



SHATTERING THE GLASS CEILING

Tips for Combatting
Promotion Discrimination

by

Eric Bachman

ZUCKERMAN LAW

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Previously, Bachman served as Deputy Special Counsel, Litigation and Legal Affairs at the U.S. Office of Special Counsel (OSC) and Special Litigation Counsel and Senior Trial Attorney in the Civil Rights Division of the Department of Justice. Bachman's wins include a \$100 million settlement in a disparate impact Title VII class action, a record-setting Whistleblower Protection Act settlement, and a \$16 million class action settlement against a major grocery chain. Bachman began his career as a public defender and has served as lead or co-counsel in numerous jury trials.

Zuckerman Law is committed to vigorous and effective representation of victims of harassment, discrimination and retaliation. We are privileged to partner with our clients to help break through the glass ceiling. Although these cases can be challenging, an experienced and diligent legal team and their client can achieve important relief for the client, as well as broader relief for other victims of discrimination in the workplace. *U.S. News and Best Lawyers*® have named Zuckerman Law a Tier 1 firm in Litigation—Labor and Employment in the Washington DC metropolitan area. If you have suffered unlawful conduct in the workplace, call us for a confidential consultation at 202-769-1681 or 202-262-8959.

Washingtonian
Magazine
named
Bachman a
Top Lawyer



Introduction

Despite significant gains made by women and racial minorities across corporate America, a stubborn glass ceiling prevents them from advancing to the most powerful and highest paying jobs in their companies.

A recent study illustrates how the glass ceiling still applies to high-level corporate positions. In 2017, the number of female Chief Executive Officers (CEOs) among Fortune 500 companies has dwindled to just 5.4% (27 out of 500). This statistic alone helps illustrate the persistent presence of glass ceiling and promotion discrimination in the workforce.

To help break through the glass ceiling at your work, knowing your rights and how to

overcome the defenses that employers typically assert in these cases is a vital first step. This guide lays out general answers to common questions asked by employees facing glass ceiling/promotion discrimination at work.

Potential claims of glass ceiling and promotion discrimination should, however, be reviewed on a case-by-case basis with attention paid to the specific conduct that occurred in your workplace and the laws that apply in that state and in that workplace.

Information contained in this guide should not be relied on as legal advice. You should consult an attorney for advice on your specific situation.



Number of female CEOs among Fortune 500 companies in 2017

Historical Context

While the number of female CEOs remains troublingly low, it should not cloud the overall (albeit too slow) strides that women have made in getting the top jobs in Fortune 500 companies. For example, the [WSJ reports](#) that in 1995 the number of Fortune 500 female CEOs was 0 (zero), while approximately 27 female CEOs were in place in 2017.

Ultimately, however, the fact remains that the number of women serving as CEOs, female board members, and in other senior corporate positions remains far below the expected proportion given the number of women in the workforce.



Number of female CEOs among Fortune 500 companies in 2017 vs 1995

Questions and Answers About Glass Ceiling/ Promotion Discrimination Issues

What is glass ceiling discrimination?

A glass ceiling generally refers to an unfair, artificial barrier that prevents certain employees (women; people of color; LGBT) from fairly competing for upper management jobs in companies. In practice, it keeps qualified employees from reaching their full potential and, depending on applicable law, illegally blocks them from occupying the best-paid and most powerful positions. The glass ceiling can be caused by, among other things:

- entrenched attitudes/stereotypes about what type(s) of people should get the “top” jobs at the company;
- subjective/hard to define qualifications for promotions that introduce conscious or unconscious biases into decision-making; and/or
- a lack of networking and mentoring opportunities for women, people of color, and LGTB individuals.

Title VII of the 1964 Civil Rights Act, as well as other federal and state laws, make it illegal for an employer to use promotion practices that create a glass ceiling.

According to a [Women in the Workplace](#) study released by McKinsey & Co., for every 100 women who get promoted from an entry-level position to manager, 130 men advance. The study found that women are less likely than men to advance for various reasons:

- they experience an uneven playing field;



- their odds of advancement lower at every level;
- a persistent leadership gap exists in the most senior roles;
- gender diversity is not widely believed to be a priority; and
- while employee programs designed to help balance work and family are abundant, participation is low among both sexes due to concerns that using them will negatively affect their careers.

What steps can I take to combat glass ceiling discrimination?

If you believe your company** denied you a promotion to a high-level position because of, for example, your gender, race/national origin, or sexual orientation, what can you do? If you want to preserve your ability to challenge this glass ceiling in court, you should consider the following options:

- File a written complaint and follow your company’s policy for submitting internal complaints;

- You may also want to file a [charge of discrimination with the Equal Employment Opportunity Commission \(EEOC\)](#). Their website has helpful information on how to file the complaint. Depending on where you live, your complaint must be filed within 180 or 300 days of the discriminatory act. If you have any questions about whether the EEOC is the right place to file, use their [online assessment center](#), which will help you decide if the EEOC is the correct agency

** If you are a federal government employee or a state or local (city, county) government employee, different complaint filing procedures may apply. The EEOC's website has a handy [online assessment tool](#) that provides information on how to file a complaint.

How do I prove I suffered glass ceiling discrimination?

The first step (called a prima facie case) to proving your glass ceiling discrimination claim is to show that:

- You are a member of a protected class (for example, a woman, African-American, Hispanic);
- You applied for and were qualified for the promotion; and
- After you were rejected, the position remained open or was filled by a person with similar qualifications.

If you make this initial showing, then your employer is required to give a reason why it did not select you for the promotion. Importantly, at this stage, your employer can simply offer a reason; they do not have to prove that this reason was what actually motivated their decision.

So, for example, your company could claim that it did not promote you because they expected higher earnings from the unit you supervised; you did not yet possess enough experience for the position; you lacked sufficient leadership skills, etc.

If your employer proffers a legitimate, non-discriminatory reason for why they did not promote you—and they almost always do—you must then show that this reason was not the true basis for the decision. That is, you must prove that the claimed reason was a pretext for discrimination. Not all federal courts apply the same analysis regarding pretext, but generally pretext can be shown by:

- Evidence that you were substantially better qualified than the person selected;
- Similarly situated employees of a different gender, race, national origin, etc. were treated better;
- Shifting and inconsistent reasons offered by the employer; or
- Exposing other flaws in the employer's stated reason (for example, significant deviations from normal procedures in the promotion process);
- However, it is not enough to simply nitpick about relatively minor flaws in the selection process.

The ultimate question—which you must prove by a preponderance of the evidence—is whether, based on all the evidence presented, a jury could reasonably infer that your employer discriminated against you by not selecting you for the promotion.

Who is considered a similarly situated employee?

The precise definition of who is a similarly situated employee varies depending on the specific legal claim and in which federal court you file your case. Generally, however:

to be similarly situated to another employee, [the plaintiff] must show that the employee is directly comparable in all material respects.

Brown v. Illinois Dep't of Natural Resources, 499 F.3d 675, 682 (7th Cir. 2007) (citation omitted). If your case is a class action, rather than an individual complaint, then a different take on the “similarly situated employee” may apply.

To figure out if one of your co-workers qualifies as a “similarly situated employee,” a court will carefully review the particular facts in your case. Each case and each work environment is

different, but some of the criteria that courts evaluate to see if you have identified a similarly situated employee who the company treated better are:

- do you share the same supervisor;
- do you perform very similar job tasks and responsibilities (both the number and weight) as the other person;
- do you have similar job performance evaluations and disciplinary history; and
- is your experience level (including supervisory experience) the same as the other person.

Most courts do not require an exact match on these criteria, but the more comparable you are to the other person, the more likely a court will deem them a “similarly situated employee.”

How do I show I'm better (or at least as) qualified as the selected candidate?

After you lost out on the promotion, you may have asked someone at the company why you weren't selected, and a common response will be that the other candidate was simply better qualified. This justification is often the core issue in a glass ceiling discrimination case, i.e., showing that you were actually more qualified for the job than the selected candidate.

In *Ash v. Tyson*, the Supreme Court rejected an onerous standard under which pretext can be established through comparing the qualifications of candidates only when “the disparity of qualifications is so apparent as to virtually jump off the page and slap you in the face.”



The Supreme Court found this standard “unhelpful and imprecise” and, identified other types of proof to demonstrate pretext, including:

- “a reasonable employer would have found the plaintiff to be significantly better qualified for the job”;
- “no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff”; or
- “plaintiff’s qualifications are ‘clearly superior’ to” the selected applicant.

Types of evidence that can prove you are the better qualified promotion candidate

It won’t be enough to simply testify that your job experience and qualifications are better than the selected candidates’ qualifications. You will instead need to point to circumstantial evidence (assuming you do not have direct evidence) that you are demonstrably better qualified.

The manner in which you prove that you’re the better qualified candidate will vary depending on the state you work in and whether your case is an [individual versus class action case](#).

Courts have looked to a range of evidence in glass ceiling discrimination lawsuits, including:

- prior job performance evaluations, bonuses, awards;
- testimony from colleagues and managers about your qualifications and job performance;
- objective data showing how you and your group of employees performed;
- interview notes from the promotion panel/ decision-makers; and
- the selected candidate’s lack of experience or qualification in an important aspect of the job (even better if you can show the selectee later needed significant training to do the job after they were promoted).



Remedies for glass ceiling discrimination

If you win your case at trial or settle with the company beforehand, several types of remedies may be available. For example:

- Back pay—the difference between what you should have been paid if promoted and what the company actually paid you;
- Compensatory damages—damages for emotional distress, reputational harm, etc. that you suffered as a result of the company’s refusal to promote you;
- Punitive damages—damages to punish the company if it acted with malice or reckless indifference;
- Attorney’s fees and litigation expenses; and/or
- Make-whole relief—placing you into the higher-level position you were unlawfully denied.

Importantly, different federal, state and local laws may apply to your case and may allow different types and amounts of damages (Title VII, for example, has a cap on the amount of compensatory and punitive damages you can recover).

Class action versus individual cases in the glass ceiling context

Figuring out whether your potential glass ceiling case should be an individual versus a class action case is a key step.

An individual case involves one employee suing her employer for glass ceiling/ promotion discrimination. Individual actions are far more common than class action lawsuits.

Class action cases, on the other hand, involve a lead plaintiff(s) who, along with the lawyer for the class, represent the interests of a larger group

of class members who have been harmed by the company in some common way. Class actions can range in size from 20–30 individuals to thousands of people.

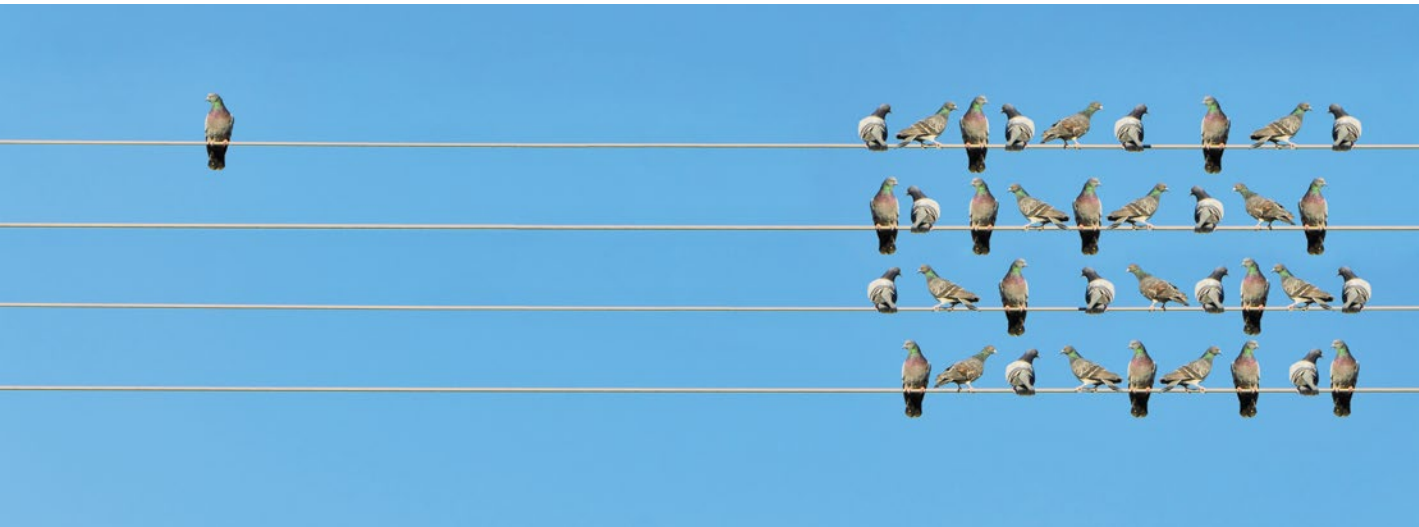
An example of a class action glass ceiling case is [EEOC v. Mach Mining, LLC](#), which the EEOC filed on behalf of female applicants of various mining companies—a traditionally male-dominated industry—who alleged they were excluded from high-paying jobs. The settlement included:

- \$4.5 million in damages to the class members;
- hiring goals for female employees;
- training on anti-discrimination policies; and
- reporting to the EEOC about compliance with the settlement terms.

In either an individual or class action case, you will need to meet certain procedural and jurisdictional requirements. Class actions, however, have additional requirements under [Federal Rule of Civil Procedure 23](#) that must be met (different rules apply for state court cases).

The requirements include, among other things:

- showing that the proposed class action involves enough people, usually at least 20-30 class members (numerosity);
- significant factual or legal issues that will affect the class members in a common way, as well as similar claims or defenses among the parties (commonality and typicality); and
- demonstrating that the lead plaintiff(s) will properly represent the other class members and that the lawyer is qualified and experienced in class action cases (adequacy of representation).



If the above criteria are met, then the proposed class action must also meet an additional condition:

- the employer has acted on grounds generally applicable to the class members and they are seeking injunctive and/or declaratory relief (and certain forms of monetary relief) (Federal Rule of Civil Procedure 23(b)(2)); or
- questions of law or fact common to class members predominate over any questions affecting only individual class member and a class is action is a more fair and efficient way to proceed (Federal Rule of Civil Procedure 23(b)(3)).

There are several important factors to consider in evaluating whether a potential glass ceiling case should be an individual or class action. For example:

- Do you know other female employees who have experienced similar problems (for example, discriminated against by the same supervisor);

- Is the discriminatory treatment the result of a company policy or other consistent practice, such as a specific promotion process or compensation formula;
- Are there at least 20-30 female employees who may have been affected by the same type of discriminatory conduct; and
- Will it be more efficient to combine all of these claims into one lawsuit rather than having a host of separate, individual lawsuits.

A court will ultimately decide whether the case can go forward as a class action based on a variety of factors, including the procedural requirement described above.

What should I do if I'm retaliated against for complaining about glass ceiling discrimination?

Retaliation is, unfortunately, an all too common phenomenon at work. Title VII and other anti-discrimination laws prohibit an employer taking an adverse employment action against an employee for reporting discrimination at work or taking an action to remedy discrimination,

such as filing a discrimination complaint or testifying in another employee's discrimination lawsuit.

The scope of retaliatory adverse actions is broad. Prohibited retaliation includes firing, reduction in pay, denial of a promotion, or any action that might dissuade a reasonable worker from opposing discrimination.

The anti-retaliation provisions in anti-discrimination laws are critical because they encourage people to come forward with complaints of discrimination to stamp out discrimination. And when an employer retaliates against somebody for complaining about discrimination or exercising a right to combat discrimination (e.g., filing a discrimination lawsuit), there are strong anti-retaliation provisions that will allow you to go into court and get redress for that.

What is an EEOC discrimination charge and what deadlines apply to filing one?

If you are considering filing a glass ceiling/promotion discrimination case, or other employment discrimination claim, you need to know about EEOC discrimination charge filing process. Generally, someone who believes they have been discriminated against at work must first file an [EEOC discrimination charge](#) before they can file an employment discrimination lawsuit under Title VII of the 1964 Civil Rights Act in federal court (different procedures may apply for a state law claim or claims under different federal laws).

Before you file a charge with the EEOC, it is often worthwhile to try and address your dispute with the company short of formal litigation. You

may also want to speak with a lawyer before filing an EEOC charge because many procedural hurdles exist, which may limit the type of claims you can file in court as well as the damages you can receive.

If you decide to file an EEOC discrimination charge, the [EEOC's website](#) contains valuable information on how to do so. Depending on what state you live in, your charge of discrimination must be filed within 180 or 300 days of the discriminatory act.

Note: different requirements apply depending on whether your employer is a private company, state or local government, union, or the federal government, and it is important to follow those specific requirements.

Arbitration and why it matters if you signed an arbitration agreement

Many employees do not even realize that, when the company hired them, they signed an agreement to arbitrate any claims against the company, which waived their right to try their claims before a jury.

When parties agree to arbitrate, it generally means they've agreed not file a case in court. Instead, their legal dispute will be heard by a private, neutral, third party (the arbitrator). The arbitrator will hear each side's evidence and arguments and then making a ruling. The arbitrator's decision is generally binding on the parties. Arbitration can take many different forms so it's important to know what rules apply if you have signed an arbitration agreement at your job.

A big difference exists between filing your case publicly in court versus proceeding in arbitration. For example:

- unlike in court, no jury of your peers will decide your case in arbitration
- instead, a private, third-party individual (often paid for by the employer) will rule on the case
- arbitration generally occurs in private with strict confidentiality rules in place
- in court, on the other hand, most proceedings are public
- the discovery phase, in which you develop the facts necessary to prove your case, is usually much more limited in arbitration; and
- to the extent an appeal process exists in arbitration, it is usually far narrower than what is available in court

Partners and executives: are they employees or employers?

One of the more hotly debated topics is whether partners and executives should be viewed as the employer versus the employee when they suffer discrimination at work. This matters a great deal because if s/he is deemed an employer, then the executive will not be covered by [Title VII of the 1964 Civil Rights Act's](#) (and most other federal laws') anti-discrimination provisions. And this legal question is increasingly playing out in corporate boardrooms, medical practices, and law firms around the country.

A typical scenario involves a high-level manager, executive, or law firm partner who is harassed, repeatedly passed over for a promotion, or fired and then seeks shelter from the discrimination through a Title VII lawsuit. Often the defendant company will file a motion to dismiss the case on

this threshold issue because if the plaintiff is not an “employee” then they may not sue under Title VII.

In [Clackamas Gastroenterology Associates v. Wells](#), 123 S.Ct. 1673 (2003), the Supreme Court outlined the standard measuring whether a person is an “employee” covered by federal anti-discrimination laws, such as Title VII, the American with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).

The key factor is how much, or little, control the individual has over their work, compensation, and workplace decisions.

The Supreme Court settled on a six-factor test to assess if a person holding a high-level position should be considered an “employee” including whether:

- the company can hire or fire the individual or set the rules and regulations of their work;
- the extent to which the company supervises the individual's work;
- the individual reports to someone higher in the company;
- the extent to which the individual is able to influence the company;
- the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- the individual shares in profits, losses, and liability of the company

[Clackamas](#), 123 S.Ct. at 1680. None of these factors is decisive; instead, they should be viewed as a whole. For example, a junior partner at a professional services firm who plays a minimal role in the management of the firm can be deemed an employee under Title VII.



Other Examples of Glass Ceiling Discrimination

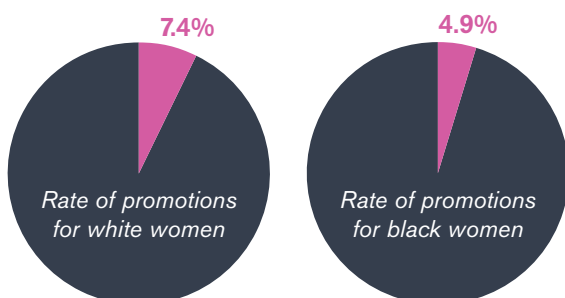
Glass ceiling discrimination and women of color (aka the “concrete ceiling”)

It’s often said that a “glass ceiling” exists for women in companies, and for women of color the added layer of race creates a further “concrete ceiling” when it comes to promotions. As the author of a recent [study](#) noted: “Women of color face more obstacles and a steeper path to leadership, from receiving less support from managers to getting promoted more slowly. And this affects how they view the workplace and their opportunities for advancement.”

The unfortunate takeaway is that:

two patterns are clear: compared to white women, things are worse for women of color, and they are particularly difficult for black women.

By way of example, the rate of promotions for white women is a paltry 7.4%, but for black women it is an even lower 4.9% promotion rate.



The “bamboo ceiling:” another form of promotion discrimination in Silicon Valley

Another issue that has not been explored as deeply is the under-representation of Asian-American employees in the executive ranks (dubbed the “bamboo ceiling”) of technology companies.

An [in-depth analysis](#) of publicly available information from some of the top technology companies, including Google, Hewlett-Packard, Intel, LinkedIn, and Yahoo, sheds some revealing light on the dearth of Asian-American executives across the industry.

Although Asian-American employees are actually in some cases over-represented in non-management positions in these five tech companies, they are, according to [Ascend Foundation’s](#) research, “severely underrepresented at the executive levels.”

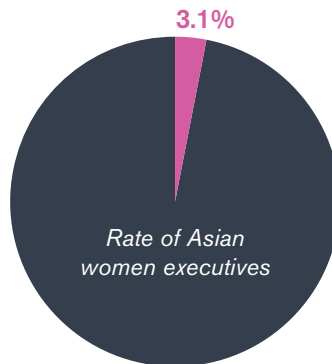
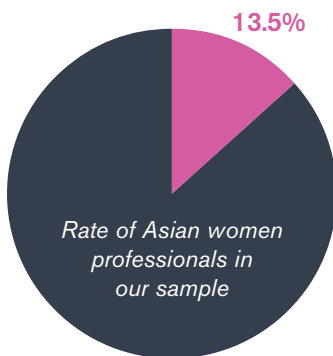
The data from these five companies show that Asian employees comprised 27.2% of the professional workforce, but made up only 13.9% of the executives in the professional workforce at Google, Hewlett-Packard, Intel, LinkedIn, and Yahoo.

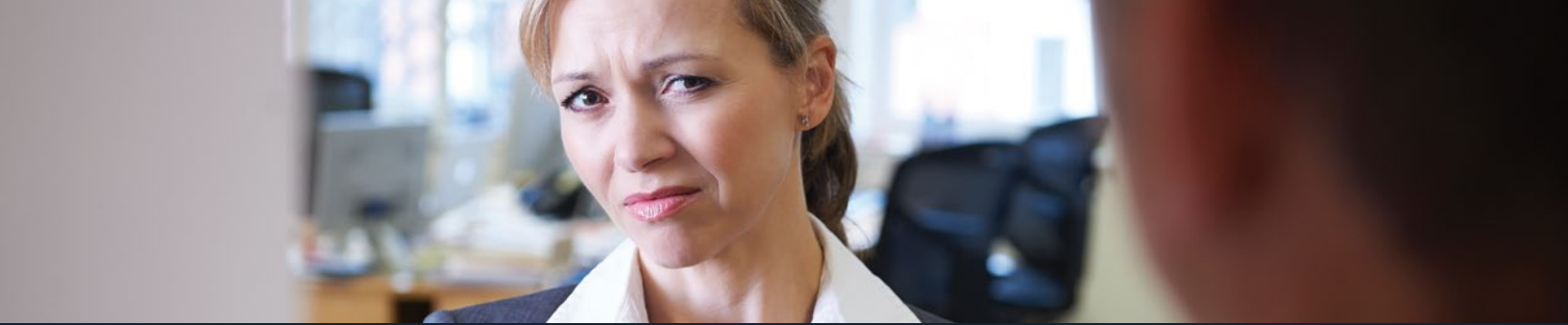


Some of the more striking conclusions that the Ascend Foundation draws from its data analyses include:

- “Although there are nearly as many Asian professionals as white professionals in most of these five companies, white men and women are ~154% more likely to be an executive compared to their Asian counterparts.”
- “Asian women are the least represented as executives, relative to their percentage in the workforce. There are 9,254 Asian women professionals in our sample (13.5%), but only 36 Asian women executives (3.1%).”

“... White men and women are ~154% more likely to be an executive compared to their Asian counterparts.”





A Vicious Cycle: How the Glass Ceiling Fuels Sexual Harassment

The dearth of women in the most senior/powerful positions in many companies (the glass ceiling) helps perpetuate a workplace culture in which sexual harassment is allowed to fester.

On the one hand, it's an oversimplification to say that having more women in higher-level positions would stamp out all sexual harassment problems. But on the other hand, it's hard to deny that if more women are in supervisory, managerial, and executive jobs at a company, then the company is more likely to be proactive about addressing the problem and actually holding harassers accountable.

Debating whether the glass ceiling amplifies sexual harassment or vice-versa is a bit like a “chicken or the egg” argument. But steps can

be taken to start addressing both problems in a concrete way.

One idea, which was included in the [Uber diversity and harassment report](#) (authored by former Attorney General Eric Holder), is to tie managers' financial compensation to how well they adhere to diversity and inclusion policies and other ethical business practices. The reports notes that:

Experience shows that compensation provides a powerful tool for creating incentives for behavior, and reinforcing a company's values. Many leading companies have incorporated similar metrics into the compensation packages for senior executives as a way of ensuring that their compensation practices reward conduct that is consistent with the cultural environment that they hope to create.

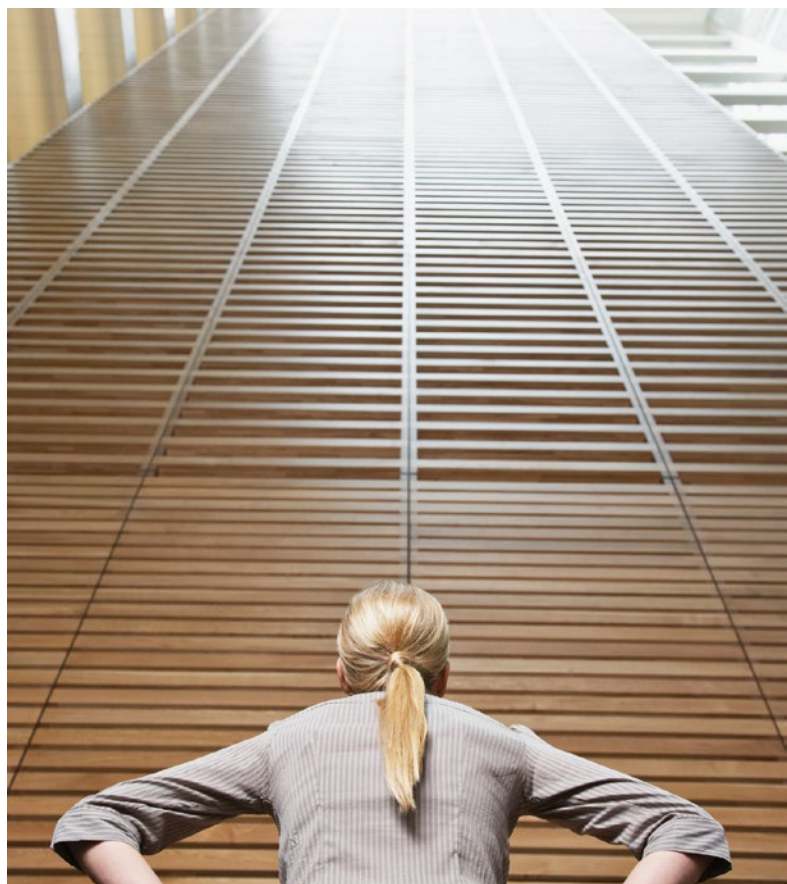
As money is the ultimate motivator at many companies, if Uber successfully improves its workplace culture by tying performance compensation to diversity and ethical business practices, this could have ripple effects across corporate America.

This concept alone, however, will not be enough and it is important for companies, employee rights groups, and the broader public to keep having this difficult but vital conversation about how to help ensure equal treatment of women in the workplace.



Key takeaways

- A glass ceiling generally refers to an unfair, artificial barrier that prevents certain employees (women; people of color; LGBT) from fairly competing for upper management jobs in companies.
- If you want to preserve your ability to challenge this glass ceiling in court, you should consider the following options:
 - File a written complaint and follow your company's policy for submitting internal complaints;
 - You may also want to file a [charge of discrimination with the Equal Employment Opportunity Commission \(EEOC\)](#).
- In glass ceiling cases, it will be necessary to prove that you were better qualified for the position compared to the selectee and how similarly situated employees have been treated by the company
- Additional legal considerations apply if you are a high-level executive or law firm equity partner because you may be considered an “employer” versus an “employee” and thus not covered by Title VII's protections
- Glass ceiling discrimination is not limited to white female employees; for example, women of color (“the concrete ceiling”) and Asian-American employees (“the bamboo ceiling”) often experience even more severe promotion discrimination



Though glass ceiling discrimination remains all too common, progress is being made. And by knowing the signs of promotion discrimination in your company as well as your legal rights and remedies, you will be better positioned to break through the glass ceiling.

Zuckerman Law represents victims of glass ceiling/promotion discrimination and we can discuss your matter with you during a confidential consultation.



To learn more about your rights, call Zuckerman Law 202-262-8959
www.zuckermanlaw.com