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WORKPLACE DISCRIMINATION AND THE INEFFICIENCY OF THE *ELLERTH/FARAGHER* DEFENSE

*Kimberly F. Medina*¹

In the 1990s, only a small percentage of beach lifeguards employed by the city of Boca Raton, Florida, were female. Despite their competency as lifeguards, these women were repeatedly subjected to sexual harassment from two of their male supervisors. The supervisors often made comments about the women's appearances, giving them ratings based on their level of attractiveness. They would also make sexually charged jokes, including using physical gestures to imitate the act of oral sex. One of the supervisors even tackled one of the female lifeguards, Beth Ann Faragher, and told her that he would readily have sex with her if she had larger breasts. On another occasion, the other supervisor pressed himself against another female lifeguard in a sexual manner while she was bending over to drink from a water fountain.²

Kimberly Ellerth, working at a remote location for Burlington Industries, received similar harassment from a colleague's supervisor, who regularly made inappropriate comments about her attire, requested sexual favors, and made threats when she refused his

1 Kimberly F. Medina is a senior in international relations at Brigham Young University. She plans to attend law school in 2019. She would like to express her sincerest thanks to her editors and research assistants, Mitchell Anderson, Brady Davis, and Tyler Garrett, for the time and effort they contributed to this article. Tyler Garrett is majoring in English language with a minor in editing, and plans to attend law school in 2018. Kimberly would also like to thank Kris Tina Carlston and the editing board of the Brigham Young University Prelaw Review for their valuable insight and counsel.

2 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

advances.³ These women were just a few of the tens of thousands of workers across the nation who are mistreated each year because of their gender, race, color, national origin, age, genetic information, or disability status.⁴ In 1998, the year in which the two cases described above were brought to the Supreme Court, the Equal Employment Opportunity Commission (EEOC) received a total of 79,591 charges of illegal discrimination. Unfortunately, that amount has increased significantly, with 91,503 charges filed in 2016⁵ and countless other cases of discrimination presumably occurring which go unreported.

In the decisions of each of these cases (*Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth*), the Court established a standard to be applied in determining the liability of employers in cases of workplace discrimination. This standard, known as the *Ellerth/Faragher* defense (which has been accepted as applying to all forms of illegal discrimination), states that employers will not be held liable for discriminatory acts committed by supervisors or other employees within their companies if the employers take reasonable care to prevent and correct such acts, and if the employee who has been discriminated against fails to take advantage of the company resources offered for discrimination victims.⁶

3 *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

4 These seven categories have become known as “protected categories” due to their protected status under Title VII of the Civil Rights Act of 1964 (race, color, religion, national origin, and sex), the Age Discrimination Act of 1963 (age), Title I of the Americans with Disabilities Act of 1990 and Sections 501 and 505 of the Rehabilitation Act of 1991 (disability status), and the Genetic Information Nondiscrimination Act of 2008 (genetic information). Any discrimination, including harassment, that occurs against a person because of his or her status within one of these protected categories is considered illegal. Discrimination based on any other reason, which may at times be unfavorable, is not considered illegal under these federal laws.

5 *Charge Statistics: FY 1997 through FY 2016*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Feb. 14, 2017).

6 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

This attempt to hold employers accountable was designed with good intentions, but it is not without its flaws. The ambiguity of the *Ellerth/Faragher* defense gives employers an easy way out of receiving punishment for illegal discrimination committed under their jurisdiction. Additionally, it does not fulfill the intent of eliminating the discrimination, as is apparent by the increasing numbers of discrimination cases. Therefore, Congress should institute a law clarifying the standard for affirmative defense by requiring employers to provide anti-discrimination trainings, effective grievance mechanisms for employees who feel they have been discriminated against, and investigations and discipline of supervisors who have committed the discriminatory acts.

In order to better illustrate why such a statute is necessary, the following section will describe the *Ellerth/Faragher* defense in greater detail. Accompanying this description will be examples of cases in which the application of the *Ellerth/Faragher* defense failed to remedy unfortunate situations, as well as examples of cases in which the courts recognized the ambiguity of the *Ellerth/Faragher* defense and included in their opinions suggestions for how to clarify the defense in future decisions. Later in this article, a detailed description of the proposed law will be laid out, including information about the requirements each employer should meet and a clear explanation of why each aspect of the law is necessary in eliminating workplace discrimination.

I. AN EASY WAY OUT THROUGH THE *ELLERTH/FARAGHER* DEFENSE

Undoubtedly, the *Ellerth/Faragher* defense was created in an attempt to protect employers from unfair allegations. It gives employers the opportunity to assert affirmative defense and avoid legal punishment, by showing that they were not vicariously liable for the discrimination. Therefore, the employers have a great incentive to take these measures, which would ideally result in a reduction of harassing conduct occurring under the jurisdiction of those companies. However, the increasing amount of discrimination cases each year indicates that the standards outlined in the *Ellerth/Faragher* defense are far too vague to produce this result in reality.

There are two elements necessary to assert affirmative defense when discrimination occurs to the extent that it has a tangible effect on a person's employment.⁷ The first element is that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."⁸ But what constitutes "reasonable care"? The Supreme Court repeatedly uses this term throughout the decisions of both cases but fails to define it. The second element necessary for the company to claim affirmative defense, "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer,"⁹ is equally vague. At what point are an employee's attempts to take advantage of the company's preventive or corrective opportunities considered "reasonable"? These two critical elements for an affirmative defense have been left wide open to interpretation.

This lack of clarity has caused several problems in determining who is liable in cases of harassment. For example, in *Hardage v. CBS Broadcasting*, Hugh Hardage alleged that his supervisor, Kathy Sparks, regularly flirted with him and on multiple occasions made physical advances toward him, including rubbing his leg and trying to touch his crotch. When he refused her advances, she threatened retaliation. Hardage reported the harassment several times to other managers in the company, and was told he should deal with the harassment himself. Eventually, he sued the company, but the district court granted summary judgment in favor of CBS and dismissed the case, despite the clear evidence that harassment had occurred.¹⁰

7 Tangible effects on employment refers to: hiring or firing, promotions or demotions, changes in compensation or employment benefits such as health insurance, or any other measurable changes to the terms or conditions of employment. *Enforcement Guidelines on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Jun. 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html>.

8 *Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 765.

9 *Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 765.

10 *Hardage v. CBS Broadcasting, Inc.*, 427 F.3d 1177 (2005).

It is interesting that CBS was successful in claiming affirmative defense, considering it had not conducted any trainings in attempt to prevent sexual harassment before this case occurred, nor did the managers, acting on behalf of the company, take any corrective measures after they became aware of the situation.¹¹ Yet the court ruled that CBS was nonetheless justified because Hardage had told the supervisors to whom he had reported the harassment that he would take care of the situation himself, and because Hardage failed to provide specific details of the harassing behaviors.¹² Clearly, the managers at CBS did not do everything that they could have done to protect Hardage from such pervasive harassment that had a definite effect on his employment. However, they suffered no legal repercussions as a result because of the ambiguity of the standard necessary for affirmative defense.

Several cases have been brought before the Supreme Court since the *Faragher* and *Ellerth* cases attempting to clarify this standard. Among them are *Gorzynski v. JetBlue Airways*¹³ and *Equal*

11 *Id.* at 1186.

12 *Id.* at 1191.

13 *Gorzynski v. JetBlue Airways Corporation*, 596 F.3d 93 (2010). Diane Gorzynski, working as a customer service supervisor for JetBlue Airways, claimed that her supervisor repeatedly made sexual comments and tried to grab female crewmembers. The supervisor was the designated employee to whom Gorzynski was to report allegations of harassment, according to company policy, so she attempted to raise a complaint to him, but was later terminated. The court ruled that the *Ellerth/Faragher* defense did not apply in this case because she had tried to raise a complaint but the avenues of doing so were insufficient for the situation.

Employment Opportunity Commission v. Wal-Mart Stores.¹⁴ Both of these cases mention anti-harassment policies and effective grievance mechanisms, which are also hinted at in *Faragher* and *Ellerth*.¹⁵ However, both cases further state that simply having these policies and mechanisms is likely to be insufficient.

In *Gorzynski v. JetBlue Airways*, the plaintiff's harasser was the person designated within the company's grievance mechanisms to whom she should raise the complaint. The court ruled that the company should have considered this special circumstance and provided her with additional mechanisms, setting the precedent that employers must provide employees assistance according to the specific circumstances of their complaints in order to not be considered liable for the harassment. In *Equal Employment Opportunity Commission v. Wal-Mart Stores*, the court set another important precedent by ruling that there must be trainings and other means to disseminate knowledge about the relevant policies and grievance mechanisms.

II. A NEW STATUTE IS NEEDED

Although there have been clarifications made to the *Ellerth/Faragher* defense through these cases and others, workplace

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- 14 *Equal Employment Opportunity Comm'n v. Wal-Mart Stores*, 187 F.3d 1241 (1999). While working as an employee in the receiving department at Wal-Mart, Eduardo Amaro requested an interpreter for certain circumstances because he was hearing-impaired. After refusing to attend a mandatory training because this necessary accommodation had been denied to him, he was demoted to a janitorial position. When he complained of disability discrimination, he was suspended and eventually terminated. The court determined that the supervisors at Wal-Mart "had acted with malice or reckless indifference to [Amaro's] rights" and that even though the company had a nondiscrimination policy it was still liable for the discrimination because of its failure to educate the supervisors about non-discrimination policies.
- 15 *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806-807 (1998) (referencing EEOC's encouragement of grievance procedures, as well as the Court's opinion that there should be a "stated policy suitable to the employment circumstances"); *see also Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-765 (1998) (also referencing EEOC's encouragement of grievance procedures and the Court's opinion).

discrimination continues to be a problem. Employers are undoubtedly using this defense to avoid legal punishment when they should face serious consequences for not taking enough measures to eliminate illegal discrimination in their companies. Because employers are taking advantage of the defense's ambiguity in this way, Congress should write a statute that clearly defines a standard of necessary actions that all employers must take to prevent and correct discriminatory behavior. This law, which should include trainings, grievance reporting policies, and discipline of employees who do discriminate illegally against coworkers or subordinates, would then be used as the minimum requirements for affirmative defense under *Ellerth* and *Faragher*. The following sections will discuss the details of each aspect of the proposed law, as well as the necessity of each in fulfilling the goal of eliminating workplace discrimination.

A. Trainings

The *Ellerth/Faragher* defense says that employers should do what is reasonable to prevent illegal discrimination from occurring in their workplaces. Perhaps the most obvious way of doing this is by holding trainings to inform workers about illegal discrimination. The EEOC itself has advised, in its "Enforcement Guidelines on Vicarious Employer Liability for Unlawful Harassment by Supervisors" (published in response to the *Ellerth* and *Faragher* cases), that employers provide trainings that advise employees of their rights and responsibilities under Title VII of the Civil Rights Act of 1964 (Title VII).¹⁶ These guidelines repeatedly advise that trainings be regularly provided to both employees and supervisors about illegal discrimination and how to avoid it.

A few states have taken the EEOC's advice and implemented laws requiring sexual harassment trainings in the workplace. California and Maine's laws are the most extensive on the topic. California's law lays out specific training requirements that all companies

16 *Enforcement Guidelines on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Dec. 6, 2016, 2:31 PM), <https://www.eeoc.gov/policy/docs/harassment.html>.

employing fifty or more individuals must follow.¹⁷ All employees working in supervisory positions must receive a minimum of two hours of sexual harassment training within six months of initially assuming such positions and then again every two years thereafter.

Maine's law is very similar, requiring employers with fifteen or more employees to provide sexual harassment training for all new employees within one year of beginning work. This training should include

the illegality of sexual harassment; the definition of sexual harassment under the state and federal laws and federal regulations . . . ; a description of sexual harassment, utilizing examples; the internal complaint process available to the employee; the legal resource and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation.¹⁸

This information must also be posted in a "prominent and accessible location in the workplace" and annually dispersed in writing to each individual employee.

Though these statutes are too recent to have significant data showing their effectiveness, the specificity of who should be trained, when the trainings should take place, and how the trainings should occur (including details of what information should be included) make them excellent examples of the kind of law that Congress should adopt. Laws such as these are more likely to be effective than other less specific laws because the requirements are measurable and therefore easier to consistently and uniformly enforce.

Based on the template these two statutes provide, official anti-discrimination trainings should be provided to all employees within a designated period of time after being hired or appointed to a supervisory position, and again at regular intervals thereafter. The

17 2 CAL. GOV. CODE § 12950.1 (Deering 2016). Though the specificity of the training requirements in this law is an aspect of the law that increases the likelihood that it will be effective in reducing discrimination, a significant flaw in the statute is that it only applies to larger companies, though illegal discrimination could just as easily occur in smaller companies as well.

18 ME. REV. STAT. ANN. tit. 26, § 807 (1991).

trainings should be detailed and extensive, addressing (as the Maine statute does for sexual harassment) the definition of illegal discrimination, including why it is illegal, and a description of the various types of illegal workplace discrimination.

It is important to note that the Maine statute requires disseminating information not only about harassment, but also about the internal complaint processes and legal resources available to employees who feel they have been harassed. Having these processes and resources available is another critical action that employers must take to eliminate discrimination. This will be discussed in greater detail in the following section, but it is important that this information be presented to employees early and often during their employment so they have the information needed to use those resources, as referenced in the second requirement of the *Ellerth/Faragher* defense.¹⁹

A main concern that employers may have about this proposal is that it may be costly to implement these requirements. If they are not already holding antidiscrimination trainings, they would need to either hire a professional to give the trainings or train someone within the company to be able to do so, which would increase expenses for the companies either way.

However, doing nothing to prevent discrimination from occurring would be more costly for the company. Studies have shown that workplace harassment can lead to anxiety, depression, Post-Traumatic Stress Disorder, stress, fatigue, low self-esteem, and other negative physical and emotional effects that decrease worker productivity.²⁰ A 2002 study of 9,000 federal employees, conducted by psychologist Michael H. Harrison, PhD, of Harrison Psychological Associates, showed that this decrease in productivity, in conjunction with missed time off work and high turnover rates resulting

19 See *Faragher*, 524 U.S. at 807 (stating that employers must show that the employee failed to take advantage of available resources); see also *Ellerth*, 524 U.S. at 765 (also stating that there must be evidence that the employee did not take advantage of available resources).

20 David C. Yamada, *Symposium: Introduction to the Symposium on Workplace Bullying: Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP'T. POL'Y J. 475, 480 (2004) (discussing the negative health effects of workplace bullying).

from workplace harassment, resulted in a collective cost of more than \$180 million over a two-year period.²¹ With this perspective, it is evident that it is worth the time and money investment to take the necessary measures to prevent discrimination and harassment.

Of course, the expenses of taking preventative measures are only worth it if they are effective in eliminating discrimination, and the lack of data proving the effectiveness of the mandatory trainings in California and Maine does raise the question regarding the effectiveness of such trainings in general. In fact, it is very possible that trainings alone are insufficient in preventing instances of discrimination. However, in conjunction with grievance mechanisms and disciplinary action—the additional measures that Congress should require employers to take—trainings not only fulfill their purpose more effectively, but become the foundation of the process that every employer will take to eliminate discrimination in their workplaces.

B. Grievance Mechanisms

Building upon that foundation, it is critical that there be complaint processes and resources available to those employees who feel that they have been discriminated against. In an article about effective complaint procedures, the Society for Human Resource Management wrote, “Employees who raise concerns can be an organization’s early warning system signaling compliance concerns. . . . Listening to the employee and directing him or her to the most appropriate person who can help solve the concern is the first step in calming the situation.”²²

An important part of effective grievance mechanisms is making clear avenues available for the victim employee to report the

21 Liz Urbanski Farrell, *Workplace Bullying’s High Cost: \$180M in Lost Time, Productivity* (Mar. 18, 2002), <http://www.bizjournals.com/orlando/stories/2002/03/18/focus1.html>.

22 *Retaliation: Complaint Procedures: How Do We Handle an Employee Who Habitually Bypasses His Supervisor or Internal Procedures with Complaints?*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Mar. 12, 2015), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/chroniccomplainer.aspx>.

discrimination to individuals in the organization who could help remedy the situation. This could include going through line management to the perpetrator's supervisors, or going to an entirely neutral third party, such as a human resources representative. The proposed law would require employers to establish and make known to their employees such reporting avenues, and to provide multiple options of places employees could go to seek help. This would eliminate potential biases that individuals handling the complaint may have, as well as make it as simple as possible for the victim to raise a complaint.

Ellerth demonstrates the importance of this kind of grievance mechanism, particularly having multiple avenues through which to report the alleged discrimination. In this case, Burlington Industries had an employee grievance policy and Ellerth was aware of it, but she never took advantage of it because her only options for people to report the harassment to worked in a different city and she had little to no interaction with them.²³ Because of this, it would have been a great inconvenience for her to reach out to these designated individuals. Though she ultimately did not do anything to inform the company of the harassment, the Supreme Court still found that the company was liable for the harassment because of the inconvenience that restricted her ability to file a complaint and get the problem resolved.²⁴

Another aspect that should be included in the grievance procedures is the protection of the complainant's anonymity. In *Faragher*, information was brought to the attention of the city, which proceeded to make an attempt, albeit a mediocre one, at conducting an investigation. However, the anonymity of Faragher and her female co-workers was not protected in the investigation, so they hesitated to give the investigators accurate information out of fear of retaliation from the supervisors who were harassing them.²⁵ As a result, the

23 *Ellerth*, 524 U.S. at 751.

24 *Id.*

25 Beth Ann Faragher, *The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Faragher v. City of Boca Raton: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L.J. 417, 423 (2005).

city failed to properly discipline the supervisors and was unsuccessful at eliminating the harassment.

C. Investigations and Discipline of Violators

This example leads to the final element of the proposed law, for trainings and reporting mechanisms alone are not enough to eliminate the problem of workplace discrimination. After these initial measures are put into place, it is essential that the victims of discrimination feel that their concerns will be taken seriously by those they report to. The key to achieving this is ensuring that the person to whom the victim reports will use that information to improve the situation. The following elements are necessary to providing this assurance.

1. Conducting an Investigation

The EEOC has recommended that employers “set up a mechanism for a prompt, thorough, and impartial investigation into the alleged harassment” of an employee.²⁶ In another sexual harassment case, *Swenson v. Potter*, the Ninth Circuit Court of Appeals determined that an investigation must include two essential elements: temporary action to prevent further harassment during the investigation and permanent remedial action once the investigation has confirmed the harassment.²⁷ The supervisors in *Hardage* failed to conduct such an investigation, leaving Hardage feeling that he had no other option than to resign from his position. In *Faragher*, the city opened an investigation but was not thorough in conducting that investigation, so no changes were made to the treatment of the female lifeguards.

In contrast, in *Ladson v. George Washington University*, a complaint was raised about an employee allegedly making many racist and sexually explicit comments to other employees at George

26 U.S. Equal Employment Opportunity Comm’n, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (Oct. 25, 2016), <https://www.eeoc.gov/policy/docs/harassment.html>.

27 *Swenson v. Potter*, 271 F.3d 1184, (D. Mass. filed Nov. 30, 2001).

Washington University. University officials conducted an investigation and interviewed a variety of witnesses, who confirmed the allegations, despite the insistent denial of the claims by the accused. As a result of this investigation, the university made the appropriate decision to terminate the individual's employment.²⁸

In this case, the complainant and other victims were ultimately protected from the harassment by their colleague, and when the terminated employee filed a lawsuit alleging that his termination was unlawful, the case was dismissed because the investigation conducted by the university proved otherwise. The university was not found liable for any charges of illegal discrimination or harassment.

A thorough investigation, like the one conducted by George Washington University, should meet a number of criteria, as outlined by the Society for Human Resource Management. Such criteria should include gathering evidence, remaining objective, interviewing witnesses, and writing a report with the results of the investigation.²⁹ This final criterion, writing the report, is an essential part of the investigation because it proves that the investigation occurred and that a decision was made, which is important in determining employer liability. Additionally, it provides the information needed for determining appropriate disciplinary actions, if discipline is necessary.

2. Disciplining Violators

The *Ellerth/Faragher* defense states that employers must take reasonable measures to “prevent and correct”³⁰ any harassing or discriminatory behavior. All of the previously discussed measures

28 Jennifer L. Gokenbach, *Thorough Investigation into Sex Harassment Complaint Provides Key Defense*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Oct. 19, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ladson-sex-harassment-complaint.aspx>.

29 Dori Meinert, *How to Conduct a Workplace Investigation*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Dec. 1, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/1214-workplace-investigations.aspx>.

30 *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (emphasis added).

are important in eliminating workplace discrimination, but without doing anything to discipline those who have committed acts of discrimination, employers cannot truthfully assert that they took reasonable care to correct the behavior and should therefore be considered liable for the discriminatory behavior committed by the supervisors. Additionally, disciplinary action for unlawful behavior is essential in eliminating such behavior because without discipline, there is no real accountability and therefore no reliable system to discourage the behavior in the future.

Together, investigating the complaints and disciplining any violators are critical in preventing future discrimination from occurring. They work together with the other two aspects of the proposed law (conducting trainings and providing grievance mechanisms) to have a greater effect than any of the individual aspects would have on their own. Though each of these elements are not without their flaws when implemented individually, when they are put together, employees have a clear understanding of what their rights and responsibilities are, they know that help is available when those rights are violated, and violators of those rights will face consequences for their acts of discrimination.

III. CONCLUSION

It is indisputable that no one should be treated differently because of his or her gender, race, color, national origin, age, genetic information, disability status, or religion when such disparate treatment has negative effects on his or her employment. It is unacceptable for people to be denied opportunities or to feel unsafe at work because of these things, most of which they generally have no control over.

The laws and court interpretations thereof are strong and clear about who is protected from discrimination and why. Unfortunately, there remains confusion about what should be done to prevent discrimination from occurring and who is responsible when it does occur. The Supreme Court has attempted to clarify this by outlining (in the *Ellerth/Faragher* defense) when employers should or should not be held responsible for illegal discrimination occurring within their

companies, but the ambiguity of the defense has only led to further confusion, resulting in cases of obvious discrimination being dismissed without any punishment.

The law proposed in this article helps to eliminate this confusion and ultimately to reduce discrimination. By requiring employers to take specific actions before, during, and after the occurrence of discrimination, it will be clear to both employers and the courts what the standards of “reasonable care” in preventing and correcting cases of illegal discrimination are. Also, a law of this nature will raise awareness among employers and employees alike about the seriousness of the existing antidiscrimination laws, bringing about a necessary and long-awaited decrease in workplace discrimination and allowing everyone the employment opportunities they deserve.

