Coloring Inside the Lines: Finding a Solution for Workplace Colorism Claims

Tennille McCray†

Introduction

In 2009, Matthew Harrison introduced a study he conducted on color discrimination in the workplace.[1] Based on his research, Harrison discovered that skin tone is more important than educational background for those seeking jobs.[2] Particularly he noted that "a darker-skinned Black male with higher levels of education and past work experience was significantly less preferred than a lighter-skinned Black male with less education and work experience."[3] When it comes to forms of race or color discrimination in the workplace, cases have often focused on actions between individuals of different races.[4] Consequently, claims of colorism have often been ignored as a negligible effect of the workplace environment.[5] Colorism involves the discrimination

---

†. J.D. expected 2012, University of Minnesota Law School. This Article is dedicated to those individuals who tirelessly fight for social justice every day. The author thanks Professor Carl Warren for his guidance and assistance throughout the writing process. The author also would like to give a special thanks to the editors and staff of *Law and Inequality: A Journal of Theory and Practice* for working on this Article.

1. *See* Matthew S. Harrison, *Colorism: The Often Un-discussed "ism" in America's Workforce*, THE JURY EXPERT, Jan. 2010, at 67, *available at* http://www.astcweb.org/public/publication/documents/HarrisonTJEJan2010.pdf. Matthew Harrison, PhD is an adjunct professor with the Department of Psychology at the University of Georgia. *Id.*

2. *Id.*

3. *Id.*

4. 45A AM. JUR. 2D *Job Discrimination* § 120 (2011) ("Separate claims of color discrimination are rare, because they are usually brought with and subordinated to race discrimination claims.").

5. Taunya Lovell Banks, *Multilayered Racism: Courts' Continued Resistance to Colorism Claims*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213, 217 (Evelyn Nakano Glenn ed., 2009), *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1821&context=fac_pubs; *see also* William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, J. ECON. PERSP., Spring 1998, at 63, 73, *available at* http://people.ku.edu/~sumanta/LaborStuff/discrimination.pdf (explaining that no one has tried to explain possible variables for skin shade discrimination in the labor market).

of one person against another based on the lightness or darkness of one's skin.[6] In 2008, the Equal Employment Opportunity Commission (EEOC) unveiled its Eradicating Racism and Colorism from Employment (E-RACE)[7] initiative to combat the growing number of racism and colorism claims in the employment arena.[8] Although the EEOC has made steps to make people aware of colorism in the workplace, those who actually experience colorism seldom find relief due to failure to establish a prima facie case in the court system.[9] There are several reasons why this is a reality for plaintiffs of color discrimination. One reason for this problem is that courts apply the same standards for colorism claims as they do for racism claims.[10] Another reason is that many judges, attorneys, and legal scholars are not knowledgeable about the complexity of colorism and the nuances that make it systematically distinct from racism.[11] Focusing mostly on the relationship with Blacks, this note explores the historical context of colorism in the United States to illustrate that although colorism is the product of racism,[12] it is also its own separate and distinct form of discrimination.[13] Part I provides a historical

---

6. *See Questions and Answers about Race and Color Discrimination in Employment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 16, 2006), http://archive.eeoc.gov/policy/docs/qanda_race_color.html.

7. *The E-RACE Initiative*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm (last visited Oct. 24, 2011) ("The E-RACE Initiative is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination.").

8. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace (Feb. 28, 2007) (on file with author), *available at* http://www.eeoc.gov/eeoc/newsroom/release/archive/2-28-07.html ("The EEOC has also observed a substantial increase over the past 15 years in discrimination charge filings based on color, which have risen from 374 in FY 1992 to 1,241 in FY 2006."); *see also Race-Based Charges FY 1997–FY 2008*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (March 11, 2009), http://archive.eeoc.gov/ stats/race.html.

9. Banks, *supra* note 5, at 213 ("The law is less clear about whether the hiring of [a lighter-skinned person] over another similarly qualified black person because of [his or] her light skin tone—colorism—is illegal.").

10. *See* 45A AM. JUR. 2D *Job Discrimination* § 120 (2011) ("Congress and the United States Supreme Court consider color and race discrimination to be distinct . . . ."). *But see Section 15: Race & Color Discrimination*, EEOC COMPLIANCE MANUAL (Apr. 19, 2006), http://www.eeoc.gov/policy/docs/race-color.html ("[T]he same analyses apply to both race and color.").

11. *See* Banks, *supra* note 5, at 216–19. "Courts have been reluctant to acknowledge the increasing complexity of race because legal race theories do not provide sufficient guidelines for courts to apply." *Id.* at 213.

12. Margaret L. Hunter, *"If You're Light You're Alright": Light Skin Color as Social Capital for Women of Color*, GENDER & SOC'Y, Apr. 2002, at 175, 175 ("To function, skin color stratification requires both racism and colorism.").

13. *Id.* at 175–76 ("[Racism] refer[s] to the U.S. system of *prejudice,*

framework of colorism in the United States. Part II looks at Title VII and the EEOC under the Civil Rights Act of 1964[14] to show how the federal government has approached color discrimination. Part III analyzes the few successful colorism claims and attempts to discern the reason for the failure of so many other colorism claims to establish a prima facie case. Part IV discusses realities unique to colorism in the workplace. Finally, Part V recommends new standards for courts to consider when addressing colorism claims.

I. The Historical Framework of Colorism in the United States

A. *Pre-Civil War*

Colorism has a long history in the United States dating back to antebellum days.[15] The sexual oppression of enslaved Black women by White slave owners resulted in the creation of a large mixed-race population.[16] Before, the dichotomy between Blacks and Whites was clear, but there was a quandary about how to define a mixed-race population.[17] Fearful that the White race would cease to exist given the continuing relationships between Whites and Blacks,[18] Whites ultimately established the "one drop rule" as an attempt to keep the White race pure from "Black blood."[19] In the infamous case *Plessy v. Ferguson*,[20] the Court addressed the issue of color as it related to a petitioner who had seven-eighths White blood and one-eighth Black blood.[21] The Court concluded that just one-eighth of Black blood made the

---

discrimination, and institutional power that privileges whites and oppresses various people of color . . . . [Colorism] describe[s] *the system that privileges* lighter skinned over the darker-skinned people within a community of color." (emphasis added)).

14. 42 U.S.C. § 2000e-2 (2006).

15. Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, AM. J. SOC., Nov. 1991, at 760, 761 ("The relationship between skin tone and privilege appears to have emerged during slavery.").

16. *See* STEPHAN TALTY, MULATTO AMERICA 63 (2003).

17. JON MICHAEL SPENCER, THE NEW COLORED PEOPLE: THE MIXED-RACE MOVEMENT IN AMERICA 1 (1997) ("Because black and white people have been viewed as pure opposites, Americans have been confused about the consequence of black and white intermixing . . . .").

18. *Id.* at 39 ("[T]he fear of allowing a middle group between the black and white races . . . is that this social arrangement would result in a greater degree of miscegenation and the eventual browning of America.").

19. *Id.* at 1 (describing the one drop rule as a way of defining Blackness).

20. 163 U.S. 537 (1896).

21. *Id.* at 538.

petitioner Black and unable to hold any privileges of his seemingly White skin color.[22] Thus, the inclusion of mixed-race individuals in the Black race made it evident that the term Black no longer indicated those of only Black blood, but all those who were somehow biologically *tainted* by Black blood.[23]

Although still enslaved, mixed-race children, often lighter in skin complexion, experienced many advantages that were not available to their darker counterparts.[24] One example of such a hierarchical structure was the stark difference between the tasks delegated to light-skinned Blacks and dark-skinned Blacks. Light-skinned Blacks often were house servants while dark-skinned Blacks carried out the physical labor in the fields.[25] These differences placed light-skinned Blacks in a better position to learn skills and become educated, privileges not offered to dark-skinned Blacks.[26] One of the greatest advantages of light skin was the higher probability of obtaining freedom.[27] Light-skinned Blacks working in the home had greater opportunities to learn valuable skills necessary to work as free laborers in order to purchase their freedom.[28] The difference in Whites' behavior towards light-skinned Blacks and dark-skinned Blacks did not go unnoticed.[29] Accordingly, light skin became a prized possession, because with light skin came a better chance at a more humane existence.[30]

---

22. *Id.* at 552 (acknowledging that the proportion of blood was a factor for determining racial classification).

23. SPENCER, *supra* note 17 ("By including mulattoes under the category of black, it was clear (and has been clear ever since) that 'black' and its earlier synonyms no longer denoted a people who were 'pure.'").

24. Keith & Herring, *supra* note 15 ("[T]he dominant white society had historically extended social and economic privileges, not available to darker blacks, to light-skinned blacks.").

25. *Id.* at 762 ("Field hands were disproportionately of pure African ancestry and were assigned to perform physically demanding, menial tasks. . . . House servants, in contrast, were largely mulatto offspring and decedents of white males and slave women.").

26. *See id.* (describing the various opportunities for mixed-race individuals to develop skills and learn to read and write).

27. TALTY, *supra* note 16 ("Wealthy landowners freed their lovers and their mulatto children [and] educated them . . . ."); *see, e.g.*, *id.* at 6 ("For whites . . . black men and women in chains were as much a part of the southern landscape as magnolia trees or livestock. But lighter-skinned captives stood out; they could disrupt slave auctions and unnerve an entire town.").

28. Keith & Herring, *supra* note 15, at 762 ("Possession of a skill was not only esteemed and a source of pride among slaves, but it often conferred other privileges such as the opportunity to work as a free laborer, save money, and purchase one's freedom.").

29. *Id.* ("[M]ulattoes were conscious of the distinctions between themselves and darker slaves and believed that their white blood did indeed make them superior.").

30. *Id.* at 763 ("[T]he slaves viewed light skin color as a desirable asset and as

B. Post-Civil War

After the Civil War, light-skinned Blacks became the elite class of the Black community.[31] They created their own niche within the Black community and established criteria for those who they believed should belong in that niche.[32] The implementation of certain tests became common methods used to distinguish the acceptable from the unacceptable in the Black community.[33] Light-skinned Blacks found ways to separate themselves from their darker counterparts in almost every aspect of life, including separate schools, churches, and organizations that catered to individuals of a certain color.[34] Walter B. Hill, Jr. and Barbara Lewis Burger explain in their article:

> African Americans who wanted to join certain churches or social clubs had to pass what was called the 'paper-bag test.' Prospective members of these organizations had to put their hand into a brown paper bag. Only if their skin was lighter than the color of the bag were they considered for membership. African Americans were eligible for membership in Blue Vein Society . . . only if the veins on their wrist were visible through their light skin.[35]

Eventually all aspects of life rested on the color of one's skin.[36] The elite position of light-skinned Blacks remained stagnant for many years, and its lingering effects are still seen today.[37]

---

symbolic of more humane treatment.").

31. *Id.* ("Because . . . blacks of mixed parentage [had] opportunities for training, education, the acquisition of property, and socialization in the dominant culture, mulattoes emerged at the top of the social hierarchy in black communities following the Civil War.").

32. *See* SPENCER, *supra* note 17, at 39 ("Between 1850 and 1915, mulattoes went from trying to assimilate into the white world to building their own world within the black community . . . ."); Keith & Herring, *supra* note 15, at 763 ("[M]embership in the elite depended strongly on family background, light skin color, a heritage of freedom before [e]mancipation, and a lifestyle patterned after affluent whites." (citation omitted)).

33. *See, e.g.*, Audrey Elisa Kerr, *The History of Color Prejudice at Howard University*, J. BLACKS HIGHER EDUC., Winter 2006–2007, at 82, 83 ("Some Howard University students . . . . were subjected to the flashlight test. If the shadow of the mouth or chin protruded beyond the outline of the nose, you failed.").

34. Walter B. Hill, Jr. & Barbara Lewis Burger, *Aristocrats of Color: Photographic Images of Black Life at Black Colleges in the 1930's*, J. BLACKS HIGHER EDUC., Winter 1998–1999, at 116, 119.

35. *Id.* at 119.

36. LEON F. LITWACK, TROUBLE IN MIND 31 (1998) ("To hear people talk, color, features and hair were the most important things to know about a person, a yardstick by which everyone measured everyone else.").

37. Keith & Herring, *supra* note 15, at 777 ("[T]he effects of skin tone are not only historical curiosities from a legacy of slavery and racism, but present-day mechanisms that influence who gets what in America."). In a survey of prime-time television advertising, "[White people] expected Black actors playing characters of

C. Colorism Beyond the Black Community

Colorism in the United States is not just limited to the Black community. However, the unique history between Blacks and Whites in America has established a law that places and analyzes racial discrimination in the context of Black and White relations.[38] Nevertheless, other racial groups also experience colorism.[39] For those of Mexican descent, color stratification is as much a part of their existence as it is for Blacks.[40] In Mexico, Spaniards maintained their position of power by creating a color caste system used to divide and conquer indigenous people.[41] Today, color consciousness begins at birth in Latino homes.[42] The reality for Mexican-Americans is that the darker the skin and more indigenous the features, the greater chance of experiencing some form of discrimination from the dominant White culture.[43]

Research shows that certain ethnic groups in the Asian community also have a history of color discrimination.[44] For example, skin color in women of Hindu and Japanese descent has

---

higher status . . . to be lighter skinned than those playing low-status roles." ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND 117, 177 (2000). Rapper Soulja Boy states that he wants a "yellow bone long haired star . . . ." SOULJA BOY, *Pretty Boy Swag*, *on* THE DEANDRE WAY (Stacks on Deck, Interscope 2010). In the film Pretty Persuasion, Kimberly Joyce, a White teenager, expounds, "If I couldn't be white and I also couldn't be Asian, then my third choice would be African-American, because I've always wanted to be a gospel singer and also, black men are more forgiving if your butt gets big. Except I'd definitely want light skin and Caucasian features like . . . Vanessa Williams or Halle Berry." *Pretty Persuasion* (REN-Mar Studios 2005).

38. *See* 45A AM. JUR. 2D *Job Discrimination* § 120 (2010) ("[T]he presumption of a Title VII-protected class status on the basis of color is tied into our national racial history."); David O. Sears & Victoria Savalei, *The Political Color Line in America: Many "Peoples of Color" or Black Exceptionalism?*, 27 POL. PSYCHOL., no. 6, 2006 at 895, 897, *available at* http://www.jstor.org/stable/20447007 ("People with Asian, Latin American, and/or Native American ancestry have had an especially privileged place in the [civil rights efforts] because of their presumed similarity to African Americans in both skin color and histories of group-based inegalitarian treatment.").

39. Christina Gómez, *Brown Outs: The Role of Skin Color and Latinas*, *in* RACISM IN THE 21ST CENTURY: AN EMPIRICAL ANALYSIS OF SKIN COLOR 193, 193 (Ronald E. Hall ed., 2008) ("Skin color has long been a topic of discussion among non-white groups in the United States.").

40. Hunter, *supra* note 12, at 177.

41. *Id.*

42. Gómez, *supra* note 39, at 194 ("Commentary on the color of newborn babies' skin color and hair texture is general parlance in many Latino homes.").

43. *Id.* at 195.

44. Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435, 453 ("While some [Asian] groups may obtain an advantage based on skin color, other [Asian] groups with darker skin do not.").

a whole range of social consequences, including consideration for marriage.[45]

II. Title VII and the EEOC

Congress created Title VII of the Civil Rights Act of 1964 (Title VII) to prohibit discrimination in the workplace.[46] Title VII came at the height of the Civil Rights Movement as a response to the growing demonstrations of resistance against segregation.[47] The original language of Title VII made it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, *color*, religion, sex, or national origin."[48] However, Title VII came with several flaws. In creating the legislation, Congress failed to define the terms "race" and "color."[49] As a result, there was and still is a great deal of confusion about what constitutes color discrimination and how to recognize it in a work environment.[50] Also, there is a pervasive notion that "race" and "color" can be used interchangeably to solely refer to racism, a trend that is evident in various court decisions.[51] Finally, Congress failed to establish a standard for courts to rely on when adjudicating colorism claims, and as a result, opened the

45. *Id.* at 456 (explaining that for Hindu women light skin is a sign of beauty and consideration for marriage); Hiroshi Wagatsuma, *The Social Perception of Skin Color in Japan*, 96 DAEDALUS 407, 407 (1967), *available at* http://www.jstor.org/stable/20027045 (describing light skin as a marker of social acceptance in Japanese culture).

46. *Teaching with Documents: The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, THE NAT'L ARCHIVES, http://www.archives.gov/education/lessons/civil-rights-act/ (last visited Oct. 27, 2011) [hereinafter *Teaching with Documents*].

47. *See Pre 1965: Events Leading to the Creation of EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/history/35th/pre1965/index.html (last visited Oct. 29, 2010).

48. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (emphasis added).

49. Banks, *supra* note 5, at 216 (explaining that neither race nor color are defined in Title VII).

50. Tanya Katerí Hernández, *Latinos at Work: When Color Discrimination Involves More than Color*, *in* SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS, *supra* note 5, at 236, 236 ("[E]mployers continue to be confused by what constitutes color discrimination in the workplace . . . .").

51. *See, e.g.*, Martin v. Georgia-Pacific Corp., 568 F.2d 58, 60 (8th Cir. 1977) (using the terms race and color interchangeably in a racism claim); Hansborough v. City of Elkhart Parks and Recreation Dep't, 802 F. Supp 199, 207 (N.D. Ind. 1992) ("[Title VII] only addresses discrimination on the basis of race, sex, religion, and national origin . . . ." (citing Hughes v. Derwinski, 967 F.2d 1168, 1173 (7th Cir. 1992))).

door to various statutory interpretations of the term color.[52] All these problems continue to impede the likelihood of a successful colorism claim brought before a court.

Another development under Title VII was the founding of the EEOC.[53] The EEOC was created specifically to enforce the laws of Title VII by investigating allegations of workplace discrimination and bringing lawsuits against unsettled out-of-court claims.[54] Initially, the EEOC's actions were narrowly defined by Congress as just implementing the law.[55] However, over the years the powers given to the EEOC have expanded exponentially to include various other duties, including outreach programs and agency initiatives.[56] As a result, the EEOC has gained valuable influence to effect change in the area of job discrimination.[57]

One of the major projects from the EEOC is E-RACE, an initiative used to improve efforts to eradicate race and color discrimination claims.[58] It started in 2008 as a response to the growing number of color harassment claims and incorporates five main goals.[59] Yet, E-RACE has not provided a solid solution for the growing number of color claims, thus bringing about the same

52. *See* Banks, *supra* note 5 ("[C]ourts are confused about what constitutes a valid colorism claim.").

53. *See Pre 1965: Events Leading to the Creation of EEOC*, *supra* note 47.

54. *See Overview*, EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/ index.cfm (last visited Oct. 27, 2011); *Teaching with Documents*, *supra* note 46 ("Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law.").

55. *See 35 Years of Ensuring the Promise of Opportunity*, EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/history/35th/history/index.html (last visited Oct. 27, 2011) ("[C]onciliation, education, outreach and technical assistance were the primary methods employed by EEOC at its inception because that was what the law permitted.").

56. *See Teaching with Documents*, *supra* note 46 ("Congress has gradually extended EEOC powers to include investigatory authority, creating conciliation programs, filing lawsuits, and conducting voluntary assistance programs.").

57. *See 35 Years of Ensuring the Promise of Opportunity*, *supra* note 55; *see, e.g.*, *The E-RACE Initiative*, *supra* note 7 (describing the E-RACE Initiative, an effort to reduce workplace race and color discrimination).

58. *The E-RACE Initiative*, *supra* note 7 ("Specifically, the EEOC will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment.").

59. *Id.* (describing the various statistics regarding recent race and color harassment claims). The five main goals of E-RACE include: improving data collection; consistency in the EEOC's charge processing; developing strategies and theories for emerging issues; enhancing visibility of enforcement efforts; and engaging the public to voluntarily promote compliance to eradicate race and color discrimination. *Id.*

problems that led to the development of E-RACE.[60] By grouping race and color together, it has allowed colorism to again be overshadowed by racism.[61] The EEOC conflates racism and colorism, explaining that "race and color clearly overlap."[62] This rationale is incorrect. Colorism is distinct from racism because it does not have the same widespread sociohistorical framework as racism.[63] In other words, the system that affords Whites privilege because of their race is not apparent in situations of color.[64]

III. Treatment of Colorism Claims in American Courts

In United States employment law, there are two major types of employment discrimination doctrines: disparate impact and disparate treatment.[65] A disparate impact claim attempts to show that a facially neutral employment practice has had a disproportionately adverse impact on members of a protected class.[66] Courts often use the eighty percent test to determine whether the impact is sufficiently disproportionate to be considered adverse.[67] If adverse impact is shown, the burden shifts to the employer to show that the action has a manifest relationship to the employment and is a business necessity.[68] A disparate treatment claim, on the other hand, arises when an employee claims that an employer treated him or her differently than other employees in a similarly situated position, or demonstrates discriminatory animus towards an entire class.[69] A

60. *See, e.g.*, *Section 15: Race & Color Discrimination*, *supra* note 10 (acknowledging that the same standard is used for both race and color).

61. *Id.* (stating that for the rest of the manual the EEOC would use race to denote both race and color).

62. *Facts About Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Sept. 8, 2008), http://www.eeoc.gov/facts/fs-race.html. *But see* Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1539 (2000) ("This approach is defensible if one accepts that race and color sometimes overlap. The problem, however, is that this approach renders color claims superfluous or void of independent meaning.").

63. Hunter, *supra* note 12, at 176 ("[A] system of domination by skin color lacks the institutional, asymmetrical power relationships that systematically privilege whites and oppress [people of color].").

64. *Id.*

65. Ricci v. DeStefano, 129 S. Ct. 2658, 2672 (2009).

66. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645 (1989).

67. United States v. Vulcan Soc'y, Inc., 637 F. Supp. 2d. 77, 86 (E.D.N.Y. 2009) ("The 80% Rule appears at 29 C.F.R. § 1607.4D, which states: 'A selection rate for any race, sex, or ethnic group which is less than four-fifths of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact . . . .'").

68. *Id.* at 97.

69. Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003); Hill v. Miss. Emp't

prima facie case is established in a disparate treatment action when (1) the individual is a member of a protected class; (2) the individual experienced an adverse action; and (3) the individual was treated differently than similarly situated individuals not in his or her protected class under certain circumstances.[70] If a prima facie case is established, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the practice.[71]

Although either claim can be argued within the colorism context, my focus is on disparate treatment with colorism claims. Disparate treatment claims are rarely successful.[72] Because colorism claims are often subordinated to racism claims,[73] courts establish different ways to apply the standard. One of the most cited colorism cases is *Walker v. IRS*.[74] Before *Walker*, courts often interpreted color to mean race under Title VII.[75] *Walker*, however, is one of the first instances where a court acknowledges colorism as a separate cause of action under Title VII.[76] In *Walker*, a light-skinned Black employee brought a color discrimination claim against her dark-skinned Black supervisor for firing her based on the light color of her skin.[77] The supervisor made statements to the employee such as "you need some sun," and "you think you're bad, you ain't about nothing, you think you're somebody, I can do what I want to do to you."[78] However, the United States District Court in Georgia held that the plaintiff failed to establish that the supervisor's statements were true because the plaintiff's

---

Serv., 918 F.2d 1233, 1238 (5th Cir. 1990) ("Only the disparate treatment model requires proof of discriminatory animus . . . . Although, for individual allegations, a single proven instance of unlawful disparate treatment suffices, showing class-wide disparate treatment requires more than isolated or exceptional instances of differential treatment.").

70. EEOC v. Metal Serv. Co., 892 F.2d 341, 347 (3d Cir. 1990).

71. *Raytheon Co.*, 540 U.S. at 50.

72. Jones, *supra* note 62, at 1532 ("[T]he resulting case law contains incomplete analyses and inconsistent outcomes.").

73. Enrique Schaerer, *Intragroup Discrimination in the Workplace: The Case for "Race Plus,"* 45 HARV. C.R.-C.L. L. REV. 57, 68 (2010) ("[I]ntragroup race discrimination often goes undetected and, therefore, undeterred.").

74. 742 F. Supp. 670 (N.D. Ga. 1990).

75. *Id.* at 671 ("Although Title VII includes 'color' as one of the bas[e]s for prohibited discrimination, that term has generally been interpreted to mean the same thing as race.").

76. *See, e.g.*, Carmona Rios v. Aramark Corp., 139 F. Supp. 2d 210, 224 (D.P.R. 2001) (explaining that a plaintiff may have a cause of action for color discrimination under Title VII based on *Walker*); Franchesci v. Hyatt Corp, 782 F. Supp. 712, 723 (D.P.R. 1992) (acknowledging that *Walker* authorized intra-racial color claims under Title VII).

77. *Walker*, 742 F. Supp. at 670.

78. *Id.* at 675.

statements could not be supported by any other employees.[79] The court's decision to find the proffered evidence insufficient is indicative of the court's unawareness about the complexity of colorism and its manifestations.[80]

Although it is difficult to establish a disparate treatment claim for colorism, there are a few cases where plaintiffs were successful in finding relief. In *EEOC v. Applebee's Neighborhood Grill & Bar, Inc.*,[81] the EEOC settled a claim where a dark-skinned employee was discriminated against by his light-skinned manager.[82] In *Applebee's*, the plaintiff, after being called names like "tar baby" and "black monkey" by his light-skinned manager, was terminated after threatening to report the manager regarding his offensive attacks.[83] Unlike in *Walker*, the plaintiff did not have to establish a prima facie case because the claim was ultimately settled through a consent decree.[84] Similarly, in the 2009 case *EEOC v. Family Dollar, Inc.*,[85] a light-skinned Black manager verbally abused her dark-skinned employee to the point of her quitting.[86] Family Dollar was unable to convince the court to dismiss the case,[87] and as in *Applebee's*, the case was settled outside of court.[88]

Because courts have not come to a consensus on how to treat colorism claims, plaintiffs face many obstacles in establishing a

---

79. *Id. But see supra* text accompanying note 73.

80. *Walker*, 742 F. Supp. at 675 (concluding that the supervisor's statements "you need some sun" and "you think you bad, you ain't about nothing" lacked evidence of color bias, and only represented the animosity between the supervisor and the plaintiff).

81. Consent Decree, EEOC v. Applebee's Neighborhood Grill & Bar, Inc., No. 02-CV-829-CAM (D. Ga. July 10, 2003) [hereinafter Applebee's Consent Decree]; *see also The Digest of Equal Employment Opportunity Law*, EQUAL EMP. OPPORTUNITY COMMISSION (Summer 2009), http://www.eeoc.gov/federal/digest/xx-3.cfm#fn8 (explaining that there is no definition of race or color under Title VII, and that people are expected to self-identify their racial category).

82. *The Digest of Equal Employment Opportunity Law*, *supra* note 81.

83. *See* Dana Hedgpeth, *Settlement Reached in Color-Bias Suit; Black Worker at Applebee's Said Lighter-Skinned Black Supervisor Harassed Him*, WASH. POST, Aug. 8, 2003, at E4.

84. Applebee's Consent Decree, *supra* note 81. The consent decree awarded Burch $40,000 and Applebee's was required to train employees about discrimination, report any later cases of color discrimination, and include color as a protected class. *Id.* at 6–7, 9–10. However, Applebee's was able to deny all liability. *Id.* at 13.

85. Consent Decree, EEOC v. Family Dollar, Inc., No. 07-CV-06996 (N.D. Ill. Feb. 17, 2009) [hereinafter Family Dollar Consent Decree].

86. *See The Digest of Equal Employment Opportunity Law*, *supra* note 81.

87. *Business Brief*, CHI. SUN TIMES, Mar. 14, 2008, at 54.

88. Family Dollar Consent Decree, *supra* note 85, at 1; *see also The Digest of Equal Employment Opportunity Law*, *supra* note 81.

successful claim.[89] In some situations, racism and colorism are analyzed separately.[90] In *Santiago v. Stryker Corp.*,[91] the court concluded that a prima facie case for color discrimination could be established in a situation where a darker-skinned Puerto Rican was replaced by a lighter-skinned Puerto Rican.[92] In other cases, the court uses the terms race and color interchangeably, so that if a person were bringing separate claims of race and color, they would just be analyzed under race.[93] For example, in *Rodriguez v. Gattuso*,[94] a couple brought an action for housing discrimination based on color.[95] The court recognized that race and color are often thought of as synonymous by courts, but that the inclusion of the word "color" meant that an individual of an ethnic group could be discriminated upon because of his or her color.[96] Finally, there are cases where courts want to address colorism separately, but do not know exactly where the line should be drawn.[97] Combating these problems effectively requires changing the way courts actually evaluate colorism claims.

IV. The Realities of Colorism in an Employment Context

The inconsistent reasoning involved with color claims in courts demonstrates that, as the system stands, it is ineffective in ensuring that the workplace is free of color discrimination.[98] There is no fixed standard that courts can apply to color claims, and this has led to a system where plaintiffs are less likely to receive relief.[99] Colorism is different from racism;[100] therefore, it is important to create a standard that reflects the unique nature of colorism itself. Changes should be adopted that will make it

89. *See* Banks, *supra* note 5.

90. *Id.*

91. 10 F. Supp. 2d 93 (D.P.R. 1998).

92. *Id.* at 96 ("Color may be a rare claim, because color is usually mixed with or subordinated to claims of race discrimination, but *considering the mixture of races and ancestral national origins in Puerto Rico*, color may be the most practical claim to present." (emphasis added)).

93. *See* Banks, *supra* note 5.

94. 795 F. Supp. 860 (N.D. Ill. 1992).

95. *Id.* at 861.

96. *Id.* at 865 ("This case presents, for perhaps the first time in a federal court, an allegation of color discrimination that is not subordinated to a more familiar claim of racial discrimination.").

97. Jones, *supra* note 62, at 1545. Courts argue that "the more the races mix, the more difficult it becomes to place individuals within specific racial categories . . . ." *Id.*; *see also* Banks, *supra* note 5.

98. *See supra* Part III.

99. *See id.*

100. *See supra* text accompanying note 13.

easier for plaintiffs to establish a prima facie case.[101] However, in order to create possible solutions to workplace colorism issues, it is imperative to first address the realities of how colorism operates in a workplace environment.

Because public knowledge about colorism is limited, it is important to stress certain realities about how colorism operates in the workplace.[102] Although the historical origins of colorism provide a basic framework of knowledge, there are still characteristics of the workplace environment that seem to foster colorism in a way that is not as evident in other arenas.[103] Noticing the distinctions of color discrimination will provide a better platform for solutions to eradicating colorism while also providing extra support for courts trying to understand the concept of colorism.

A. Color Bias Develops at a Young Age

People of color develop color consciousness at a young age.[104] Unlike racism, where one race discriminates against another,[105] acts of colorism can be committed both by Whites against Blacks and by Blacks against other Blacks of different skin tones.[106] As a result, people of color as a whole develop a life-long struggle to define themselves as anything other than the most "undesirable" color to be: black.[107] Those who have light skin see themselves as

---

101. *See* Banks, *supra* note 5, at 220 ("[L]egal scholars need to explore the possibility for developing new and effective theories to remedy harmful colorism practices outside of race discrimination law.").

102. *See* Nance, *supra* note 44, at 462 ("Many employees are not aware that color discrimination is covered by Title VII or, for that matter, what color discrimination is or is not." (citation omitted)).

103. *See id.* (recognizing that colorism claims have increased with the overall increase in workplace diversity).

104. *See* KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 95 (1992) ("[C]hildren [of color] quickly absorb the guilt, anger, jealousy, and depression generated in their families by an unresolved color complex.").

105. Racism is defined as hatred for another race. *See Racism Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/racism (last visited Oct. 27, 2011).

106. *See, e.g.*, MARITA GOLDEN, DON'T PLAY IN THE SUN: ONE WOMAN'S JOURNEY THROUGH THE COLOR COMPLEX 4 (2004) (explaining how her mother asked her to come inside of the house in fear of her becoming too dark to get a light-skinned mate in order to have lighter children).

107. *See* Ronald E. Hall, *From Psychology of Race to Issue of Skin Color: Western Trivialization and Peoples of African Descent*, 5 INT'L J. PSYCHOL. & PSYCHOL. THERAPY 121, 128 ("This devaluing of . . . the color black is pervasive throughout Western culture and is transmitted through the language and symbolism of the culture as a whole.").

superior, and those who have dark skin internalize ideas of inferiority.[108] As adults, these self-defining thoughts are transferred into the workplace.[109]

In *Walker v. IRS*, the court mentioned that the supervisor's statements "you need some sun" and "you think you're bad, you ain't about nothing" lacked evidence of color bias and only represented the animosity between the supervisor and the plaintiff.[110] However, this dialogue is indicative of a person who has internalized inferiority because of her darker skin and is now trying to gain power in the workplace environment by harassing an individual who is deemed more acceptable by society based on the lightness of her skin.[111] Alternatively, the employee's insubordination and disrespectfulness could signify that she views her lighter skin as a marker of superiority over her dark-skinned supervisor.[112] The court eventually concluded that the case lacked merits to satisfy the burden of proof.[113]

B. Colorism Operates Differently than Racism in the Workplace

The workplace culture can subconsciously encourage color discrimination without raising alarm.[114] One reason is because most people are unaware of their color biases. In many ways, the media perpetuates and cultivates people's understanding of color to the point that society views people of color by media stereotypes.[115] Therefore, an employer might only hire light-

---

108. *See, e.g.*, RUSSELL, *supra* note 104, at 95 (acknowledging that skin color shapes Black children from infancy to adulthood).

109. *See id.* at 101 ("[C]hildren can never outgrow skin color as they do other childhood traits . . . .").

110. 742 F. Supp. 670, 675 (N.D. Ga. 1990).

111. RUSSELL, *supra* note 104, at 126. Expert Midge Wilson remarks, "[A] dark-skinned person who comes into a position of authority may be motivated to punish lighter-skinned employees if . . . she believes that they have enjoyed unfair advantages because of their lighter color." *Id.*; Jones, *see supra* note 62, at 1518–20 (discussing the fact that some dark-skinned people exhibit hostility towards those with lighter skin).

112. *See Walker*, 742 F. Supp. at 675–76; *see also, e.g.*, Jones, *supra* note 62, at 1518 ("[S]ome lighter-complected persons . . . rejected their status as members of the Black race because of feelings of superiority . . . .").

113. *See Walker*, 742 F. Supp. at 675.

114. *See* Nance, *supra* note 44, at 439 ("Color judgments appear with such regularity as to escape notice." (quoting Vicki L. Ruiz, *Color Coded*, 80 NAT'L F. 16 (2000))).

115. ENTMAN & ROJECKI, *supra* note 37 ("Darkness evokes danger and dirt, so that mental associations of the color black . . . may be negative . . . . An implied preference for lightness . . . follow[s] from the hierarchy of ideal trait attainment . . . .").

skinned blacks because the media portrays light-skinned men and women as educated and business savvy without the belief that he or she is actually engaging color discrimination.[116] The same scenario is less likely to occur in a racism context because people are more likely to notice and act upon such discrimination since people of all races are aware of racism.[117]

Racism and colorism can also have contradictory effects on the dynamics of social interactions in the workplace.[118] On the one hand, the effects of colorism can cause internal friction and fractionalization within a particular race.[119] The fact that certain individuals within a race are treated preferentially can lead to jealousy and resentment among their peers.[120] At the same time, however, that friction can be ameliorated by the social effects of racism.[121] Because all members of a race are impacted by racism equally, this can create solidarity among members of that race in opposing such discrimination.[122] This solidarity can temper the severity of the fractionalization caused by colorism.[123] Therefore, the workplace environment might have dark-skinned and light-skinned employees who superficially appear to get along, but secretly have hidden tensions of colorism.[124] These tensions could be subtly expressed in their daily interactions unbeknownst to

116. *See id.* (explaining that Black actors playing characters of higher status should have light skin).

117. RUSSELL, *supra* note 104, at 134 (remarking that it is easier to bring a racism claim because "Blacks who challenge racism are supported not only by their own community but also by those Whites who are ashamed of their racist peers").

118. *See* Nance, *supra* note 44, at 445 ("[T]here will rarely be a 'smoking gun' situation in color discrimination cases . . . .").

119. Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 52, 64 ("The result [of defectors from a disfavored race] may be both increased competition and tension among people within a single racialized group, and harsher treatment of those who cannot mobilize sufficient resources to escape the box of racial stereotyping.").

120. *See, e.g.*, RUSSELL, *supra* note 104 (explaining that the obsession with color has caused the development of damaging inferiority complexes).

121. *See* Harris, *supra* note 119, at 63. The term "linked fate" is used to describe the strong sense of responsibility for people within a certain race because of a shared history of common treatment. *Id.*

122. *Id.*

123. *See* Jones, *supra* note 62, at 1518 ("[T]hroughout the early part of the twentieth century the bond among Blacks of all skin tones grew.").

124. RUSSELL, *supra* note 104, at 128 ("[People of color] often feel that they should stick to together and avoid interpersonal conflict in the office or workplace . . . ."); *see, e.g.*, Jones, *supra* note 62, at 1519 n.145 ("[C]olorism was never discussed at length among my friends and family. We were, however, all aware of the phenomenon and it sometimes affected the ways in which we lived our lives and interacted with each other.").

anyone around them.[125] It is also likely that the employees themselves are unaware that they harbor color bias.[126]

Last, people of color who experience color bias are unlikely to report the incident because there remains a pressure among people of color to keep silent about color biases.[127] People of color feel that by outwardly reflecting on color biases, they are exposing a dirty secret.[128] Moreover, people of color feel that if they report such an incident to their supervisor, who is often White, the supervisor will not understand and will trivialize the situation. As the White supervisor in *Walker v. IRS* explained, "he could not 'see' a black employee discussing a problem about a black supervisor with a white supervisor."[129]

C. *Colorism Is Not Practiced by Just People of the Same Race*

Colorism, unlike racism, operates both intraracially and interracially.[130] Although most members of the majority community are unaware of the systemic development of colorism, some still encourage and continue its practice through workplace interactions and decisions.[131] The example in *Walker* is only one instance of how Whites perpetuate colorism in the workplace.[132] The White supervisor made light of the situation between the dark-skinned supervisor and light-skinned employee because it was outside of his understanding of intraracial interactions.[133] When White people ignore or trivialize claims of color bias because of ignorance or lack of empathy, they are reinforcing color bias within communities of color.[134]

---

125. *See* Jones, *supra* note 62, at 1519 n.145.

126. *See, e.g.*, RUSSELL, *supra* note 104, at 101 (explaining that although parents prepare children for experiencing racism, few children are warned about the judgment from those of the same race).

127. *Id.* at 134.

128. *See, e.g.*, *id.* at 126 (explaining that *Walker v. IRS* exposed the Black community's "dirty laundry").

129. 742 F. Supp. 670, 674 (N.D. Ga. 1990).

130. Jones, *supra* note 62, at 1498.

131. *Id.* at 1499 ("[N]ot all colors . . . are equal, and many proceed upon the belief that . . . 'lighter is righter.'").

132. *See Walker*, 742 F. Supp. 670; *supra* note 129 and accompanying text.

133. *See* Nance, *supra* note 44, at 461 ("The employer who discriminates based on color but provides no reason for harboring the colorist views, or who clearly has been influenced by cultural influences of this country may be found liable for color discrimination.").

134. *Id.*

Preferential treatment and color bias by the White community is most commonly exhibited in the hiring and promoting processes.[135] Generally speaking, Whites are more comfortable, and thus are more likely to favor, those that look the most like themselves.[136] As a result, Whites tend to hire and promote those with lighter skin because they feel that light-skinned individuals are more closely connected to Whiteness and have somewhat rid themselves of certain traits that are supposedly innate in their darker-skinned counterparts.[137] These actions essentially perpetuate the historical system whereby light-skinned individuals act as a barrier between the darker-skinned of a race and the White community.[138] Consequently, the divide between dark-skinned individuals and light-skinned individuals increases because those with light skin are given both a greater opportunity to enter the workforce and to advance.[139]

Even in offices and workplaces that include both dark- and light-skinned individuals, Whites' daily interactions with people of color can convey color biases.[140] A dark-skinned employee might be shunned from being *truly accepted* into the workplace environment because Whites do not feel comfortable engaging someone who looks so different from themselves.[141] This will reinforce feelings of inferiority within the dark-skinned employee.[142] It could also lead to greater tensions between a light-skinned employee and a dark-skinned employee because the light-skinned employee is likely to be accepted by both Whites and Blacks.[143] All this tension

135. Jones, *supra* note 62, at 1526 (arguing that people with light skin may have a better opportunity to gain positions and socioeconomic hierarchy in the workplace environment).

136. *Id.* at 1514 ("[W]hites still seem to prefer and to find less threatening persons who look more like themselves.").

137. *See* ENTMAN & ROJECKI, *supra* note 33, at 179 (explaining that society affords those with lighter skin greater acceptance because they are closer to the White ideal).

138. *See* Jones, *supra* note 62, at 1526.

139. ENTMAN & ROJECKI, *supra* note 37, at 179 ("Th[e] cultural bias translates into greater upward mobility and easier social acceptance for African Americans with lighter skin.").

140. *See* RUSSELL, *supra* note 104, at 125 (addressing the issue that tensions about skin color and features might be instigated by Whites).

141. *See* ENTMAN & ROJECKI, *supra* note 37.

142. Maxine S. Thompson & Verna M. Keith, *The Blacker the Berry: Gender, Skin Tone, Self-Esteem, and Self-Efficacy*, GENDER & SOC'Y, June 2001, at 336, 339, *available at* http://www.jstor.org/stable/3081888 ("Frequent exposure to negative evaluations can undermine a . . . sense of self.").

143. *See* RUSSELL, *supra* note 104, at 128 (affirming that color harassment can develop from something unrelated to skin color).

intraracially and interracially is evident of one major point—lack of knowledge.

D. Many People Lack Knowledge and Awareness of Colorism

Lack of knowledge is the main reason for the increase in the number of color bias claims in the courts.[144] A number of factors are to blame for this lack of public knowledge. First, discussion of the complexity of colorism and its effects on racial groups is almost nonexistent in legal discourse and scholarship.[145] Many scholars believe that because colorism is linked to racism, it is not important enough to the race discussion to include in scholarly publications.[146] Another reason is that the legal system fails to give attention to the small but growing scholarship in favor of colorism claims.[147] Alternatively, there are those who believe that America lives in a post-racial society where racism and colorism are no longer issues.[148]

Failure to seriously consider colorism in legal discourse has led to a number of troubling consequences. First, many courts are still confused about whether to recognize the existence of color as separate and distinct, despite the fact that the term "color" has been included in the statutory language in its own clause since the statute's inception.[149] Second, plaintiffs asserting color bias often find it difficult to find representation and experts who are knowledgeable enough to adequately represent them without breaking the bank.[150] The Model Rules of Professional Conduct

144. *See supra* text accompanying note 102.

145. *See* Banks, *supra* note 5, at 220 (recognizing that scholars discuss issues such as race, class and gender but fail to touch on how those issues are controlled in an environment of color bias).

146. *See* Hall, *supra* note 107, at 127 ("[M]any [scholars] exclude the mere mention of skin color in their articles or texts.").

147. *See* Banks, *supra* note 5, at 220 (noting that arguments by legal scholars to expand antidiscrimination laws have been ignored).

148. *See What Is Post-Racial America?*, VIEW FROM THE RIGHT, http://www.amnation.com/vfr/archives/010000.html (last visited Nov. 30, 2010). Many people believe that since President Barack Obama has been elected, America has moved to a society that is beyond race. *Id. But see* DAVID THEO GOLDBERG, RACIST CULTURE 112 (1993) ("The most extreme mode of rationalizing a racist exclusion is to deny its occurrence.").

149. *See* Banks, *supra* note 5, at 216 ("Most courts refused to acknowledge race-related discrimination when the employment decision involves two people 'raced' the same."); Hall, *supra* note 107, at 127 ("Consequent to the trivialization process, race has been erroneously validated as the standard by which . . . peoples are both assessed and differentiated."); *supra* note 46 and accompanying text.

150. For example, Dr. Ronald Hall, *supra* note 107, was an expert for the winning plaintiff in *Walker v. IRS*. 742 F. Supp. 670, 675 (N.D. Ga. 1990).

state that an attorney need not be specialized in an area to give adequate representation.[151] However, when the available information on colorism is so minimal, it is difficult to believe that most attorneys will be able to gather enough information to be considered competent enough to try a case. Moreover, it is not hard to imagine the difficulty of finding an expert who is knowledgeable enough to testify, but also affordable. Consequently, as in the case *Brack v. Shoney's Inc.*,[152] claims are dismissed because many plaintiffs' experts are unskilled in the area of colorism.[153]

V. Finding a Solution for Workplace Colorism Claims

A great number of disparate treatment colorism claims originate from situations involving the workplace.[154] Legal scholars concerned about the legal system's treatment of colorism claims are split on exactly how to solve the problem.[155] Although the overall consensus is that the legal system should expand its antidiscrimination laws, some scholars believe that colorism should remain under the umbrella of racism while others believe that colorism should be distinct from racism.[156] Textual and policy arguments suggest that colorism should be evaluated separately from racism.[157] Because race and color are disjunctive in the statutory language, they should be evaluated separately by their own merits.[158] Coupled with that fact is the reality that while all Americans live in a racialized society, not all Americans live in a colorized society.[159] Therefore, while judges and lawyers will likely

151. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010).

152. No. 01-2997 DV., 2003 WL 25707392, at *1 (W.D. Tenn. June 10, 2003) (holding that the expert could not provide an opinion on colorism or tonism because of his lack of expertise).

153. *But see* Hall, *supra* note 107, at 126 (noting that the plaintiff in *Walker v. IRS* was seen to have merit because of the expert testimony of a well-known scholar in colorism).

154. Harris, *supra* note 119, at 56.

155. *See id.* at 58.

156. *Id.* ("[Trina] Jones and [Taunya Lovell] Banks disagree about whether color discrimination should be understood as analytically distinct from race discrimination or as a subset of race discrimination.").

157. The statutory language does not stipulate "race and color" but "race, color," denoting separate and distinct concepts. 42 U.S.C. § 2000e-2 (2006); *see also* YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, at CRS-2 (2008), *available at* www.fas.org/sgp/crs/misc/97-589.pdf ("The starting point in statutory construction is the language of the statute itself.").

158. *See supra* note 48 and accompanying text.

159. *See* Bekah Mandell, *Racial Reification and Global Warming: A Truly Inconvenient Truth*, 28 B.C. THIRD WORLD L.J. 289, 297 (noting that it is in

be able to identify on some level with racism, those same judges and lawyers might have no experience at all with colorism.[160] As a result, putting colorism under the umbrella of racism, as some legal scholars advocate, will likely give judges the incentive to associate a colorism claim with something they know—racism—as opposed to something that is novel to them.[161] Colorism should stand on its own merits, but there must be an adequate standard in place so that plaintiffs asserting color discrimination claims are provided a fair opportunity to satisfy the burden of proof.

The main roadblock for disparate treatment colorism claims under Title VII is the standard of review.[162] As mentioned *supra* Part III, there are several elements that must be satisfied in order to bring a Title VII claim before the court.[163] Below are suggestions for getting to a place where plaintiffs are able to satisfy this burden.

A. Colorism and Being a Member of a Protected Class

The first burden a plaintiff must satisfy in order to establish a prima facie case is determining that he or she belongs to a protected class.[164] For many of the other protected classes under Title VII, i.e. race or sex, there are clear and distinguishable characteristics that usually mark them as being a part of that particular protected group.[165] Moreover, courts have assessed multiple cases recognizing the unique characteristics that make up most of the other protected groups.[166] However, it is only recently that courts have distinguished "color" from "race," allowing people within the same race to be subsequently divided into smaller protected classes.[167] Nevertheless, courts still treat color and race as interchangeable.[168] With claims involving parties

racialized societies that White privilege thrives).

160. *See* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 4 (2006) (acknowledging that common knowledge is one factor that judges have used in dealing with cases involving race).

161. *See supra* text accompanying note 4.

162. *See* Banks, *supra* note 5, at 216.

163. *Supra* note 70 and accompanying text.

164. Walker v. IRS, 713 F. Supp. 403, 408 (N.D. Ga. 1989).

165. For example, in most sex discrimination cases, "woman" is an obvious difference from "man" in terms of evaluating sex discrimination. *See* RUSSELL, *supra* note 104, at 133.

166. *See* Banks, *supra* note 5, at 216.

167. *See* Walker, 742 F. Supp. at 671 ("Although Title VII includes 'color' as one of the bases for prohibited discrimination, that term has generally been interpreted to mean the same thing as race.").

168. Jones, *supra* note 62, at 1540 ("[T]he [Walker] court explained that, in some situations, the most practical way to bring a Title VII suit may be on the basis of

of two different races, plaintiffs normally take the safe route of arguing a race claim to satisfy this burden, but this type of claim would likely encounter problems in satisfying the later elements necessary to establish a prima facie case.[169]

To remedy this predicament, the first recommendation involves the adoption of a system that focuses directly on color differences. This would assist judges in determining whether an individual meets the burden of being a part of this protected class. Title VII is based on classifications and requires people to fit themselves in certain groups to get protection.[170] For example, if a plaintiff is bringing a race claim, he or she must identify as a particular race.[171] Similarly, a sex discrimination claim requires a plaintiff to identify as male or female.[172] Title VII reinforces ideas of differences in order to deal with discrimination based on differences.[173] Color claims would operate in the same manner with the incorporation of a color identification chart, therefore coinciding with the current system.

A color identification system that uses charts to illustrate the various subtleties in shades and tones of two parties from the same racial group will provide judges more insight into the way they evaluate colorism claims.[174] Responses to Matthew S. Harrison's research on colorism demonstrate how those involved with the court system, including trial consultants and jurors, hold biases based on color, not just race.[175] Further, they use those

---

color as opposed to race.").

169. *See, e.g.*, Jones, *supra* note 62, at 1546 (describing a hypothetical where one might be able to bring various colorism claims). For example, a dark-skinned Black plaintiff would not be able to argue that he or she was treated differently than a similarly situated light-skinned Black if the class was defined by race, rather than color. *See supra* note 70 and accompanying text.

170. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1190 (arguing that categorization can promote and perpetuate stereotypes).

171. *See* 42 U.S.C. § 2000e-(m) (2006) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice . . . .").

172. *Id.*

173. Krieger, *supra* note 170.

174. *But see* Jones, *supra* note 62 (explaining that the system right now makes colorism claims superfluous to racism claims). For an example of a color differentiation chart, see Karen Lisko, *Response to Harrison's Article on Colorism*, THE JURY EXPERT, Jan. 2010, at 76.

175. Lisko, *Response to Harrison's Article on Colorism*, THE JURY EXPERT, *supra* note 174 (acknowledging that color can indicate how one will be judged in a case); Sean Overland, *Colorism and Civil Justice: Sean Overland Responds to Harrison*, THE JURY EXPERT, Jan. 2010, at 75 (explaining that trial consultants and attorneys use race and often color as well as a predicative variable of the courtroom process).

biases to determine cases.[176] To expose those types of biases and remove them from the decision-making process requires that courts face them head on without allowing people to secretly make decisions based on superficial factors. The use of a color identification system where people identify their color can illustrate how even the slightest variation in skin tone can incite color discrimination and deal with the increased variation of skin tones with communities of color. This would include identifying one's color variation *in camera* to determine whether a color distinction even arises between two parties. The color identification system can also provide a standard that would be used by all courts while still giving judges the latitude to decide each case individually.[177] Most importantly, plaintiffs would have a greater chance to establish that they belong to a protected class. The chart would force the court to deal with the color dynamics directly by allowing both parties to decide how they best identify themselves.[178] The result would bring more necessary claims to court, provide justice for plaintiffs, and produce greater solutions for eradicating color discrimination altogether.[179]

With every solution to a problem, there are also potential conflicts that arise. One might argue that it is impossible for a color identification chart to include every single shade or tone difference.[180] It is true that such a system could not account for *every* shade, and that this could cause some claims to be dismissed. However, judges are still given the latitude to decide cases individually, so the judge could decide that the direct evidence supports the claim that the plaintiff is part of a protected class.[181] Conversely, the chart's exclusion of a particular shade contrast

176. Lisko, *supra* note 174.

177. The EEOC has sacrificed structure in order to define race and color broadly; therefore, judges can exercise broad discretion. *See The Digest of Equal Employment Opportunity Law*, *supra* note 81.

178. *See* Jones, *supra* note 62, at 1544 ("The danger is that if courts focus solely on race, they may overlook discrimination based on skin color because it may be difficult to believe that a person who hires Blacks will engage in discrimination against other Blacks, or that a person who is Black would discriminate against another Black person.").

179. *See* RUSSELL, *supra* note 104, at 134 ("[C]omplaints of job-related color harassment deserve greater recognition by the public and greater respectability in the courts."); Nance, *supra* note 44, at 462 (noting that as people discover that color is a protected class, colorism claims increase).

180. *See* Lisko, *supra* note 174 (discussing a color chart that provides ten skin tones from lightest to darkest). The chart proposed by Lisko would help to provide an estimate to the closest shade. *Id.*

181. For an example of this judicial discretion see Krieger, *supra* note 170, at 1224 (discussing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).

between two opposing parties might be indicative that the claim is superfluous because the parties' shades are so similar that it would be difficult for anyone to recognize a distinction to put one in a separate protected class.[182] In addition, one might argue that a color chart could be offensive or akin to the paper bag test.[183] However, a chart system does not have the same qualities of a paper bag test because it does not deny or allow favorable opportunities because of one's color.[184] Instead, the chart system only educates and assists individuals who are not as aware of color issues to recognize how even subtle differences in color can create divides among the same race of people.

B. Colorism and Experiencing Adverse Action

The plaintiff must next demonstrate that he or she experienced an adverse action by the defendant.[185] It is very difficult to prove this element because, unless there is some extreme outward act of harassment, color discrimination will often appear subconscious and unintentional.[186] In a racism context, actions are still easier to prove, regardless of whether they are overt or covert, because there is more knowledge and a better avenue to get direct and implied evidence surrounding race.[187] Even where the defendant uses overt acts of colorism to display his or her color biases, it will often go unnoticed because of the popular belief that racial solidarity wins in a situation of color biases between two people of the same racial group.[188]

Therefore, finding out if there has actually been adverse action would require more invasive means to establish whether

182. There are likely other "plus" factors that could be the cause of discrimination against one employee who shares a similar color with another employee in a color discrimination case (i.e. other physical features or behaviors), but that issue is outside the scope of this article.

183. Societal problems do not involve a quick and easy solution. Changes require us to make tough decisions or even reinforce old notions so that the problem is recognized and ultimately defeated. While the author feels that a chart system is a beneficial tool at the moment, she does not believe that it is something that should remain in the judicial system forever.

184. The chart serves to present a foundation for a colorism claim, which in turn assists the judge when ruling on whether to move the case forward.

185. Walker v. IRS, 713 F. Supp. 403, 408 (N.D. Ga 1989).

186. *See* RUSSELL, *supra* note 104, at 125 ("Attitudes about skin color among African Americans occasionally erupt . . . .").

187. *See supra* note 160 and accompanying text.

188. *See, e.g.*, Harris, *supra* note 119, at 59 ("[P]eople perceived as belonging to disfavored identity categories must work to disabuse . . . co-workers . . . of negative stereotypes and expectations.").

color biases exist between two opposing parties.[189] Because color claims cannot rely on the same data that is often used for race claims, and because complexions vary so much within a particular race, one solution is to implement a program that requires both the plaintiff and the defendant to undergo psychological review to establish the adverse action element.[190] The result could have several positive benefits. First, it could open the door to claims based on incidents of color discrimination that were not necessarily evident beforehand. Courts often require that the employer had the intent to discriminate, but that is often not a feasible position to have in a color claim.[191] Colorism, as mentioned in *supra* Part IV, is often based on subconscious biases; therefore psychological reviews will shed light on some of these subconscious, yet harmful discriminatory patterns.[192] In addition to the general benefit of providing evidence, psychological reviews could create a safe space for conversations involving colorism, while also sparking public dialogue about the various insecurities and complexities that develop with color biases.[193] Consequently, courts would have a better idea of whether color discrimination actually occurred and how it might have been carried out in a way that is unlike a racism claim.[194] The hope is that at some point, knowledge about colorism will expand to a point where such an invasive method is no longer necessary.

There are critics who might argue that having a program that would involve psychological reviews could be a substantial intrusion on a person's liberty. However, there are some protocols already in place that require individuals seeking to bring a discrimination claim to speak with someone about their situation.

---

189. Often these ideas of solidarity between two people of a racial group could make it difficult to prove that certain situations in the work environment were acts of color harassment. *See* RUSSELL, *supra* note 104, at 134 (describing a situation where a Black employee was deterred from bringing a colorism claim against another Black employee for fear of dividing the Black community).

190. *See id.* at 134 ("Victims of intraracial color discrimination need to be able to feel that they can file complaints without censure.").

191. *See* Banks, *supra* note 5, at 220 (discussing how the intent requirement is the most difficult aspect of establishing a colorism claim because color-based discrimination is often influenced by unconscious and unintentional biases).

192. *See Psychologist, Occupational Outlook Handbook*, U.S. BUREAU OF LAB. STAT., http://www.bls.gov/oco/ocos056.htm (last visited Oct. 29, 2011) ("The research findings of psychologist have greatly increased our understanding of why people . . . behave as they do.").

193. *See supra* text accompanying note 190.

194. *See* Jones, *supra* note 62, at 1544 ("If . . . courts understand colorism, then they are more likely to perceive the intricate ways in which people discriminate even within racial categories.").

For example, within the federal government, the current procedure begins by going to an onsite EEOC counselor.[195] This counselor will often be an employee within the plaintiff's company or agency, which may make the process seem even more invasive.[196] In these onsite meetings, potential plaintiffs must disclose all the basic information surrounding the possible claim before it can even be sent to an EEOC attorney.[197] Later, the EEOC counselor follows up on the plaintiff's initial claim by contacting and speaking with the defendant.[198] A psychological review provides a better environment for the plaintiff and the defendant because both receive the opportunity to speak with a person who has been trained to deal with these types of situations.[199] Moreover, psychologists could potentially uncover a subconscious intent to discriminate against people of certain skin colors based on factors that include more than what a defendant says he or she was trying to do in a certain scenario.[200] This is because there are probably many people who subconsciously discriminate against others based on color, just as there are many racist people who are not fully aware of their biases.[201] Because colorism is not necessarily based on purposeful intent, psychological reviews could draw out the subconscious beliefs that cause a defendant to discriminate against a person with a particular skin color.

---

195. *Overview of EEOC Federal Sector EEO Complaint Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Oct. 29, 2011) (noting that plaintiffs are required to meet with an EEOC counselor before filing a complaint with the EEOC).

196. *See id.*

197. *See Contacting an EEO Counselor*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/federal/fed_employees/counselor.cfm (last visited Oct. 29, 2011).

198. *See The Charge Handling Process*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/employers/process.cfm (last visited Oct. 29, 2011).

199. *See Psychologists, Occupational Outlook Handbook*, U.S. BUREAU OF LAB. STATS., http://www.bls.gov/oco/ocos056.htm (last visited Oct. 29, 2011) ("[P]sychologists often look for patterns that will help them understand and predict behavior using scientific methods, principles, or procedures to test their ideas. Through such research studies, psychologists have learned much that can help increase understanding between individuals, groups, organizations, institutions, nations, and cultures.").

200. *Id.*

201. Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, MINN. L. REV. 367, 415 n.164 (1996) ("Today, social cognition theorists recognize that people can be racially biased without consciousness or intent."); *see* Krieger, *supra* note 170, at 1188 (explaining that social stigmas bias a decision maker long before the decision to act).

C. Colorism and Being Treated Differently from Others Not in the Protected Class

Last, the plaintiff must demonstrate that the defendant's actions were unique to his or her own person and that the plaintiff was treated differently than similarly situated individuals outside of the protected class.[202] In other words, he or she must establish through a preponderance of the evidence that the action by the defendant was the result of personal discrimination.[203] This intent requirement is difficult to verify in a colorism context because a person is less likely to acquire direct or indirect evidence about color discrimination.[204] This is because race acts as a barrier.[205]

There are two different solutions that would allow colorism claims to move forward through the court system. One solution is for the EEOC to develop a task force under the E-RACE initiative to conduct special investigations within the office environment.[206] A member of the special task force would essentially be on the job as a regular employee to assess the workplace environment. This would allow the court to gather further information about the workplace atmosphere and whether it fosters tension between those of the same race.[207] Another, less-invasive measure could involve eliminating the third element of the prima facie standard as it relates to colorism. Because color operates in such a unique manner, satisfying elements (1) and (2) via the recommendations provided above would create enough merit to establish a prima facie case.[208]

---

202. Walker v. IRS, 713 F. Supp. 403, 408 (N.D. Ga. 1989).

203. *Id.*

204. Normally in situations of racial discrimination, a person can find some direct evidence, such as a note or email, or indirect evidence, such as noting that a company has never hired a particular racial group. *See* Banks, *supra* note 5, at 220 ("[T]he biggest obstacle to colorism claims remains the requirement that the plaintiff prove the discrimination was intentional."); Jones, *supra* note 62, at 1547.

205. *See* Banks, *supra* note 5, at 220 ("The country's current race jurisprudence resists acknowledging that most race-based discrimination is unintentional.").

206. *See The E-RACE Initiative*, *supra* note 7 (addressing the fact that the EEOC is interested in developing strategies that will improve the administrative process and litigation of workplace color claims).

207. *See* Banks, *supra* note 5, at 220 (acknowledging that many instances of harmful stereotyping and discrimination are unintentional but still influence decisions).

208. Colorism claims are unique in that a particular person might be in a situation where he or she is the only person of a particular shade in his or her workplace making a comparison implausible; or there may be others who the defendant may believe belong to the same color of the plaintiff but is accepted by the defendant because of other acceptable characteristics related to White or Black culture (i.e. hair, body shape, etc.). *See id.* at 219 ("[C]olorism evokes different stigmas and stereotypes that are not based on race . . . .").

Conclusion

Colorism is historically intertwined into the American fabric.[209] Although the origins of colorism developed from racism, the practice of colorism is unique in itself.[210] In today's workforce, colorism does not require a person of a different race to be involved in the alleged discrimination dispute.[211] Colorism can be performed both interracially and intraracially.[212] Moreover, colorism is not limited to just the Black community.[213] Colorism is relevant to other communities of color.[214] Although the origins may derive from another country, this does not deemphasize the reality that color stratification affects communities of color as well.[215]

Today, most acts of color discrimination are perpetuated in the work environment.[216] Under the present legal system, colorism plaintiffs must meet a preponderance of the evidence standard in order to establish a prima facie case.[217] However, that standard is almost impossible to satisfy in a legal environment that lacks overall knowledge of how colorism operates in the workplace.[218] Measures such as the creation of Title VII and the E-RACE initiative have developed some awareness of colorism and have also provided some relief for plaintiffs.[219] Unfortunately, the relief only reaches a limited number of people.[220] The case history regarding the success of colorism claims is dismal at best. Even most of the colorism claims highlighted by the EEOC never made it to trial.[221]

---

209. *See supra* Part I.

210. *See* Hunter, *supra* note 12, at 175–76.

211. *See* Banks, *supra* note 5, at 213.

212. *Id.*

213. Nance, *supra* note 44, at 473 ("Moreover . . . [colorism] . . . is not isolated to any particular community, but is found within all racial groups and notably within groups towards members of the same group.").

214. *See* Sears & Savalei, *supra* note 38 (noting that both Latinos and Asians experience colorism in the United States).

215. Wagatsuma, *supra* note 45 (stating that color has always been an issue in Japan).

216. Harrison, *supra* note 1, at 68 (noting that colorism has huge effects in the workplace).

217. Walker v. IRS, 713 F. Supp. 403, 408 (N.D. Ga 1989).

218. *See* Banks, *supra* note 5, at 216–17.

219. *See* 42 U.S.C. § 2000e-2 (2006); *The E-RACE Initiative*, *supra* note 7.

220. *See* Jones, *supra* note 62, at 1538 ("Most courts merely state that color claims either are or are not permitted without offering any explanation for their conclusions, and without delving too deeply into what makes a color claim analytically distinct.").

221. *See* Family Dollar Consent Decree, *supra* note 85, at 1; Applebee's Consent

Is there a solution that can provide greater relief for those victims of color discrimination? Of course! However, there are certain realities that are important to acknowledge as well. First, color biases start at birth and can cause great inferiority or superiority complexes among people of color in the same racial group.[222] Second, because of the social pressure to maintain racial solidarity, colorism claims are often harder to detect and less likely to be reported, even in some of the worst situations of workplace discrimination.[223] Third, colorism is not just an intraracial problem, but an interracial problem as well.[224] Although the White community may be unaware of their color biases, this does not mean that they cannot be victimizers. Last, there is a great lack of public knowledge and awareness of colorism that leads to many colorism claims not getting the legal support necessary to establish a prima facie case.[225]

There is hope that colorism claims will receive the same protection and attention as other claims under Title VII.[226] However, it might take incorporating new measures to make it more plausible for a plaintiff to bring a claim.[227] Through the EEOC initiative E-RACE, new strategies can be developed to give color discrimination plaintiffs greater access to the courtroom.[228] Some recommendations include establishing color differentiation charts, incorporating professional psychologists in the review of plaintiffs and defendants of a colorism claim, and creating an investigation task force.[229] These measures will give victims of color discrimination in the workplace a fair opportunity to obtain relief.

In order to eradicate colorism within the workplace, it is necessary that American society, including both the workforce and the legal system, first recognize that color discrimination is a real

---

Decree, *supra* note 81, at 1.

222. *See* RUSSELL, *supra* note 104, at 63–65, 126–27 (describing an instance where color consciousness caused an inferiority complex among coworkers of the same racial group).

223. *See* Jones, *supra* note 62, at 1519 n.145 (recognizing that although her family and others knew about colorism, they rarely discussed it).

224. *Id.* at 1498.

225. *See supra* note 44.

226. *See* Harrison, *supra* note 1, at 70 (discussing the fact that society must challenge the stereotypes that are advertised in the media in order to eradicate colorism).

227. *See* Banks, *supra* note 5, at 222 ("Unless courts can be persuaded to acknowledge how . . . colorism . . . results in economic discrimination and possible loss of liberty, discriminatory racialized decision making will not be eliminated.").

228. *See The E-RACE Initiative*, *supra* note 7.

229. *See supra* Part V.

problem plaguing racial groups.[230] Unless the legal community learns to adequately address, tackle, and discuss inequalities as they function in the workplace, both conscious and subconscious discrimination will continue unabated.[231] Acknowledging color differences might be initially uncomfortable, but those conversations will eventually lead to a work environment that is not only tolerant of its employees, but accepting of them as well.

230. *See* GOLDBERG, *supra* note 148 ("Denial may be of the intention, occurrence, or pattern of exclusion.").

231. *See* Harrison, *supra* note 1, at 70 ("Bringing to light and openly discussing the inequalities that are a result from the colorism phenomenon is the first step in eradicating its very presence.").