Report of the United States of America
Steven L. Willborn
University of Nebraska
Willborn@unl.eduOctober 2-4, 2013

IX American Regional Congress
ISL&SSL
Guayaquil, Ecuador

Theme 1:
The Role of Jurisprudence in the Fight Against Employment Discrimination

1. *Is the country's jurisprudence mentioned as a formal source of law? What is the legal status of judicial decisions?*

Courts in the United States are a primary and formal source of law on employment discrimination. The laws prohibiting employment discrimination in the United States are stated in very general terms. For government workers, the United States Constitution's due process and equal protection clauses limit employment discrimination; both use very general language. All workers are also protected by federal and state statutes prohibiting employment discrimination. These statutes also use very general language. For example, the main prohibition on employment discrimination in the principal federal law says that it is illegal:

> "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…" Title VII of the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1).

Because the statutory language is so general, the courts have been the primary source of law in defining the ways in which discrimination can be proven. For example, the courts defined the precise ways in which both direct and indirect discrimination could be proven and defended under the general statutory language. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)(defining the proof structure for individual cases of direct discrimination); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)(defining the proof structure for cases of indirect discrimination). In some instances, the legislature later amended the statute to incorporate and refine the proof structures established by the courts, but even those statutes tended to follow earlier judicial leads.

The United States is a federal system and, in this area, almost every state also has a state statute prohibiting employment discrimination. Here, again, the statutes tend to use very general language to prohibit discrimination, which allocates a great deal of authority to state courts to fill in the precise details of the non-discrimination obligation. The state statutes tend to mirror the federal statutory language and, in turn, state courts tend to follow federal courts in interpreting that language.

2. *Do judicial decisions have binding force?*

Yes. In individual cases, there is no appeal outside a judicial forum for resolving disputes. On matters of statutory construction, judicial decisions have binding force although the legislature can, of course, amend the statute to revise the governing rules if they disagree with judicial interpretations.

3. *How are cases publicized? How accessible are the decisions?*

Judicial opinions are publicly available. Historically, all important decisions were published in bound volumes. Today, important decisions are generally published both in bound volumes and on the internet. At least one state has recently begun to publish its judicial opinions only on the internet.

4. *What are the mechanisms for unifying the jurisprudence?*

At the federal level, there are three levels of federal courts: trial courts, appellate courts, and the Supreme Court. The Supreme Court has discretion whether to accept appeals from the appellate courts. But despite that, key issues in employment discrimination law tend to be decided by the Supreme Court. The rulings of the Supreme Court are binding as toall federal law as applied in either state or federal courts.

Having said that, the United States is a federal system and, as mentioned earlier (Question 1), each state has its own employment discrimination laws. The highest court in each state has the final say in interpreting state statutory law, whether applied in state or federal court. In general, however, the states tend to follow the federal lead in their employment discrimination jurisprudence. But because of the federal nature of the system, some variation in jurisprudence is an accepted part of our system. It is common for state and local nondiscrimination laws to increase the types of statuses protected (for example, many prohibit discrimination on the basis of sexual orientation and marital status) and to increase the number of employers covered by the laws (for example, to cover smaller employers than the federal laws). See response to Question 10 below.

5. *What factors, legal or otherwise, have enhanced the rule of law in the workplace?*

I think three major factors have enhanced the rule of law in American workplaces. First, there has been a sea change in the attitude of Americans towards discrimination. The first major, federal employment discrimination statute was the Civil Rights Act of 1964. When it was enacted, employment discrimination was widely practiced and accepted. Newspapers had separate want-ads for men and women, African-Americans were largely excluded from many categories of jobs, etc. Today, employment discrimination is not socially acceptable. While it still exists, its manifestations tend to be subtle rather than blatant. On those relatively rare occasions when obvious discrimination occurs, it is widely condemned.

Second, an industry has developed to train managers and others about good employment practices. This has been fueled in part by the development of doctrine that provides defenses to some types of discrimination claims if adequate policies and training are in place. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(employers can avoid liability for sexual harassment if they act reasonably to prevent and correct it). But the development is also related to the change in general attitudes towards employment discrimination. Employers seem to be genuinely interested in minimizing illegal discrimination and enhancing productive, diverse workforces. For example, when the Supreme Court last considered whether affirmative action (positive discrimination) was legally permissible, many large employers and the military argued in support of the value they place on diverse workplaces and the need for affirmative action to ensure them. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

Finally, the protections for employees who report illegal discrimination have been enhanced in recent years. As discussed below (Question 14), the major method of enforcement of discrimination statutes in the United States is through private lawsuits filed by workers. In the last decade or so, the courts have been increasingly willing to protect workers against retaliation by employers against workers who file claims. *See* Richard Moberly, *The Supreme Court's Anti-Retaliation Principle*, 61 CASE WESTERN RESERVE LAW REVIEW 375 (2010). This type of protection has enhanced the enforcement effort.

6. *What instruments of international humanitarian law on non-discrimination are used most frequently, and what is the binding force of such instruments?*

Courts in the United States very seldom refer to international law when deciding employment discrimination cases. I know of no employment discrimination decision which treats an international instrument as binding.

There is a very active debate at the highest judicial levels about whether it is appropriate to refer to foreign or international law, even when it is nonbinding and used only to consider appropriate resolutions under United States law. Justice Scalia on the United States Supreme Court is skeptical about reliance on foreign or international law. He has said, for example, that judicial reliance on foreign law is selective, opportunistic, and inappropriate. See, e.g., Roper v. Simmons, 543 U.S. 551 (2005)(Scalia, J., dissenting). Justice Breyer, also on the Supreme Court, has used and defended the use of foreign law in deciding cases. See, e.g., Knight v. Florida, 528 U.S. 990 (1999)(Breyer, J., dissenting). For a discussion between the two Justices on this topic, see A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Anonin Scalia and Stephen Breyer, at http://www.wcl.american.edu/secle/founders/2005/050113.cfm.

7. *Has the United State ratified ILO Conventions Nos. 100 and 111? Are the standards applied in the United States? What other ILO Conventions on discrimination have been ratified?*

The United States has not ratified ILO Conventions Nos. 100 and 111, nor has it ratified other ILO Conventions that relate directly to employment discrimination.

The United States has only ratified 14 Conventions in total, including only two of the eight fundamental conventions. Its most recent ratification (and the only one in this century) was in 2001 (No. 176 on unemployment).

8. *Are there constitutional provisions that address employment discrimination?*

Yes, the Equal Protection Clause of the United States Constitution prohibits discrimination on the basis of race, sex and a limited set of other "suspect" criteria. U.S. CONSTITUTION, amend. 14. Most state constitutions contain a similar provision. This prohibition applies only to discrimination by government employers and it prohibits only intentional/direct discrimination.

9. *Do collective agreements cover employment discrimination and what are the most common provisions?*

Most collective bargaining agreements have provisions that prohibit employment discrimination. They also generally have grievance and arbitration procedures to facilitate resolution of claims of violations of the collective bargaining agreement.

However, even those most collective bargaining agreements have such provisions, relatively few Americans are covered by collective bargaining agreements. In 2012, about 12% of all workers were subject to collective bargaining agreements, or about 16 million out of a total workforce of 125 million. A much higher percentage of public-sector workers (40%) than private-sector workers (7%) were represented by unions. Bureau of Labor Statistics, U.S. Department of Labor, *Union Members – 2012* (January 23, 2103), at www.bls.gov/news.release/pdf/union2.pdf.

10. *What types of discrimination are addressed other than race, color, sex, religion, political opinion, national extraction and social origin?*

The United States does not have general prohibitions on employment discrimination on the basis of political opinion or social origin. The First Amendment to the United States Constitution provides some protection for political opinion, but only for public employees and, even then, the protection is fairly limited. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410 (2006)(no protection for employee speech if it relates to job duties).

National law in the United States provides protection in two major additional areas: age and disability discrimination. Age discrimination has been prohibited by federal law since 1974. Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. In general, the Act prohibits employment discrimination against people aged 40 and over. Discrimination on the basis of disability has been regulated since 1990. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. In general, the Act

requires employers to take all reasonable steps to accommodate individuals with disabilities to permit them to work.

State law in about half of the states and local law in most major metropolitan areas also prohibit employment discrimination on the basis of sexual orientation. *See* ACLU, Non-Discrimination Laws: State-by-State Information, at www.aclu.org/maps/non-discrimination-laws-state-state-information-map.

Finally, a wide assortment of other types of discrimination is often addressed by state or local law. The municipal code in Madison, Wisconsin, provides an example of how extensive the list of protected categories can be. In addition to the usual categories, that ordinance also prohibits employment discrimination because of "marital status, source of income, arrest record, conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, genetic identity, political beliefs, familial status, student status, domestic partnership status or status as a victim of domestic abuse, sexual assault, or stalking." Madison, Wis., Municipal Code § 39.03(1).

11. *What groups or sectors are most affected by employment discrimination?*

The groups most affected are those targeted by the employment discrimination laws: racial and ethnic minorities, women, the aged, and individuals with disabilities.The United States is a society with enormous differences in wealth and status. *See* G. William Domhoff, *Wealth, Income, and Power* (United States ranks 93 out of 134 countries studied in income inequality). Because of these differences, the effects of discrimination (or simply market-based differences in group access to education and jobs) can lead to large and significant differences in the positions of these groups in society. With one major exception, the groups protected by the discrimination laws also tend to have significantly lower wealth and status in American society. The exception are the aged, who tend to be somewhat wealthier than the average American and yet enjoy protection under the employment discrimination laws.

12. *What are the current challenges facing the United States on employment discrimination? What situations are not currently covered?*

Recent concerns about employment discrimination law in the United States include the following:

- One of the Commissioners on the United States Equal Employment Opportunity recently said that federal law provides inadequate protection for lesbian, gay, bisexual, and transgender workers. Ben James, *EEOC Commish Says Title VII Not Enough for LGBT Workers,* Law 360 (March 6, 2013). This is an area of great public interest in the United States and the trend is distinctly in the direction of increased protections, although increased protections at the federal level seem unlikely in the near future.

- Employment discriminationlawsuits, by their nature, are generally class-based. In early cases, that was recognized and class actions were fairly readily available to employment discrimination plaintiffs. But in recent years, the courts have cut back significantly on the availability of class actions. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). This means that many lawsuits are too small to pursue and, since individual plaintiffs are the main enforcers of the discrimination laws (see Question 14 below), some violations of the laws will go unredressed.

- Employers in the United States have increasingly inserted arbitration clauses into employment agreements. These clauses generally cover discrimination claims, as well as other types of claims. The courts defer greatly to these arbitration clauses and employers have used them to limit the types of lawsuits that might be brought, for example, to limit the availability of class actions. *Cf. Compucredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)(enforcing limitations on class actions under a credit card consumer agreement). As with the limitations on class actions, these types of limitations in arbitration agreements weaken the enforcement scheme for employment discrimination in the United States since that scheme depends greatly on enforcement by employees.

- The United States has a very weak set of laws providing for leave time from work. For example, at the federal level, there is no protection for paid leave, the unpaid leave guarantee is for only 12 weeks, and that guarantee only applies to those working for large employers. Family Medical Leave Act, 29 U.S.C. § 2601 *et seq*. While these limits on guaranteed leave time affect all workers, they make it especially difficult for women and individuals with disabilities to become and remain full participants in the workforce.

13. *What are the burdens of proof in employment discrimination actions?*

Burdens of proof in employment discrimination actions in the United States are varied and highly technical and complex.

For individual actions alleging direct discrimination, there are two proof schemes. First, for claims in which the dispute is whether the adverse employment action was caused by discrimination or another factor ("either or" claims), the plaintiff bears an easy initial burden. In hiring discrimination cases, the burden is that the plaintiff must prove that she is a member of a protected group, applied for a job for which she was minimally qualified, was rejected, and the employer continued to try to fill the position. The employer must then present evidence of the legitimate, non-discriminatory reason which it claims resulted in the adverse employment decision. Then, the plaintiff bears the burden of proving that the employer's claimed reason is

not the true reason and instead that the true reason was illegal discrimination. *McConnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The initial burden varies slightly depending on the nature of the alleged discrimination (hiring, discharge, promotion, etc.), but it is always a light burden, as is the employer's initial burden. The goal of the first two steps of the analysis is to eliminate common reasons for the adverse decision to permit the case to focus on the dispute about whether the "real" reason was the one the employer forwards or discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-56 (1981).

Another set of burdens applies to cases that involved so-called mixed motives. This class of cases recognizes that both legitimate and illegitimate factors may result in an adverse employment decision. In mixed-motives cases, the plaintiff bears the initial burden of proving that an improper consideration, such as race or sex, was a "motivating factor" for an adverse employment decision even though there may have been other factors that also motivated the decision. If the plaintiff can prove that an illegitimate consideration was one of the "motivating factors" for an adverse decision, then she is entitled to at least some relief. She is entitled to an injunction, a declaratory judgment and attorney's fees. However, if the employer can prove that it would have made the same decision even if the illegitimate factor had not been a motivating factor, then that is the limit of the plaintiff's relief. On the other hand, if the employer cannot carry its "same result anyway" defense, then the plaintiff is entitled to full damages, which could include backpay and reinstatement. Title VII of the Civil Rights Act of 1964, §§ 2000e-2(m), 2000e-5(g)(2)(B). (This type of claim is unavailable for age discrimination. For age discrimination claims, the plaintiff must prove *both* that age motivated the adverse decision and that the result would have been different if age were not a motivating factor. *Gross v. FBL Financial Services, Inc*., 557 U.S. 167 (2009).)

The courts have also recognized that direct discrimination can be proven with statistical evidence. In "systemic disparate treatment" cases, the plaintiff bears the burden of showing (1) the expected treatment of a group that one would expect in the absence of discrimination; (2) the actual treatment of that group by the employer; and (3) that the difference is legally significant. On the first element, a plaintiff might show, for example, that one would expect about half the workforce to be female if half the job applicants were female. On actual treatment, then, the plaintiff might show that only one-quarter of the actual employees of the company were female. The third step of the analysis would be to use statistical techniques to demonstrate that the difference between the expected and ideal treatment was large enough to be legally significant. The plaintiff bears the burden of proof on all three of these elements. The leading cases on this type of discrimination are *Teamsters v. United States*, 431 U.S. 324 (1977) and *Hazelwood School District* v. United States, 433 U.S. 299 (1977).

Indirect discrimination is also cognizable in the United States. For this type of discrimination, a plaintiff bears the initial burdens of proof to demonstrate that (1) the employer uses a particular neutral factor to make employment decisions and (2)

that the factor has a disproportionate adverse effect on a protected group. If the plaintiff carries this burden, the employer then bears the burden of showing that the factor is job related for the position in question and consistent with business necessity. (In age discrimination cases, the employer's burden is lighter; it need only prove that the factor is "reasonable."*Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008).) Finally, if the employer can carry its burden, the plaintiff could still prevail if she could show that an alternative employment practice could accomplish the same business purposes with a lesser disparate impact on a protected group. For example, an employer might violate the statute if it requires a college degree (which would likely have a disparate impact against certain racial groups) even though a reading test would ensure equally capable employees with a lesser disparate impact.*Griggs v. Duke Power Co*., 401 U.S. 424 (1971); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1).

The burdens of proof are different in disability and harassment cases. For disability discrimination, the plaintiff must show that she is an individual with a disability, who is qualified to perform the job in question, with "reasonable accommodations." The employer can attempt to defend by demonstrating that, even if the plaintiff can carry her burdens, accommodating her would impose an "undue hardship" on the employer. Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. In general, the plaintiff's burden to demonstrate that an accommodation is "reasonable" requires her to show that accommodation would be possible in the "ordinary" case or in the "run of cases," while the employer's burden to show "undue hardship" would require an employer to prove that something about its particular circumstances would make an accommodation especially difficult even though it might be reasonable in a normal case. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 400-405 (2002).

Harassment claims also have a different proof structure. Although most harassment claims involve sexual harassment, the concept has been applied across the full range of types of discrimination in the United States to include racial harassment, disability harassment, etc. In general, the plaintiff must prove that (1) she falls within a protected group (that is, she is a woman, an individual with a disability, etc.); (2) that there was unwelcome conduct (3) on the basis of the protected category and (4) either that the conduct was "severe or pervasive" or that a tangible aspect of her employment was affected (e.g., she was fired or failed to receive a promotion). If the harassment were by someone other than one of the employer's supervisors (for example, by a co-worker or a customer), the plaintiff must also prove that the employer was negligent in failing to prevent the harassment or in responding to it inadequately. If the harassment were by one of the employer's supervisor, then the employer is liable unless it can carry its burden of proving that it took reasonable care to avoid the harassment (for example, by having rules prohibiting it and training employees appropriately) and that the plaintiff unreasonably failed to take advantage of the preventive or corrective measures offered by the employer. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

14. *Are discrimination cases handled differently procedurally than other types of cases? Are there special mechanisms in place for reporting violations?*

There is a special administrative procedure for handling discrimination cases. However, it is common for labor regulation in the United States to have special administrative procedures (e.g., for labor union regulation, workplace safety regulation, etc.).

Procedurally, individuals with employment discrimination claims must file charges initially with their state or local anti-discrimination agency. If the claim is not quickly resolved there, they may file with the federal Equal Employment Opportunity Commission (EEOC). When it receives a charge, the EEOC investigates the claim, determines if there is reasonable cause to believe that discrimination has occurred and, if there is reasonable cause, attempts to settle the case. If the EEOC either finds no reasonable cause to believe that discrimination has occurred or cannot settle the case, then it issues a "right to sue" letter. Individuals are also entitled to request and receive a "right to sue" letter if the EEOC takes more than 180 days to resolve the issue. The "right to sue" letter permits the individual to file a lawsuit. Employment discrimination lawsuits follow the normal procedures for civil cases.

The time limits for filing discrimination claims are relatively short. An individual must file her initial charge with the EEOC within either 180 or 300 days of the time the discrimination occurs (which time limit applies depends on the nature of the applicable state law). The individual has 90 days after receiving her right-to-sue letter to file her action in court.

The EEOC also has the statutory authority to file a lawsuit on behalf of individuals claiming discrimination, but its resources are limited. It does not file very many lawsuits. In fiscal year 2012, for example, the EEOC filed a total of only 155 such lawsuits nationwide. EEOC Litigation Statistics, FY 1997 through FY 2012, at http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm (this is roughly one lawsuit for each million workers in the labor force).

For most other labor regulation in the United States, an administrative agency is empowered to prosecute claims on behalf of workers. Enforcement of the major discrimination statues, in contrast, is viewed primarily as one of "private attorneys' general." That is, at the end of the process, workers themselves must file and prosecute their own lawsuits at their own expense. The discrimination statutes encourage these kinds of lawsuits through one-way shifting of attorney's fees. That is, successful plaintiffs in discrimination lawsuits can recover their attorney's fees from the losing employer in the case, but employers who are successful in defending against claims cannot recover their attorney's fees. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). There has been much debate in the United States about whether this is an effective enforcement scheme. *See* Steven L. Willborn, *Labor Enforcement Theory: The Case of Public vs. Private Enforcement* (forthcoming).

15. *Does the United States permit positive discrimination (affirmative action)?*

Yes. See Question 16 below for information on situations in which affirmative action is permitted.

16. *What are the practices with respect to affirmative action?*

The rules for permissible affirmative action are different for private and public employers.For public employers, affirmative action must comply both with statutes that prohibit employment discrimination and with state and federal constitutional provisions. The constitutional provisions tend to be more stringent, so they are the principal restrictions for public employers. I will discuss the constitutional restrictions on affirmative action first. Then, I will discuss the statutory limitations on affirmative action which apply primarily to private employers.

A. Constitutional Restrictions on Affirmative Action

Several state constitutions impose a categorical ban on affirmative action by public employers in those states. Beginning with California in 1999, seven states have placed such bans in their state constitutions (Arizona, California, Michigan, Nebraska, Oklahoma, New Hampshire, and Washington). In general, these bans mean that public employers in those states may not engage in any type of affirmative action.

Late in 2012, a federal court held that the ban on affirmative action in the Michigan constitution violated the United States Constitution and, as a result, enjoined its enforcement. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 701 F.3d 466 (6th Cir. 2012)(en banc). The rationale for the decision – that it imposed improper and heightened political burdens on racial minorities – is one that could apply generally to all of the state constitutional prohibitions on affirmative action. Thus, it is now an open question whether these types of bans in state constitutions are consistent with the United States constitution. The United States Supreme Court has not yet decided whether it will review this decision.

In addition to these constitutional bans in some state constitutions, the United States Constitution imposes limits on affirmative action that apply universally. The Equal Protection Clause of the 14th Amendment to the United States Constitution was enacted in the aftermath of the Civil War and, in general terms, it prohibits race and gender discrimination. The Court, however, has allowed affirmative action if two general requirements can be met. First, there must be a strong justification for the affirmative action and, second, when justified, the affirmative action must be very narrowly tailored to address that justification.

The Supreme Court currently recognizes only two interests as sufficient to justify affirmative action in employment: (1) remedying past discrimination and (2) student diversity in higher education. There is a case currently before the Supreme Court in

which the Court will reconsider whether the second factor is still sufficient to justify affirmative action. *Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012)(decision expected in June, 2013).

When affirmative action is permitted, the United States Constitution also requires that it be narrowly tailored to its purpose (that is, narrowly tailored to achieve the goal of either remedying past discrimination or achieving student diversity). To be narrowly tailored, the affirmative action must be temporary (it must end when the goal is achieved) and flexible (not have stringent outcome requirements), and it must not unduly "trammel" the interests of the non-preferred groups (for example, it cannot impose a ban against hiring or admission of non-preferred group members or interfere unduly with their legitimate expectations).

In general, while the United States Constitution imposes significant limitations, public employers are permitted to engage in affirmative action under the proper conditions, and they do so. Over time, however, the United States Supreme Court has limited the circumstances in which affirmative action is permitted, and the trend of increasing limitations is expected to continue.

B. Affirmative Action for Private Employers

Private employers are not constrained by limitations on affirmative action imposed by the United States and state constitution. Thus, affirmative action by private employers is limited only by the statutes prohibiting employment discrimination. In general, this means that private employers, while still quite limited, are more able to engage in affirmative action.

The general structure of the limitations on affirmative action by private employers mirrors the public-employer limitations. That is, there must be a strong justification for any affirmative action and the affirmative action must be narrowly tailored to achieve its goals. The two leading cases on private-sector affirmative action, however, indicate that the justifications for affirmative action are interpreted more generously than they are for public employment. Instead of having to prove a firm basis for believing that past discrimination has occurred, a private-sector employer can justify affirmative action with less evidence than that. *Johnson v. Transportation Agency of Santa Clara Co*., 480 U.S. 616 (1987). For example, proving that there is a manifest imbalance in traditionally segregated job categories is sufficient to justify affirmative action, even in the absence of evidence that the segregation resulted from discrimination. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). When justified, private-sector affirmative action must be narrowly tailored in the same ways as public-sector affirmative action, as discussed above.

In general, then, private-sector employers have more freedom to engage in affirmative action than public-sector employers. Despite that, however, there are still significant limitations on their ability to do so.

17. *What are the remedies for illegal employment discrimination?*

The available remedies are:

- Reinstatement or Front Pay. Plaintiffs can be instated to positions (if they have not been hired initially) or reinstated (if they have been improperly fired). They are presumptively entitled to the seniority they would have had absent the illegal discrimination. If reinstatement is impractical, plaintiffs may be entitled to "front pay" instead; front pay is the monetary value of the job in the future.

- Backpay. Plaintiffs are entitled to backpay from the time of the illegal discrimination until the time of the favorable judgment. Plaintiffs have a duty to mitigate these damages. Thus, backpay awards will be reduced by amounts the plaintiff earned during that period or by amounts they would have earned had they mitigated properly.

- Compensatory Damages. Plaintiffs are entitled to compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S. C. § 1981a(b)(3). But the amount of these damages are capped (see the discussion of punitive damages below).

- Punitive Damages. Plaintiffs are entitled to punitive damages if they can prove that the defendant acted "with malice or with reckless indifference." 42 U.S.C. § 1981a(b)(1). Compensatory and punitive damages are capped to an amount that depends on the size of the employer. The smallest employers can be required to pay no more than $50,000 in combined compensatory and punitive damages; the largest employers can be required to pay no more than $300,000. 42 U.S.C. § 1981a(b)(3).

- Liquidated Damages. For age discrimination claims and sex-based wage discrimination claims, plaintiffs are also generally entitled to liquidated damages in an amount equal to their actual damages. Thus, plaintiffs are entitled to roughly double the amount of their actual damages, that is, their actual damages plus an equal amount in liquidated damages.

- Attorneys' Fees. Prevailing plaintiffs are entitled to recover their reasonable attorneys' fees in pursuing their claim. As mentioned above (see question 14 above), discrimination enforcement is based on a "private attorneys' general" concept where most of the enforcement will occur through private actions, rather than through government-led enforcement efforts.

- Injunctions, Declaratory Relief, and Affirmative Remedies. Courts commonly enjoin employers from continuing to engage in illegal discrimination. In addition, particularly in class claims that extend over many years, courts may order affirmative relief for non-plaintiffs, such as an order to hire a certain percentage of women in the future.

These are the remedies generally available for violation of federal discrimination statutes. Remedies for violations of state laws generally follow this structure, although there may be some differences (e.g., some states do not provide caps on compensatory and punitive damages, or provide different caps).

18. *Is there a legal reform project in operation with a goal of providing greater protection against employment discrimination?*

No.

19. *Has the United States been condemned by the Inter-American Court of Human Rights for violating non-discrimination principles?*

No.