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It's About Discrimination and Equality, Not Just Diversity and Bad Actors

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It's About Discrimination and Equality, Not Just Diversity and Bad Actors

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Photo by Scott Schiller

Ask people to think of Silicon Valley and the Bay Area and most people will think of innovation and cutting-edge change. It's true that firms in Silicon Valley are moving on harassment and discrimination these days—they can't afford not to in an era of #MeToo—but for them to take the lead, to innovate in ways that will really make a difference, they will need to take discrimination seriously and to resist the temptation to individualize what is almost always a broader organizational problem.

Take Uber. Over a year ago now, Susan Fowler came forward publicly with her compelling account of harassment and retaliation that she experienced at Uber, triggering an internal investigation that led to the resignation of Co-Founder Travis Kalanick and at least 20 other people. The firm during that time also hired Eric Holder (former U.S. Attorney General now partner at a law firm) to undertake a broader investigation into the organizational causes of harassment and discrimination. On the morning of the release of Holder's report and the Uber board's unanimous approval of its recommendations, Susan Fowler tweeted: "Remember that this is not about diversity and inclusion, it's about laws being broken. Harassment, discrimination, and retaliation are illegal." She was absolutely right. Turning Uber's culture and practices of discrimination (including harassment) into a mere matter of "commitment to a diverse and inclusive workplace" would be a

serious mistake. It suggests that what Uber does in response to serious harassment and discrimination is above and beyond what the law requires.

All too often firms create diversity offices with no connection to their equal employment offices. Compliance officers are seen as the “bad cops” of the organization, while diversity work is “strategic” and diversity officers “change agents.” We are told that organizations are aiming for a diverse and inclusive workplace because it is “good for business,” and yet even at the highest levels we see evidence of individualizing discrimination, making it about a few isolated, rogue actors instead of the company at large. As Arianna Huffington, an Uber board member, described her sense of the situation at Uber, “yes, there were some bad apples, unquestionably. But this is not a systemic problem.” Even the measures taken by many companies today, measures like bias training and complaint systems, tend to target individuals to the exclusion of broader practices and cultures that can incite widespread discrimination.

Meanwhile, our laws have been shifting to buy into this story of individuals as the wrongdoers and organizations as innocent bystanders. In its decision rejecting class action treatment for female workers at Wal-Mart several years ago, the Supreme Court gave weight to the mere existence of Wal-Mart’s nondiscrimination policy and its stated willingness to punish individuals under that policy. The Court expected no inquiry into whether and how the policy was implemented in the practices and cultures of the organization. Indeed, the Court rejected the plaintiffs’ evidence of widespread sex-based discrimination as insufficient to establish that individual managers at Wal-Mart were acting similarly and with similar biases. In doing so, the Court turned the plaintiffs’ case into one of individual claimants alleging discrimination against specific managers, when that wasn’t really their charge at all.

We need a strong federal law of employment discrimination that goes beyond individual moments of harassment and discrimination. Our laws should incentivize the kinds of measures that the Holder report identified without requiring someone like Susan Fowler to allege serious harassment and retaliation first. These are measures, for example, that monitor complaints for broader patterns of discrimination, assess and revise hiring and promotion practices, build in structural accountability, consider how work is organized and assigned, and target cultures, not just individuals, for change. Such measures should be general practice at a firm that seeks to avoid liability for a pattern or practice of discrimination. Our law has the capacity to incentivize meaningful change, but we need to strengthen the law’s systemic theories of discrimination, not break them down.

Last summer, Uber announced that a settlement had been reached in a lawsuit brought by female and racial minority engineers alleging discrimination in promotion and pay. As part of the settlement, Uber admitted no wrongdoing. It promised, however, to implement some of the recommendations that had been put forward in the Holder report, hire an outside independent consultant to review job descriptions and processes for engineer positions, and pay up to ten million dollars, among other things. Maybe this is a start, even if not yet the Silicon Valley that we know and respect for taking the lead.

Tristin K. Green is a Professor of Law at the University of San Francisco School of Law. Her essay, "Was Sexual Harassment A Mistake? The Stories We Tell," was published in the Yale Law Journal Forum as part of a collection of essays on law and the #MeToo moment. Her book, Discrimination Laundering: The Rise of Organizational Innocence and Crisis of Equal Employment Opportunity, was published by Cambridge University Press in 2017.