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Teaching Employment Discrimination Law, Virtually

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TEACHING EMPLOYMENT DISCRIMINATION LAW, VIRTUALLY

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INTRODUCTION

The process of education, teaching, and learning has ideally been conceived of as a transformative endeavor. Students learn a new way of thinking and asking questions, rather than memorizing or assimilating material verbatim by rote. As curiosity and inquisitiveness are to be valued, students change their mode of analysis and in so doing, the way that they perceive the world. While this is the typical meaning of "transformative" learning,[1] what if learning were *actually* transformative? In other words, what if what you were learning or the process of learning turned you into someone else (at least for the course of a lesson)? The lesson is one that you can perform in your class; it is one that I used in my employment discrimination seminar.

Let's engage in a thought experiment. What if, without pain or expense, you could immediately change your height, your weight, your eye color, or your skin color? How would being able to choose these aspects of your

1. Transformative learning has become something of an education buzzword recently. In 2010, the Association of American Law Schools used as its theme "Transformative Law." *Event Information: 2010 Annual Meeting*, THE ASS'N OF AM. LAW SCH., https://memberaccess.aals.org/ eWeb/DynamicPage.aspx?webcode=EventInfo&Reg_evt_key=e95fe6b3-00bd-4570-950c-d1b fa09e510c&RegPath=EventRegFees (last visited Sept. 4, 2013). In 2012, Saint Louis University renamed its teaching resource center to make it the Reinert Center for Transformative Teaching and Learning. *Reinert Center for Transformative Teaching and Learning*, ST. LOUIS UNIV., http://www.slu.edu/cttl/about-us/history (last visited Sept. 13, 2013).

physical identity change the way that you thought about the world? Luckily, with the advent of virtual worlds and avatars, we are now in a position to explore these issues. Additionally, we can use virtual world technologies in order to help our students understand the issues in the Employment Discrimination course at a much deeper level than might otherwise have been possible. My academic focus has recently been on "virtual work"—how the labor and employment law fields are changing due to advances in technology and communication. In this Article I apply these virtual work concepts and ideas to employment discrimination pedagogy.

Given the wide range of issues covered in the Employment Discrimination course—race, religion, ethnicity, sex, sexual orientation, disability—no student will have personal experience with every type of discrimination. Understanding the motivations, frustrations, and reasons why a plaintiff might bring a case is useful for both employee and management side employment discrimination practice. So my contribution to this Symposium is to discuss a specific lesson that uses technology and my research on virtual work to help students develop their cultural competency skills. If the idea behind the old cliché of trying to develop understanding for someone different from you is to "walk in another person's shoes," my suggestion is that these shoes may be virtual. That is, if your avatar ends up walking at all, because why walk when you can fly?

As we set out on this journey through virtual employment discrimination pedagogy, let me first describe my roadmap. First are the goals of the lesson. I want to deepen the students' understanding of the substantive law of virtual employment discrimination itself. In other words, while there is a component of this lesson that is just about the cool new technology, there is actual doctrine—rather futuristic doctrine to be sure—but this is a perfect opportunity to ask students to think about the ongoing trends and the future of work. The second goal is to encourage and nurture the set of skills known as cultural competency. With these goals in mind, I turn in Part Two to the mechanics of the lesson itself. In clear steps, I describe how I set up the lesson and what I did during my virtual class with the students. I also discuss possible concerns and drawbacks, and offer some strategies for addressing them. Finally, in the last part of the paper, I note how virtual worlds are helpful in the broader context— how they might be used to help us teach and learn about diversity and also help avoid unconscious bias.

I. GOALS OF THE LESSON

This lesson had multiple goals; on one level, I was interested in having the class learn about and discuss the future of work itself, and what impact technology would have on the field of employment law. On another level, I was interested in discussing the concept of identity and its nuances with the

students, and I wanted to use technology to develop cultural competency skills. Let me discuss each of these goals in turn.

A.   *Learning the Substantive Doctrine of Virtual Work*

In recent years, work has become more global, less tied down to tangible outputs, and less dependent on physical workplaces.[2] In industrialized countries, knowledge and service work, rather than manufacturing, has been growing in value and importance.[3] In earlier writing, I noted that these trends, along with the internet and improved communications technology, have resulted in the rise of what I term "virtual work."[4] As I have noted before, virtual work is an umbrella term that includes off-site work, crowdsourced micro-labor, in-game work or gamified work, and work in virtual worlds. Because the lesson I am describing in this Article involves teaching a class in a virtual world, I focus my discussion here mostly on those working in virtual worlds. Recently, employment agencies like Manpower and Randstad have begun recruiting, collecting résumés, and performing interviews with candidates in the virtual world Second Life.[5]

While a move toward virtual work is one trend, another more disturbing trend is an increase in the number of employment discrimination claims filed with the U.S. Equal Employment Opportunity Commission (EEOC), which recently reached almost one hundred thousand claims per year.[6] Further, a well-known empirical study revealed a surprising amount of discrimination present in labor markets when it was conducted in 2004.[7] The study revealed that job-seekers sending out résumés with Caucasian-sounding names fared more favorably than those job-seekers with African-American sounding

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2. SAMUEL ESTREICHER & MIRIAM A. CHERRY, GLOBAL ISSUES IN EMPLOYMENT LAW 1–2 (2008).

3. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2008).

4. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 954 (2011).

5. Both Manpower and Randstad have advertisements posted on YouTube touting their recruiting services in Second Life. *See, e.g.*, Mijkevanschieveen, *Virtual Jobs at Randstad*, YOUTUBE (Apr. 12, 2007) http://www.youtube.com/watch?v=k5xF43POYv8 (advertisement for Randstad); Aaron Uhrmacher, *Manpower's Machinima on the World of Virtual Work*, YOUTUBE (July 12, 2007), http://www.youtube.com/watch?v=sNjxucDI8bo (advertisement for Manpower).

6. *Charge Statistics FY 1997 Through FY 2012*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Aug. 22, 2013).

7. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 997–1008 (2004). *See also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1283–84 (2005); STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS 170–71 (rev. ed. 2006) (containing a chapter discussing earning prospects for job seekers on the basis of their names).

names.[8] And so discrimination—especially the hidden, subtle, unconscious bias type of discrimination—continues to be a current, relevant, and disturbing part of the landscape of employment law.

Some commentators had hoped that technologically enabled forms of work might result in the reduction of recurrent forms of unconscious bias.[9] Why would the "real world" identity of the workers they hire matter if those workers will only work in a virtual setting? One human resources professional had the following to say: "I interviewed three people on Second Life, but I found it harder than in real life because sometimes you don't know if it's a man or a woman, if they're young or old, and you have to ask more questions to find out what's behind the avatar . . . . It is challenging, but I'm not ready to let go of it yet."[10] This comment is telling. While on the one hand, it is perfectly understandable and acceptable for the interviewer to want to know more about the person they are interviewing so as to establish a rapport or to check credentials, on the other hand, some of these characteristics should not be entering into the employment relationship at all. Why should it matter if the applicant is young or old, male or female? These are protected categories under existing employment discrimination laws.

And so, even in a virtual world, there is a very real danger that some forms of existing discrimination could be replicated. For example, a blog article on work in virtual worlds took screenshots of avatars with the caption, "All avatars are not created equal. Who would you rather work with?"[11] The first screenshot showed an avatar of a middle-aged white male who was wearing a crisp white shirt and tie and a pair of dress slacks, in what looked like a typical real world office environment, complete with a virtual ficus tree. The second screenshot was of two avatars, one of whom had pink hair, appeared androgynous, and was wearing a pair of skintight leather chaps, and the second of whom was a duck-like character with horns who appeared to be waving a magic wand.[12] The implication was clear; the first avatar was supposed to represent someone trustworthy to do business with. The second pair of avatars seemed odd, potentially unsettled, and not avatars you wanted to entrust with your credit card number. It was probably not an accident that the trustworthy avatar in this screenshot presented as a middle-aged white male.

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8. Bertrand & Mullainathan, *supra* note 7, at 997-1008.

9. For example, technology might be used in the hiring process to weed out applicants who harbor unconscious biases. *See* Philip E. Tetlock, Gregory Mitchell & L. Jason Anastasopoulos, *Detecting and Punishing Unconscious Bias*, 42 J. LEGAL STUD. 83, 85 (2013).

10. Gabrielle Monaghan, *A Virtual Way to Find Real Talent*, SUNDAY TIMES (LONDON), Mar. 16, 2008, at 19 (quoting an interview with a human resource professional).

11. *Immersive Environments*, INTERNET TIME WIKI, http://internettime.pbwiki.com/Immersive+Environments (last visited Aug. 21, 2013).

12. *Id.*

Assuming that someone might not be offered a job because of avatar appearance, we are then presented with some interesting legal issues and intellectual challenges. For example, how can one suffer from employment discrimination if one's "true" identity is unknown to the ultimate decision-maker? The paradigm for employment discrimination law largely depends on the basis of readily observable visual cues and traits.[13] Some employment discrimination, however, flows not only from such visual differences, but from unconscious biases and traits that may be associated with being of a particular protected class.[14] Still, though, would this depend on discrimination against the person "behind" the avatar, not the avatar itself? The question of whether there is discrimination against the avatar or the person behind the avatar is a vexing one.

Professor Wendy Greene wrote in a recent article about a disturbing trend, the "actuality requirement," that has cropped up in several federal district court decisions.[15] The "actuality requirement" mandates that an employment discrimination plaintiff be discriminated against because of actual membership in a particular group.[16] So, for example, if a worker was harassed on the basis of his Mexican heritage, but he was in fact of mixed race with one African-American and one Caucasian parent, then that worker's case would be dismissed. Under the misguided analysis of the "actuality requirement," if a worker is misperceived as a different race, color, ethnicity, or gender and then is harassed or discriminated against on that basis, that is still not enough to win that worker protection under Title VII. Disturbingly, the alleged target of discrimination must then perform a second step in which his or her identity is litigated. Despite the presence of the "actuality requirement" in a few district courts, Professor Greene also points out that the EEOC as well as other courts have rejected the "actuality requirement."[17] The "actuality requirement" would be almost nonsensical in a virtual world setting, as the avatar is not "actually"

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13. *See, e.g.,* Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 293 (2000) (listing many occupational fields that were over ninety-five percent male, including many mechanical and blue collar jobs, and seven occupational fields, including receptionists, secretaries, and childcare workers that were over ninety-five percent female); Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 545 (2005).

14. Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstructions*, 100 YALE L.J. 1329, 1332–33 (1991) (discussing accent discrimination and studies on voice discrimination based on assumption of race from voice or accent).

15. D. Wendy Greene, *Categorically Black, White or Wrong: The Emergence Of An "Actuality Requirement" and Identity Adjudication in Title VII Litigation*, 47 U. MICH. J.L. REFORM (forthcoming 2013).

16. *Id.*

17. *Id.*

any particular race, ethnicity, or gender, but rather is a changeable cultural and computational construction.

Avatar malleability raises other issues. Because one can change one's identity in Second Life through only a few clicks of the mouse, one could say that the person behind the avatar could easily change his or her identity to conform to whatever his or her audience or employer wanted to see. Could an employer mandate that all employees have a particular racial, ethnic, or gender identity in their avatars, so as to promote a brand or portray a certain image? Would such coerced forms of "passing" become reviled or commonplace? An employer faces limits on these practices in the real world, but perhaps the concern is not as invidious in a virtual world like Second Life, where anyone can decide that they want to become a Caucasian man for one hour and a Hispanic female the next.

Recently, the writings of many critical legal scholars have focused on the social construction of identity at work.[18] The literature discusses the fact that the concepts of race, gender, and sexuality are not fixed, static, or immutable notions, but rather are heavily dependent on social context.[19] This paradigm has meaning based on our current notions of the self, but what does identity even mean in the context of virtual worlds and freely assumed avatars?[20] In the real world, identity runs the range from socially constructed and changeable to those that are fixed and immutable. In virtual worlds, however, one has much greater freedom as to how to present oneself as an avatar and the entire concept of identity is more fluid. We are therefore presented with interesting questions. How would each one of us view the world if we were not constrained by our physical appearance?[21] How much of our physical appearance is a matter of social construction and social pressure? Further, if each of us freely chooses a racial, gender, and sexual identity for our "alter ego" in cyberspace, how closely would that avatar match our "identity" in real life?

So, in the real world, one of the reasons that Congress and the EEOC have prohibited certain types of discrimination is because they are the result of immutable traits—aspects of identity that cannot (at least easily) be changed.[22]

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18. *See, e.g.*, Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772, 780 (2002); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS ix (2006); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260–62 (2000).

19. *See, e.g.*, JUDITH BUTLER, GENDER TROUBLE 6 (1999) (critiquing conception of gender and sexual orientation as binary).

20. Susan P. Crawford, *Who's in Charge of Who I Am?: Identity and Law Online*, 49 N.Y.L. SCH. L. REV. 211, 211 (2004).

21. *See* Kevin Noble Maillard & Janis L. McDonald, *The Anatomy of Grey: A Theory of Interracial Convergence*, 26 LAW & INEQ. 305, 312–17 (2008) (discussing how passing for another race requires believability in physical appearance).

22. James Leonard, *Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 745–46 (2007). *See also Facts*

Therefore, the basis for prohibiting employment discrimination in a virtual world would have to rest on a different rationale than one based on immutable characteristics. Instead, we would need to base both harm and protection on a different theoretical footing. Perhaps a reason to forbid discrimination could be found in either the values of equal opportunity, tolerance, or understanding difference, rather than in immutability.

This also raises another identity issue. Given the vast array of identities available in virtual worlds, perhaps the terms "identity" and "discrimination" are being defined far too narrowly. During my experiences in virtual worlds, I have come across many non-human avatars.[23] Perhaps instead of discrimination against one sex, sexuality, or ethnic group, it is possible that additional discrimination will develop against non-humans (or perhaps, humans). Whether this is, or should be, troubling is another question. It is too soon to tell.

What might provide a better paradigm for employment discrimination in virtual settings? Consider the Americans with Disabilities Act, which contains broad language and covers those who are perceived as having a disability, even if they are not actually disabled.[24] Although controversial, there might be an argument that Title VII should, even without amendment, be read to include misperceptions of identity.[25] Thus the coverage of the statute would not depend on whether one actually is of a certain race or gender, but rather, on how one is perceived. This is an important point for virtual employment discrimination because so much of the endeavor depends on how one's avatar is perceived, rather than the person behind the avatar, whose identity may (or may not) be known.

B. *Cultural Competency Skills*

In addition to discussing the larger trends of virtual work, globalization, technology, and the ways that this is changing employment law doctrine, I also

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About Race/Color Discrimination, EEOC, http://www.eeoc.gov/facts/fs-race.html (last modified Sept. 8, 2008).

23. Not all of the characters in Second Life are human. *See* Attila Berry, *Lawyers Can Earn Actual Cash in Virtual World*, N.Y. L.J., Aug. 3, 2007, at 24 ("People in Second Life act pretty much like people do everywhere. They just might do it in the form of a fuzzy, tangerine-colored fox.") Among many children's virtual worlds, humans are actually the exception, rather than the norm. *See, e.g., Club Penguin Q & A*, CLUB PENGUIN, http://www.clubpenguin.com/company/news-media/club-penguin-qa?expand=1 (last visited Sept. 16, 2013).

24. 42 U.S.C. § 12102(1)(C) (2006). "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." *Id.* § 12102(3)(A).

25. Onwuachi-Willig & Mario Barnes, *supra* note 7, at 1287–89.

wanted students to develop their cultural competency skills. One important component of teaching an employment discrimination course is to help students develop skills in cultural competency and cross-cultural understanding that will give a fuller comprehension of the case law, their clients, and the multi-cultural workforce of the future. That is not to downplay the many other important goals and issues in the course, for example: statutory interpretation, following the evolution of case law, evidence and proof issues, civil procedure, tort, and contract issues. Also important in the course is the ability to examine issues from both the employment plaintiff and management perspectives, so as to provide a balanced perspective as well as to learn the importance of anticipating opposing arguments. But one major, overarching theme—at least in the way that I teach the class—involves helping students to understand, grapple with, and be sensitive to many of the important civil rights issues that underlie the subject matter of the course. This involves an understanding of how others may view the world.

How might changing your identity through your avatar play into the idea of cultural competency? Consider the description offered by Lisa Nakamura in her book *Cybertypes*:

> Role-playing is a feature of [virtual worlds and cyberspace]—not a bug—and it would be absurd to ask that everyone who plays within it hew literally to their "real life" gender, race, or condition of life. A diversification of the roles that are permitted and played can enable a thought-provoking detachment of race from the body, and a questioning of the essentialness of race as a category. Performing alternative versions of self and race jams the ideology-machine, and facilitates a desirable opening up of what Butler calls "the difficult future terrain of community" in cyberspace.[26]

To date, cultural competency programs are common in medical schools and social work programs, as these practitioners often deal with a wide variety of clients. Developing cultural competency skills are thus vital to providing good client service.

These same skills are also important to attorneys who may deal with clients from many different backgrounds.[27] While not yet a common part of the curriculum in law schools, it is a developing field, especially in the area of clinical legal education.[28] Remembering my own experience with the law

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26. LISA NAKAMURA, CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET 49 (2002) (citation omitted).

27. Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education— A Case for Cultural Competency*, 38 S.U. L. REV. 1, 2 (2010).

28. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 34 (2001); Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 N.Y.L. SCH. L. REV. 445, 446 (2011).

school clinic when I was a law student, cross-cultural competency was extremely important to my success at relating to the clientele, but it was not something that I could have identified at the time that I was immersed in it. Given the importance of skills training—emphasized by the Carnegie Report[29]—for law students, it makes sense to have students develop these skills in a variety of settings. With these goals in mind, I turn to the mechanics of the lesson itself.

II. DESCRIPTION OF THE LESSON

My seminar's journey into virtual employment discrimination took part in three phases. In the first phase, I assigned the students background reading on virtual worlds and gave them an excerpt from my article (at that time in draft) *A Taxonomy of Virtual Work*.[30] Then, during a class session, we discussed the material as a group. I summarized the salient trends in virtual work (noted above), and challenged the class to think about how these changing trends in how work is performed could possibly change (or not change) the law, and how the law might (or might not) keep up with these possible changes. The initial component of the lesson was very much in keeping with a traditional "seminar style" class and in fact, other than the subject matter, contained little in the way of classroom technology.

I ended the class session, however, by using technology. Using the classroom computer and projector, I signed onto Second Life and showed them my avatar (who looks like me, with curly red hair, wearing a business suit). I used my avatar to show the class the online environment—the virtual island and environment associated with our school. At this point, the students were "watchers" of the technology rather than the "doers." I then informed the students that during our next class meeting, we would meet in the computer lab, and that each of them would be creating their own avatar.

The students were excited. During our next class meeting, we met in the computer lab. With the help of Monica Sharum, a law librarian with a specialty in emerging technologies, each student signed up for the Second Life website, clicked the "safe mode" version, walked through the necessary screens, and created a new avatar. While some of my students were familiar with the concept of Second Life, none of them had actually gone online or created an avatar before.[31] This was a hands-on exercise. Using the projector and her own avatar as an example, Ms. Sharum described how you could, with the click of a

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29. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 1 (2007) [hereinafter CARNEGIE REPORT].

30. *See* Cherry, *supra* note 4, 954.

31. I would expect that over the years, this will change and eventually this type of lesson will seem commonplace, but in that class, none of the students had experienced making an avatar in a virtual world.

button, make your avatar become tall or short, change hair color, adjust skin color, or change your avatar's body type. The students had great fun with this, as they changed the eye color, gender, and height of their various avatars. Because I was sitting in the back of the room, I could see that students were staying on task and following the instructions that the librarian was giving them about controlling their avatars. When I talked to students after class, all but one expressed enthusiasm and wanted to learn more.[32] I then informed the class that our next session would actually meet in Second Life. I would take attendance based on whose avatars showed up in the virtual world. In fact, I told the class that I would not be physically present in the classroom, but rather would access the virtual environment from my office.

For our class session, I logged into the virtual environment during our regular class time from my office. I later found out that some of the students were logging in from their personal computers at home, while others were using their laptops and sitting in the classroom, while still others were logging in from the computer lab at school. Using a headset and a microphone, I could broadcast my voice to the other avatars in the room. Two other students had microphones and could speak back. The other students, who did not have microphones, could hear us through the computer speakers, but could not respond orally. They could, however, type a message that appeared as an "instant message" in a separate window.

We did encounter some initial confusion in trying to hold our class session in Second Life. While the students had seen my avatar (during the demonstration during the last session), and my avatar approximated something of the way that I look in real life, the students had chosen avatars that, for the most part, looked nothing like their real life appearances. Many had changed their genders, and others kept changing different aspects of their appearance even while we were meeting in our class. It was therefore rather difficult to keep track of who was who. Despite the initial confusion, however, as a class we were able to review some case materials that we would normally go over in a regular class session, in much the same way.

Although I was initially worried that students might have difficulty navigating the virtual world, that worry was without a basis. The then-Director of the University of the Pacific's Center for Teaching and Learning, Jace Hargis, joined us for the balance of the class. This was a plus factor of using Second Life, since the undergraduate campus of the University, where Professor Hargis was located, was approximately two hours away. We were able to receive the benefit of his "presence" because of the technology. Professor Hargis also had a headset and was able to stream audio through the computers' sound system. He explained to the class that we would be taking a

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32. I will discuss what happened with this particular student under the part of the paper labeled "concerns."

"short tour" of various educational Second Life websites. We went to islands where students could see how to manipulate the double helix of DNA in order to understand how genes work as well as other islands where professors held virtual classes. We transported to a "virtual law office," an environment that an attorney-friend had established to meet and conduct business with clients in Second Life. We ended our tour by visiting "Manpower Island."

Manpower Island is the Second Life presence of the temporary staffing firm "Manpower."[33] Other employment agencies, such as Randstad and others, have set up online presences or created islands in virtual worlds.[34] The Manpower Island website featured information for both employers and employees on various opportunities. There was material on the island that described how employers could use the site to connect with and recruit tech-savvy workers. Further, there were opportunities for job-seekers to be able to submit their résumés through Second Life. Basically, the experience was like a virtual hiring hall, providing potential employees and employers another way to connect with each other.

The students left the lesson that day having absorbed a great deal of information, not just about the cases that we had discussed, but about some of the trends in work, and also having learned about a virtual world that had previously been unfamiliar to them. Afterwards, students reported that they had found the lesson captivating, that it held their attention, and that they were glad that they had participated. While this was an extremely positive outcome, and I feel that I met the goals that I had set out for this unit, at the same time, I should also note that there was a concern that came from one student. There also may be concerns about what I am proposing from a more macro-perspective. I will address each of these concerns in order.

One student stayed after class to talk with me after we worked on creating avatars. The student told me that he was having trouble following the lesson, that his technology skills were not good, and that he felt uncomfortable. While I tried to talk him into at least trying the next class session, and asked him to spend some more time with me in Second Life or to spend time with the librarian, the student declined to do so. At that point, since cajoling would not work, I told the student that I would excuse him, but that he would have to write a paper about one of the trends of employment discrimination in the future. I did not want the student to be penalized, but on the other hand felt that

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33. *Event Convenes Second Life Gurus to Discuss Opportunities to Further Real Life Social Responsibility Efforts in Virtuality*, MANPOWERGROUP, http://www.manpowergroup.com/wps/wcm/connect/manpowergroup-en/home/newsroom/news-releases/news-archive/manpower%20inc%20celebrates%20first%20anniversary%20in%20second%20life#.Uijfu7Tvzj (last visited Aug. 12, 2013).

34. Robert Slagter et al., *Does Your Company Need a Second Life?*, NOVAY, at 14, 22, https://doc.novay.nl/dsweb/Get/Document-74869/ (last visited Aug. 21, 2013).

he would need to do something extra to make up for his lack of participation with the virtual work exercise.

Aside from the possible difficulty with technology, other issues and concerns could arise if the subject material is not treated with sensitivity, either by the instructor or the students. As noted by Lisa Nakamura in *Cybertypes*, individuals choosing to inhabit an avatar of a different race or gender sometimes choose the most stereotypical characteristics.[35] Professor Nakamura concentrated her research and fieldwork on Asian cybertypes, and she notes that Asian males are often portrayed as samurai or as characters from martial arts movies; while on the other hand, Asian women are portrayed as exotic sexual objects, in the style of geisha.[36] She notes that many people on the web engage in a type of very shallow identification with "the other" and engage in a form of identity tourism.[37]

> To Nakamura this trend is troubling because it only serves to reinforce stereotypes, rather than break them down. For example, she noted one interaction where she met up with another avatar who presented Nakamura's dark-skinned avatar with a new head, and suggested that she whiten her skin so that she would fit in better.[38] Nakamura also noted the following about her interactions in a prototypical virtual space, LambdaMOO: [O]rientalized theatricality is a form of identity tourism; my research indicates that players who choose this type of racial play are almost always white, and their appropriation of stereotyped male Asian samurai figures allows them to indulge in a dream of crossing over racial boundaries temporarily and recreationally. Choosing these orientalized cybertypes tips their interlocutors off to the fact that they are not "really" Asian; they are instead playing in a familiar type of performance. Thus the Orient is brought into the discourse, but only as a token or type. The idea of a nonstereotyped Asian male identity is so seldom enacted in LambdaMOO that its absence can only be read as a symptom of suppression.[39]

It is important to note this dynamic to the class before beginning, and to let them know that while there is room to "play" with identity, we also have to be careful of reinforcing existing stereotypes. Having the students read some of Nakamura's work in advance of the lesson would be helpful to understand these particular dynamics.

Therefore, I believe that Professor Nakamura's concerns can be addressed in the context of a class where the students and professor have an existing relationship of trust that has been built throughout the semester. Handled in a structured environment—where the class is interacting with each other and the

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35. Nakamura, *supra* note 26, at 38.
36. *Id.* at 39, 43.
37. *Id.* at 40.
38. *Id.* at 52.
39. *Id.* at 39.

professor, not with random avatars—accidental exposure to racial stereotypes (or other offensive material, such as spam or pornography) is unlikely to occur. Upon entering Second Life, we all clicked the "safe mode" option, which is generally thought to weed out the more risky or objectionable islands or sites. If you are meeting all in one location—such as our class did at the virtual campus of the University of the Pacific, there are not likely to be problems with unwanted avatars wandering into the lesson.

But what if the concern is not what would be said or represented by an interloper, but rather a student in the class who has picked a cybertyped identity as his or her avatar? That did not happen in the class that I taught. In fact, many of the students were constantly changing the look of their avatars as the class progressed, so it was difficult to tell what, if any identity, they might be aiming for on a consistent basis. They were "playing" with identity more than anything else, which I took as a positive sign. The feedback that I received from students afterward confirmed that they were experimenting with changing their appearances.

But assuming that a student did choose a stereotyped identity, I think that with an existing relationship with the student, it might make for a good "teaching moment." While this takes some sensitivity, so does the entire endeavor of teaching either a class or a unit on employment discrimination, so I do not think this challenge is unique to the virtual world or technology.

III. IMPLICATIONS OF THE LESSON

Since the rulings in *Farragher* and *Ellereth*, employers have had an incentive to provide training programs that have the goal of preventing sexual harassment and other forms of employment discrimination.[40] In these two cases, the Supreme Court provided a limited affirmative defense for employers who set up appropriate training and reporting systems for civil rights violations.[41] While some have criticized these reporting structures for creating additional procedural obstacles for plaintiffs—because plaintiffs must essentially exhaust their remedies with their employer before having an actionable claim for harassment[42]—arguably at least the goal of prevention has been given more attention. The types of programs that employers provide are varied. Some conduct a yearly diversity training program or use other lectures that are enforced by attendance policies; others allow users to read a few paragraphs and take a test that certifies compliance solely on the computer.

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40. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 806–08 (1998).

41. *Burlington*, 524 U.S. at 765–66; *Faragher*, 524 U.S. at 780, 804, 807–08.

42. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 21–22 (2003).

Obviously these types of diversity programs vary in their quality and effectiveness. One critique of diversity training is that the programs do not seem to be reaching the individuals who probably need the most help with cultural sensitivity or gender issues. If voluntary, the people who have the most problems—who do not recognize the importance of the issues—will simply not attend. Sometimes these issues can be addressed skillfully by the individual or group that is conducting the diversity training, but at other times, these issues can become divisive. Having a simple lecture on diversity may be too easy to tune out and may result in passivity. However, "sharing" issues during a diversity training may end up either being divisive or may put too much burden on employees that already may feel marginalized, or like "tokens."

Some have noted that those who are likely to listen and pay attention to diversity training are those that are already aware of the importance of diversity. As such, the programs can sometimes take on the tone of "preaching to the choir." Others seem almost too basic, asking participants to engage in trite or banal clichés with scant learning content. The use of clichés and trite expressions has become the fodder for humor, being lampooned by the likes of "The Office" and movies that deal with workplace issues.[43]

So how does the lesson that I described above help with these situations? I would argue that instead of these traditional ways of conducting a diversity training, we might be able to design new programs that would guide workers through what it is like to actually *be* a person of a different group. For example, learners could be presented with challenges based on their new chosen identity. We could intersperse their interaction with text-based learning about, for example, the women's suffrage movement, the civil rights movement of the 1960s, the Chicano movement, or laws about same-sex marriage, all the while popping up questions that would ask the person who was experiencing the event how these might have affected their lives in their new identity in different ways.

By changing identities in a structured environment it is possible that internet users could reach better and more real understandings of each other's identities in real life. If a man (Victor) had to assume the identity of a woman online (Victoria), he would have to confront the barrage of unwanted sexual innuendo that most women online routinely encounter. Having such experiences might convince even some of the most skeptical that sexual harassment is a real problem in the real world.[44]

Perhaps, while challenging for human resource professionals to "interview blind," it could provide an excellent learning experience on unconscious bias. The virtual world might force employers to question why certain assumptions

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43. *See, e.g.*, NBCNetworkShows, *The Office: Diversity Day*, YOUTUBE (June 22, 2012), http://www.youtube.com/watch?v=FVXGnXgL-dI.

44. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).

exist at all that would make someone's identity relevant to the job that is to be performed. Rather like questioning "what is the color of a flesh-colored Band-Aid?", thinking about why physical appearance matters could provide a refreshing perspective that could actually break through many limiting stereotypes.[45] Again, with virtual worlds there is either a great potential for achieving a more colorblind, meritocratic system of work, or the danger that there will be mere replication of ongoing patterns of discrimination.

In these ways, shifting identities in the virtual world could initiate understanding in the real world between real people. The freedom to make identity choices is appealing and has a great deal of potential for those interested in diversity and promoting understanding.

CONCLUSION

Having seen the capabilities of Second Life, it was much easier for my Employment Discrimination students to think about identity as a concept that could either be inflexible or, within the realm of Second Life, much more malleable. The lesson helped students understand the recent trend toward the globalization of work and away from the concept of a physical workplace. We raised interesting questions about any such litigation involving avatars. As such, I would recommend the lesson for anyone teaching employment law or employment discrimination law.

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45. Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 817 (1991); *see also* COLSON WHITEHEAD, APEX HIDES THE HURT 88–89 (2006) (a humorous and thought-provoking novel describing the marketing of flesh-colored Band-Aids in various skin tones).