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## **Innocent Until Proven Guilty**

### **A Critical Interrogation of the Legal Aspects of Job Fit in Higher Education**

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**S**TATUTORY, REGULATORY, AND CONSTITUTIONAL law heavily regulates employment discrimination law. Discrimination based on race, color, religion, national origin, sex, age, or disability is prohibited under federal law and the provisions of many state laws, most of which are applicable to both public and private institutions of higher education. Principal among the federal statutes that cover employment discrimination are Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Equal Pay Act of 1963 (29 U.S.C. § 206[d] et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.),<sup>1</sup> Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 et seq.),<sup>2</sup> and the Genetic Information Non-discrimination Act of 2008 (42 U.S.C. § 2000ff et seq.). However, there are discrepancies between state and federal law and their protections for certain groups; for example, while some states and locales have laws and ordinances protecting against sexual orientation discrimination, there is not yet a federal law to afford such protection nationally. Several of these laws also prohibit retaliation against employees for the exercise of their rights as provided by

these laws, which is also a form of discrimination. In addition, some state and federal courts have ruled that discrimination against transgender individuals qualifies as sex discrimination and a violation of the Civil Rights Act (*Smith v. City of Salem*, 2004).<sup>3</sup>

This chapter provides a foundation of employment discrimination law so that individuals who experience discrimination can determine and address the burden of proof applicable to cases of employment discrimination. For the purposes of this chapter, we concentrate on examining Title VII and issues of discrimination based on race, sex, color, religion, and national origin. The authors introduce a critical framework to examine an employment discrimination case involving a faculty member to provide practical strategies for prospective student affairs applicants to identify and document potential instances of discrimination. However, it is necessary to be realistic in knowing and understanding that the law has limitations because of its narrow interpretation and absence of legislation that promotes inclusivity. Therefore, the student affairs profession should continue leading by example as a societal institution that demonstrates how to address and eradicate employment discrimination.

## JOB FIT AND HIGHER EDUCATION

Given the nature of the higher education profession, its social justice tenet, and the importance of being critical of educational and social contexts, many professionals may be challenged by their fit during the interview, hiring, and job performance stages. Carbado (2013) asserts there is a persistent invisibility of intersectionality that includes gender, race, and sexual orientation due to society and the courts using lenses that are colorblind and gender- and heteronormative. The normativity of the dominant culture's expectations of appearance and behavior of applicants can outweigh as well as conflict with institutions' promotion of diversity and inclusion. The lack of recognition of oppressive forms of normativity result in evaluations such as "female like a heterosexual White woman," "gay like a White heterosexual man," and "Black like a man" (Carbado, 2013, pp. 818–836). These comparisons are not illegal, yet they are damaging and serve as a key component in the maintenance of homogenous environments.

In 2006, the Council for the Advancement of Standards in Higher Education (CAS Standards, 2006) developed a set of characteristics to be embodied and implemented by all higher education practitioners.

The following are the main categories: (a) general knowledge and skills, (b) interactive competencies, and (c) self-mastery. Within each category there are several “professional competencies,” including ones that pertain to personality and behavior. Additionally, in 2015, as a joint initiative, the American College Personnel Association (ACPA) and NASPA–Student Affairs Administrators in Higher Education (NASPA) assigned a task force with the responsibility to “establish a common set of professional competency areas for student affairs educators” (p. 4). Serving as guiding tenets, the ACPA/NASPA competencies include (a) personal and ethical foundations; (b) values, philosophy, and history; (c) assessment, evaluation, and research; (d) law, policy, and governance; (e) organizational and human resource; (f) leadership; (g) social justice and inclusion; (h) student learning and development; (i) technology; and (j) advising and supporting. As a profession, we expect student affairs professionals to develop and enhance these proficiencies throughout their service in the field.

Through a critical race theory (CRT) lens using the current federal law that one would invoke if they alleged a hiring discrimination claim, we discuss the challenges to success that exist for an applicant because of the status quo maintaining expectations that are encompassed in higher education discourse. Most, if not all, higher education institutions tout commitments to diversity and inclusion through various marketing outlets, yet the student enrollment, curriculum, professors, and staff continue to perpetuate Whiteness. This overwhelming Whiteness manifests as White supremacist practices that operate as the norm (Patton, 2015). McLaren (1997) defines *Whiteness* as a societal construct that emerged “at the nexus of capitalism, colonial rule, and the emergent relationships among dominant and subordinate groups. . . . Whiteness operates . . . as a universalizing authority . . . [that] appropriates the right to speak on behalf of everyone who is non-White while denying voice and agency” (p. 267). For this chapter the authors define *social justice* from a legal perspective in which the law contributes to the fair and equitable treatment of all people with regard for socially constructed identities that limit access to resources and full engagement in society.

One example of the intersection of social justice and fit follows when a public state college president commented on how well a new administrator was performing in their role but expressed concern that they were not “fitting in” within their department (Tierney, 1988). The president did not give substantive feedback with their comment, leaving the administrator to ponder what it meant to not “fit in.” How do higher education and student

affairs practitioners determine if they will fit in with a department and campus culture, especially if their skills, knowledge, and disposition match a job description and they can provide concise and measurable work experience examples that align with the 10 ACPA/NASPA competencies? Applicants may possess the educational background, relevant experiences, and proven skills for a position but their personality or fit is not always easily determined from their résumés or curriculum vitae. Title VII applied rigidly to a perceived wrongful employment action, such as hiring, firing, or demotion, makes it difficult to prove fit is a cloaked method for discrimination because courts are reluctant to allow the effects of historic and current systemic exclusionary behavior toward marginalized populations to serve as evidence. Therefore, a favorable ruling for the student affairs applicant or employee who files a lawsuit is unlikely.

Within the study of environments and human interactions there has been a focus on the positive and negative results of combining human characteristics and values inside various spaces (Lewin, 1935, 1952; Parsons, 1909). Specifically, “fit has been a central concept in organizational theory literature since the 1960s when person-environment fit models became prevalent” (Kezar, 2001, p. 86) by the works of numerous researchers. Fit is relevant within organizational research because prior studies have revealed that “individuals were most successful and satisfied when their skills, aptitude, values, and beliefs matched the organizations” (p. 87). In a student affairs context, the profession prides itself on being inclusive and welcoming of individuals who will add value to departmental missions because of their unique perspectives and experiences. The importance of interrogating how and in what ways fit becomes a proxy for discrimination in higher education and student affairs is needed to ensure inclusive-centered approaches are utilized and not ones that “collude to maintain disparities and reinforce social inequity” (Chambers, 2017, p. 10).

Two key criticisms have emerged regarding the concept of organizational fit (Kezar, 2001). First, historically marginalized people are challenged with how to best present themselves to be viewed as the right fit for positions (Carbado & Gulati, 2000). Second, the likelihood of assimilation increases because of the expectation to meet some unspoken criteria that may not align with one’s own unique expression and values (Kezar, 2001). Hence, institutions of higher education hiring participants should make every effort to be cognizant of the environment that exists and interrogate what message it embodies and communicates to those seeking employment. This critical assessment of fit is warranted because it may be difficult for marginalized people in society to present themselves in an authentic way that will be

considered the right fit for an organization. There are different ways one can articulate or perceive job “fit,” and the recognition of this should heighten the sense of awareness for decision makers. Work environments that are encumbered with a “culture of hegemonic collegiality” that is “a set of norms that demand that subordinated groups conform their behavior and interactions to the expectations of the group in power in order to ‘get along’” (Cho, 2006, p. 812), can be stressful and result in premature departures.

## CRITICAL RACE THEORY

CRT is a legal-based theoretical framework that emerged in the mid-1970s as a challenge to mainstream notions of race, racism, and racial power in American society. Jones (2009) states it “is an exciting, revolutionary intellectual movement that puts race at the center of critical analysis. Race has no necessary epistemological valence, we are told, but depends on the context and organization of its production for its political effects” (p. 17). CRT probes the legal system and questions established and accepted foundational doctrines such as equality theory, legal reasoning, and neutrality in constitutional law (Delgado & Stefancic, 2001).

CRT has expanded beyond the legal field and emerged in various disciplines, such as sociology, political science, and education. Ladson-Billings and Tate (1995) charted a CRT for education that theorized education as rife with racialized and racist cultural constructs and demarcations. Since their seminal writing, many education scholars have used CRT in the K–12 and higher education settings to “raise questions, engage in conscientious dialogue, and produce research in which CRT would serve as a tool and framework to unsettle racelessness in education” (Patton, 2015, p. 2). To be more inclusive in higher education, analytical tools that question and name the operation of Whiteness are necessary to address covert and coded racism.

Through a critical lens guided by CRT, we provide examples of challenges in higher education for individuals who are nonmajority members of society.

## EMPLOYMENT DISCRIMINATION LAW

### History of Title VII

Title VII of the Civil Rights Act of 1964 is the most comprehensive federal statute and prohibits discrimination in employment based on race, sex,

religion, and national origin. The law prohibits discrimination in individual employment decisions as well as employer policies or patterns of conduct that discriminate broadly against members of protected groups. As a result, it is unlawful to discriminate against any employee or applicant for employment in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. This extends to employment decisions based on stereotypes and assumptions about the abilities, traits, or performance of individuals. Discrimination based on an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features, violates Title VII, even though not all members of the race share the same characteristic (Gross, 1998; Kahn, 2005).

Both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related are prohibited.<sup>4</sup> For example, equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic-based organizations or groups; or attendance or participation in school or places of worship generally associated with certain minority groups. Title VII was amended in 1978 to include pregnancy-based discrimination in its prohibition of gender-based employment discrimination. The Pregnancy Discrimination Act of 1978 provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work” (42 U.S.C. Sec. 2000e[k]). Related medical conditions include lactation, breastfeeding, and abortions (42 U.S.C. Sec. 2000e[k]). This is important to note, as any discrimination against women for these related medical conditions would be a violation of Title VII for any institution that receives federal funding, public or private. Similarly, the Family and Medical Leave Act of 2006 outlines similar requirements for pregnancy leave and pregnancy-related conditions to ensure that women are not discriminated against for their leave (29 U.S.C. §§ 2601-2654).

With the Lilly Ledbetter Fair Pay Act of 2009, Congress added language to Title VII that prohibits unlawful employment practice with respect to discrimination in compensation. This includes protections for individuals subject to discriminatory compensation decisions or practices, or those negatively affected by the application of a compensation decision. Discriminatory compensation decisions or practices include those related to time wages, benefits, or other paid compensations (42 U.S.C. § 2000e-5[e][3][A]).

Title VII also prohibits discrimination on the basis of conditions that predominantly affect protected groups, which are the various classifications

mentioned in our explanation of Title VII, such as race, gender, disability, age, and so on, unless the practice is job-related and consistent with business necessity, termed a *bona fide occupational qualification* (BFOQ). BFOQs may apply to situations involving religion or sex (Lilly Ledbetter Fair Pay Act, 2009). The protected characteristics of race and national origin are excluded as a BFOQ for college and university positions (Kaplin & Lee, 1995). For example, while a private, religious institution may discriminate and interview and hire only those candidates that ascribe to the institution's religious teachings, the institution may not discriminate against the candidate's race or national origin. The candidate's understanding of the institution's religious mission is paramount in their work, but their race or national origin is not critical to the delivery of the mission.

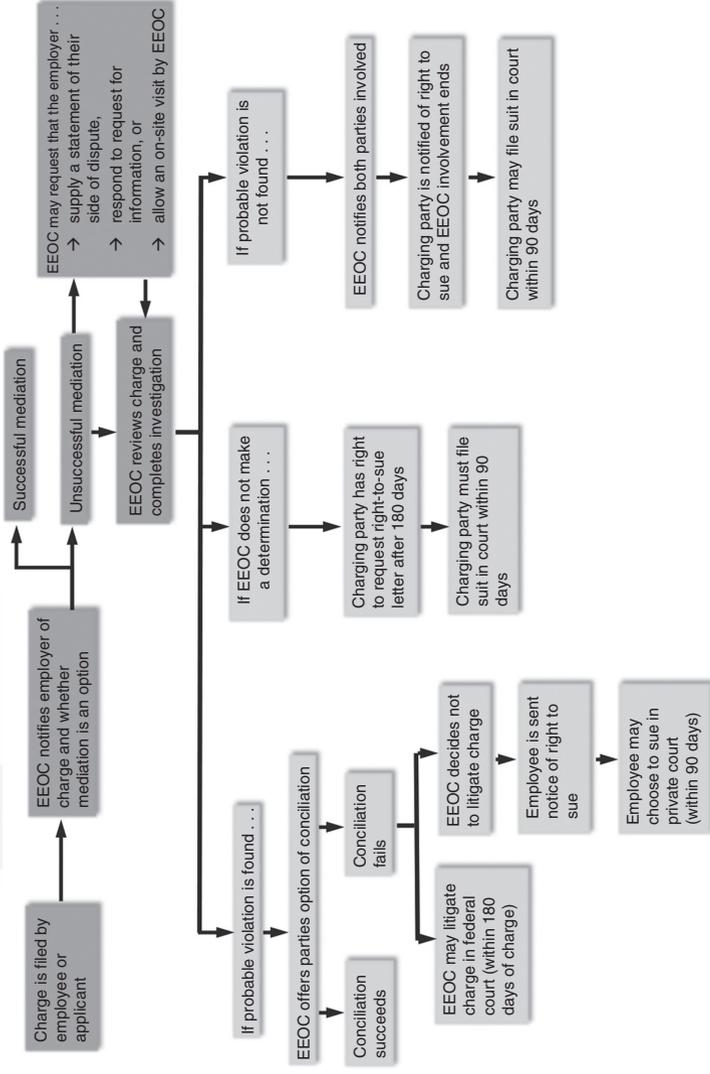
### **The Role of the Equal Employment Opportunity Commission**

If an individual has experienced discrimination based on the various protected classes mentioned, the individual may file a complaint. The Equal Employment Opportunity Commission (EEOC) enforces Title VII. It may receive, investigate, and resolve complaints of unlawful employment discrimination. It may also initiate lawsuits against violators or issue right-to-sue letters to complainants. For an individual to succeed, Title VII gives employees two possible causes of action. Under a theory of *disparate impact*, plaintiffs allege that an employer's seemingly neutral policies have a discriminatory effect on a protected group, and the employer cannot justify the policies by business necessity. Under a theory of *disparate treatment*, plaintiffs allege that an employer intentionally discriminated against a member or members of a protected group and a shifting burden of proof applies to the determination of liability. Disparate treatment is more common in postsecondary education. It can manifest when an individual is denied a job, promotion, or tenure or claims to be treated less favorably than their colleagues because of their race, sex, national origin, or religion and is subjected to a detrimental working condition (*Lynn v. Regents of the University of California*, 1981).

Figures 2.1 and 2.2 help potential complainants understand the complaint process when first filing a claim with the EEOC. All employment discrimination laws that are enforced by the EEOC, except for the Equal Pay Act, require complaints to be filed with the EEOC before civil lawsuits may be commenced against the alleged discriminator.

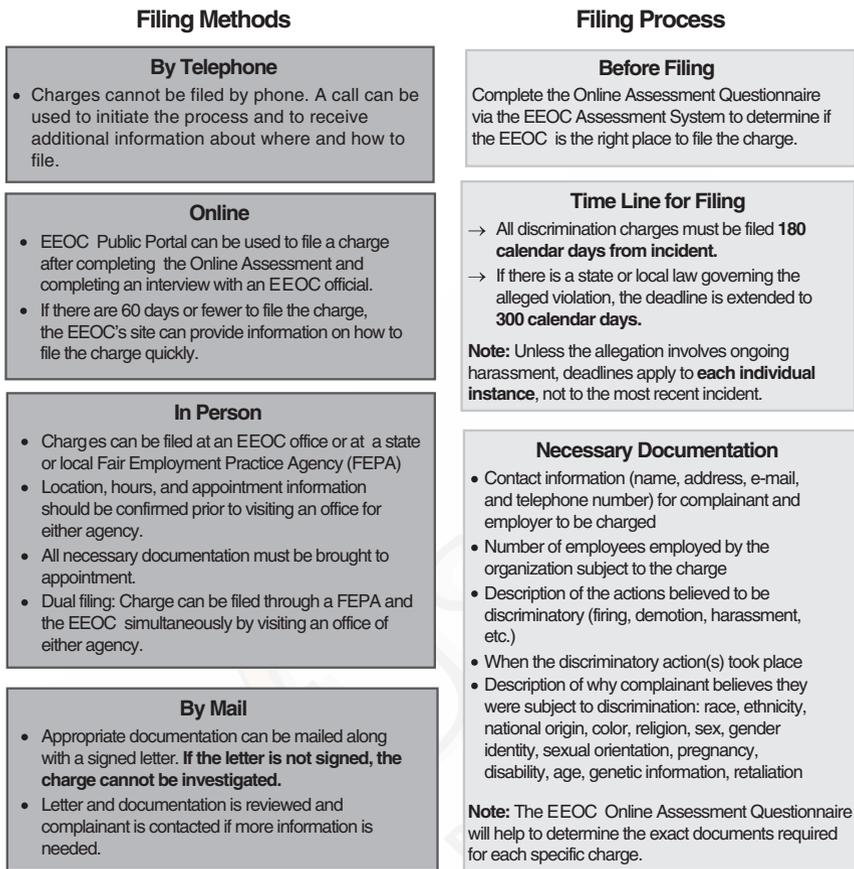
It is critical to note that a complainant must file a complaint with the EEOC within 180 days from the incident.

**Figure 2.1.** EEOC charge-filing process.



Note: Graphic by A. King-Kostelac. Information adapted from the U.S. Equal Employment Opportunity Commission. (n.d.-a). Retrieved from [www.eeoc.gov/index.html](http://www.eeoc.gov/index.html)

**Figure 2.2.** Filing employment discrimination charges with the EEOC.



*Note:* Federal employees and applicants for federal jobs have a different complaint process. Graphic by A. King-Kostelac. Information adapted from the U.S. Equal Employment Opportunity Commission. (n.d.-b). *How to File a Charge of Employment Discrimination*. Retrieved from [www.eeoc.gov/employees/howtofile.cfm](http://www.eeoc.gov/employees/howtofile.cfm)

### A Case Example in the Higher Education Context

Carbado and Gulati (2000) argued there are three problems with anti-discrimination law in proving discrimination in the workplace. We adopt their challenges to assert how employers can cloak discriminatory practices by higher education institutions in their hiring practices under the guise of fit. The first challenge is that courts do not give credence to applicants who are members of marginalized populations and how their positionality

subjects them to stereotypes and misconceptions regardless of the applicant's credentials. Because evidence, direct or circumstantial, is expected to support claims of discrimination, it is challenging to establish fault with an individual or the organization (Carbado & Gulati, 2000), especially because institutions will rely on their nondiscriminatory policies.

The second challenge is producing evidence to support the claim. Institutions of higher education have established policies and programs that present a persona of inclusive and nondiscriminating environments. Since an applicant will have only limited interactions with the institution during the interview process, it would be difficult to show how a person was not hired unless someone says or does something that is deemed discriminatory.

The third and final challenge surrounds the question that must be answered for all discriminatory claims: "Was there intentional discrimination based on the plaintiff's membership in a protected class, such as race, gender, or disability?" (Carbado & Gulati, 2000, p. 1297). As long as an employer can show nondiscriminatory reasons—e.g., "We did not hire X because their answers did not reflect an understanding of our department's goals, it's not because they are [blank]"—this is difficult to prove. Unless there is evidence that the university's hiring officials said or did something discriminatory, fit will be couched in nondiscriminatory language despite the candidate knowing what they experienced. "In most cases, plaintiffs have to rely on circumstantial evidence of intentional discrimination" (Carbado & Gulati, 2000, p. 1297). Circumstantial evidence would need to illustrate the alleged discrimination similarly to the assertion made by the discriminated applicant. For example, an individual denied a student affairs position might find forth evidence of a pattern of not hiring individuals with certain characteristics or hiring ones with homogenous traits to be useful. To illustrate the application of Title VII in the higher education context, we have selected a faculty example to analyze through a CRT framework. Many of the lawsuits filed in higher education in the area of employment law involve faculty denied tenure. Hence, the following case addresses a faculty concern with relevant application to student affairs professionals.

### *Girma v. Skidmore College (2001)*

In September 1999, Paul B. Girma, a Black male of Ethiopian national origin, filed a race, national origin, and age discrimination lawsuit in a New York federal district court against Skidmore College, a private liberal arts institution located in Saratoga Springs, New York. Skidmore hired Girma,

who possessed a doctorate in finance, on a three-year renewable contract to teach courses in the business department. At the time of Girma's lawsuit, he asserted in his complaint that, in addition to what he viewed as incidents with racially discriminatory overtones, there had been no Black tenured professors at Skidmore since its inception (*Girma v. Skidmore College*, 2001, p. 340). The racial overtones are known as racial microaggressions, or "brief, commonplace, and subtle indignities (whether verbal, behavioral, or environmental) that communicate negative or denigrating messages to people of color" (Constantine, Smith, Redington, & Owens, 2008, p. 349). Unspoken and differing standards of evaluation of Whites and their non-White peers have been documented. Institutions of higher education have historically been and currently comprise predominantly White faculty members. Courts have transitioned from finding merit with how structural and innocuous policies result in racial inequality to requiring evidence of intentional racial discrimination (Harris, 2014). The result of such legal decisions is that "the reach of anti-discrimination measures and permissible remediation have been restricted rather than expanded" (Harris, 2014, p. 103). Because law tends to be steeped in the notion of formal equality in which all people come into courts as equals, courts execute decisions that reflect a color-blind and gender-normative analysis. The plaintiff has to prove the nondiscriminatory intended practice has a harmful effect. Therefore, Eurocentric practices and expectations are placed on faculty of color (Patton, 2015). Without legal protection unless behavior is deemed blatantly discriminatory, faculty of color, especially on predominantly White campuses and on the tenure track, are subject to unchecked discriminatory practices and a thriving system of racial inequities (Louis, Rawls, Jackson-Smith, Chambers, Phillips, & Louis, 2016).

While teaching, scholarship, and service were key components for reappointment, student evaluations were heavily relied on in the decision. Girma's evaluations in his first year were numerically below the score needed for reappointment so he was encouraged to improve them. Students' comments reflected a frustration with Girma's pedagogical approach, "citing his inability to support the students' needs and respond adequately to their questions during classes" (*Girma v. Skidmore College*, 2001, p. 332). Research has shown that Black faculty members experience challenges and critiques of their credentials by both White colleagues and students (Flowers, Wilson, González, & Banks, 2008; Pittman, 2012). Relevant to Girma's experience, student evaluations of faculty of color have been examined and found to be lower than their White professors (Huston, 2006; Littleford, Ong,

Tseng, Milliken, & Humy, 2010; Littleford, Perry, Wallace, Moore, & Perry-Burney, 2010). Based on the court's narrow perspective of Girma's claims, the student evaluations research may not have been analyzed as providing legitimate support for him.

Girma provided two examples, which the court did not view as rising to the level of racial or national origin discrimination. The first, regarding the way in which Girma was hired, reflected an interest convergence theory. Interest convergence is a CRT tenet describing when people of color are provided an opportunity of advancement only when it benefits the dominant group (Delgado & Stefancic, 2001). A former White female professor testified that she had recommended Girma for consideration, but it was not until a selected candidate declined the offer that he was hired. The White female professor alleged that the White male chair, Roy Rotheim, told her the department had to hire someone or the faculty line would be taken away and the White female dean "was not likely to refuse to hire a minority candidate" (*Girma v. Skidmore College*, 2001, p. 336). The court responded to the first contention by stating the following:

Even assuming this occurred, it indicates that race played a role in Girma's initial hiring, not in the decision whether to offer him a second three-year contract. While these circumstances may have some value in developing a circumstantial case of discrimination (as may other circumstances mentioned here), they are hardly a smoking gun. (*Girma v. Skidmore College*, 2001, p. 336)

The court's refusal to view the tokenistic agenda of the chair is problematic. Also problematic is evidence having to be synonymous with a "smoking gun" analogy, meaning that "policy documents or evidence of statements or actions by decision makers exist that may be viewed as directly reflecting the alleged discriminatory attitude" (*Girma v. Skidmore College*, 2001, p. 335). A disparate impact analysis was absent from the court's perspective on how Girma was hired. Dismissing the ways in which dominant groups use *diversity* as a way to meet departmental expectations, as opposed to genuine efforts to diversify faculty, stymies efforts to "restructure higher education and create a socially just society" (Chambers, 2017, p. 1).

The second assertion made by Girma involved a meeting with the department chair during his second year to discuss his student evaluations and their impact on his reappointment. This meeting took place in the campus student cafeteria over coffee, which offended Girma and caused

him to feel embarrassed due to the lack of privacy of the setting. The verbatim conversation was not provided to the court. However, Girma viewed this incident as a deliberate act by the chair that “breached the confidentiality of personnel evaluations . . . to provoke a reaction from [him] in a public forum” and believed “Professor Rotheim would not have similarly embarrassed Caucasian professors” (*Girma v. Skidmore College*, 2001, p. 336). The court once again showed a lack of cultural awareness by not taking into consideration how a person of color perceived the setting in which this important meeting took place. The court was dismissive of accusations about racist behavior exhibited by the chair because the court did not assess the way in which the meeting took place as discriminatory. It responded:

There is no evidence indicating that anyone other than Girma and Rotheim heard the content of the conversation, nor is there any indication that the content of the conversation or its setting supports an inference that Rotheim harbored any racial or ethnic animus against Plaintiff (or anyone else). Despite Plaintiff’s subjective beliefs about this encounter, it is not evidence of direct discrimination. (*Girma v. Skidmore College*, 2001, pp. 336–337)

Additionally, the court referenced another case involving a Black female professor who was denied promotion to full professor after two failed attempts. The court in *Bickerstaff v. Vassar College* (1999) established that “feelings and perceptions of being discriminated against are not evidence of discrimination” (p. 456). The court’s lack of recognition of the importance of a chair’s role in the tenure-track faculty journey, microaggressions, and the lack of support that can take an emotional toll on faculty of color are all results of systemic racism’s impact on the tenure process. Until courts acknowledge the fact that systemic racism and exclusionary practices cloak the tenure process, faculty of color will continue to face challenges in the court of law especially if they do not have direct evidence of the discrimination. From the “facts” presented in the district court’s opinion, Girma lacked support from the decision-making members of his process ranging from his all-White colleagues and department chair to the dean and the college president. Allies do not have to be and should not be only from one’s ethnic or racial group, because cultural awareness and competence are valuable to everyone involved in the tenure process. “Changes in the university ecology cannot occur by itself; the support of administrators at all levels, faculty peers, faculty development offices, department chairs, deans and provosts are

essential” (Louis et al., 2016, p. 470). Ultimately, the court ruled in favor of Skidmore College:

Despite the fact that the Court must draw all reasonable inferences in his favor, Plaintiff has offered nothing from which a reasonable trier of fact could conclude, using the employer’s criteria, that he was qualified to continue holding the position or that the criteria was not applied uniformly. Consequently, there is no support for the position that the stated basis for the College’s determination was a pretext for discrimination. (*Girma v. Skidmore College*, 2001, pp. 344–345)

### STUDENT AFFAIRS PROFESSIONALS AND LAWSUITS

Lawsuits involving student affairs professionals have not received the attention of the courts in the same manner as faculty. The use of CRT to analyze Girma’s situation offered one perspective of challenges in employment law. Other critical frameworks such as critical feminist, critical queer, LatCrit, and TribalCrit can be employed to expose and analyze the ways in which societal norms oppress and marginalize individuals. Critical theories that address power and inequity allow student affairs professionals to gain a useful understanding of the challenges that are associated with proving discriminatory practices by drawing parallels with Girma’s case. Consider the situation of an individual with marginalized identities who is hired into an entry or mid-level student affairs position. The person is cognizant that they will be the only person of their race, nationality, gender, religion, sexual identity, sexual orientation, or intersecting identities in their new office. During the interview process, the person may have perceived their future colleagues to be individuals who were self-aware and conscious of language and behavior that could be problematic for students and their peers. However, when the person attends their first staff meeting, they are surprised by comments that are made by not only peers but also their supervisor. As a result, in the new person feels isolated and offended. Seeking advice and overall support, the new person consults with a mentor at another institution about what to do. The mentor reminds the new person that fit can be viewed as an innocuous employment tool yet serve as a cover for discrimination. The advice that the mentor provides is a way to be proactive in the matter. Depending on one’s comfort level, they could name the behavior and request a specific change in behavior by their colleagues.

Organizational change could manifest in various ways, including a one-on-one with the supervisor or the colleagues. If an environmental issue were perceived, discussing with a supervisor the opportunity to bring a trained professional to conduct a workshop would be useful in “unlearning” normative behavior and discourse. One must decide to the extent they desire to challenge people and environments in which fit is utilized to maintain spaces of exclusion and intolerance.

If hired, a student affairs professional can reasonably expect to receive constructive and substantive feedback at various intervals regarding their job performance. Student affairs professionals have the support of the ACPA/NASPA competencies as a way to guide a conversation about ensuring each staff member works in places that exemplify professional ethics even if the law does not provide the same protection.

## PRACTICAL STRATEGIES

When going through the interview, hiring, and/or promotion process, higher education and student affairs professionals should keep the following strategies in mind to ensure that intentional and unintentional discrimination does not occur as both a job seeker and a search committee member. Many institutions are now using affirmative action advocates who provide an outside perspective during the search process. There is an inherent culture in any department or unit that may influence the interpretation of a candidate’s fit without fully vetting their skills and qualifications to fulfill the position description. The following suggestions offer several practical strategies, in no particular order, that may be helpful to job seekers and search committee members.

Student affairs professionals must recognize how their own biases can influence decision-making in hiring practices. Self-awareness can influence how culture is shaped and maintained in the work environment. If an institution is seeking to determine how welcoming or uninviting its campus culture is, an assessment of the climate is warranted (Harper & Hurtado, 2007). Student affairs professional can influence and shape campus culture.

A case study can serve as an example. Kye is a multiracial transgender male going through portions of the gender confirmation process. He applied for an assistant director position at a public institution in an office consisting of White, heterosexual, and cisgender females and males. During Kye’s lunch for his campus visit, one of his potential future colleagues asked, “How does

your family feel about your decision to physically transition?” Kye was taken aback, chose not to answer, and changed the subject. After the campus visit, the staff discussed applicants for final consideration. Several staff members, including the staff member who posed the question, stated Kye was qualified but he did not seem like the right fit for the office. If you are the office director, how do you engage your staff in a conversation about fit? A staff conversation that ideally probed for specific examples of how Kye would not add value to the team is warranted. Most importantly, the director could facilitate a dialogue that includes a call for self-reflection on perspectives and biases that maintain inequities and perpetuate hegemonic notions of fit that contribute to exclusive environments.

Social justice competency is necessary for leadership to engage staff in these types of conversations. Staff members should also “do the work” to not only participate in conversations but also suggest behavioral changes for self and peers. “Social justice is both a process and a goal” (Chambers, 2017, p. 10); therefore, continually reading and discussing scholarship that highlights hegemonic forms of normativity, such as hetero- and cisnormativity, enhances the likelihood of unlearning biases. Additionally, student affairs professionals should make a consistent commitment to be transformation agents who are equipped with knowledge and solutions by attending conferences that offer a variety of workshops and presentations that focus on ways to serve diverse student populations as well as contributing to personal and professional development.

Behavior-based questions should be used by both the applicant and the hiring committee to probe the ambiguity behind job fit. Hypotheticals and detailed questions that will inform all parties how social justice is incorporated into everyday decision-making and interactions in a department and institution should be used. While this will allow the search committee to gauge the applicant’s fit to the department’s values, it will also help the applicant understand the department’s level of commitment to social justice. Applicants can ask, “On a daily basis, what efforts are made by staff to demonstrate an understanding of systemic racism in higher education and to implement behavior that addresses it?” Applicants can also ask more probing questions, such as: “How does this department/unit define *social justice*? What professional development opportunities are available that enhance knowledge about inclusion and equity? If I were to speak with the undergraduate student workers and graduate assistants who work in this area, would they be able to articulate specific social justice programs or initiatives that are

sponsored or supported by this office?” Depending on the responses to these questions, all parties can learn more about philosophies and perspectives.

Job descriptions should be written with as much specificity as possible to inform potential candidates more about the climate and culture of the overall institution and of the specific department. While employers want to present their institutions as “best places” to work, they should be honest with themselves and with their candidates about what newcomers can expect out of the job, institution, and locale. If employers are honest about their climate and working conditions, job seekers are more likely able to have an accurate read of the fit and will most likely remain in the position longer than if they misread their expectations of the climate. Honesty should address the challenges of programming, limited resource allocations, and any other known factors that could require individuals to be creative in their solution-focused thought process. However, honesty would require employers to have introspection of their culture and working environment, which is a limitation. Those units that can build an organizational and working culture that reflects this type of honest reflection of their own reality are more likely to be able to communicate this culture to their candidates. Frequent workshops focused on reducing bias can promote an inclusive environment. It could also provide a platform for colleagues to discuss issues and reduce human resources complaints and staff turnover. Employers who are intentional in their use of language and interview protocols that promote inclusivity are more likely viewed as ideal “fits” for job seekers.

It is necessary to be realistic in knowing and understanding that the law has limitations because of its narrow interpretation and absence of legislation that promotes inclusivity. These two challenges slow progress for marginalized applicants. For example, Congress has not enacted federal laws that recognize the mistreatment of gender-variant individuals. The Employment Non-Discrimination Act (ENDA), which would “prohibit workplace discrimination based on sexual orientation or gender identity” (ENDA, 2009), is a much-needed law. However, in its current proposed format, religious entities, including religiously affiliated higher education institutions, would be exempt from complying with it. “The narrow protections afforded currently under Title VII establish the need for ENDA if there is to be any meaningful federal prohibition of workplace discrimination and harassment based on sexual orientation and gender identity” (Reeves & Decker, 2011, p. 78). However, institutions have been proactive to implement protective

policies that address discrimination of any form, whether or not local, state, or federal law mandates enforcement.

Institutions and departments should begin leveraging the benefits of implementing initiatives focused on recruiting faculty and staff of diverse backgrounds. With this commitment, institutions and departments can address their own unconscious biases that become an issue of fit during the hiring process. Some institutions have hired specialized recruiters to help units and departments create advertisements that attract a diverse pool and address any vagueness that can become issues during the search, interview, and hiring process. In addition, to address the implicit bias as mentioned previously, some institutions have created positions of *search advocate* who go through training to understand implicit bias, the legal environment, and recruiting and screening strategies. These search advocates are other faculty or staff of the institution. While most if not all institutions have an “outside” member on search committees, most of these outside members do not have such specialized training to address these issues.

## CONCLUSION

“Antidiscrimination law is about freedom from legal constrictions, but it is limited in its ability to empower anyone to do anything as it does not take into account the reality of social inequity” (Chambers, 2017, p. 276). Hence, student affairs departments and units should be intentional and ground their hiring practices in inclusion and not homogeneity. Social justice and multiculturalism “involve student affairs administrators who have a sense of their own agency and social responsibility that includes others, their community, and the larger global context” (ACPA & NASPA, 2015, p. 28). While the hegemonic perception of the student affairs field is one of multiculturalism, which may erroneously encourage us to seek out, hire, and work with others whose values align with our own, this format pressures applicants to conform to a persona that is inauthentic. Therefore, our profession must internally assess how to resist expectations and behaviors that cause alienation. An unbiased examination of a candidate’s fit to successfully accomplish the required job tasks begins with determining what *fit* already means to a unit. While many times fit serves as a mask for employment discrimination of one or more of protected and unprotected classes, we hope the strategies and information we have presented will help job seekers and search committee members avoid violating the law. We also hope the strategies we discussed

will help all individuals involved in job searching and hiring to cease and discontinue hegemonically normative methods that are exclusionary. A successful search yields the candidate who best serves students and works in an inclusive environment. Fit is best left for shoes.

## NOTES

1. 29 U.S.C. § 621 et seq. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits age-based discrimination in employment for persons 40 years of age or older. The law prohibits age discrimination in hiring, discharge, pay, promotions, and other terms and conditions of employment. As part of the Fair Labor Standards Act, its application is to institutions with 20 or more employees and which affect interstate commerce. The standards for coverage parallel those of Title VII.

2. Along with Title VII, the Immigration Reform and Control Act of 1986 prohibits discrimination against aliens.

3. The Equal Employment Opportunity Commission (EEOC) made a historic decision in *Macy v. Holder*, Appeal No. 0120120821 (2012), by stating that transgender discrimination is gender discrimination and therefore protected under Title VII.

4. See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (examining intentional discrimination); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (examining unintentional discrimination).

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