrants granted United States permanent residency during fiscal year 2000.[2] In 2001, seventeen percent of the legal immigrants granted permanent residencies were admitted under employment preferences.[3] Of the employment preference category, four percent were professionals with advanced degrees or exceptional ability[4] and another eight

1. *Legal Immigration, Fiscal Year 2001,* ANNUAL REPORT- U.S. DEPT. OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, OFFICE OF POLICY AND PLANNING, STATISTICS DIVISION, *available at* http://www.immigration.com/newsletter1/legalimmreport.pdf. (last visited August 2002).
2. *Id.*
3. *Id.* at 2.
4. *Id.* at 5.

percent were skilled workers, professionals, or unskilled workers.[5] Mexico, India, China, the Philippines, and Vietnam were the top five countries of origin for the United States immigrants in 2001.[6] These five countries are the former homelands of nearly forty percent of all United States immigrants.[7] Sixty-five percent of these immigrants settled in either Texas, California, New York, Florida, Illinois, or New Jersey.[8] Thus, because the influx of immigrants to the United States is constant[9] and comprised of workers wanting to enter into United States businesses,[10] protection of these potential workers becomes vital for the United States government.

B. *The Historical Impact of Immigration on United States Business*

Immigration is not a new phenomenon in the United States. America has traditionally been coined a "melting pot"[11] of people living, working, and functioning in one of the most diverse cultures in the world.[12] The 'melting pot' term has exemplified America[13] for nearly 100 years.[14] This melting pot culture stems from the combination of each American's ancestral history.[15] With the exception of Native Americans, almost all American citizens can trace their lineage to immigrants from some other land or continent.

American businesses and the United States economy have

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5. *Id.*

6. *Id.* at 2.

7. *Id.*

8. *See Legal Immigration, Fiscal Year 2001,* ANNUAL REPORT- U.S. DEPT. OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, OFFICE OF POLICY AND PLANNING, STATISTICS DIVISION, *available at* http://www.immigration.com/newsletter1/legalimmreport.pdf (last visited August 2002).

9. *Id.* at 3.

10. *Id.*

11. Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority, and Law,* 58 WASH. & LEE L. REV. 23, 28 (2001) (citing Lawrence M. Friedman, THE HORIZONTAL SOCIETY 171 (1999) (showing that the term "melting pot" was adopted from a 1908 Israel Zangwill play and was incorporated into American dialogue to symbolize immigration in the United States)).

12. Peter H. Shuck, Immigration at the Turn of the New Century, Lecture Before the Case Western Reserve University School of Law for the Frederick K. Cox International Law Center (Oct. 26, 2000), *in* 33 CASE W. RES. J. INT'L L. 1, 5 (2001) (stating "[n]o other state exhibits America's level of diversity over so many different social domains").

13. *Id.* at 6.

14. *See* Friedman, *supra* note 11, at 29.

15. *Id.* at 28.

been one of the main benefactors of such a diverse society.[16] Diversity is responsible for generating new ideas in the marketplace,[17] providing a skilled and large labor pool of potential employees,[18] and providing access to new and previously inaccessible markets through family ties to foreign lands.[19] Furthermore, immigration has allowed many potential business leaders and future politicians to establish roots in America and begin to foster economic growth and stability within its shores.[20]

II. THE NATION RESPONDS TO THE TRAGIC EVENTS OF SEPTEMBER 11TH

A. *Response of the Federal Government*

Prior to September 11, 2001, the United States had not endured a credible homeland security threat for over thirty years.[21] However, the September 11th attacks on New York,[22] Pennsylvania,[23] and Washington, D.C.[24] initiated by Osama bin Laden[25] and carried out by his terrorist al-Qaeda[26] network have

16. *See* Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 134 (2000).

17. *Id.* (demonstrating that "[d]iversity sparks productivity gains by fostering innovation and creative thinking").

18. *Id.* (stating that "companies embracing diversity [have] a competitive advantage in the escalating 'war for talent'").

19. *Id.* (explaining that diverse workforces "provide corporate America with the insights needed to achieve maximum market penetration in more diverse domestic and inherently diverse global markets").

20. Rodulfo Figueroa, Opening Remarks, Before the American Dream—Immigrant Reality Symposium, *in* 7 LA RAZA L.J. 81, 82 (1994) (showing that California immigrants are willing to work hard and develop ties to the community in an effort to promote economic freedom and success).

21. *See* ROBERT A. DIVINE, THE CRISIS IN THE CUBAN MISSILE CRISIS 3-4 (Robert A. Divine ed., 2nd ed. 1988) (describing the Cuban Missile Crisis as the last time the United States was on Defcon 3 alert (war alert)).

22. *See New York Victim Count of 2,893 Closes in on Final Number*, ST. LOUIS POST-DISPATCH, Jan. 10, 2002, at A8 (stating that 2,893 people died in the World Trade Center attacks on September 11, 2001).

23. *See id.* (showing that 44 people died in Pennsylvania on plane that was part of the September 11th attacks on the United States).

24. *See id.* (showing that 189 people died in the attack on the Pentagon building in Washington, D.C. on September 11, 2001).

25. *See* Yaroslav Trofimov et al., *'This Is All That We Hoped For. . .'—Import of bin Laden's Video is in the Eye of the Beholder*, WALL ST. J., Dec. 14, 2001, at B1 (commenting on video that the United States claims shows bin Laden was responsible for the September 11 attacks on the United States).

26. *See* Elisabeth Bumiller, *A Nation Challenged: The Video; bin Laden, On Tape, Boasts of Trade Center Attacks; U.S. Says It Proves His Guilt*, N.Y. TIMES, Dec. 14, 2001, at A1 (commenting on video that the United States claims shows Al Qaeda was responsible for the September 11 attacks on the United States).

put America on alert. In immediate response to the attacks, President George W. Bush specifically created a Department of Homeland Security[27] and has vowed to utilize the United States military to eliminate any and all terrorist threats to the United States in existence throughout the globe.[28]

1. United States Foreign Policy Response

Within weeks after the attacks, President Bush, with Congressional support,[29] declared that United States foreign policy would be to immediately deploy United States troops to Afghanistan in order to search for and eliminate Osama bin Laden and his terrorist cells in the region.[30] The Bush administration also broadened its position by stating it would declare war on any country that aids or funds any terrorist activities that may be detrimental to the United States.[31] Recently, the administration has focused its efforts on Iraq's role in funding and supporting terrorists; war with Iraq was arguably necessary and unavoidable.[32] The Bush administration's foreign policy response has been quick, decisive, and broad.[33] Overall, it was initially largely supported by the United States citizenry, but only time will tell if continued support can be expected.[34]

2. United States Domestic Policy Response

Unlike the foreign policy arena, where governmental action was quick, logical, and decisive, the federal government's domestic policy after September 11th can be characterized as chaotic, enduring, and controversial. Immediately following the

27. *See What's News*, WALL ST. J., June 7, 2002, at A1 (showing agency was created to include 169,000 employees and have a budget of $37 billion).

28. *See* Jeanne Cummings & Neil King, Jr., *Bush Demanded Sweeping Retaliation for Terrorist Attacks*, WALL ST. J., Oct. 8, 2001, at A28 (quoting President Bush as saying "[o]ur military action is also designed to clear the way for sustained, comprehensive and relentless operations to drive [terrorists] out and bring them to justice").

29. *See* Greg Jaffe, *Bush to Ask Congress For Nearly $8.5 Billion in Additional Emergency Defense Funds*, WALL ST. J., Feb. 14, 2002, at A8 (showing that Bush was granted $17.4 billion from Congress in September 2001 to fight the war against terror).

30. *See* Cummings, *supra* note 28, at A28.

31. *See* Cummings, *supra* note 28, at A28.

32. *See* Jeanne Cummings, *Leading the News: Bush Spells Out Reasons Iraq is Still a Threat*, WALL ST. J., Oct. 8, 2002, at A3 (showing "congressional approval of a war resolution [against Iraq] wouldn't signify 'military action is imminent or unavoidable.' Rather, it would show that 'America speaks with one voice and is determined to make the demands of the civilized world mean something.'").

33. *See* Cummings, *supra* note 28, at A28.

34. *See* John Harwood, *Bush Maintains Wartime Support With 82% Approval Rating in Poll*, WALL ST. J., Jan. 24, 2002, at A20 (showing President Bush's backing for the war on terrorism by roughly 82% of the American citizenry).

attacks, the federal government's main function was to empathize and help citizens grieve.[35] The government also attempted to reassure the general public of its safety within the United States borders.[36]

Soon after the grieving period had subsided, the federal government asked United States citizens to cede some of their personal freedoms and liberties in an effort to both protect themselves and to insure the elimination of the possibility of future terrorist attacks on the United States mainland.[37] Immediately, citizens found themselves surrounded by chaos at nearly all United States airports.[38] Already anxious passengers faced armed military personnel at every airport,[39] were stripped of items posing the slightest possible harm,[40] had their checked luggage inspected during on-the-spot searches by airport personnel,[41] and were alerted by a terrorist threat warning system implemented to warn citizens of any possible danger that might interrupt their daily lives.[42]

B. *Psychological and Emotional Response by the Citizenry*

The American people reacted to the September 11th tragedy in a diversity of ways.[43] Many citizens prayed[44], others sought the

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35. *See Weekend Journal*, WALL ST. J., Sept. 14, 2001, at W1 (stating that "President Bush has called for a national outpouring of prayer today, asking people to leave their work at lunchtime and visit a place of worship." Places of worship were a main source of comfort for the nation following the September 11 attacks).

36. *See What's News*, WALL ST. J., Nov. 9, 2001, at A1 (describing how the President wants Americans to remain calm as he "told Americans not to give in to 'exaggerated fears or passing rumors' and urged them to perform community service if they want to help fight terrorism").

37. *See How September 11 Changed America*, WALL ST. J., Mar. 8, 2002, at B1 (detailing that the USA Patriot Act passed in October 2001 gave the federal government the ability to subpoena citizens and immigrants suspected of possible terrorist activity. The Justice Department also suggested National Neighborhood Watch encouraging neighbors to pay close attention to each other and look out for possible terrorist activity).

38. *See id.*

39. *See id.* (showing that "[n]ow there are about 1,000 marshals—the government refuses to release exact figures—and they fly on domestic flights, too").

40. *See id.* (demonstrating that things as small as "[n]ail clippers and razors are now often confiscated from carry-on bags").

41. *See id.* (showing that "[a]s for luggage, airlines have dropped years of resistance and now subject most checked bags to scrutiny for explosives").

42. *See* Jim VandeHei, *Start at Yellow, 'Elevated': Ridge Unveils a Color-Coded System For Terrorism Risk*, WALL ST. J., March 13, 2002, at A4 (showing that Homeland Security Director Tom Ridge installed a "new, color-coded national terrorism warning system").

43. *See generally* Mark A. Schuster, M.D. et al., *Special Report: A National Survey of Stress Reactions After the September 11, 2001, Terrorist Attacks*, 345 NEW ENG. J. MED. 1507, 1509 (2001) (showing that "[a]dults responded to the attacks in various ways." Furthermore, "the reactions varied significantly according to sex, race or ethnic group,

social support of friends and family, but a few reacted with anger.[45] The Islamic faith and people of Middle Eastern descent were, and remain, the target of much racial stereotyping and disdain.[46] Foreseeing they would be the target of a backlash, Muslim clergymen and racial group spokespeople attempted to encourage Americans to avoid racial stereotyping and discrimination against United States citizens of Middle Eastern descent.[47] In spite of their pleas, a few Muslim mosques suffered property damage[48] and men, women and children across the country bore the brunt of both verbal and physical harassment.[49]

C. *U.S. Business Reaction*

Immediately following the attacks of September 11th, the United States economy entered a shaky and unstable time.[50] Businesses were unsure about the possibility of future attacks, and the market reflected the worries surrounding such an unsettling time.[51] Faced with unstable markets and a homeland under attack, many businesses were unsure about what the future held in store.[52] Businesses residing in New York's world-famous World Trade Center no longer had offices, and many other businesses feared their office buildings might be next.[53]

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presence or absence of prior emotional or mental health problems, distance from the World Trade Center, and region of the country").

44. *See* Coming Together, *supra* note 34, at W1.

45. *See* Robert Tomsho, *An Imam Who Fled Terror in Lebanon Now Fears It in Quincy*, WALL ST. J., Sept. 19, 2001, at A1 (showing that Muslims feared for their safety because a few Americans were the root of "vicious attacks that [had] been unleashed against Muslims, Arab-Americans and others in the wake of last week's terrorist assaults on the World Trade Center and the Pentagon").

46. *See id.; see also* JUDITH N. MARTIN & THOMAS K. NAKAYAMA, INTERCULTURAL COMMUNICATION IN CONTEXTS 197 (1997) (detailing how "Jack Shaheen, who is of Lebanese decent, went in search of 'real' Arabs after tiring of the way Lebanese and other Arabs were portrayed in the media as billionaires, bombers, and belly dancers. According to his research, 'television tends to perpetuate four basic myths about Arabs: they are all fabulously wealthy; they are barbaric and uncultured; they are sex maniacs with a penchant for white slavery; and they revel in acts of terrorism." Shaheen also addresses the myth that all Arabs are Muslim).

47. *See* Tomsho, *supra* note 45, at A1.

48. See Tomsho, *supra* note 45, at A1 (detailing that "dozens of incidents—including assaults, threats and murders in Arizona, Texas and California—that may be related to the backlash across the country during the past week").

49. *See* Tomsho, *supra* note 45, at A1.

50. *See* Jon E. Hilsenrath, *Terror's Toll on the Economy*, WALL ST. J., Oct. 9, 2001, at B1 (showing the negative impact the attacks had on certain areas of the economy including automobiles, energy, consumer items, gambling, retailers, and tele-communication companies).

51. *See id.*

52. *See id.*

53. *See id.* (showing that New York's economy suffered at least 108,500 job losses as

Small businesses are especially vulnerable during poor economic times.[54] Without the resources to weather a stormy economic period, many small business owners feared the worst once news of the attacks permeated through the community.[55] Much like the citizenry in general, most business owners realized that Osama bin Laden and al-Quaeda were solely responsible for the attacks. However, like some citizens, a few business owners associated all Muslims and citizens of Middle Eastern decent with Osama bin Laden and al-Quaeda and discriminated against them in numerous ways.[56] Some employers allegedly refused to hire applicants of Middle Eastern decent, while others subjected the employees to harassment in a variety of ways.[57]

III. PURPOSE AND SCOPE OF THIS COMMENT

This comment seeks to demonstrate how existing federal law is designed to deal with the hostile work environment being faced by United States citizens of Middle Eastern descent after the events of September 11th. Under Title VII of the Civil Rights Act of 1964 ("Title VII"), employees and potential employees are afforded protection from race, gender, sex, or national origin discrimination at the hands of present or future employers.[58] However, prior to September 11, 2001, the 7th Circuit Court of Appeals began to erode the national origin discrimination protection afforded under Title VII.[59] While the United States Circuit Courts of Appeal are currently split on the issue,[60] the

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a direct result of the terrorist attacks).

54. *See* James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 314 (2000) (showing that successful small businesses tend to merge with larger businesses prior to economic downturns).

55. *See* Richard Breeden, *One Year Later*, WALL ST. J., Sept. 10, 2002, at B2 (showing that "[m]ore than 40% of the owners or chief executives of small and midsize businesses said their companies cut spending as a result of the events of Sept. 11").

56. *See* Steve Bates, *Fighting the Backlash*, HR MAGAZINE, Dec. 1, 2001, at 40 (stating that employment lawyers are seeing "[c]laims of unfair treatment of Muslims and Arab-Americans have increased rapidly in the weeks following the Sept. 11 terrorist attacks, making it more crucial than ever that employers take proactive steps to defuse hostility based on religion, ethnicity or national origin").

57. *See id.*

58. 42 U.S.C. § 2000e-2(a) (2000).

59. E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233, 235-36 (7th Cir. 1993) (Judge Posner writing for the majority holding that word of mouth employment practices are passive by nature and are not a violation of Title VII ban on national origin discrimination).

60. *Compare* E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993) *and* E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (showing the 7th Circuit holding that word of mouth employment practices do not violate Title VII) *with* Nat'l Ass'n for the Advancement of Colored People v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982) *and* Domingo v. New Eng. Fish Co., 727 F.2d 1429 (9th Cir. 1984)

United States Supreme Court may be called upon to decide which interpretation of national origin protection under Title VII is correct. This article examines the demoralizing ramifications of the 7th Circuit's position if adopted by the Supreme Court in the near future. The erosion of national origin discrimination protection may be devastating to citizens of Middle Eastern descent in light of the tragedy of September 11th.

IV. TITLE VII: AFFORDING PROTECTION TO EMPLOYEES IN HOSTILE TIMES

A. *Hostile Times Necessitating the Passage of Title VII*

The Civil Rights Act of 1964[61] was necessitated by the pervasive and blatant racial and sexual discrimination existent in American society prior to the Civil Rights movement.[62] Minorities were second-class citizens in a society that openly discriminated against them.[63] They could not go to the same schools as whites,[64] could not choose their own seats on a bus,[65] and were subjected to disenfranchisement.[66] American society had become numb to the

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(showing other circuit courts disagreeing and holding that word of mouth employment practices are active acts and do violate Title VII national origin employment discrimination).

61. 42 U.S.C. §§ 2000e-2000e-17 (2000).

62. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW, CASES AND MATERIALS 222 (4th ed. 1998) (showing that discrimination "left unregulated, [has] resulted in identifiable groups, such as women, blacks, and other minorities, being underrepresented in the more desirable sectors of the workforce relative to their availability and ability to work").

63. *See id.* at 224 (stating that the unemployment rate of blacks in 1962 was "more than twice the rate of white unemployed workers").

64. *See generally* Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1659-60 (1997) (stating that on September 4, 1957, at Central High School in Little Rock "[i]t was the troops surrounding Central High School that greeted the African American students as they made their way to school" because of the Supreme Court's holding to allow nine African-American students to enroll at the school against the will of the administration and public).

65. *See generally* A. Leon Higginbotham, Jr., *Rosa Parks: Foremother & Heroine Teaching Civility & Offering a Vision for a Better Tomorrow*, 22 FLA. ST. U. L. REV. 899, 901 (1995) Higginbotham details the famous event when:

> [e]ven though the three African-American male passengers went to the most rear seat at the order of the bus driver, Rosa Parks refused to move and give up her seat to a white passenger. By making that modest protest, she was declaring that she, too, was a human being, full of dignity, and that she should be treated as the first-class citizen she was.

Id.

66. *See generally* Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 735 (1998) (describing that "[b]y the early 1900s, a majority of states with large populations of

daily acts of discrimination in a "separate but equal" society.[67]

B. *The Goals of Title VII*

The Civil Rights Act of 1964 was designed under the John F. Kennedy administration[68] and implemented by his successor Lyndon Baines Johnson.[69] It was the culmination of a turbulent time in American history: the Civil Rights movement.[70] Kennedy had two goals that he wanted accomplished by passage of the Act: to fulfill the moral need for reform, and to bring about economic equality to all racial groups in America.[71] Realizing the nation had a moral need for reform, Kennedy saw the Civil Rights Act of 1964 as the perfect opportunity to afford protection to groups that were wrongly facing discrimination in every aspect of their daily lives.[72] Title VII of the Civil Rights Act of 1964 deals solely with employment discrimination.[73] It affords employees and potential employees protection against race, sex, religion, and national origin discrimination.[74] By offering employees this protection, Kennedy saw the Civil Rights Act of 1964 as a tool that would help bring economic equality to those citizens that had never had a fair chance to succeed in America because they could never be

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freedmen had adopted poll taxes that effectively eliminated many potential African-American voters from the polls").

67. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the separate-but-equal doctrine provided that facilities or services separate from but of equal quality to those provided for whites were provided for people of color. This doctrine was in practice until 1954. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (desegregating schools and abolishing the separate-but-equal doctrine)).

68. *See* David C. Butow, *Counting Your Employees For Purposes of Title VII: It's Not as Easy as One, Two, Three*, 53 WASH. & LEE L. REV. 1103, 1108 (1996) (stating that " [i]n 1963, President John F. Kennedy asked Congress to deliver to the nation a comprehensive civil rights bill that would guarantee Americans the opportunity for equal employment").

69. *See id.* at 1108-09 (describing that "[a]fter Kennedy's death, President Lyndon B. Johnson asked Congress once again to enact a civil rights bill. This time Congress responded with the eleven titles of the 1964 Act.").

70. *See id. See also* Augustus F. Hawkins, *Becoming Preeminent in Education: America's Greatest Challenge*, 14 HARV. J. L. & PUB. POL'Y 367, 375 (1991).

71. Geraldine S. Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 422-24 (1999).

72. *See* Butow, *supra* note 68, at 1108.

73. *See* Rothstein & Liebman, *supra* note 62, at 223. The authors state:

> Title VII, dealing with employment, prohibits discrimination based on race, color, religion, sex, and national origin. The legislative history of Title VII shows that the primary focus of the law was racial discrimination. It also shows that Congress was concerned with eliminating not only specific instances of employment discrimination, but its broader economic and social effects as well.

Id.

74. *See id.*

gainfully employed as a result of discrimination.[75] The Supreme Court was clear when it described the purpose of Title VII as providing equal employment opportunities while removing the barriers of past discrimination.[76]

C. *The History of Title VII*

Title VII regulates both state and private employers[77] and was enacted by Congress under the authority derived from the Commerce Clause[78] and Fourteenth Amendment[79] of the United States Constitution.[80] The provision is "Congress's most comprehensive attempt to battle employment discrimination."[81] This original text of Title VII limited protection to race, color, religion, national origin and sex.[82] This original text has been altered with the addition of three amendments.[83] Later, through incorporation, other protected classes were adopted under Title VII including employees over age forty and disabled workers.[84]

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75. *See* Butow, *supra* note 68, at 1108.

76. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (noting that the objective of Congress was to "achieve equal employment opportunity and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

77. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW, CASES AND MATERIALS 225 (4th ed. 1998) (stating "[t]he Act applies to all private employers with 15 or more employees. It also applies to federal, state, and local government employers. All employees of a covered employer are protected").

78. Henry P. Ting, *Who's the Boss?: Personal Liability under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515, 551 n.37 (1996).

79. *Id.*

80. U.S. CONST. Amend. XIV.

81. *See* Douglas P. Ruth, *Title VII & Title IX: Is Title IX the Exclusive Remedy for Employment Discrimination in the Educational Sector?*, 5 CORNELL J.L. & PUB. POL'Y 185, 187 (1996).

82. *See* Civil Rights Act of 1964 § 703(a), 42 U.S.C. §§ 2000e-1(m) (2000) (stating that it is unlawful for an employer to discriminate based on "race, color, religion, sex, or national origin"). *See also* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW, CASES AND MATERIALS 225 (4th ed. 1998) (detailing that sex discrimination protection was added while "Representative Howard W. Smith (D.Va.) was seeking to kill Title VII and thought that including the ban on sex discrimination would encourage other representatives to oppose the legislation." Representative Smith's plan backfired and sex was included as a protected classification).

83. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW, CASES AND MATERIALS 226 (4th ed. 1998) (stating that Title VII was amended by "the Equal Employment Opportunity Act of 1972 [which] substantially expanded the Act's coverage and increased the EEOC's enforcement power." Title VII was also amended by the "Pregnancy Discrimination Act of 1978 [which] added § 701(k) [and] expanded the definition of sex discrimination to include discrimination on the basis of 'pregnancy, childbirth, and related medical conditions.'"The most recent amendment was the Civil Rights Act of 1991 that "provided a right to a jury trial, [and] added compensatory and punitive damages to the available relief.").

84. *See, e.g.*, The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213

D. *The Enforcer: The Equal Employment Opportunity Commission*

Congress, realizing it needed an enforcing body to carry out the goals and purposes of Title VII, created the Equal Employment Opportunity Commission ("EEOC").[85] Wary of an overly powerful agency, Congress incorporated a tight set of administrative guidelines and time limitations into the enactment statute creating the EEOC.[86] The statute provided that the EEOC be comprised of five members each being appointed by the President of the United States.[87] Each EEOC member serves a mandatory five-year term.[88]

The EEOC handles all violations of the Title VII discrimination statute.[89] The EEOC receives complaints in the form of: agency investigations, agency recordkeeping, and complaints filed directly by individual citizens.[90] Each complaint must be filed within 180 days after the alleged discrimination unless state laws set forth more stringent requirements.[91]

If state law is more restrictive than the EEOC guidelines, state law takes precedent and governs the complaint filing procedures for the employee suffering the alleged discrimination.[92] If the employee decides to file with both the EEOC and local government, the "EEOC charge may be filed up to 300 days after the occurrence of the alleged discrimination or thirty days after notice of termination of local proceedings, whichever comes first."[93]

The EEOC begins its investigation for cause once the discrimination charge has been filed against the employer.[94] The EEOC has a duty to serve notice on the employer of a potential

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(1994) (prohibiting discrimination in employment against employees with physical or mental disabilities); *see also* The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1994) (prohibiting age discrimination in employment for employees over age 40).

85. 42 U.S.C. § 2000(e)-4(a) (2000).

86. *See, e.g.*, Mohasco Corp. v. Silver, 447 U.S. 807, 825-26 (1980); *see also* Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 98 (1981).

87. *See* 42 U.S.C. § 2000(e)-4(a).

88. *Id.*

89. *See* Title VII— Equal Employment Opportunity, 1964 U.S.C.C.A.N. (88 Stat.) 2391, 2515.

90. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW, CASES AND MATERIALS 227 (4th ed. 1998).

91. *Id.*

92. *See* H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2405-06.

93. *See* Rothstein & Liebman, *supra* note 62, at 227.

94. H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2404.

violation of Title VII.[95] The notice must be provided to the employer within ten days from the date the complaint was filed with the EEOC.[96] Next, the EEOC conducts a preliminary investigation searching for cause to back the claim.[97] If cause is found, the EEOC attempts to settle the dispute.[98] If a settlement can be reached, the matter is dissolved and the dispute is ended.[99] However, if a settlement cannot be reached, the EEOC may file suit on behalf of the employee in United States District Court.[100] However, if no cause is found, or if no settlement has been reached or lawsuit has been filed within 180 days from the filing of the complaint, "the EEOC notifies the complainant via a "Right to Sue" letter."[101] Upon receipt of the letter, the charging party has 90 days to bring a civil action in federal district court.[102]

E. *Basic Title VII Causes of Action and Defenses*

There are two distinct types of Title VII claims that can be brought in federal district court.[103] The United States Supreme Court created the first type of claim called disparate impact.[104] Congress, following the Supreme Court's mandate, codified disparate impact in the 1991 Amendment to the Civil Rights Act of 1964.[105] A disparate impact claim is premised on the principle that there need not be any intent by the employer to discriminate, but that an employer's facially neutral practice has had a disparate impact on an employee of a protected class.[106] The plaintiff in a disparate impact claim has the burden to show a causal link between the employer's employment practice and a disparate impact on a protected class.[107] The employer may then show a business necessity as an affirmative defense against

95. *See id.*

96. *See* 42 U.S.C. § 2000e-5 (2000).

97. H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2404.

98. *See id.*

99. *See id.*

100. *See id.* at 2404-05.

101. *See* Rothstein & Liebman, *supra* note 62, at 227.

102. *Id.*

103. Lehmuller v. Inc. Village of Sag Harbor, 994 F.Supp. 1087, 1091 (E.D.N.Y. 1996) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977)).

104. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-431 (1971) (establishing disparate impact as a legitimate claim).

105. *See* Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1072 (1991) (codified as amended at 42 U.S.C. § 2000e-2 (2000)).

106. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977)).

107. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

plaintiff's disparate impact claim.[108] The employee may then counter by showing that there was an alternative practice available to the employer that would not create the disparate impact, but that the employer did not implement the non-discriminatory practice.[109]

The second type of Title VII discrimination claim is called disparate treatment.[110] Disparate treatment claims require the employer to intentionally discriminate against the employee in order to be found liable.[111]

There are three subsets of disparate treatment claims: facial discrimination claims,[112] circumstantial evidence claims,[113] and direct evidence claims with a mixed motive.[114]

Once an employee establishes a prima facie case against an employer all hope for the employer is not lost. Title VII affords employers two distinct defenses. The first defense is a statutory affirmative defense called a Bona Fide Occupational Qualification ("BFOQ").[115] However, some courts hold that the BFOQ is not available for most employers who are accused of discriminating against employees based on race.[116]

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108. *Id.*

109. *See* § 2000e-2(k)(1)(A)(ii) (2000).

110. *See* Rothstein & Liebman, *supra* note 62, at 244 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

111. *See* Rothstein & Liebman, *supra* note 62, at 244.

112. *See* Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) (where black employees were fired for refusing to clean floors, court found that statements by agent of employer constituted direct evidence of the discrimination the employees were subjected to at Havens. Further, this case establishes that the burden of proof always rests with the plaintiff in these types of cases).

113. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (establishing first that, in order to win a circumstantial evidence disparate treatment claim, the employee must show (1) that he is a member of a protected class, (2) that he is qualified for the job, (3) that the employee was rejected despite being qualified, and (4) that the employer kept advertising and hired a white employee and second that the employee has the burden of persuasion).

114. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989) (showing that the plaintiff must establish the same prima facie case as in a direct evidence claim, but that the plaintiff must demonstrate that discrimination was a motivating factor for the employer while outweighing any preponderance of evidence shown by the employer that it would have made the same decision even if it had not taken plaintiff's gender into account).

115. *See generally* Wilson v. Southwest Airlines Co., 517 F.Supp. 292 (N.D.Tex. 1981) (showing that §703(e) of Title VII provides that an employer can not be held liable for discrimination when discrimination is reasonably necessary to the normal operation of business).

116. *Compare* Knight v. Nassau Cnty. Civ. Serv. Comm., 649 F.2d 157, 162 (2d Cir. 1981) (recognizing that a BFOQ is not a valid defense in racial discrimination cases involving hiring black workers to recruit more minorities to the civil service commission) *with* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (allowing a BFOQ in substance in a race claim involving a juvenile boot camp because the efficiency of the boot camp

The second defense for employers against Title VII discrimination claims is the existence of an affirmative action policy.[117] To be a valid defense, the affirmative action plan must have a trigger consistent with the purposes of Title VII and must not unduly trammel the rights or expectations of others.[118]

F. *Title VII Proceedings and Damage Awards*

All Title VII cases are heard in district court under a de novo standard of review.[119] The district court may award an injunction thereby ending the discriminatory employment practice and it may award relief in the form of back pay, compensation, or front pay.[120] "Also, both compensatory and punitive damages may be awarded up to $300,000 for companies with more than 500 employees."[121] The compensatory damages include both pecuniary (actual money spent on the claim) and non-pecuniary damages (money not actually spent, e.g. mental anguish).[122]

V. *THE SEVENTH CIRCUIT'S DECISIONS SURROUNDING WORD OF MOUTH HIRING PRACTICES*

The United States Court of Appeals for the Seventh Circuit has presented its opinion about word of mouth hiring practices through two cases.[123] In both cases the court has held that word of mouth hiring practices constitute nothing more than mere passive acts for which the employer cannot be held liable for discrimination.[124]

A. *Equal Employment Opportunity Commission v. Chicago Miniature Lamp Works*

In 1991, the Seventh Circuit held for the first time that word of mouth employment practices were passive acts and did not constitute discrimination under Title VII.[125] The case arose when

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necessitated hiring black boot camp counselors).

117. *See, e.g.*, Taxman v. Bd. of Educ., 91 F.3d 1547, 1556 (3d Cir. 1996) (showing affirmative action policy as a defense to racial discrimination).

118. *See id.* at 1563-65 (holding that the school district's affirmative action policy trammeled the rights of white employees and therefore was deemed invalid).

119. *See* Rothstein & Liebman, *supra* note 62, at 227.

120. *See id.*

121. *See id.*

122. 42 U.S.C. § 1981a(b)(3) (2000).

123. E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993); E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991).

124. *Id.* (both cases holding that word of mouth hiring practices are passive acts).

125. *See Chicago Miniature Lamp Works*, 947 F.2d at 305.

the EEOC sued Chicago Miniature Lamp Works ("Chicago Miniature") charging race discrimination against black employees.[126]

Chicago Miniature is "a manufacturer of light bulbs located in a largely Hispanic and Asian neighborhood on the north side of Chicago."[127] The EEOC alleged that Chicago Miniature was engaged in discriminating against blacks in their promotion, recruitment and hiring practices.[128] Chicago Miniature "relied almost exclusively on 'word-of-mouth' in order to fill its entry-level job openings."[129] "Employees told relatives and friends about the job and, if interested, the friends would fill out an application for employment at Chicago Miniature."[130]

The district court found that "[the result was] the exclusion of blacks from the network of information concerning jobs" and "gross under-representation of blacks in Chicago Miniature's entry-level workforce."[131] As a result, the United States District Court for the Northern District of Illinois held that Chicago Miniature was in violation of Title VII and was liable for discriminatory employment practices under a disparate impact Title VII claim.[132]

In his appellate opinion, Circuit Judge Cummings reversed as clearly erroneous the district court's holding that Chicago Miniature violated Title VII.[133] Judge Cummings, speaking for the Seventh Circuit, held that word of mouth was a passive act since the practices are "undertaken solely by employees."[134] The court concluded that "[Chicago] Miniature is not liable when it passively relies on the natural flow of applicants for its entry-level positions."[135] Furthermore, the Seventh Circuit held that "[Chicago] Miniature's entry-level hiring practices were straightforward, simple, and effective."[136]

126. *Id.*
127. *Id.* at 294.
128. *Id.*
129. *Id.* at 295.
130. *Id.*
131. *Chicago Min. Lamp Works*, 947 F.2d at 295.
132. *Id.* at 296.
133. *Id.* at 294.
134. *Chicago Miniature Lamp Works*, 947 F.2d at 305.
135. *Id.*
136. *Id.*

B. *Equal Employment Opportunity Commission v. Consolidated Service Systems*

In 1993, the Seventh Circuit again was afforded the opportunity to speak on the issue of word of mouth employment practices.[137] Circuit Judge Posner wrote the opinion for the Seventh Circuit for the case in which the EEOC sued a small janitorial company for discriminating in favor of persons of Korean descent.[138]

Consolidated Service Company is a small Korean-owned janitorial and cleaning service company located in Cook County Illinois.[139] The owner, Mr. Hwang, and most employees are Korean immigrants.[140] The company is very small, with annual sales of only $400,000.[141] Seventy-three percent of the applicants and eighty-one percent of the hires at Consolidated Service are Korean.[142] However, less than one percent of the workforce and three percent of the janitorial workforce in Cook County are Korean.[143] Mr. Hwang utilizes word of mouth in numerous ways. Koreans will approach Hwang at work or at a social event seeking a job.[144] On a few occasions, Hwang has "asked employees whether they know anyone who wants a job."[145] Hwang did purchase "newspaper advertisements on three occasions—once in a Korean-language newspaper and twice in the *Chicago Tribune*—but these ads resulted in zero hires."[146] Upon review of the evidence, the United States District Court for the Northern District of Illinois held that Consolidated Service was not actively discriminating by utilizing word of mouth as their sole hiring practice.[147]

Judge Posner agreed with District Court Judge Holdermann and affirmed the lower court's holding.[148] Unlike the Seventh Circuit opinion in *E.E.O.C. v. Chicago Miniature Lamp Works*,[149] Judge Posner wrote this opinion based upon an almost purely economics perspective. The Seventh Circuit held that "[i]f an

137. E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993).
138. *Id.* at 234.
139. *Id.* at 235-36.
140. *Id.* at 235.
141. *Id.*
142. *Consol. Serv. Sys.*, 989 F.2d at 235.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Consol. Serv. Sys.*, 989 F.2d at 235.
147. *Id.* at 234.
148. *Id.*
149. 947 F.2d 292.

employer can obtain all the competent workers he wants, at wages no higher than the minimum that he expects to have to pay he can reduce his costs of doing business by adopting just the stance of Mr. Hwang."[150] The court further opined that word of mouth exercises in an ethnic community may never produce a racial balance in the community.[151] Judge Posner dismissed this imbalance as a natural and acceptable consequence of doing business in an ethnic immigrant community.[152] Consistent with their findings in *E.E.O.C. v. Chicago Miniature Lamp* Works,[153] the Court held that word of mouth recruiting was passive.[154] The Court considered this passive act as beneficial to both the business owner and the employee, as the employee will not risk getting in trouble for referring a "dud" and the potential employee will "likely get a franker, more accurate more relevant picture of working conditions than if he learns of the job from an employment agency, a newspaper ad, or a hiring supervisor".[155] Judge Posner closed his affirming opinion by recognizing the gravity of the holding as it affects a large number of immigrants in this country that use their common ancestry as a stepping stone for success.[156] He states, rightly so, that it would be "a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring."[157]

VI. OTHER CIRCUIT'S DECISIONS REGARDING WORD OF MOUTH HIRING PRACTICES

Unlike the Seventh Circuit,[158] other United States Courts of Appeals[159] have held that word of mouth recruiting and hiring practices do violate Title VII.

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150. *Consol. Serv. Sys., 989 F.2d 233 ,235.*

151. *Id.*

152. *Id.*

> The social and business network of an immigrant community racially and culturally distinct from the majority of Americans is bound to be largely confined to that community, making it inevitable that when the [word of mouth] network is used for job recruitment the recruits will be drawn disproportionately from the community.

153. 947 F.2d 292 (7th Cir. 1991).

154. *See Consol. Serv. Sys.*, 989 F.2d at 236.

155. *Id.*

156. *See id.* at 237-38.

157. *Id.* at 238.

158. *See* E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993); E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991).

A. *Domingo v. New England Fish Company*

In 1984, the Ninth Circuit had the opportunity to hear a case centered on word of mouth hiring practices.[160] The United States District Court for the Western District of Washington was the court of original jurisdiction.[161] The case involved a Filipino employee who worked for New England Fish Company ("Nefco").[162] Nefco operates salmon canneries in Alaska two months out of the year.[163] Nefco hired employees in different ways depending on the employee's job title.[164] The machinists working for Nefco were all hired by word of mouth.[165] Vacancies were filled by friends and family first.[166]

Because most of the machinists were white, most of the employees recruited were also white.[167] Furthermore, "Nefco gave preference in hiring to relatives of company employees and business associates."[168] The policy clearly benefited whites.[169] Senior District Judge Gus Solomon found that discrimination existed and held Nefco liable.[170]

The Ninth Circuit upheld the decision of the United States District Court for the Western District of Washington.[171] The appellate court held that Nefco was using word of mouth hiring practices that were benefiting one ethnic group while acting to another's detriment.[172] Therefore, unlike the Seventh Circuit's holding that word of mouth practices are nondiscriminatory and economically beneficial,[173] the Ninth Circuit held that word of mouth practices are neither beneficial nor are they

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159. *See* N.A.A.C.P. v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982) (the problem with this case is that the 11th Circuit did not outright find the word of mouth practices were discriminatory but rather relied on findings of the trial court and decided the appropriateness of injunctive relief); Domingo v. New Eng. Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984).

160. *See New Eng. Fish Co.*, 727 F.2d at 1429, 1433.

161. *Id.* at 1432.

162. *Id.* at 1433.

163. *Id.*

164. *Id.*

165. *Id.*

166. *New Eng. Fish Co.*, 727 F.2d at 1433.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 1447.

172. *New Eng. Fish Co.*, 727 F.2d at 1444 (showing "Nefco's lack of objective hiring criteria and use of word-of-mouth recruitment directed at particular ethnic groups makes it difficult to determine precisely which of the claimants would have been given a better job absent discrimination, but it is clear that many should have.").

173. *See* E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993).

nondiscriminatory.[174] Consequently, the Ninth Circuit[175] has come to a distinctly different conclusion about word of mouth hiring practices as have their Seventh Circuit colleagues.[176]

B. *N.A.A.C.P. v. City of Evergreen*

In 1982 when confronted with how to treat word of mouth recruiting practices, the Eleventh Circuit[177] came to the same conclusion as the Ninth Circuit.[178] *N.A.A.C.P. v. Evergreen*, originated in the United States District Court for the Southern District of Alabama.[179] All of the black citizens of Evergreen, Alabama sued the city for discrimination in the hiring of various jobs with city agencies and departments.[180] Forty percent of Evergreen's citizens are black; however, the city had only one black person among their fifteen supervisory positions at the time of the lawsuit.[181] Furthermore, the city had no uniform system of recruiting or filling vacancies.[182] Judge Daniel Thomas wrote the trial court's opinion and held that the word of mouth recruiting system was certainly discrimination under Title VII.[183] The district judge held for the black citizens of Evergreen and awarded declaratory relief and attorney's fees to them.[184] However, the judge did not award injunctive relief sought by the plaintiffs.[185]

Circuit Judge Johnson, writing the opinion for the Eleventh Circuit, upheld District Judge Thomas' granting of declaratory

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174. *See* Domingo v. New Eng. Fish Co., 727 F.2d 1429, 1445 (9th Cir. 1984) This case held:

> [w]ord of mouth recruitment, directed along racial lines, made it especially difficult for present or prospective employees to become aware of openings as they occurred. Such recruitment procedures also may have created confusion about what Nefco was looking for by way of qualifications since non-whites were sought only for certain positions.

Id.

175. *Id.* at 1429.

176. See E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993).

177. N.A.A.C.P. v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982).

178. *See New Eng. Fish Co.*, 727 F.2d at 1436.

179. 693 F.2d 1367 (11th Cir. 1982).

180. *Id.* at 1369.

181. *Id.*

182. *Id.* ("Evergreen had no written job descriptions, no uniform personnel procedures, no uniform wage schedules and no affirmative action program").

183. *Id.* (ruling by Judge Thomas stating "the lack of any system of advertising job vacancies other than by word of mouth 'undoubtedly operated to the benefit of white applicants and to reduce the number of potential black applicants' by excluding blacks from access to such information").

184. *City of Evergreen*, 693 F.2d at 1369.

185. *Id.*

relief and awarding of reasonable attorney fees, but reversed the denial of injunctive relief and remanded the case for the district court to award the appropriate decree of injunctive relief to the black citizens of Evergreen.[186] The Eleventh Circuit held that there was "abundant evidence in the record of consistent past discrimination."[187] The Eleventh Circuit continued by instructing the district court to award the black citizens an injunction from engaging in "any employment practices, including [word of mouth] recruitment, appointment, promotion, retention, or any other personnel action, for the purpose or with the effect of discriminating against any employee."[188] Thus, like the Ninth Circuit,[189] the Eleventh Circuit recognized the word of mouth recruitment practices to be active and in violation of Title VII of the 1964 Civil Rights Act.[190]

VII. SPLIT IN THE CIRCUIT COURTS: THE NEED FOR A UNIFORM BODY OF LAW FOLLOWING SEPTEMBER 11

A. *Consequences if the Supreme Court Adopts the Seventh Circuit's Holding*

1. Word of Mouth May be the Only Viable Job Source for Arab-Americans post September 11

Since September 11, 2001, the United States has been frantically attempting to rid itself of potential terrorist threats inside of its borders.[191] While most citizens believe that the USA Patriot Act's grant of power to the federal government to subpoena both citizen and immigrant suspects of terrorism is a good policy,[192] United States citizens of Arab descent have reason to be scared.[193] The USA Patriot Act coupled with the American

186. *Id.* at 1370.

187. *Id.*

188. *Id.* at 1371.

189. *See* Domingo v. New Eng. Fish Co., 727 F.2d 1429 (9th Cir. 1984).

190. *See* N.A.A.C.P. v. City of Evergreen, 693 F.2d 1367, 1369 (11th Cir. 1982); 42 U.S.C. §§ 2000e-2000e-17 (1994).

191. *See How September 11 Changed America*, WALL ST. J., Mar. 8, 2002, at B1 (The USA Patriot Act passed in October 2001 gave the federal government the ability to subpoena citizens and immigrants suspected of possible terrorist activity. The Justice Department also suggested National Neighborhood Watch encouraging neighbors to pay close attention to each other and look out for possible terrorist activity).

192. *Id.*

193. *See* Robert Tomsho, *An Imam Who Fled Terror in Lebanon Now Fears It in Quincy*, WALL ST. J., Sept. 19, 2001, at A1 (showing that Muslims feared for their safety because a few Americans were the root of "vicious attacks that [had] been unleashed

business response following the bombings show a grim outlook for citizens of Arab descent seeking employment in the United States.[194] With businesses skeptical about hiring Arab-Americans,[195] many citizens of Middle-Eastern descent will be forced to turn to family and friends for a job by utilizing word of mouth hiring practices.

Since the United States Circuit Courts are split on whether or not word of mouth hiring practices constitute discrimination,[196] Arab-American business owners will remain wary of hiring other Arab-Americans in fear of an employment discrimination lawsuit. Therefore, the United States Supreme Court must not sit idle on this issue. The Supreme Court must clarify the law in this area and resolve any ambiguity facing Arab-American business owners. By adopting the Seventh Circuit's[197] view that word of mouth is a passive act and is therefore not discrimination under Title VII,[198] the Supreme Court will be allowing Arab-Americans the opportunity to seek employment through open channels; a rarity since the tragic events of September 11, 2001.

2. Potential Problems With Adopting the Seventh Circuit's Analysis

By adopting the Seventh Circuit's holding,[199] the Supreme Court can alleviate some of the problems Arab-Americans face in finding a job post-September 11, but the Court may be allowing much more discrimination to penetrate American businesses. By holding that word of mouth hiring practices do not violate Title

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against Muslims, Arab-Americans and others in the wake of last week's terrorist assaults on the World Trade Center and the Pentagon").

194. *See* Steve Bates, *Fighting the Backlash*, HR MAGAZINE, Dec. 1, 2001, at Vol. 46, Issue 12 (stating that employment lawyers are seeing "[c]laims of unfair treatment of Muslims and Arab-Americans have increased rapidly in the weeks following the Sept. 11 terrorist attacks, making it more crucial than ever that employers take proactive steps to defuse hostility based on religion, ethnicity or national origin").

195. *Id.*

196. *Compare* E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993) *and* E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (7th Circuit holding that word of mouth employment practices do not violate Title VII) *with* N.A.A.C.P. v. City of Evergreen, 693 F.2d 1367 (11th Cir. 1982) *and* Domingo v. New Eng. Fish Co., 727 F.2d 1429 (9th Cir. 1984) (other Circuit Courts disagreeing and holding that word of mouth employment practices are active acts and do violate Title VII national origin employment discrimination).

197. *See* E.E.O.C. v. Consol. Serv. Sys., 989 F.2d 233 (7th Cir. 1993); E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (7th Circuit holding that word of mouth employment practices do not violate Title VII).

198. *Id.*

199. *Id.*

VII,[200] the Court is actually opening the door for Caucasian-owned businesses to employ word of mouth hiring to create a purely Caucasian workforce.

In essence, should the Supreme Court adopt the Seventh Circuit's holding,[201] it is foreseeable that American businesses may employ word of mouth hiring to save money, and will therefore create homogeneous work environments. The consequences of such an endeavor could include an undermining of the purposes of Title VII,[202] and the eventual return of segregation to the American workplace. Each business's workforce will be comprised entirely of workers who share the nationality of the business ownership. The years of diversity building and color-blindness in America[203] can dissolve instantly should the United States Supreme Court uphold the Seventh Circuit's opinion[204] that word of mouth hiring practices are not in violation of Title VII.[205]

B. *Consequences if Supreme Court Adopts Other Circuit's Holdings*

1. Arab-Americans May Not Find Jobs

Since September 11, American business owners have been reluctant to hire Arab-American employees for both personal[206] and economic reasons.[207] As a result, Arab-American workers need alternative channels to assist them in their employment searches. Word of mouth recruiting and hiring is an alternative

200. *Id.*

201. *See Chicago Miniature Lamp Works,* 947 F.2d at 305 (holding word of mouth employment practices to be passive, and therefore non-discriminatory).

202. *See* Butow, *supra* note 68, at 1108.

203. *See* 42 U.S.C. §§ 2000e-2000e-17 (1994) (showing that the United States government has attempted to eliminate discrimination and bring diversity to the workplace since 1964).

204. *See Consol. Serv. Sys.*, 989 at 236; *Chicago Min. Lamp Works*, 947 F.2d at 305 (7th Circuit holding that word of mouth employment practices do not violate Title VII).

205. *See Chicago Min. Lamp Works,* 947 F.2d at 305 (holding word of mouth employment practices to be passive, and therefore non-discriminatory).

206. *See generally* Mark A. Schuster, M.D. et al., *Special Report: A National Survey of Stress Reactions After the September 11, 2001, Terrorist Attacks*, 345 NEW ENG. J. MED. 1509 (2001) (showing that "[a]dults responded to the attacks in various ways." Furthermore, "the reactions varied significantly according to sex, race or ethnic group, presence or absence of prior emotional or mental health problems, distance from the World Trade Center, and region of the country").

207. *See* Richard Breeden, *Small Business, Small Talk / One Year Later*, WALL ST. J., Sept. 10, 2002, at B2 (showing that "[m]ore than 40% of the owners or chief executives of small and midsize businesses said their companies cut spending as a result of the events of Sept. 11").

channel by which Arab-Americans can get jobs in the United States.

However, should the United States Supreme Court adopt the holding that word of mouth hiring practices are in violation of Title VII,[208] that channel will be stripped as a tool which Arab-Americans seeking jobs can utilize. Not only will this affect those Arab-Americans already in the United States, but it will reduce the number of Middle Easterners immigrating to the United States to seek their opportunity, like so many before them have.[209]

2. Title VII Will Remain Intact and Continue to Govern Discrimination in America

By holding that word of mouth practices do violate Title VII,[210] the Supreme Court will uphold Title VII as the penultimate anti-discrimination statute governing employment in America. Such a holding will ensure that President Kennedy's goals and ideals underlying Title VII continue to guide employment law in the United States.[211]

While the events of September 11, 2001 were certainly tragic, their effects will gradually dissipate with the passage of time. Conversely, a Supreme Court holding is timeless. If the Supreme Court undermines Title VII by adopting the Seventh Circuit's holding,[212] the anti-discrimination laws governing employment practices no longer have any teeth and Title VII becomes useless. Therefore, by holding against the Seventh Circuit,[213] the Supreme Court is upholding the integrity and

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208. *See* N.A.A.C.P. v. City of Evergreen, 693 F.2d 1367, 1369 (11th Cir. 1982); Domingo v. New Eng. Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984) (showing other Circuit Courts disagreeing and holding that word of mouth employment practices are active acts and do violate Title VII national origin employment discrimination).

209. *See* Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority, and Law*, 58 WASH. & LEE L. REV. 23, 28 (2001) (citing Lawrence M. Friedman, THE HORIZONTAL SOCIETY 171 (1999) (showing that America has been considered a 'melting pot' since 1908 due to immigrants seeking opportunity and profits in America)).

210. *See City of Evergreen*, 693 F.2d at 1369; *New Eng. Fish Co.*, 727 F.2d at 1436 (showing other Circuit Courts disagreeing and holding that word of mouth employment practices are active acts and do violate Title VII national origin employment discrimination).

211. *See* Butow, *supra* note 68, at 1108.

212. *See Consol. Serv. Sys.*, 989 F.2d at 236; *Chicago Miniature Lamp Works*, 947 F.2d at 305 (showing the 7th Circuit holding that word of mouth employment practices do not violate Title VII).

213. *See City of Evergreen*, 693 F.2d at 1369; *Domingo*, 727 F.2d at 1436 (showing other Circuit Courts disagreeing and holding that word of mouth employment practices are active acts and do violate Title VII national origin employment discrimination).

gravity of Title VII.[214]

VIII. CONCLUSION

Title VII of the Civil Rights Act of 1964[215] has been the supreme anti-discrimination employment law for almost forty years.[216] Since the events of September 11, 2001, Arab-Americans have looked to the statute for protection from discrimination in the workplace. However, the Seventh Circuit[217] has provided the Supreme Court the opportunity to undermine Title VII by holding that word of mouth hiring practices do not violate Title VII.[218] Other circuits disagree,[219] and it is now up to the Supreme Court to decide the fate of Title VII, and the subsequent options available to Arab-Americans seeking employment in the tough post-September 11 American economy.

Matthew Noll

214. *See* Butow, *supra* note 68, at 1108.

215. *See* 42 U.S.C. §§ 2000e-2000e-17 (showing that the United States government has attempted to eliminate discrimination and bring diversity to the workplace since 1964).

216. *Id.*

217. *See Consol. Serv. Sys.*, 989 F.2d at 236; *Chicago Miniature Lamp Works*, 947 F.2d at 305 (showing the 7th Circuit holding that word of mouth employment practices do not violate Title VII).

218. *Chicago Miniature Lamp Works*, 947 F.2d at 305 (showing the 7th Circuit holding that word of mouth employment practices do not violate Title VII).

219. *See City of Evergreen*, 693 F.2d at 1369; *Domingo*, 727 F.2d at 1436 (showing other Circuit Courts disagreeing and holding that word of mouth employment practices are active acts and do violate Title VII national origin employment discrimination).