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ORGANIZATIONAL RESPONSIBILITY FOR WORKPLACE RACIAL AND SEXUAL HARASSMENT: THE STORIES OF ONE COMPANY'S WORKERS

*Cheryl L. Wade**

PROLOGUE

Plaintiff: . . . I see Mr. Willie Pressley over on the side of me with a bucket and a mop. My supervisor is like sitting right across from him . . . when I walk through and a couple more guys sitting in there. So I walked through. And as soon as I got by Willard Pressley, he had this mop in his hand and he rammed it up my ass—well, my butt. Excuse me. Sorry.¹

Plaintiff's attorney: How old a man is Willard Pressley?²

Plaintiff: I guess he's about 75 now. You know, this was like three—three years ago.³

Plaintiff's attorney: Did you hit him back?⁴

Plaintiff: I mean, as bad as I wanted to, no, I didn't.⁵

Plaintiff's attorney: And what race is Willard Pressley?⁶

Plaintiff: He's—he's a white man.⁷

. . . .

Plaintiff's attorney: . . . [W]hat did it do to you to be rammed like this at work?⁸

Plaintiff: Man, I'm—I was pretty much an emotional wreck, man. You

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1. Transcript of Record at 278, *Taylor v. Turner Indus. Grp., LLC*, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 279.

*know, I mean, it—that kind of messed me up right there, man. I mean, I’ve never been done like that before. And for somebody to do that to me, I mean, it’s—it’s—it’s very degrading, and, I mean, it’s—I mean, it’s crazy, man, because I would never do anybody like that.*⁹
*Plaintiff’s attorney: Did you think the attack was racially motivated?*¹⁰
*Plaintiff: Yes, I do.*¹¹

I. INTRODUCTION

I begin this Article with the testimony of an African-American man who, along with hundreds of African-American coworkers,¹² brought a race discrimination suit against an industrial construction and fabrication limited liability company (“LLC”) doing business in Texas and Louisiana.¹³ The company, Turner Industries (“Turner”), rigorously defended itself against the allegations, and rather than settle the case, Turner and ten of the plaintiffs went to trial in October 2012.¹⁴ A jury awarded two of the ten plaintiffs in the 2012 Bellwether trial¹⁵ \$2 million each in damages, but the plaintiff whose testimony I include

9. *Id.*

10. *Id.*

11. *Id.* This dialogue is the direct examination of one of the African-American plaintiffs in *Taylor v. Turner Indus. Grp., LLC*, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Sept. 17, 2012). The plaintiffs sued for employment discrimination in the U.S. District Court for the Eastern District of Texas located in Marshall, Texas, in 2012. *Id.* at *1.

12. Plaintiffs’ attorneys did not file a class action. They concluded that the facts of each plaintiff’s complaint were too dissimilar and would not qualify as a class action. Interview with James Vagnini, Attorney for Turner plaintiffs, in Lake Charles, La. (July 27, 2011).

13. See *Turner Indus. Grp., LLC*, 2012 WL 4092492, at *1-2; Leslie Eaton, *Industrial Services Firm Faces Bias Suit*, WALL ST. J., Jan. 31, 2011, at B4 (discussing the *Turner* case and recent similar lawsuits against Turner).

14. See generally Transcript of Record, *Taylor v. Turner Indus. Grp., LLC*, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

15. See Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 578 (2008) (“The original bellwether was a typical, perhaps particularly docile sheep who signaled the direction of the flock because he traveled at its center. Bellwether trials also approximate a ‘typical’ case through averaging. In common usage, the term bellwether refers to a leader or an indicator of future trends.”); Kristine B. *What Is Bellwether Trial? Take that Trial for a Test Drive, Baby!*, LAWYERSANDSETTLEMENTS.COM, (Mar. 4, 2011), <http://www.lawyersandsettlements.com/blog/what-is-a-bellwether-trial-take-that-trial-for-a-test-drive-baby-06917.html> (“[A] bellwether trial is a trial to indicate future trends in a specific litigation. They are used when a large group of plaintiffs have filed suit based on the same theory or claim and the only feasible way to handle the caseload is through a bellwether trial.”). The Bellwether trial is used to determine whether a trial for the larger group of plaintiffs should go forward. Kristine B. *supra*. Before litigating the claims of all the Turner plaintiffs, the court asked the attorneys for the plaintiffs and the defense to choose five plaintiffs each. Interview with James Vagnini, *supra* note 12. The plaintiffs’ attorneys chose the plaintiffs with the strongest arguments. *Id.* Alternatively, Turner’s attorneys chose plaintiffs for the Bellwether trial who had relatively weaker cases. *Id.* The testimony and jury verdict would help the court and the attorneys for both sides to determine whether they should proceed with litigating the cases for the remaining plaintiffs. *Id.*

above lost at trial and was awarded nothing.¹⁶ It seems, however, that even though eight of the Bellwether trial plaintiffs walked away with nothing, the biggest loser was Turner. Turner spent thousands of dollars to defend itself against the case, and in some circles, its reputation has been profoundly harmed.

This Article was inspired by Nancy Levit's invitation to participate on a panel entitled, "Institutional Responsibility for Sex and Gender Exploitation" at the 2013 Annual Meeting of the American Association of Law Schools.¹⁷ According to *The American Heritage Dictionary*, exploit means "to make use of selfishly or unethically."¹⁸ There are other ways to define the term, but the selfish or unethical use of a person based on gender describes the narratives included in this Article about workplace discrimination and the organizational governance practices that allow employment bias to persist and even thrive.¹⁹

If we believe the narratives, Turner exploited its African-American employees' hard work, talent, and services. These workers, like all employees, helped Turner earn profits for its shareholders. But, the use of their labor was exploitative because they suffered discrimination that made it difficult for them to do their jobs and remain emotionally healthy.²⁰ The narratives I describe in this Article²¹ are about a private for-profit LLCs' selfish use of workers' time, talent, and skill.²² It is selfish in the sense that workers are exploited for the benefit of investors. This type of "selfishness" is expected in this context. One of

16. Telephone Interview with James Vagnini, Attorney for Turner plaintiffs, in New York, N.Y. (Oct. 27, 2014).

17. For more information, see https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=df575e0f-4130-40a3-ba1f-34d45028e0fb&RegPath=EventRegFees&REg_evt_key=a931e6c6-e043-4c5d-9af6-491599393238.

18. THE AM. HERITAGE DICTIONARY 478 (2d college ed. 1985).

19. See *infra* Part IV.

20. Interview with James Vagnini, *supra* note 12.

21. Critical race theorists emphasize the value of narratives in providing a voice to historically marginalized groups like those discussed in this Article. See RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION 43-52 (2d ed. 2012) ("Stories also serve a powerful . . . function for minority communities. . . . Stories can give them voice and reveal that others have similar experiences. Stories can name a type of discrimination; once named, it can be combated."); Nancy Levit & Allen Rostron, *Calling for Stories*, 75 U. MO. KAN. CITY L. REV. 1127, 1127-28 (2007) ("Stories are the way people . . . understand situations. People recall events in story form. Stories are educative; they illuminate different perspectives and evoke empathy. Stories create bonds; their evocative details engage people in ways that sterile legal arguments do not."); see also Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 754 (2011) ("Personal stories . . . enrich[] understandings of the situations of disempowered people."); Catharine A. MacKinnon, *Law's Stories as Reality and Politics*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 232, 235 (Peter Brooks & Paul Gewirtz eds., 1996) ("Dominant narratives are not called stories. They are called reality.")

22. See *infra* Parts IV-V.

the basic tenets of corporate governance is the idea that corporations exist to maximize shareholder wealth.²³ And, similarly, LLCs are formed in order to make money for investors who are called members.²⁴ The goal is always to earn a profit for investors, but the exploitation of workers in order to achieve this goal becomes unethical and illegal if workers are subjected to harassment and bias.²⁵

Turner workers were also exploited in the sense that their presence in the workplace was essential to Turner's claims that it was an equal opportunity employer.²⁶ Turner's workplaces are located in areas with large African-American populations.²⁷ Turner had to establish some level of racial diversity among employees because an all-white workforce in towns with large African-American populations would be open to criticism and questions about Turner's employment practices.

In this Article, I discuss the possibility of corporate responsibility for the unfair treatment of workers based on race and gender through an examination of business governance.²⁸ I explore whether Turner, or any company, can be, and should be, held accountable for the acts committed by individual employees.²⁹ When racist graffiti appeared on the walls, Turner investigated and had someone paint over it.³⁰ Is this enough?

23. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

24. See *Limited Liability Company*, SBA.GOV, <http://www.sba.gov/content/limited-liability-company-llc> (last visited Nov. 23, 2014) (describing the formation of LLCs and how profits are shared among members).

25. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

26. See *id.*; *EEO Statement*, TURNER INDUS., <http://www.turner-industries.com/PageDisplay.asp?P1=26971> (last visited Nov. 23, 2014).

27. For example, Turner has facilities in several East Texas cities—Houston, Beaumont, and Paris. *About Turner*, TURNER INDUS., www.turner-industries.com/about-turner (last visited Nov. 23, 2014). The largest county in East Texas includes the city of Beaumont, which is 47.3% African American. *Beaumont (City), Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/4807000.html> (last updated July 8, 2014). According to the 2010 U.S. Census Bureau, Paris, Texas is 23.4% African American. *Paris (City), Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/4855080.html> (last updated Mar. 27, 2014).

28. See *infra* text accompanying notes 147-55. In the 1990s, the two largest race discrimination class actions in U.S. history were filed within just a few years of each other. See Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This Is Not Just Women's Work*, 65 MD. L. REV. 346, 359 (2006) [hereinafter Wade, *Transforming*]; Cheryl L. Wade, "We Are an Equal Opportunity Employer": Diversity Doublespeak, 61 WASH. & LEE L. REV. 1541, 1550-52 (2004) [hereinafter Wade, *We Are an Equal Opportunity Employer*]. Texaco and Coca-Cola paid approximately \$176 and \$192 million, respectively, to settle class actions brought by African-American employees alleging racial discrimination and harassment. See Wade, *Transforming*, *supra*, at 359; Wade, *We Are an Equal Opportunity Employer*, *supra*, at 1550-51. The lead plaintiffs in both class actions were women. See, e.g., BARI-ELLEN ROBERTS & JACK E. WHITE, *ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA 2* (1998).

29. See *infra* Part IV.

30. See generally Transcript of Record, *Taylor v. Turner Indus. Grp., LLC*, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 17, 2012); Transcript of Record, *Taylor v. Turner Indus.*

Turner defended itself by pointing out that it did not have details about the identities of the persons who committed the acts.³¹ Also essential to Turner's defense were its assertions that it had a formal policy that denounced discrimination and harassment.³² Turner's written policy asserted that it would not tolerate harassment and bias.³³ But, the more important question focuses on Turner's responsibility for creating and maintaining a workplace culture in which this kind of behavior occurs. Should Turner be held accountable for its workplace culture?

The point of this Article is that potential corporate or organizational accountability for the acts of individuals employed by a business organization may help to cure racially toxic workplace cultures.³⁴ Equally important is the fact that companies like Turner may be able to avoid allegations of, and complaints about, widespread discrimination. Accountability at the organizational or corporate level potentially inspires companies to do what they can to prevent the filing of litigation by attempting to establish workplace cultures that foster racial and gender equity. The threat of litigation may help to convince companies to take the steps they should have taken in order to adhere to best practices.³⁵ When the two largest race discrimination cases in U.S. history were settled, the settlement terms required the companies to do what they would have done if they had practiced good governance before the litigation was filed.³⁶

Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 16, 2012); Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

31. See generally Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 17, 2012); Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 16, 2012); Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

32. See generally Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 17, 2012); Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 16, 2012); Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

33. *EEO Statement*, *supra* note 26 (detailing Turner's policy against harassment and discrimination).

34. See *infra* text accompanying notes 147-55.

35. See, e.g., Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 434-35 (2002) [hereinafter Wade, *Racial Discrimination*] (discussing how corporate managers can learn from previous racial discrimination complaints, including how to avoid future lawsuits).

36. See Wade, *We Are an Equal Opportunity Employer*, *supra* note 28, at 1550-51 (elaborating on the terms of the settlement agreements, including requirements that Coca-Cola and Texaco participate in employee diversity training programs).

Most companies attempt to establish healthy cultures by creating programs that monitor their employees' compliance with the law.³⁷ These compliance programs may include the appointing of a compliance officer, and the creation of a compliance committee or department.³⁸ Committee or department members typically draft compliance handbooks. They may also create compliance hotlines that allow employees to easily report a coworker's failure to comply with the law.³⁹

Business leaders can transform racially hostile environments by designing and implementing programs that monitor employees' compliance with the laws that prohibit discrimination. They must make sure that these compliance programs are not merely cosmetic. Someone at, or near, the top of the organizational hierarchy, must give attention to the firm's compliance program. Managers must clearly articulate their firm's anti-discrimination policy. Many companies do this by providing diversity training.⁴⁰ Allegations of noncompliance with anti-discrimination law must be thoroughly investigated, and when employees fail to comply, there must be repercussions for those failures.

II. RACE DISCRIMINATION IN THE TWENTY-FIRST CENTURY

The stories of African-American employees at Turner include vividly disturbing allegations of present-day employment discrimination in southern United States ("the south").⁴¹ These stories, however, are not about race alone. Issues relating to sex and gender exploitation are just as important as race in attempting to understand the nature of present day workplace discrimination. The Turner plaintiffs are African American, but gender is equally relevant to the exploitation they suffered.⁴² All of these African-American men and women suffered race discrimination, but the nature of the discrimination and exploitation they faced varied.⁴³ The nature of the exploitation the men

37. See Philip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 500 (2005).

38. *Id.* at 501.

39. *Id.*

40. Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1641-42 (2007).

41. See Lindsay Wise, *Rally, Lawsuit Allege Racism at Turner Industries*, HOUS. CHRON., Jan. 31, 2011, <http://www.chron.com/business/article/Rally-lawsuit-allege-racism-at-Turner-Industries-1615601.php>; *infra* Parts IV-VI.

42. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F., 1989, at 139 (discussing the workplace issues black women face as a singular group).

43. See *infra* Part IV.

faced differed fundamentally and qualitatively from the ways in which the women were exploited.⁴⁴

Turner is not a large publicly-held corporation.⁴⁵ It is a family-owned LLC.⁴⁶ But, even though Turner is not a public corporation, it is imperative to acknowledge the stories of Turner employees in order to understand issues of corporate and organizational governance, race, and gender. In 2011, Turner employed more than 29,000 people throughout the United States.⁴⁷ In the small southern towns in which Turner operates, Turner provides a significant portion of the local employment opportunities. African-American workers are uniquely dependent upon, and almost inextricably tied to, employers like Turner.⁴⁸ Turner employees said that they endured racism at work because they could not get jobs elsewhere.⁴⁹ When some complained, they said that they were fired in retaliation.⁵⁰ Then, they were blacklisted and no other employer in the area would hire them.⁵¹

On its website, Turner explains that it “maintains prospering relationships with major refining, petrochemical and chemical corporations, such as BASF, Dow, Exxon and . . . Shell.”⁵² This means

44. See *infra* Parts IV–VI.

45. *About Turner*, *supra* note 27.

46. *Id.*; Search for Louisiana Business Filings: Turner Industries Group, L.L.C., LA. SECRETARY ST., <http://www.sos.la.gov/BusinessServices/SearchForLouisianaBusinessFilings/Pages/default.aspx?PF=1> (last visited Nov. 23, 2014) (search by entity name for “Turner Industries;” then select the “Turner Industries Group, L.L.C.” hyperlink). An LLC is a business organization that protects the individuals who invest in it from personal liability. See UNIF. LTD. LIAB. CO. ACT 1, prefatory note (1996) (amended 2006). It is a relatively new type of business organization that provides its investors with tax treatment that is more advantageous than that provided to the shareholders of a corporation. See *id.*

47. *Career Center*, TURNER INDUS., <http://www.turner-industries.com/turner-careers> (last visited Nov. 23, 2014).

48. See *Baton Rouge Company Sued on Charges of Racism*, FOX 8 (May 2, 2013, 6:58 PM), <http://www.fox8live.com/story/22082135/baton-rouge-company-sued-on-charges-of-racism> (stating that Turner employs over 15,000 workers in skilled labor positions); Leslie Eaton, *Black Workers' Complaints Advance: EEOC Finds Evidence of Racial Discrimination at a Turner Industries Plant; Firm Denies Charges*, WALL ST. J., Apr. 16, 2010, <http://online.wsj.com/news/articles/SB10001424052702304628704575186383446219918> (discussing the need for a more diverse workforce at Turner and characterizing the company as “a big fish in a small pond”); see also Patrick McGeehan, *Blacks Miss Out as Jobs Market Rebounds in City*, N.Y. TIMES, June 21, 2012, at A1 (“Nationally, about 53 percent of all blacks and 60 percent of whites are working.”).

49. Interview with James Vagnini, *supra* note 12.

50. See Eaton, *supra* note 13; Jason Trahan, *EEOC: Black Workers Harassed at Pipe Factory in East Texas*, DALL. MORNING NEWS (Apr. 15, 2010, 2:31 AM), <http://www.dallasnews.com/news/crime/headlines/20100415-EEOC-Black-workers-harassed-at-241.ece> (recounting the story of a white former-Turner worker who needed to find an out-of-state job after being fired for refusing to sign a false affidavit regarding a black worker).

51. See Trahan, *supra* note 50.

52. *Celebration Highlights the Past and Future of Turner Industries' Presence in the Houston Area*, TURNER INDUS. (Jan. 31, 2012), <http://www.turnerindustriesmedia.com/2012/01>.

that the Turner story is about much more than the hundreds of aggrieved workers at a family-owned LLC. It also involves the large public corporations that do business with Turner. This fact is significant because public companies are typically more accountable for, and vulnerable to, discrimination allegations that can harm their reputations than are smaller businesses like Turner.⁵³

III. HOW THE CASE AGAINST TURNER INDUSTRIES BEGAN

Early in 2009, two Texas civil rights activists, Reverend Peter Johnson and Reverend Ronald Wright, contacted New York attorneys about alarming accusations of workplace racial harassment, retaliatory firings, and pay and promotion discrimination at Turner.⁵⁴ The Turner plaintiffs complained about discrimination in hiring and in decisions concerning job assignments and layoffs.⁵⁵

Responding to numerous claims of racial discrimination filed on behalf of Turner employees by their attorneys, the U.S. Equal Employment Opportunity Commission (“EEOC”)⁵⁶ conducted an investigation of Turner that lasted one year and three months.⁵⁷ In March 2010, the EEOC concluded that it had reasonable cause to believe that Turner’s African-American employees were denied promotions and equal pay, and suffered racial harassment, disproportionately harsh disciplinary processes, and retaliation when they complained.⁵⁸

53. See, e.g., Wade, *We Are an Equal Opportunity Employer*, *supra* note 28, at 1550-52; Shelley DuBois, *Merrill Lynch Settles Discrimination Lawsuit*, USA TODAY (Aug. 29, 2013, 12:01 AM), <http://www.usatoday.com/story/money/markets/2013/08/28/merrill-lynch-black-financial-advisers-discrimination-lawsuit-settlement-2722833>.

54. Interview with James Vagnini, *supra* note 12.

55. See Eaton, *supra* note 13.

56. The EEOC was established as part of the Civil Rights Act of 1964, but it did not become operational until July 2, 1965. Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e-4 (2006); see also 1964, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/history/index.html> (last visited Nov. 23, 2014). Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, national origin, sex, religion, and retaliation, and the EEOC is one of the federal agencies that oversee its implementation. §§ 2000e-2, e-4; see GEORGE A. RUTHERGLEN & JOHN J. DONOHUE III, *EMPLOYMENT DISCRIMINATION: LAW AND THEORY* 2-3, 534 (3d ed. 2012); Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1239 (2010). The EEOC handles, among other things, claims brought under Title VII. Modessit, *supra*, at 1239-40. The EEOC, however, did not have enforcement authority until the Equal Employment Opportunity Act of 1972 was enacted. *Id.*

57. Interview with James Vagnini, *supra* note 12.

58. See Eaton, *supra* note 13; Wise, *supra* note 41. Turner’s initial response to the EEOC’s finding was interesting. Turner employees told Vagnini that the chief executive officer recorded a message that was delivered to every employee’s cell phone denying the allegations. Telephone interview with James Vagnini, Attorney for Turner plaintiffs, in New York, N.Y. (Apr. 30, 2011).

The EEOC's finding inspired Turner to reach a conciliation agreement in July 2010, settling the case with about six employees from Turner's pipe plant in Paris, Texas.⁵⁹ Typically, conciliation agreements, such as the one Turner entered into, compensate aggrieved parties for pecuniary losses, like the costs of medical care resulting from mental anguish and emotional trauma caused by a defendant's conduct.⁶⁰ In addition to compensating for economic harm, defendants may agree to change the way they function in order to avoid harming other employees.⁶¹ The conventional conciliation agreement not only compensates victims, but it also provides for potential cultural and structural change when defendants agree to reform allegedly harmful business practices.⁶² Unfortunately, according to some of Turner's African-American employees, little to nothing changed after the conciliation agreement.⁶³ More than one year after Turner entered into the agreement, more than 200 employees came forward with complaints about widespread discrimination, and a patently racist workplace culture and environment.⁶⁴ Like the first six plaintiffs in Paris, they alleged workplace harassment and discriminatory employment practices.⁶⁵

IV. NINA TAYLOR

In July 2011, two and a half years after civil rights activists first contacted the New York attorneys about the trouble at Turner, I travelled to Texas and Louisiana to meet the Turner plaintiffs. I made the emotional and sad trip with one of the plaintiffs' New York attorneys, James Vagnini.⁶⁶ Reverend Johnson met us at the Lake Charles, Louisiana airport, and we eventually made our way to the Best Western

59. See Eaton, *supra* note 13; Wise, *supra* note 41. If the EEOC investigates discrimination allegations and determines that there is reasonable cause to believe that a violation has occurred, Title VII requires the use of "informal methods of conference, conciliation, and persuasion" before proceeding further with litigation. § 2000e-5(b). The objective of the conciliation process is to inspire the parties to agree on an acceptable resolution and sign a written agreement that is designed to eliminate discriminatory employment practices. See 29 C.F.R. § 1601.24(a) (2013).

60. See, e.g., EEOC v. Liberty Trucking Co., 695 F.2d 1038, 1039-40 (7th Cir. 1982) (detailing the parties' conciliation agreement which included, *inter alia*, reinstatement and back pay); EEOC v. Bloomberg L.P., 751 F. Supp. 2d 628, 632, 633 & n.4 (S.D.N.Y. 2010) (detailing the parties' conciliation agreement, which included front pay and compensatory damages to the harmed).

61. See, e.g., *Liberty Trucking Co.*, 695 F.2d at 1039-40; *Bloomberg L.P.*, 751 F. Supp. 2d at 632, 633 & n.4.

62. See, e.g., *Liberty Trucking Co.*, 695 F.2d at 1039-40; *Bloomberg L.P.*, 751 F. Supp. 2d at 632, 633 & n.4.

63. Interview with James Vagnini, *supra* note 12.

64. See Eaton, *supra* note 13.

65. See *id.*

66. *Id.*

Hotel, where a handful of the plaintiffs waited with a couple of their family members in the hotel lobby. Vagnini, expecting to meet with about eighty of his clients that evening, was disappointed to see that hotel workers had not set up the hotel's meeting room.

It was hot outside in Lake Charles on that July evening, and it was hot inside the meeting room. Texas and Louisiana were in the middle of an oppressive heat wave. But even in the extreme heat, the plaintiffs and other Turner employees came to meet with their attorneys to discuss the race discrimination lawsuit they had brought against one of the small town's most powerful employers.

Along with activists, Turner workers, and their attorneys, I pitched in to take chairs from a closet and place them in about twenty rows. When we finished setting up the room, Vagnini introduced me to Nina Taylor, one of the original plaintiffs,⁶⁷ and she and I left the main meeting room to talk about her experiences at Turner. Nina, who no longer worked for Turner, had worked as a "fire watch,"⁶⁸ which required her to look out for the safety of the welders and other workers at Turner job sites. Part of Nina's job was to watch over welders as they worked in order to make sure they were safe.⁶⁹ Nina stood ready to warn the welders when sparks flew and a fire was likely.⁷⁰ She would stop them from working and call for help if the danger of a fire escalated.⁷¹

In the fall of 2009, Nina had been working for Turner for about five years.⁷² In October of that year, one of Nina's coworkers told her that her foreman needed her to clean out a toolbox. In the toolbox, she found a noose.⁷³

The noose, like the Nazi swastika, is a powerful symbol of racial hatred and violence; in the nineteenth and twentieth centuries, thousands of African Americans were murdered by lynching.⁷⁴ Lynching was a practice where mobs murdered, degraded, and tortured victims.⁷⁵ The torture took various forms, but it typically included tying a rope into a

67. See generally Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Sept. 17, 2012).

68. See 29 C.F.R. § 1910.252(a)(2)(iii)(B) (2013).

69. See *id.*

70. Interview with Nina Taylor, Plaintiff in Taylor v. Turner Indus. Grp., in Lake Charles, La. (July 27, 2011).

71. *Id.*

72. *Id.*

73. *Id.*

74. Richard M. Perloff, *The Press and Lynchings of African Americans*, 30 J. BLACK STUD. 315, 315, 318 (2000); see also SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 16 (2007).

75. IFILL, *supra* note 74, at 16-17; Jeannine Bell, *The Hangman's Noose and the Lynch Mob: Hate Speech and the Jena Six*, 44 HARV. C.R.-C.L. L. REV. 329, 331-32 (2009).

noose and placing it around the victims' necks in order to hang them.⁷⁶ The day before I met Nina, I visited the African American Museum in Dallas, Texas, including its exhibits about the local history of lynching. I saw picture after picture of nooses tied around the necks of murdered black men. The museum's docent claimed that as a child he had witnessed a lynching. This troubling era in U.S. history, and its impact and prevalence in Texas, clarified for me the fact that the noose Nina found was a powerful and palpable threat that was meant to intimidate her.

The power of the noose as a symbol of hatred and danger for African Americans, and the impact that Nina's discovery of the noose may have had on her, became even more vivid for me while researching the history of lynching in the United States. I found an article that described a newspaper account of a lynching. The *New York Times* published the article on February 2, 1893.⁷⁷ The headline read: "Another Negro Burned."⁷⁸ The article described the lynching of Henry Smith, an African American who "was placed on a 10-foot-high scaffold and was tortured for 50 minutes by red-hot irons thrust against his body."⁷⁹ After this initial torture, Smith was set on fire.⁸⁰ This happened in Paris.⁸¹

Nina had driven from Texas to Lake Charles, Louisiana in order to meet with her lawyers and me. She had worked for Turner at different

76. IFILL, *supra* note 74, at 16-17; Bell, *supra* note 75, at 331-32.

77. *Another Negro Burned*, N.Y. TIMES, Feb. 2, 1893, at 1.

78. *Id.*

79. Perloff, *supra* note 74, at 319; *Another Negro Burned*, *supra* note 77.

80. Perloff, *supra* note 74, at 319; *Another Negro Burned*, *supra* note 77.

81. Perloff, *supra* note 74, at 319; *Another Negro Burned*, *supra* note 77. Richard Perloff notes that the lynching of African Americans became the norm, stating that:

Approximately 4,742 individuals were lynched between 1882 and 1968 . . . 3,445 or 73% were Black . . . During the heyday of lynching, between 1889 and 1918, 3,224 individuals were lynched, of whom 2,522 or 78 percent were Black . . . Typically, the victims were hung or burned to death by mobs of White vigilantes, frequently in front of thousands of spectators, many of whom would take pieces of the dead person's body as souvenirs . . .

Perloff, *supra* note 74, at 315. Stewart Tolnay and E.M. Beck conducted several years of research, discovering that:

2,805 [documented] victims of lynch mobs [were] killed between 1882 and 1930 in ten southern states. Although mobs murdered almost 300 white men and women, the vast majority—almost 2,500—of lynch victims were African-American. Of these black victims, 94 percent died in the hands of white lynch mobs. The scale of this carnage means that, on the average, a black man, woman, or child was murdered nearly once a week, every week, between 1882 and 1930 by a hate-driven white mob.

STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHING, 1882-1930, at ix (1995) (footnote omitted).

jobsites and refineries throughout Texas.⁸² Turner's headquarters is located in Baton Rouge, Louisiana, but it owns industrial construction companies in several cities in the Southeast—including Paris.⁸³ The torture of Smith in 1893 had nothing to do with Turner.⁸⁴ Smith's torture, however, and the lynching and torture of thousands more in the south, left a legacy understood clearly by Nina and the person(s) who tied the noose and left it for her to find.⁸⁵

I asked Nina about the racial climate at Turner before the day she found the noose.⁸⁶ She told me that she had seen racist graffiti on bathroom walls, and heard racist jokes in the workplace.⁸⁷ But when she found the noose, everything changed for her.⁸⁸ Nina, one of the persons responsible for the safety of her coworkers, no longer felt safe at the jobsite.⁸⁹ Intimidated and frightened, she told her immediate supervisors that she intended to file a complaint with Turner's human resources department.⁹⁰ Nina felt that complaining to the jobsite managers was futile.⁹¹ She suspected that one of the managers was responsible for the noose that had been left for her to find.⁹² In fact, Nina had overheard a disturbing exchange between a supervisor and a worker when the supervisor first came to the jobsite.⁹³ She heard the supervisor say that: "One nigger on my jobsite is one nigger too many."⁹⁴

When Nina complained to her immediate supervisors about finding the noose, she was told to wait inside the jobsite office.⁹⁵ She complied and waited in the office while the jobsite managers made phone calls and discussed the incident.⁹⁶ They did not support her decision to file a complaint with human resources, and tried to discourage her from doing so.⁹⁷

82. Interview with Nina Taylor, *supra* note 70.

83. *About Turner*, *supra* note 27.

84. *See Another Negro Burned*, *supra* note 77.

85. *See* Perloff, *supra* note 74, at 315, 319; Eaton, *supra* note 13; *see also* IFILL, *supra* note 74, at 143.

86. Interview with Nina Taylor, *supra* note 70.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

Finally, after almost two hours had passed, Nina announced that she intended to leave the office.⁹⁸ One of her supervisors told her that if she left the office, she would have to walk to the jobsite exit.⁹⁹ Walking around the construction site was dangerous, and therefore considered a safety violation.¹⁰⁰ But, Nina was frightened and exhausted by the day's events, so she left the office and ran to the exit gate.¹⁰¹ For this, she was fired.¹⁰² Nina did get her job back, but when she returned, none of her coworkers—even those with whom she had worked for several years—spoke to her.¹⁰³ The other employees ostracized Nina.¹⁰⁴ She told me that the isolation was overwhelming.¹⁰⁵

Eventually, Turner transferred Nina to a Turner jobsite in Beaumont, Texas.¹⁰⁶ Everyone at the Beaumont jobsite had heard about the noose incident and the complaint that Nina had eventually filed with Turner's human resources department.¹⁰⁷ From the start, many of her new coworkers at the Beaumont site treated her with disdain.¹⁰⁸ One coworker confronted Nina saying that she was the reason why Turner employees' salaries had been cut.¹⁰⁹ Another coworker made a thinly veiled threat.¹¹⁰ As Nina passed by, she heard him tell another worker that there were a lot of places to hide a dead body in the plant.¹¹¹ Even though he was not talking to Nina, she felt that he intended for her to hear the comment.¹¹²

Nina fared no better with the plant's supervisors. One manager told her that she should have been fired instead of transferred.¹¹³ Another supervisor shocked her when he said, "if I had tied that noose, I would have put it around your neck. I would have done a James Byrd."¹¹⁴

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* James Byrd, an African American who had lived in Jasper, Texas, was a modern-day lynching victim. See Steve Barnes, *Texas: Grave Desecrated a Second Time*, N.Y. TIMES, May 8, 2004, at A13 [hereinafter Barnes, *Grave*]; Steve Barnes, *Texas: Teenagers Charged in Grave Desecration*, N.Y. TIMES, May 12, 2004, at A20 [hereinafter Barnes, *Texas*]. In 1998, three white men in Jasper brutally murdered Byrd by placing chains around his ankles and tying

Nina's anguish amplified when her trouble with coworkers at the Beaumont plant moved beyond hostile words and verbal threats.¹¹⁵ On several occasions, someone, hidden behind racks and platforms, threw things at Nina while she worked.¹¹⁶ She always called the plant's safety managers to show them the tools, straps, and cups that had landed at her feet.¹¹⁷ According to Nina, however, the safety managers did not take her seriously.¹¹⁸ They treated her as though she was a nuisance, and ignored her complaints.¹¹⁹

During our interview, Nina told me about a white worker at the Beaumont plant who approached her with a strange warning.¹²⁰ He described the container in which she had brought her lunch that day and then told her not to eat her lunch.¹²¹ When Nina pressed him to explain, he refused to answer and hurried away, afraid that someone would see him talking to her.¹²² A little later that day, the worker who had warned Nina disposed of her lunch so that she would not eat it.¹²³ Several days later, he approached Nina again, saying that his conscience was bothering him, and he explained his strange behavior days before.¹²⁴ He had witnessed several white employees take Nina's lunch container from the place where she had stored it.¹²⁵ They opened the container and spat in her food.¹²⁶

At this point in the interview, Nina seemed overwhelmed by the events she relived as she told me her story. She took several deep breaths and after a minute or so, Nina was able to continue.

To minimize safety risks, employees arriving at work were required to park their cars in a lot and take a bus provided for them to and from

him to the back of a truck. Doug Miller, *James Byrd's Killer: "I'd Do It All Over Again,"* KHOU11 (Sept. 20, 2011, 2:14 PM), <http://www.khou.com/news/The-Texas-murder-that-shook-America-130176288.html>. They dragged him for almost three miles while he fought to stay alive during much of the incident. *See id.* By the time it was over, Byrd's body parts were scattered alongside the country road. *See id.* Two of the men who tortured Byrd received death sentences. *See Barnes, Grave, supra.* The other was sentenced to life in prison. *Id.* Six years after his death, two white men were charged with criminal mischief for desecrating Byrd's grave. *See Barnes, Texas, supra.* The grave was desecrated a second time when racial slurs were carved onto Byrd's overturned headstone. *Barnes, Grave, supra.*

115. Interview with Nina Taylor, *supra* note 70.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*; *see also* Wise, *supra* note 41.

121. Interview with Nina Taylor, *supra* note 70; *see also* Wise, *supra* note 41.

122. Interview with Nina Taylor, *supra* note 70.

123. *Id.*

124. *Id.*

125. *Id.*; *see also* Wise, *supra* note 41.

126. Interview with Nina Taylor, *supra* note 70; *see also* Wise, *supra* note 41.

the plant.¹²⁷ Nina agonized over where she should sit on the bus filled with hostile coworkers.¹²⁸ She was afraid to sit at the back of the bus because she would be too far away from the door in case she needed to make a hasty escape if someone harassed her.¹²⁹ Nina decided to sit in the front of the bus.¹³⁰ Occasionally, she felt something wet fall on her.¹³¹ She turned around, but could not determine what it was or who was responsible.¹³²

One day, after getting off the bus, someone told Nina that the back of her coat was soiled.¹³³ Nina removed the coat to take a look.¹³⁴ “Someone had spit tobacco all over the back of my coat,” Nina told me.¹³⁵ “How did that make you feel?” I asked her.¹³⁶ “I felt humiliated. I felt isolated. I’m not a crybaby, but I cried so much then. I even had to take anxiety medication.”¹³⁷ At this point in the interview, reliving her ordeal, Nina cried. Several minutes passed before she could speak again:

When you work as a fire watch—the guys are up in the racks. The welders have face shields on and can’t see what’s happening. Their life is in your hands. You have to have a certain bond with the people you work with. You don’t want your fire watch to walk out on you. To have so much hate that you don’t [consider] that I’m the person who may have to save your life—to treat the person who may have to save your life like that¹³⁸

By the time I met her on that hot afternoon, Nina had told her story many times. She recounted the events to human resource professionals, to trusted friends, to her attorneys, and eventually to reporters.¹³⁹ Nina and I talked for more than an hour that day, and it was clear that speaking of those events still drained her. When I ended the interview with Nina in order to meet the other Turner workers and plaintiffs, she seemed relieved. Perhaps she was relieved to have the opportunity to tell her narrative again. Maybe our conversation helped to unburden her.

127. Interview with Nina Taylor, *supra* note 70.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

Nina endured race discrimination that was inextricably linked to sexual harassment.¹⁴⁰ The subtle threats to her physical wellbeing were especially potent because Nina was a woman working in a predominantly male environment.¹⁴¹ She was vulnerable because, as a woman, she had not been socialized in the same way as many of her male coworkers. She was an easy target for physical aggression because she was not likely to have much experience in effectively defending herself against violence inflicted by men who are likely to be larger and stronger than she. But, Nina was the lead plaintiff in a case alleging race discrimination.¹⁴² This means that she had to ignore the aspects of her ordeal that related fundamentally to her vulnerability as a woman. Nina's hard work was exploited. Her work benefitted Turner, but she was physically vulnerable and attacked in a way that made gender painfully relevant for her.¹⁴³

Nina did not sue the coworkers who harassed her. Instead, Nina sued Turner, the company that employed her.¹⁴⁴ Should Turner be held accountable for the behavior of some of its employees? Is Turner responsible for the threats, physical intimidation, and harassment that Nina endured? Was Turner responsible for the racially hostile environment that Nina and other African-American employees said existed? Nina and the other Turner plaintiffs argued that Turner should be held accountable for a racially toxic workplace culture that allowed discrimination and harassment to persist.¹⁴⁵ Turner argued that it had a policy against discrimination and harassment, and that it was not responsible for the acts undertaken by individual employees—especially since Nina was not able to identify many of the harassers.¹⁴⁶ The most pertinent question, however, relates to how Turner could have avoided the filing of the litigation in the first place. What could Turner have done to create a more equitable workplace environment?

Turner may have avoided the litigation and the controversy by installing a program that effectively monitored its employees'

140. See generally Crenshaw, *supra* note 42.

141. See Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual "Horseplay": Same Sex Sexual Harassment, Workplace Gender Hierarchies and the Myth of the Gender Monolith Before and After Oncale*, 11 YALE J.L. & FEMINISM 155, 170-72 (1999) (discussing the role of gender dominance and the need to reinforce gender norms, and how they lead to sexual harassment of women).

142. See *Taylor v. Turner Indus. Grp., LLC*, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Sept. 17, 2012).

143. See Axam & Zalesne, *supra* note 141, at 173-74.

144. See *Taylor*, 2012 WL 4092492, at *1.

145. *Id.*

146. *Id.*; see also *EEO Statement*, *supra* note 26.

compliance with anti-discrimination law.¹⁴⁷ Compliance is an integral part of corporate governance, but no compliance program will prevent all discrimination and harassment. Inevitably, when a company employs thousands,¹⁴⁸ someone will discriminate or harass. Compliance programs focus on what experts call best practices—the aspirational governance efforts that help to transform corporate and organizational cultures.¹⁴⁹ The goal is to establish a healthy workplace culture where discrimination and harassment will not persist.¹⁵⁰

An effective compliance program must clearly enumerate the steps that managers should take to investigate discrimination and harassment allegations as soon as they are made.¹⁵¹ Turner should have conducted a training program encouraging employees to report harassment and discrimination. This encouragement must include a commitment by the company that employees who complain will not face retaliatory demotions or firings. When Nina complained about harassment, an adequate compliance program would have mechanisms in place that included the questioning of each of Nina’s coworkers.¹⁵² An adequate compliance program would convey to those in supervisory positions that employee complaints about racial discrimination and harassment must be taken seriously and carefully investigated.¹⁵³ If the allegations of harassment and discrimination continue, senior managers must become involved.¹⁵⁴ And, most importantly, corporate or organizational policy should make it clear that employees who discriminate or harass will be fired.¹⁵⁵

V. MORE TURNER PLAINTIFFS

The day after meeting with some of the Turner plaintiffs in Lake Charles, Vagnini and I flew into Dallas. In Dallas, we met with Jay Ellwanger, one of the other attorneys handling the plaintiffs’ case, and

147. See Hart, *supra* note 40, at 1638-39.

148. In 2011, Turner had 29,000 employees. *Career Center*, *supra* note 47.

149. See Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 157 (2014) (“Thus, there is a risk that corporations will departmentalize and adopt these common structural exemplifications of a robust compliance program as best practice”); Hart, *supra* note 40, at 1638-39.

150. See Wade, *We Are an Equal Opportunity Employer*, *supra* note 28, at 1570, 1574-75; see also *Model EEO Programs Must Have an Effective Anti-Harassment Program*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/federal/model_eeo_programs.cfm (last visited Nov. 23, 2014) [hereinafter *Model EEO Programs*].

151. See *Model EEO Programs*, *supra* note 150.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

the three of us drove from Dallas to Paris, to meet with another group of Turner plaintiffs. It was another brutally hot day on July 28, 2011 when we arrived at America's Best Value Inn, where the meeting was to take place. The extreme heat and the desolate, gloomy surroundings in town and near the motel created a heaviness in the air that followed us inside the meeting room, where approximately twenty African-American men waited. This group of plaintiffs lacked the energy I saw among the Turner employees in Lake Charles.

Vagnini and Ellwanger explained the recent developments in the case and the paperwork the men would have to complete that day. Vagnini checked names and identification to verify that all of the men were plaintiffs. Vagnini seemed less familiar and friendly with this group than he was with the Lake Charles group.

For a while, I was the only woman in the room until a local activist, Brenda Cherry, joined the group. Vagnini introduced me to Cherry, and she and I sat in a corner of the room to talk about Paris' racial climate while Vagnini and Ellwanger helped the men complete paperwork related to discovery. At first, this meeting of Turner plaintiffs was far less emotional than the Lake Charles meeting. The Paris men spent most of their time with the paperwork, but their lawyers had set aside time for the men to tell me their stories after they finished completing the forms. Unlike the group in Lake Charles, most of the Paris plaintiffs left without discussing their experiences at Turner. Some had to go back to work. Some of them even went back to their jobs at Turner. Only six or seven men remained to tell me their stories.

Steve Dawson, a thin man with a short, gray beard framing his worn, but pleasant face, was the first to tell his story. Out of all the men who attended this meeting, Steve seemed the most vulnerable and wounded. He spoke about racial harassment inflicted upon him by white employees at Turner.¹⁵⁶ Steve was even harassed by his white coworkers when they passed his home as he sat on his front porch.¹⁵⁷ He told me that at work, they called him "the black redneck."¹⁵⁸ He continued: "And they called me nigger too."¹⁵⁹ A younger man, strong and confident, sitting next to Steve and across the table from me, interjected: "[T]hey

156. Interview with Steve Dawson, Plaintiff in *Taylor v. Turner Indus. Grp.*, in Paris, Tx. (July 28, 2011).

157. *Id.*

158. *Id.*

159. *Id.*

wouldn't call *me* nigger."¹⁶⁰ Joseph Porter, another Turner plaintiff, retorted, "they wouldn't try that on me."¹⁶¹

After all of the other men left, Steve told me the rest of his story. He spoke proudly about his ability to work long and hard hours.¹⁶² He told me that his skill made him an "artist" in his vocation.¹⁶³ Paradoxically, in spite of the racial epithets and insults they hurled at him, Steve said that his Turner coworkers and supervisors admired his good work, and that some even envied his talent.¹⁶⁴ At the end of our long conversation, Steve revealed that even though he worked hard and loved his work, the racism he endured had taken a serious toll on his health.¹⁶⁵ Like Nina, the lead plaintiff with whom I had spoken to in Lake Charles, Steve's doctor had prescribed anxiety medication for him.¹⁶⁶ I asked Steve and Joseph why they remained in Paris. Why not leave the town where they suffered so much pain? Steve succinctly explained: "I'm disabled now. Where am I going to go?"¹⁶⁷

Up until this point, the Paris meeting had been calm and dispassionate. This group of all-male plaintiffs was much more reticent than the Lake Charles group that included both men and women. The men were reserved, but all of this dramatically changed when Joseph explained why he continued to live and work in Paris.¹⁶⁸ With tears in his eyes, Joseph explained that he had left Paris years before in order to find work.¹⁶⁹ While he was away, his mother suddenly died.¹⁷⁰ Now, his older sister was ill.¹⁷¹ "I can't leave again," he said.¹⁷² He had always helped his family by sending them money, and now he wanted to be physically close to them.¹⁷³ But coming back to Paris was difficult for Joseph. He explained that it was like traveling back in time as far as race relations were concerned.¹⁷⁴

160. *Id.*

161. Interview with Joseph Porter, Plaintiff in *Taylor v. Turner Indus. Grp.*, in Paris, Tx. (July 28, 2011) (emphasis added).

162. Interview with Steve Dawson, *supra* note 156.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*; *supra* text accompanying note 137.

167. Interview with Steve Dawson, *supra* note 156.

168. Interview with Joseph Porter, *supra* note 161.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

Both Steve and Joseph struggled with the questions that African Americans asked themselves decades earlier when they faced the blatantly racist brutality of the south in the twentieth century.¹⁷⁵ Should they move away from areas like Paris and Lake Charles? Or should they stay near their hometowns, close to family and friends, even though they were likely to endure frequent and overt racial hostility?

Most of the African Americans who migrated north and west in the early- and mid-1900s did so in search of employment and economic opportunity.¹⁷⁶ When they arrived in northern cities and western towns, however, they had to navigate a racism that was more subtle and covert, but just as real.¹⁷⁷ They paid more for the shabby apartments they rented than did the white families who had vacated them.¹⁷⁸ They were paid less than their white counterparts at the factories in which they worked.¹⁷⁹ They had to get used to the fast pace of large cities like New York, Detroit, Chicago, and Los Angeles.¹⁸⁰ In the twenty-first century, if the Turner plaintiffs decided to leave Paris and Lake Charles, they would be doing so in a time of extraordinary economic uncertainty.¹⁸¹ If they migrated to New York City, for example, they would discover that almost half of black men there are unemployed.¹⁸²

The male plaintiffs I spoke with in Paris suffered race discrimination that impacted them as men in ways that were different from the race discrimination endured by Nina. This became clear when I witnessed the bravado of the plaintiffs who commented on Steve's story. The blatant nature of the disrespect that Steve faced was something that Joseph and the other younger man said they would not endure.¹⁸³ The ridicule and harassment was seen by Joseph and others as an attack against Steve as a man, and was not limited to race. It was clear from their comments that Joseph and the others did not want to appear weak. "They wouldn't call *me* nigger."¹⁸⁴ "Yeah, they know who to try that stuff with."¹⁸⁵

175. See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 8 (2010).

176. See *id.* at 8-9, 36.

177. *Id.* at 272, 316.

178. *Id.* at 250.

179. *Id.* at 317.

180. *Id.* at 9.

181. See, e.g., McGeehan, *supra* note 48.

182. See *id.*

183. Interview with Steve Dawson, *supra* note 156; Interview with Joseph Porter, *supra* note 161.

184. Interview with Joseph Porter, *supra* note 161.

185. *Id.*

VI. THE OCTOBER 2012 TURNER TRIAL

Turner eventually settled the race discrimination case brought by Nina and almost 200 African-American plaintiffs.¹⁸⁶ Both parties, Turner and the plaintiffs, agreed not to reveal the terms of the settlement.¹⁸⁷ Before settling, however, a Bellwether trial was held at the United States District Court for the Eastern District of Texas.¹⁸⁸ In order to get a sense of the soundness of both the plaintiffs' and Turner's case, the District Court allowed ten plaintiffs to bring their cases against Turner in October 2012.¹⁸⁹ The plaintiffs chose five of the plaintiffs for the Bellwether trial, and the defendants chose the other five.¹⁹⁰ All ten of the Bellwether plaintiffs were men.¹⁹¹ I began this Article with the direct examination of Charles Sampson, one of the Bellwether plaintiffs.¹⁹²

I attended the trial and I was especially moved by Charles' description of the sexual harassment he endured while working at Turner. According to Charles, a white coworker assaulted him by sticking a mop handle into his buttocks.¹⁹³ I witnessed Charles' humiliation, anger, and frustration as he relived the ordeal during his testimony. In a strong, but halting voice, Charles stammered as he described the attack that so profoundly demeaned him.

Charles' attorney asked whether he thought the attack was motivated by racial bias.¹⁹⁴ Charles said that it was.¹⁹⁵ This was all that mattered for the plaintiffs' attorney in this race discrimination case. But, it is obvious that the impact of the attack related to sex and gender, as much as it related to race. On cross-examination, Turner's attorney confirmed that Charles was fully clothed when his coworker touched him, or as Charles testified, "rammed" him with the mop.¹⁹⁶ The implication was that Charles was not harmed because he was wearing pants. Turner's attorney also suggested that Charles and his coworker had enjoyed a friendly relationship that included joking around with

186. Telephone Interview with James Vagnini, *supra* note 16.

187. *Id.*

188. See generally Transcript of Record, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

189. *Id.*

190. *Id.*

191. *Id.*

192. See *supra* note 1 and accompanying text.

193. Transcript of Record at 278-79, Taylor v. Turner Indus. Grp., LLC, No. 2:11-CV-57-JRG, 2012 WL 4092492 (E.D. Tex. Oct. 15, 2012).

194. *Id.*

195. *Id.*

196. *Id.*

each other.¹⁹⁷ Charles adamantly denied that the two men shared such a relationship.¹⁹⁸ The exchange between Turner's attorney and Charles became tense. The court had to admonish Charles to allow the attorney to finish his questions before Charles answered.¹⁹⁹ In his haste to convey to the jury the degradation he felt, Charles had interrupted the lawyer several times.²⁰⁰

While I was moved by Charles' testimony, the jury, evidently, was not. Charles received no damages.²⁰¹ The jury only awarded damages to two of ten Bellwether plaintiffs.²⁰²

Discrimination litigation has the potential to inspire cultural transformation, but this potential remains unattained because the litigation process ignores the nuance of what plaintiffs endured. Perhaps Nina's white coworkers at Turner targeted her because she is African American. But, the harassment she faced made her status as a woman particularly relevant.²⁰³ Charles may have been harassed because he is

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Telephone Interview with James Vagnini, Attorney for Turner plaintiffs, in New York, N.Y. (Nov. 13, 2012).

202. *Id.* It is impossible to reconstruct the jurors' deliberative process in order to understand why only two of the ten plaintiffs were successful. Turner's defense was rigorous, but it would be foolish to ignore the possibility that the predominantly white jury failed to make a connection with the Bellwether plaintiffs because of race and class differences between the jurors and the plaintiffs. Also relevant are assumptions that many Americans, including the jurors, may make about the eight young black men who lost their cases. The eight Bellwether plaintiffs were young men who must confront negative stereotypes in American society (the Bellwether plaintiffs who were awarded damages were over fifty-years-old). The social construction of young black men as criminal, along with other negative stereotypes, may make them seem unworthy and undeserving of compensation in a civil trial like the one against Turner. Psychological studies have revealed that black males have been stereotyped as criminal. See Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876-78 (2004) ("The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years."); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 403 (1996) ("One of the stereotypes most often applied to African American males is that they are more dangerous, more prone to violence, and more likely to be criminals or gang members than other members of society."); Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305, 323 (2012) ("Scholars have opined that 'the stereotype of African-Americans as violent and criminally inclined is one of the most pervasive, well-known, and persistent stereotypes in American culture. Where other negative cultural stereotypes about Blacks have significantly diminished, this one has remained strong and influential, particularly among Whites.'"). Many Americans see young black men as individuals who inflict pain on others. Kwei Yung Lee, *supra*, at 403. It may be difficult for these Americans to imagine that young black men can suffer the kind of emotional and mental harm that the Bellwether plaintiffs described. Stereotypes about young black men may have infected the Turner trial.

203. See *supra* text accompanying notes 140-43.

African American, but the nature of the harassment he endured was sexual.²⁰⁴ Both Nina and Charles, however, had to call the case they brought against Turner a race discrimination suit, even though sex and gender were equally pertinent to their ordeal.²⁰⁵ This requires plaintiffs to ignore significant aspects of the discrimination they faced in order to make their case fit discrimination litigation requirements. It also prevents employers from fully understanding the complexities of workplace discrimination and harassment, and reduces the efficacy of discrimination litigation and its potential to transform business culture.

VII. CONCLUSION: LESSONS LEARNED FROM THE TURNER INDUSTRIES EXPERIENCE

It is clear that even in the twenty-first century, racism and discrimination persist.²⁰⁶ The allegations that the Turner plaintiffs made against their white coworkers provide painful illustrations of racism's persistence.²⁰⁷ It is possible that if Turner's officers or managers understood racism's depth and persistence, they would have taken the matter of Turner employees' compliance with anti-discrimination law much more seriously. Telling the narratives of present-day discrimination victims is imperative. If their stories are not told, many Americans, because of the incredible social progress this nation has made, will believe that racism, sexism, and discrimination are no longer matters that require attention.²⁰⁸

The threat or filing of employment discrimination litigation against a company has the power to inspire that company to attempt to transform its workplace culture.²⁰⁹ In employment discrimination cases, plaintiffs' attorneys ask companies to take the steps that would be considered best practice under longstanding corporate governance principles,

204. See *supra* text accompanying notes 1-11, 193-97.

205. See *supra* Part IV; text accompanying notes 1-11, 203. Critical race theorists have explained that discrimination victims must choose whether they will bring a race discrimination or sex discrimination suit even when they face discrimination on the basis of race *and* gender. See, e.g., Crenshaw, *supra* note 42. For decades, race theorists have lamented the fact that the law ignores the ways that race and gender intersect. The discrimination that Nina faced was based not just on race, but on gender also. See *supra* Part IV. The same is true with respect to the harassment that Charles suffered. See *supra* text accompanying notes 191-202. In spite of this, both plaintiffs had to decide whether to bring a race case or a gender case. In deciding to bring a race discrimination suit, the relevance of their gender obscures full comprehension of the type of harm they suffered.

206. See Kwei Yung Lee, *supra* note 202, at 402-03.

207. See *supra* Parts IV-VI.

208. See Kwei Yung Lee, *supra* note 202, at 402-03.

209. See Hart, *supra* note 40, at 1638-39; Wade, *Racial Discrimination*, *supra* note 35, at 434-35.

which would apply to LLCs, partnerships, and other business organizations that employ thousands of people.²¹⁰ These are the steps that Turner should have taken before the plaintiffs' alleged discrimination. Turner should have established the kind of compliance program described earlier in this Article.²¹¹

Companies like Turner should take responsibility for establishing healthy workplace cultures before any allegations of discrimination are made. And when allegations are made, the company should hold offending members of its workplace accountable. Of course, this should happen as a normative matter in order for the company to avoid liability. More important, however, is the possibility that this course of action may heal racially hostile corporate cultures and avoid litigation altogether.

210. See DeStefano, *supra* note 149, at 157.

211. See *supra* Part I.