Sex Discrimination Claims Under Title VII of the Civil Rights Act of 1964

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I. OVERVIEW: THE TITLE VII STATUTE

The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 (Title VII) marked the beginning of modern, broadly applicable anti-discrimination law.[1] Title VII prohibits employment discrimination based on sex, race, and other protected traits.[2] Although often sparking litigation, Title VII was meant "to

1. *See* LAWRENCE SOLOTOFF & HENRY S. KRAMER, SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE 1–2 (2000).

2. *See* Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a) (West); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (noting congressional intent to promote parity in employment opportunities).

encourage informal conciliation and to foster voluntary compliance"[3] through "the creation of antiharassment policies and effective grievance mechanisms."[4] Amended several times,[5] Title VII currently makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[6]

Title VII protects both men and women from sex discrimination in the workplace. "'Race' and 'sex' are general terms that, in everyday usage, require modifiers to indicate any relatively narrow application. We do not commonly understand 'race' to refer only to the black race or 'sex' to refer only to the female.'"[7] "Sex" was amended into the statute on the last day of the debate, resulting in little to no legislative history to assist in statutory interpretation.[8]

Sex-discrimination claims under Title VII fall within one of two broad categories: disparate treatment and disparate impact. Disparate treatment claims require a plaintiff to show that they suffered unfavorable employment terms or conditions or were subjected to discriminatory acts because of their sex. [9] Alternatively, disparate impact claims allege that while employment practices were facially neutral, they resulted in discriminatory effects on a protected class.[10]

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3. Stache v. Int'l Union of Bricklayers Allied Craftsmen, 852 F.2d 1231, 1234 (9th Cir. 1988), *cert. denied* 493 U.S. 815 (1989).

4. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

5. *See* H.R. Rep. No. 102-40, pt. 1, at 4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 550 (revealing that Congress sought to fortify "protections and remedies" available under Title VII); *see also* H.R. Rep. No. 92-238, at 3 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 2137, 2139 (noting that Congress sought to equip the Equal Employment Opportunity Commission with procedures necessary to counter employment discrimination).

6. 42 U.S.C. § 2000e-2(a). An employer is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person," with some stated exceptions. *Id.*

7. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 597–98 (2004).

8. AUGUSTUS B. COCHRAN III, SEXUAL HARASSMENT AND THE LAW 19–21 (Peter Charles Hoffer & N. E. H. Hull eds., Univ. Press of Kan. 2004); HERMA HILL KAY & MARTHA S. WEST, SEX BASED DISCRIMINATION: TEXT, CASES AND MATERIALS 552–53 (Thomson West, 6th ed. 1996).

9. *See generally* 42 U.S.C. § 2000e-2(a)(l).

10. *See* § 2000e-2(k)(l)(A)(i).

Title VII requires that the plaintiff's aggrievement fall within the "zone of interests" of the statute in order to file a claim.[11] Under the "zone of interests" test, if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute, a court will assume that Congress did not intend to permit the suit.[12] For example, a court would find that a claim did not fall within Title VII's "zone of interests" if a plaintiff merely showed that an employer treated male and female employees differently. Rather, the plaintiff/employee must demonstrate that the disparate treatment occurred *because* of their sex.[13] Similarly, adverse actions based on personal hostility are not actionable.[14]

Parts II and III of this article explore the two primary types of Title VII cases. Part II covers the elements of disparate treatment, including individual disparate treatment, sexual harassment, and systemic disparate treatment, and Part III discusses the nuances of disparate impact. Part IV addresses the remedies applied once a Title VII violation has been established. Part V discusses the definition of sex and Part VI describes some of the challenges for Title VII in the context of sexual discrimination, including religion and the intersection of race and gender.

II. DISPARATE TREATMENT

Disparate treatment occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[15] Disparate-treatment claims can be based on individual or systemic disparate treatment,[16] including sexual harassment.

This section examines (A) how to effectively state a disparate-treatment claim through the establishment of intentional discrimination, (B) the elements of individual disparate-treatment claims versus systemic disparate-treatment claims, and (C) systemic disparate-treatment claims based on sexual harassment and pregnancy discrimination.

A. STATING A DISPARATE-TREATMENT CLAIM

In order to prevail on a Title VII disparate-treatment claim based on sex, a plaintiff must establish that they were treated differently than other similarly

11. Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 174–78 (2011) (maintaining a retaliation claim by an employee who alleged he was terminated after his fiancée and co-worker filed a discrimination complaint with the EEOC).

12. *Id*. at 178 (quoting Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399–400 (1987)).

13. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998).

14. *See* Peters v. Renaissance Hotel Operating Co., 307 F.3d 535, 548 n.11 (7th Cir. 2002); Grimes v. Tex. Dep't of Mental Health & Mental Retardation, 102 F.3d 137, 143 (5th Cir. 1996).

15. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

16. *See* Cooper v. S. Co., 390 F.3d 695, 724 (11th Cir. 2004) (citing EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000), *overruled on other grounds by* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456–58 (2006)) (noting that in a "pattern and practice" disparate treatment case, the plaintiff must prove, typically through a combination of statistics and anecdotes, that discrimination is the company's standard operating procedure).

situated individuals because of their sex.[17] Under the burden-shifting framework set forward by the Supreme Court in *McDonnell Douglas Corp. v. Green*, the plaintiff bears the initial burden of demonstrating a prima facie case of discrimination by establishing that they were intentionally discriminated against.[18] The burden then shifts to the defendant to provide at least one legitimate non-discriminatory reason for the alleged action; finally, it shifts back to the plaintiff to demonstrate that their employer's proffered reasons for the alleged action were pretextual.[19]

Defendants do not have a burden to prove that the decision was made for a non-discriminatory reason. The *McDonnell Douglas* framework is purely procedural, "designed only to establish an order of proof and production," not to provide plaintiffs a substantive structural advantage.[20]

1. Discriminatory Intent

"[D]iscriminatory intent or motive" is required to establish a disparate-treatment claim, but intent need not be malicious.[21] Liability in disparate treatment cases depends on whether the employer's action was motivated by the protected trait,[22] which is proved by either direct or circumstantial evidence.[23] Direct evidence, such as a showing of definitive discrimination demonstrated by explicit remarks from the employer,[24] is rarely available. Instead, plaintiffs typically rely on circumstantial evidence to prove discriminatory intent.

2. Employer Defenses

Courts have recognized several defenses for Title VII defendants who engage in disparate treatment of employees, including bona fide occupational qualifications, mixed motives, and the *Ellerth-Faragher* affirmative defense.

a. Bona Fide Occupational Qualifications. When an employee's sex impacts job-related abilities, their employer can raise a bona fide occupational qualification (BFOQ) defense.[25] The employer must show that its discriminatory practice relates to the "essence" of the business and bears a strong correlation to the plaintiff's capacity to do their job.[26]

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17. *See* Jespersen v. Harrah's Operating Co., 392 F.3d 1076, 1079 (9th Cir. 2004), *aff'd en banc*, 444 F.3d 1104 (9th Cir. 2006).

18. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Cooper*, 390 F.3d at 723–24.

19. *See McDonnell Douglas*, 411 U.S. at 802–04.

20. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993).

21. *See Jespersen*, 392 F.3d at 1079; Watson v. Fort Worth Bank Tr., 487 U.S. 977, 986 (1988).

22. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993)).

23. *See Cooper*, 390 F.3d at 723.

24. *See id.* at 723 n.15.

25. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) ("[P]ermissible distinctions based on sex must relate to ability to perform the duties of the job.").

26. *See* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 n.24 (1985) (citing 29 C.F.R. § 1625.6(b) (1984)) ("An employer asserting a BFOQ defense has the burden of proving that (1) the [discriminatory

However, the targeted trait must be essential to the business as a whole and tied to the particular job in question,[27] and some courts also require the employer to show that there were no available alternatives to the institution of a discriminatory practice.[28] Although this defense was thought to be very broad, the Supreme Court narrowed its application in *UAW v. Johnson Controls*. The Court rejected a BFOQ defense after the employer barred all fertile women of any age, marital status, or child-bearing inclination from holding a position in which they would be likely to be susceptible to lead exposure because "[f]ertile women . . . participate in the manufacture of batteries as efficiently as anyone else."[29]

A commonly-accepted BFOQ defense is when an employer has reason to believe that its gender-based hiring policy was necessary to safeguard legitimate privacy interests of third parties, such as prisoners or psychiatric patients.[30] "Most privacy-based BFOQ requests occur when employees in the position at issue perform legitimate job duties requiring that they intrude upon the privacy interests of a third party by, at minimum, viewing the third party completely

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qualification] is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact."); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388–89 (5th Cir. 1971) (finding that the "cosmetic" or "soothing" effects presumably afforded to airline passengers served only by female flight attendants could not excuse the company's discriminatory refusal to hire males because the Court defined the essence of the business as safe transportation rather than maximum profit), *cert. denied*, 404 U.S. 950 (1971); Weeks v. S. Bell Tel. Co., 408 F.2d 228, 234 (5th Cir. 1969) (finding that even if discrimination against a protected group is intended to improve the operation of a function crucial to the enterprise, the employer must show that "all or substantially all" members of the protected group lack the required characteristic and would thus be unable to sufficiently perform that function).

27. *See Johnson Controls*, 499 U.S. at 201 (stating that a BFOQ defense can succeed only if the defendant objectively demonstrates that the discrimination is not only "'reasonably necessary' to the 'normal operation' of the 'particular' business," but also relates to "job-related skills and aptitudes").

28. *See, e.g.*, Reed v. Cnty. of Casey, 184 F.3d 597, 599–600 (6th Cir. 1999) (finding sex-based BFOQ where state law required the presence of a female prison guard when a female prisoner was in jail, and transfer of female employee from first to third shift was justified when no effective alternative existed); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 703–05 (8th Cir. 1987) (finding sex-based BFOQ where employer terminated an unmarried pregnant female employee because the primary purpose of the organization was to help teenaged girls and provide them with role models, and the job would inevitably put the employee in contact with the girls).

29. *See Johnson Controls*, 499 U.S. at 205–06.

30. Olsen v. Marriott Int'l, Inc., 75 F. Supp. 2d 1052, 1069 (D. Ariz. 1999) (stating that a privacy-based BFOQ required the defendant to show that: (1) "legitimate privacy rights of patients, clients, or inmates 'would be violated by hiring members of one sex' to fill the position at issue," and (2) "there are no reasonable alternatives to a sex-based policy") (quoting Hernandez v. Univ. of St. Thomas, 793 F. Supp. 214, 216 (D. Minn. 1992)); Jennings v. N.Y. State Office of Mental Health, 786 F. Supp. 376, 380–81 (S.D.N.Y. 1992) (finding that a privacy-based BFOQ required the defendant to show that: (1) it had "factual basis for believing that it is necessary" to employ a person of a particular sex in a position to "protect the privacy interests" of a third party; (2) a third party's "privacy interest is entitled to protection under the law;" and (3) "no reasonable alternatives exist to protect those interests other than the gender based hiring policy") (citation omitted), *aff'd per curiam*, 977 F.2d 731 (2d Cir. 1992).

naked."[31] "Such duties might include viewing the third party toileting or touching the third parties' genitalia for legitimate purposes such as bathing."[32] For example, a BFOQ defense may be found legitimate for an employer seeking to hire a janitor, who must intrude on legitimate privacy interests by cleaning workplace bathhouses where male employees undress, shower, and use urinals.[33]

b. Mixed Motives. A "mixed motive" defense is when an employer can demonstrate that it had both legitimate and illegitimate reasons for taking an adverse employment action.[34] In 1991, Congress amended Title VII to classify any illegitimate consideration of a protected trait in an employment decision as a per se violation, regardless of the protected trait's proportional influence on the final decision.[35] However, the amendments also allow an employer to limit its liability to declaratory relief, injunctive relief, and attorney's fees when it pleads a mixed motive defense and demonstrates that it would have taken the same action absent any consideration of the protected characteristic.[36]

These amendments superseded *Price Waterhouse v. Hopkins*, where the Supreme Court adopted the "motivating factor" test for mixed motive cases.[37] Under this analysis, where the employer's adverse decision was motivated by both permissible and impermissible factors, the employer had to prove that it would have reached the same decision absent the impermissible motive.[38]

c. Ellerth-Faragher Affirmative Defense. The *Ellerth-Faragher* affirmative defense only applies in Title VII sexual-harassment cases where the harassing employee does not take a tangible employment action, such as denying a promotion or a raise.[39] The employer can assert an *Ellerth-Faragher* affirmative defense if the employer establishes that (1) it exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer

31. *Olsen*, 75 F. Supp. 2d at 1062.

32. *Id.*

33. *See* Brooks v. ACF Indus., Inc., 537 F. Supp. 1122, 1126–28 (S.D.W. Va. 1982).

34. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2538 (2013).

35. *See* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m) (West) ("Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). *But see* Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39-40 (1st Cir. 1998) (holding that no error existed where the jury was instructed: "If you find that the plaintiff was discharged for reasons other than his gender you must find for the defendant.").

36. Civil Rights Act of 1964, Pub. L. No. 116–259 (codified at 42 U.S.C. § 2000e-5(g)(2)(B)(i)).

37. Price Waterhouse v. Hopkins, 490 U.S. 228, 249–50 (1989) (plurality opinion), *superseded in part by* 42 U.S.C. § 2000e-2(m); *see* Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1038 (8th Cir. 2010) (stating that "[t]he Price Waterhouse plurality's understanding that an employer might escape liability by showing that it would have made the same decision even without a discriminatory motive is no longer permissible because Congress provided otherwise" in 42 U.S.C. § 2000e-2(m)).

38. *See Price Waterhouse*, 490 U.S. at 250.

39. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 760–61 (1998).

provided.[40] Otherwise, employers are held vicariously liable for the harassment only if the plaintiff proves that the employer was negligent in controlling working conditions because the employer knew or should have known about the conduct and failed to stop it.[41] "In practice, courts have accorded broad deference to employer policies under that standard; in the absence of a 'tangible employment action,' a finding of liability is unlikely even if the employer's policy is demonstrably ineffective in preventing harassment."[42]

3. Pretext Rebuttal

After the employer has articulated a legitimate, non-discriminatory reason for its conduct in a sex-discrimination case, the burden of proof shifts back to the plaintiff. The plaintiff must rebut the employer's evidence of a non-discriminatory motive. While the presumption of intentional discrimination has dissipated, the plaintiff can still prove disparate treatment by demonstrating that the employer's explanation is false or pretextual.[43]

For example, the Third Circuit summarized the requirements for pretext in *Franks v. Lehigh*, stating that in order to discredit the employer's reasons, the plaintiff

> "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer . . . Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' . . . and hence 'infer that the employer did not act for (the asserted) non-discriminatory reasons.'"[44]

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40. *See id.* at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

41. *Ellerth*, 524 U.S. at 759.

42. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 14 (2006) (citing Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 212–16 (2004); Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. 1, 4–6, 27–28 (2001); David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1266–67 (2001) (concluding, based on a study of the first eighteen months of implementation of *Faragher* and *Ellerth*, "that many of the judicial opinions are result-oriented," that "courts often find that the complaining employee acted 'unreasonably' as a matter of law, even when such a determination may merit a more thorough review of the facts of the case," and that these holdings may "establish a perverse incentive for employers seeking to avoid liability, and create unacceptable barriers and requirements for employees who may need to seek redress for compensable behavior at the workplace"); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 708–15 (2000)).

43. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

44. Franks v. Lehigh, 143 F. App'x 462, 463 (3d Cir. 2005) (emphasis in original) (quoting Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (internal citations omitted)).

A jury may find that illicit discrimination occurred by combining the plaintiff's prima facie case with sufficient evidence that the employer's proffered explanation is false.[45]

B. INDIVIDUAL DISPARATE TREATMENT CLAIMS

A plaintiff can claim intentional individual discrimination due to sex, as a result of: (1) failure to hire, promote, or transfer; (2) discharge; (3) disciplinary action; (4) constructive discharge; (5) compensation; or (6) employer retaliation. By establishing a prima facie case of disparate treatment, a plaintiff "in effect creates a presumption that the employer unlawfully discriminated against the employee."[46]

1. Hiring, Promotion, and Transfer

To establish an individual prima facie case of discrimination in hiring or promotion decisions, an unsuccessful applicant must demonstrate that: (1) plaintiff applied for and was qualified for a job or promotion for which the employer was seeking applicants; (2) despite their qualifications, the applicant was rejected for the position; and (3) after the plaintiff was rejected, the position remained open and the employer continued to seek applications from individuals with similar qualifications.[47] When an employer maintains a formal system for hiring and promoting, a plaintiff's prima facie case must establish that the individual expressed a desire for the promotion, and followed the formal procedures for obtaining the promotion.[48] The Department of Justice has recently adjusted its stance, asserting that Title VII similarly applies to the discriminatory denial of transfers, even if that transfer is "purely lateral" with no change in pay or working conditions.[49]

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45. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 147 (2000) ("The factfinder's disbelief of the reasons put forward by the defendant [] may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.") (emphasis in original) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1983)).

46. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981).

47. *See McDonnell Douglas Corp*., 411 U.S. at 802; *see also* Burdine, 450 U.S. at 254 n.6 (applying the prima facie elements of a race-discrimination case, as articulated in *McDonnell Douglas*, to a sex-discrimination case).

48. *See* Williams v. Giant Food, Inc., 370 F.3d 423, 430–31 (4th Cir. 2004) ("If an employer has a formal system of posting vacancies and allowing employees to apply for such vacancies, an employee who fails to apply for a particular position cannot establish a prima facie case of discriminatory failure to promote. In such a circumstance, the employee's general requests for advancement are insufficient to support a claim for failure to promote. On the other hand, if the employer fails to make its employees aware of vacancies, the application requirement may be relaxed and the employee treated as if she had actually applied for a specific position."); *cf.* Smith v. J. Smith Lanier Co., 352 F.3d 1342, 1345 (11th Cir. 2003) (holding that expressing a general interest in being rehired without submitting an application is not enough to establish a prima facie case of age discrimination when a defendant-employer has publicized an open position).

49. *See* Brief for the Respondent in Opposition, Forgus v. Shanahan, No. 18-942, 2019 WL 2006239, at *8 (May 6, 2019), *cert. denied*, Forgus v. Esper, 141 S. Ct. 234 (2020) (stating that the Fourth

An employer can still avoid liability if the decision was based on a legitimate non-discriminatory reason, such as choosing to hire an equally qualified applicant over another, barring any evidence of an unlawful motive.[50] Moreover, a "desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate, and common reason on which to base a hiring decision."[51] This reasoning is also applicable in a failure-to-promote case.[52] The employer cannot merely assert that it selected the "best qualified" employee.[53] To satisfy their burden of proof, the employer must articulate specific reasons for its decision "so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[54] Legitimate, non-discriminatory qualifications may include seniority,[55] educational background,[56] technical training,[57] and/or job performance.[58]

Title VII applies to the hiring of non-military federal employees.[59] To bring a claim under § 2000e-16 of Title VII, an individual must be an applicant for federal employment, a current federal employee, or a former federal employee.[60]

A 2008 case brought by a non-military federal employee successfully argued the applicability of Title VII hiring protections to gender identity. In *Schroer v. Billington*, Schroer, a transgender woman, applied for a position of specialist in terrorism with the Congressional Research Service presenting as male.[61] She was highly qualified and tested higher than any other interviewee.[62] After receiving an offer of employment, Schroer informed her employer that she intended to transition from male to female, prompting the Congressional Research Service to withdraw its offer.[63]

Circuit's decision on this case was incorrect, and that the denial of transfer is actionable under Title VII under the plain meaning of the statutory text).

50. *See* Evans v. Techs. Applications and Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996).

51. Holder v. Old Ben Coal Co., 618 F.2d 1198, 1202 (7th Cir. 1980); *see also* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (naming this as one of the most common employer defenses in Title VII hiring cases).

52. *See Evans*, 80 F.3d at 960.

53. *Id.*

54. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255–56 (1981).

55. *See, e.g.*, Dodd v. Runyon, 178 F.3d 1024, 1028 (8th Cir. 1999) (finding no Title VII violation where failure to promote female employee was based on a seniority system that precluded postal clerks from advancing to the position of carrier).

56. *See, e.g.*, Stanziale v. Jargowsky, 200 F.3d 101, 105–06 (3d Cir. 2000) (finding that employer had a legitimate, non-discriminatory reason to pay a female employee with a postgraduate education a higher salary than the male plaintiff, who lacked even a bachelor's degree).

57. *See id.* (noting that the female Sanitary Inspector was more qualified because she, unlike the male plaintiff, had been certified in pesticide application and lead poisoning investigation).

58. *See Evans*, 80 F.3d at 960 ("Job performance and relative employee qualifications are widely recognized as valid, non-discriminatory bases for any adverse employment decision.").

59. Brown v. Gen. Servs. Admin., 425 U.S. 820, 835 (1976); Ferguson v. N.Y.C. Transit Auth., 206 F. Supp. 2d 374, 376 (E.D.N.Y. 2002).

60. 42 U.S.C. § 2000e-16(a) (West); Robinson v. Shell Oil Co., 519 U.S. 337, 341-46 (1997).

61. Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

62. *Id.* at 296.

63. *Id.* at 296, 299.

Schroer brought a claim under Title VII.[64] The court ruled in favor of Schroer, determining that denying her employment because of her transition fits precisely under discrimination "because of sex" under Title VII.[65] The court stated that, for purposes of Title VII liability, it does not matter if an offer of employment is withdrawn because the employee is perceived to be "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transgender person."[66]

2. Compensation

In a Title VII prima facie case of sex-based wage or salary discrimination, a plaintiff must show that they occupy a job similar to other higher paying jobs occupied by the opposite sex.[67] Unlike the Equal Pay Act, "Title VII has a relaxed standard for proving the similarity of positions."[68] For a Title VII case, the plaintiff can meet their burden to establish a prima facie case of discrimination merely by "demonstrating that she is female and that the job she occupied was similar to higher paying jobs occupied by males."[69] Under the Equal Pay Act, however, one must show that they were paid differently "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions" and that they don't fall into any of several exceptions.[70] The plaintiff must then ultimately establish that the employer had an intent to discriminate.[71] An unlawful employment action occurs each time a person is discriminatorily compensated.[72]

3. Discharge

To establish a prima facie case for discriminatory discharge, a plaintiff must show that: (1) their performance adequately met employer expectations; (2) despite their performance, plaintiff was discharged or demoted; and (3) after their termination or demotion, the employer either sought a replacement with similar

64. *Id*. at 295.

65. *Id*. at 308.

66. *Id*. at 305.

67. *See* Sprague v. Thorn Ams., Inc., 129 F.3d 1355, 1363 (10th Cir. 2003) ("A female Title VII plaintiff establishes a prima facie case of sex discrimination by showing that she occupies a job similar to that of higher paid males.") (quoting Meeks v. Computer Assocs. Int'l, 15 F.3d 1013, 1019 (11th Cir. 1994)); EEOC. v. Reichhold Chems., Inc., 988 F.2d 1564, 1569 (11th Cir. 1993). *But see* Adams v. CBS Broad., Inc., 61 F. App'x 285, 288 (7th Cir. 2003) (noting that the Supreme Court has not articulated how the standard four-part McDonnell Douglas analysis should be tailored to wage-discrimination claims).

68. *Reichhold Chems*., 988 F.2d at 1570; s*ee also* Lawrence v. CNF Transp., Inc., 340 F.3d 486, 492–95 (8th Cir. 2003) (finding for the plaintiff on sex-discrimination claim under the Equal Pay Act and Title VII because she was paid less than her successor and was denied a benefit given to him).

69. Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1529 (11th Cir. 1992).

70. 29 U.S.C. § 206(d)(1) (West).

71. *See* Belfi v. Prendergast, 191 F.3d 129, 140 (2d Cir. 1999); *Reichhold Chems*., 988 F.2d at 1570.

72. *See* 42 U.S.C. § 2000e-5(e)(3)(A) (West) (overturning Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).

qualifications and/or replaced the plaintiff with an individual who was not a member of the plaintiff's protected class.[73]

Similar prima facie requirements exist when a plaintiff claims to have been improperly discriminated against during a reduction-in-force layoff. In this situation, the plaintiff must demonstrate that: (1) the plaintiff was selected for discharge from a larger group of employees; (2) the plaintiff was performing at a level largely equivalent to the lowest category of the group maintained; and (3) the selection process for discharge resulted in more favorable treatment of similarly-situated employees who were not members of the plaintiff's protected class.[74]

Most federal circuits allow a finding of improper discharge even if the plaintiff does not show that their successor was not a member of plaintiff's protected class; the characteristics of the plaintiff's replacement are important but not dispositive.[75] However, the Sixth and Ninth Circuits find improper discharge only when the plaintiff was replaced with, or at least treated less favorably than, an individual who did not share the plaintiff's protected trait.[76]

4. Constructive Discharge

A constructive-discharge claim arises when an employee quits due to the employer's conduct.[77] Courts examine the circumstances surrounding an employee's decision

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73. *See* Karpel v. Inova Health Sys. Servs., 134 F.3d 1222, 1227–28 (4th Cir. 1998) (outlining the prima facie elements of a Title VII discriminatory discharge); *see also* Neuren v. Adduci, 43 F.3d 1507, 1512 (D.C. Cir. 1995); Cumpiano v. Banco Santander P.R., 902 F.2d 148, 153 (1st Cir. 1990).

74. *See, e.g.*, Corti v. Storage Tech. Corp., 304 F.3d 336, 340 n.6 (4th Cir. 2002) (applying *Mitchell* to a Title VII gender discrimination claim); Krchnavy v. Limagrain Genetics Corp., 294 F.3d 871, 876 (7th Cir. 2002) (stating that in a mini-reduction-in-force, where a discharged employee's duties were absorbed by other employees, the plaintiff must show that those other employees were not members of the protected class); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315 (4th Cir. 1993) (outlining prima facie case for discriminatory reduction-of-force in ADEA context).

75. *See, e.g.*, Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997) (stating that evidence that the replacement was within plaintiff's protected class was "certainly material to the question of discriminatory intent," but "not outcome determinative"); Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1996) (stating that, while replacing a plaintiff with an individual outside of the plaintiff's protected class "may help to raise an inference of discrimination," it is "neither a sufficient nor a necessary condition"); *Cumpiano*, 902 F.2d at 154–55 (stating that a replacement's characteristics "may have evidentiary force in a particular case," however, the fourth prong may be satisfied "simply by showing that the employer had a continued need for someone to perform the same work after [the complainant] left"); Walker v. St. Anthony's Med. Ctr., 881 F.2d 554, 558 (8th Cir. 1989) (stating that the sex of the plaintiff's replacement is a relevant consideration, but not necessarily a determinative factor in whether she established a prima facie case of discrimination); Meiri v. Dacon, 759 F.2d 989, 996 (2d Cir. 1985) (stating that evidence that replacement was within plaintiff's protected class "may weaken, but certainly does not eliminate, the inference of discrimination"); Schwartz v. Paralyzed Veterans of Am., 930 F. Supp. 3, 9 (D.D.C. 1996) (stating that evidence that replacement was within plaintiff's protected class is relevant but not dispositive of fourth prong, though ultimately ruling against her on that basis).

76. *See* Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 660 (9th Cir. 2002); Mitchell v. Toledo Hosp., 964 F.2d 577, 582–83 (6th Cir. 1992).

77. Levenstein v. Salafsky, 414 F.3d 767, 774 (7th Cir. 2005).

to quit and the employer's conduct that precipitated that decision.[78] In *Pennsylvania State Police v. Suders*, a case involving workplace sexual harassment, the Supreme Court held that Title VII is violated when sexually harassing behavior in the workplace becomes so intolerable that a reasonable employee would feel compelled to resign.[79]

An employer may defend against a claim of constructive discharge due to sexual harassment using an *Ellerth-Faragher* affirmative defense.[80] The employer must demonstrate that (1) it had implemented a policy to address complaints about sexual harassment, and (2) the plaintiff unreasonably failed to utilize this resource.[81] However, this defense is not permissible in cases where the plaintiff reasonably resigns because of an official adverse change in the plaintiff's employment status.[82]

5. Disciplinary Action

To assert a prima facie case of improper disciplinary action, a plaintiff must show that (1) they were qualified for the job, and (2) a similarly-situated employee engaged in identical or similar misconduct but was not punished as severely.[83]

6. Retaliation

Title VII prohibits an employer from taking adverse action against a job applicant or employee "because [s]he has opposed any practice made an unlawful employment practice by [Title VII] or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" regarding a Title VII violation.[84] A retaliation claim may be established even if the plaintiff does not succeed on the underlying harassment claims.[85] In the retaliation context, an employer's conduct is actionable if it would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."[86]

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78. *See* Pa. State Police v. Suders, 542 U.S. 129, 134 (2004) (holding that constructive discharge is found where the plaintiff can "show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."); *Levenstein*, 414 F.3d at 775 ("We conclude that a person who is on leave with pay, with a temporary (though unsatisfying) reassignment pending an investigation of serious job misconduct, who resigns rather than waits for the conclusion of reasonable prescribed due process procedures of the institution, has not from an objective standpoint been constructively discharged.").

79. *Suders*, 542 U.S. at 148.

80. *Id*. at 130.

81. *See id*. at 134.

82. *See id.*

83. *See* Alexander v. Fulton Cnty., 207 F.3d 1303, 1336 (11th Cir. 2000), *overruled on other grounds by* Manders v. Lee, 338 F.3d 1304, 1308 n.52 (11th Cir. 2003); *see also* Archie v. Frank Cockrell Body Shop, Inc., 581 Fed. App'x. 795, 798 (11th Cir. 2014).

84. 42 U.S.C. § 2000e-3(a) (West).

85. Gilooly v. Mo. Dep't of Health, 421 F.3d 734, 739 (8th Cir. 2005).

86. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

To assert a prima facie case of retaliation under Title VII, an employee must show that: (1) the employee engaged in conduct protected under Title VII; (2) the employee suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action.[87] Circumstantial evidence is sufficient to establish a causal connection, such as when the employer points to certain conduct as a justification for punishing the plaintiff but does not punish other employees who have engaged in the same type of conduct.[88] The Ninth Circuit allows proximity in time to be used to establish an inference of retaliation.[89] However, the Second and Eighth Circuits have held that circumstantial evidence must consist of more than mere temporal proximity in order to give rise to an inference of retaliatory motive.[90] There is no definitive time limit that establishes a presumption, though the Supreme Court has ruled that twenty months is too long to establish temporal proximity.[91] Other courts have determined that shorter time periods are insufficient.[92]

In *Burlington Northern Santa Fe Railway Co. v. White*, the Supreme Court resolved a long-standing dispute between the circuits as to the scope of Title VII's anti-retaliation provision, by holding that unlike the substantive provision, the anti-retaliation provision is not limited to discriminatory actions that have an effect upon the terms or conditions of one's employment.[93] Instead, an adverse employment action is one that would have been "materially adverse" to a "reasonable employee" who may have decided against pursuing a discrimination claim on that basis.[94] The Supreme Court affirmed the broad scope of the Title VII anti-retaliation provision in *Thompson v. North American Stainless* by applying the *Burlington* standard to third-party reprisals, meaning employer retaliation through adverse actions against an employee other than the plaintiff, but who has some relationship with or is close to the plaintiff. [95] However, the Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful.[96]

87. *Gilooly*, 421 F.3d at 739–40 (reversing summary judgment for employer as to the plaintiff's retaliation claim because the termination was based on the plaintiff's conduct during a sexual harassment investigation).

88. *See* Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

89. *See* Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

90. *See* El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010); Kipp v. Mo. Highway Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002).

91. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (noting that "[a]ction taken (as here) 20 months later suggests, by itself, no causality at all.").

92. *See, e.g.*, Thomas v. Cooper Lighting Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (holding that a period of three to four months is insufficient to establish close temporal proximity).

93. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–70 (2006).

94. *Id.* at 68.

95. Thompson v. N. Am. Stainless, 562 U.S. 170, 174–75 (2011) (including the example of firing a plaintiff's "close family member").

96. *Id.* at 173–75 (finding that the plaintiff had a Title VII retaliation claim when he was fired after his fiancée filed a charge alleging sex discrimination because it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.").

The Supreme Court also raised the standard of proof required to show retaliation in a 5-4 decision in *University of Texas Southwestern Medical Center v. Nassar*.[97] In *Nassar*, a doctor of Middle Eastern descent alleged that his ultimate supervisor at the university discriminated against him on the basis of his religion and ethnicity.[98] As a result of the harassment, Nassar arranged to terminate his work at the university, and instead joined the staff of the affiliated hospital.[99] Nassar sent a letter to the supervisor of the alleged harasser, explaining why he was resigning, but this supervisor rejected his accusations, expressing interest in publicly exonerating the alleged harasser.[100] This supervisor then protested to the hospital, and Nassar's employment offer was withdrawn.[101] The Court rejected the "motivating-factor" standard, instead adopting "but-for causation" and holding that "a plaintiff making a retaliation claim under §200e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."[102] The Court declined to apply this standard to the case at hand, and remanded it to the Fifth Circuit to do so.[103]

The Court based its reasoning in *Nassar* on the textual definition of the word "because" and tort law, rejecting an Equal Employment Opportunity Commission (EEOC) compliance manual's interpretation.[104] The Court also relied on *Gross v. FBL Financial Services Inc*.,[105] a case that has been widely interpreted by the lower courts to require that the employer's desire to discriminate was the "but-for" cause of the adverse employment action.[106]

Justice Ginsburg wrote a strong dissent in *Nassar*, which she read from the bench.[107] In her dissent, Justice Ginsburg wrote, "[a]dverting to the close connection between discrimination and retaliation for complaining about discrimination, this Court has held, in a line of decisions unbroken until today, that a ban on discrimination encompasses retaliation." Justice Ginsburg called on Congress to overturn the rulings, just as she successfully did in 2007 in response to the *Lilly Ledbetter*[108] decision.[109]

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97. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2532–33 (2013).

98. *Id*. at 2523.

99. *Id*. at 2523–24.

100. *Id*. at 2524.

101. *Id*. According to the supervisor of the alleged harasser, staff physicians at the hospital were required to also serve on the faculty of the university due to the affiliation agreement between the two institutions.

102. *Id*. at 2534.

103. *Id*.

104. *Id*. at 2524–25, 2527–28, 2533–34.

105. 557 U.S. 167 (2009).

106. Brian S. Clarke, *The Gross Confusion Deep in the Heart of University of Texas Southwest Medical Center v. Nassar*, 4 CAL. L. REV. 75, 75–76 (2013).

107. Debra Cassens Weiss, *SCOTUS Rules for Employers in Bias and Retaliation Cases; Ginsburg Says Ball is in Congress' Court*, AM BAR ASS'N J. (Oct. 31, 2020, 5:58 PM), http://www.abajournal.com/news/article/scotus_rules_for_employers_in_bias_and_retaliation_cases_ginsburg_says_ball/.

108. Ledbetter v. Goodyear Tire Rubber Co., 127 S. Ct. 2162 (2006).

109. Cassens Weiss, *supra* note 107. This decision was released on the same day as the Court's decision in *Vance v. Ball State University*, and in her bench statement jointly condemning the two

C. SYSTEMIC DISPARATE TREATMENT

Systemic disparate treatment and individual disparate treatment are subsections of disparate treatment.[110] Individual plaintiffs tend to rely on the theory of systemic disparate treatment instead of individual disparate treatment because of how discrimination evolved in the workplace.[111] The subtlety of demonstrating individual discrimination treatment such as day-to-day interactions is hard to prove from a singular perspective.[112] While most discrimination practices are subtle because overt discrimination is taboo, systemic disparate treatment theory allows the aggregation of the subtle discrimination on an institutional level.[113] The aggregated subtle discrimination is proven through statistical evidence, anecdotal evidence, and social scientist testimony.[114] Thus, systemic disparate treatment theory does not require the plaintiffs to identify specific based biases of their employers, instead of placing the blame on the entity perpetuating discrimination practices.[115]

Systemic disparate treatment occurs when an ongoing practice or policy has an adverse effect on a protected class.[116] Although Title VII does not require an employer to mirror the demographics of the general population in its labor force, disproportionate representation can be evidence of systemic disparate treatment.[117] When specific qualifications are required for a position, statistical evidence must exclude unqualified group members to prove systemic disparate treatment.[118]

To show employer intent in these cases, plaintiffs often focus on the overall pattern of discriminatory decision making, rather than on individual employment decisions.[119] However, assessment of individual employment decisions may

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decisions, Justice Ginsburg called on Congress to overrule both. *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2466 (2013).

110. Martha S. Davis, *Rape in the Workplace*, 41 S.D. L. REV. 411, 429 (1996).

111. Stephanie S. Silk, *More Decentralization, Less Liability: The Future of Systemic Disparate Treatment in the Wake of Wal-mart v. Duk*es, 67 U. MIAMI L. REV. 637, 654 (2013).

112. *Id*. at 655.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See* Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1301 (8th Cir. 1997) (citing l Aff. Action Compl. Man. (BNA) § 2:0005) ("Employment policies or practices that serve to differentiate or to perpetuate a differentiation in terms or conditions of employment of applicants or employees because of their status as members of a particular group . . . concerns a recurring practice or continuing policy rather than an isolated act of discrimination.").

117. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

118. *See* Hazelwood Sch. Dist. v. United States, 433 U.S 299, 308 n.13 (1977) (noting that a comparison to the general population was sufficient in *Int' l Brotherhood of Teamsters* because truck driving is an easily acquired skill, but teaching in a school requires special qualifications); *see also* Alexander v. Fulton Cnty., 207 F.3d 1303, 1327–28 (11th Cir. 2000) (stating that underrepresentation of whites in sworn law enforcement positions relative to the general population was insufficient evidence of discrimination against whites because the general population is not qualified for such positions), *rev'd on other grounds*, Manders v. Lee, 338 F.3d 1304, 1328 n.52 (11th Cir. 2003).

119. *See Int'l Brotherhood of Teamsters*, 431 U.S. at 360 n.46.

reveal a general pattern of discrimination or a discriminatory policy.[120] The EEOC extends these protections to federal contractors, subcontractors, and construction subcontractors in an effort to provide protection against disparate treatment to an expanded category of federally funded workers.[121]

A systemic disparate treatment claim can be supported by a facially discriminatory policy, statistical evidence,[122] anecdotal evidence,[123] or a combination of these factors.[124] Statistical evidence can be particularly useful, as it allows courts to infer that a pattern of adverse actions— against employees of one sex—is the result of discriminatory treatment.[125] To be effective, the statistical evidence must use a qualified labor pool as the basis for comparison.[126] Without this basis, a plaintiff must provide an appropriate benchmark against which the court may evaluate whether a statistical disparity exists.[127] Although anecdotal evidence may strengthen the evidence of disparate treatment, statistical disparities alone may establish a prima facie case where there are gross disparities.[128] Plaintiffs do not have to prove discrimination with scientific certainty;[129] statistical evidence

120. *Id.*

121. Discrimination on the Basis of Sex, 81 Fed. Reg. 39, 108–01 (Aug. 15, 2016).

122. *See id.* at 339 (citing Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620 (1974)) ("[S]tatistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue.").

123. *See Alexander*, 207 F.3d at 1325 (stating that anecdotal evidence concerning discriminatory treatment of similarly situated co-plaintiffs or nonparties who are members of a complainant's protected group "undoubtedly are relevant to every other plaintiff's core allegation of systemic discrimination."); *see also* Damon v. Fleming Supermarkets of Fla., 196 F.3d 1354, 1361 (11th Cir. 1999) (stating that anecdotal evidence is significant in cases of individual plaintiffs alleging individual disparate treatment).

124. *See, e.g.*, *Int'l Brotherhood of Teamsters*, 431 U.S. at 338–42.

125. *See id.* at 339 (noting that statistical evidence of "longstanding and gross disparity" may suffice to establish a prima facie case of pattern and practice discrimination under Title VII because "absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.").

126. *See* Evans v. McClain of Ga., 131 F.3d 957, 963 (11th Cir. 1997) (finding no pattern or practice of discrimination where an African-American plaintiff demonstrated statistical evidence of a disproportionately low number of African-American supervisory employees but did not demonstrate statistical evidence of African-American applicants for his position as an assistant plant manager because "statistics without an analytic foundation are virtually meaningless."); *see also* Krodel v. Young, 748 F.2d 701, 709 (D.C. Cir. 1984) ("Where liability depends on a challenge to systemic employment practices, courts have required finely tuned statistical evidence, normally demanding a comparison of the employer's relevant workforce with the qualified populations in the relevant labor market.").

127. *See* Forehand v. Fla. State Hosp., 89 F.3d 1562, 1574 (11th Cir. 1996) ("Courts should adopt the benchmark which most accurately reflects the pool of workers from which promotions are granted unless that pool has been skewed by other discriminatory hiring practices.").

128. *See* Hazelwood Sch. Dist. v. United States, 433 U.S. at 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

129. *See* Bazemore v. United States, 478 U.S. 385, 400 (1986) ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.").

showing gross disparities in the representation of characteristics, coupled with anecdotal or circumstantial evidence, may be enough to establish a discriminatory pattern or practice.

In a systemic-disparate-treatment case seeking class-wide injunctive or declaratory relief, plaintiffs need not present evidence that each person who seeks relief was a victim of the employer's discriminatory policy.[130] Rather, plaintiffs need only prove that the company's standard operating procedure was discriminatory, which may be shown through statistics alone.[131]

A plaintiff can claim systemic disparate treatment, due to sex, if: (1) formal policies were in place,[132](2) pattern-and-practice of discrimination is demonstrated,[133] and (3) the employer's defenses do not show that the discrimination is statistically significant[134] and it was not conducted in pursuit of affirmative action.[135] Confirming that these factors are met establishes a prima facie case for systemic disparate treatment.

1. Formal Policies

Title VII prohibits: (i) formal employment policies classifying certain occupations as male or female positions;[136] (ii) sex-specific employee guidelines that do not impose comparable requirements upon the different sexes;[137] and (iii) formal policies of disparate compensation and provisions of benefit plans that provide

130. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 360 (1977); *cf.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S 338, 349-50 (2011) ("Commonality [a requirement for class certification] requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution").

131. *Int'l Brotherhood of Teamsters*, 431 U.S. at 336; Beck v. Boeing Co., No. 02-35140, 2003 WL 683797, at *1 (9th Cir. Feb. 25, 2003).

132. *See* Long v. Ringling Bros., 882 F. Supp. 1553, 1559 (D. Md. 1995).

133. *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000).

134. *See Int'l Brotherhood of Teamsters*, 431 U.S. at 360.

135. *See* United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979).

136. *See Long*, 882 F. Supp. at 1559 (finding a Title VII violation where an employer refused to interview a qualified female candidate for a road controller position in overseas operations based on the employer's preference for a male employee to occupy the position, as the refusal constituted a formal policy of discrimination).

137. *See* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1029–30 (7th Cir. 1979) (finding no Title VII violation where personal appearance regulations had different requirements for women and men as long as the requirement was justified by some commonly accepted social norm and was reasonably related to employer's business needs); *see also* O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987). *But see* Viscecchia v. Alrose Allegria, LLC, No. 14-CV-6064, 2015 WL4602729, at *5 (E.D.N.Y. July 30, 2015) (citing Harper v. Blockbuster Ent. Corp., 139 F.3d 1385, 1387 (11th Cir. 1998)) (finding no Title VII violation where an employer enforced a hair length policy for male employees but not female employees because courts have held that sex-specific grooming policies do not violate Title VII's mandate of equal employment opportunities).

benefits at different rates[138] or require different contributions[139] based on the employee's sex.

An employer may avoid liability by asserting a Bona Fide Occupational Qualification defense (BFOQ).[140] The employer bears the burden to demonstrate that its discriminatory practice relates to a characteristic that goes to the "essence" of the enterprise and bears a high correlation to the plaintiff's capacity to perform their job.[141] Notably, this defense is unavailable when discrimination is based on race or color.[142]

2. Pattern-and-Practice

In order to prove that an employer's pattern and practice of hiring, promotion, or other employment-related activities constitute systemic disparate treatment, a plaintiff must demonstrate by a preponderance of the evidence that the employer's standard operating procedure was to discriminate on the basis of sex.[143] Sporadic acts of sex discrimination are insufficient to assert a prima facie case of systemic disparate treatment.[144] Statistical evidence, as discussed above, can be an effective tool to demonstrate that an employer's standard operating procedure is discriminatory.[145]

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138. *See, e.g.*, Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1074 (1983) (finding a Title VII violation where a company calculated monthly benefit payments using sex-based mortality tables resulting in lower monthly benefits for females than for similarly-situated males who contributed equal amounts during tenure).

139. *See* L.A. Dep't of Water Power v. Manhart, 435 U.S. 702, 712–13 (1978) (finding a Title VII violation where an employer relied on actuarial tables based entirely on sex to require greater contributions to benefit plans from female employees).

140. *See* 42 U.S.C. § 2000e-2(e) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.").

141. *See* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 407–13 (1985). For more on the bona fide occupational qualification (BFOQ) defense, *see supra* Part II.A.2.

142. *See* 42 U.S.C. § 2000e-2(e) ("It shall not be unlawful . . . for an employer to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.").

143. *See* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286–87 (11th Cir. 2000) ("A pattern and practice claim either may be brought by the EEOC if there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination. . .or by a class of private plaintiffs under 42 U.S.C. § 2000e. In such suits, the plaintiffs must establish that 'sex discrimination was the company's standard operating procedure.' To meet this burden of proof, a plaintiff must 'prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts. It has to be established by a preponderance of the evidence that [] discrimination [is] the company's standard operating procedure—the regular rather than unusual practice.'").

144. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977).

145. *Id.* at 339.

3. Employer's Defenses

In systemic-disparate-treatment cases, the employer's defense must be "designed to meet the prima facie case" established by the plaintiff's statistical proof because the focus of its rebuttal "will not be on individual employment decisions."[146] To meet its rebuttal burden, the employer must demonstrate that the plaintiff's statistical evidence "is either inaccurate or insignificant."[147]

Another defense that employers may exercise is the use of affirmative action as a rationale for differential treatment. The Supreme Court has held that an employer can lawfully take race into account in preferring African-American candidates as a group for admission when the position will have an on-the-job training program.[148] Additionally, the preference must be designed to remedy underrepresentation in the workforce relative to the labor pool, thus making the action consistent with the purpose of Title VII.[149] Likewise, employers may take sex into account as a group for admission to address the problem of underrepresentation of women in the workforce.[150] They may also use those programs as a defense against claims of discrimination.[151] Once a plaintiff has presented a prima facie case for sex discrimination alleging that they were passed over in favor of a protected class, the employer need only articulate the existence of an affirmative action plan to justify its adverse employment decision.[152] The plaintiff then bears the burden to prove that the affirmative action plan is invalid; thus, the plan is pretextual.[153] An affirmative action plan is valid as long as it was implemented to correct a manifest imbalance in the workplace and is narrowly tailored in duration and scope so as not to unnecessarily infringe upon the rights of non-minorities.[154]

D. SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination and is thus actionable under Title VII.[155] A sexual harassment claim may be made in response to any unwelcomed sexual behavior that unreasonably impedes an individual's work performance or

146. *Id*. at 360 n.46.
147. *Id*. at 360.
148. *See* United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979).
149. *Id*.
150. *Id*. at 205 n.5.
151. *See* Johnson v. Transp. Agency, Santa Clara Cty., 480 U.S. 616, 626–27 (1987).
152. *See id*. at 626.
153. *Id*.
154. *See id*. at 637, 640 (finding that as part of an affirmative action plan for gradual improvement in the representation of minorities and women in an agency's work force, the agency was allowed to take the employee's sex into account in determining her eligibility for promotion); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (finding a Title VII violation because the affirmative action program was not sufficiently tailored to remedy past discrimination); United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (finding no Title VII violation where preferential treatment was based on an acceptable affirmative action program adopted as a temporary measure to eliminate manifest imbalance in workforce).
155. Solotoff & Kramer, *supra* note 1, at 1–3; Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

creates an environment that is intimidating, offensive, or hostile.[156] Sexual harassment claims fall under the disparate-treatment theory of Title VII and encompass both "quid-pro-quo" and "hostile-work-environment" claims.[157] The EEOC determined that sexual harassment is actionable under Title VII because it prevents employees from working in an environment free of discriminatory ridicule, insult, and intimidation.[158]

In order for a plaintiff to make a case for sexual harassment under Title VII, they must establish a (1) prima facie case[159] within the bounds of recognized (2) types of sexual harassment.[160]

1. Prima Facie Case

A plaintiff asserting a sexual harassment claim must first establish that the defendant's alleged conduct was (a) unwelcome and unsolicited and (b) motivated "because of sex."[161] This standard does not preclude same-sex harassment claims,[162] nor does the conduct have to be motivated by sexual desire.[163]

a. Unwelcomeness. To establish a prima facie case of sexual harassment, a plaintiff must show that the alleged conduct was unwelcome and unsolicited.[164] To show unwelcomeness, the plaintiff must show that they "neither solicited . . . nor invited" the sexual advances and "regarded the conduct as undesirable or offensive."[165] The focus will be on the "plaintiff's words, deeds and deportment."[166] Importantly, the plaintiff need not show that their participation was involuntary.[167] The defendant may counter this claim by introducing evidence that the plaintiff welcomed the sexual behavior, as long as such evidence is not unfairly

156. *See Meritor*, 477 U.S. at 65.
157. *Id.*
158. *Id.*
159. *See id.* at 68.
160. *Id* at 65.
161. *See id.* at 68 ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.").
162. *See* Noto v. Regions Bank, 84 F. App'x 399, 401–02 (5th Cir. 2003). In *Noto*, the court stated that a plaintiff could allege same-sex sexual harassment in one of three ways. "First, he can show that the alleged harasser made 'explicit or implicit proposals of sexual activity' and provide 'credible evidence that the harasser was homosexual.' Second, he can demonstrate that the harasser was 'motivated by general hostility to the presence of [members of the same sex] in the workplace.' Third, he may 'offer direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'"
163. *See* Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 80 (1998); EEOC v. Nat'l Educ. Ass'n, Ala., 422 F.3d 840, 844 (9th Cir. 2005).
164. *See Meritor*, 477 U.S. at 68 (quoting 29 C.F.R. § 1604.ll(a) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").
165. Moberly v. Midcontinent Comm'ns, 711 F. Supp. 2d 1028, 1038 (D.S.D. 2010) (quoting Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 966 (8th Cir. 1999)).
166. Souther v. Posen Constr., Inc., 523 F. App'x 352, 355 (6th Cir. 2013).
167. *See Meritor*, 477 U.S. at 68.

prejudicial.[168] Some courts have excluded evidence of a plaintiff's sexual conduct outside the workplace, when offered to show welcomeness, on grounds that such evidence is only marginally probative and creates a substantial risk of unfair prejudice.[169]

b. "Because of Sex" Rationale. Title VII prohibits discrimination that occurs "because of [an] individual's . . . sex."[170] The "because of sex" provision protects both males and females.[171] The critical inquiry in the "because of sex" analysis is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of other sexes are not exposed.[172] Even when employees of different sexes are exposed to harassing conduct, female employees can be disproportionately harmed when the conduct degrades women.[173]

2. Types of Sexual Harassment

Although the terms (a) "quid pro quo" and (b) "hostile work environment" are not included in the text of Title VII,[174] the Supreme Court distinguished between quid-pro-quo and hostile-work-environment claims in *Meritor Savings Bank v. Vinson*, and ultimately determined that both of these kinds of claims are entitled to protection under Title VII.[175]

a. Quid Pro Quo. To establish a prima facie case for "quid pro quo" harassment, a plaintiff must demonstrate that: (1) they refused unwelcome sexual advances;[176]

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168. *See* EEOC, Notice No. N-915-050, Policy Guidance on Current Issues of Sexual Harassment (1990), http://www.eeoc.gov/policy/docs/currentissues.html; *see generally* Fed. R. Evid. 412(b)(2) ("In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.").

169. *See* Fed. R. Evid. 401, 403, 404; Wolak v. Spucci, 217 F.3d 157, 160 (2d Cir. 2000) (excluding evidence of the plaintiff's history of viewing pornography outside the workplace because such evidence was of marginal probative value); Polo-Calderon v. Corporacion Puertorriqueña de Salud, 992 F. Supp. 2d 53, 54–55 (D.P.R. 2014) (finding that the probative value of plaintiff's sexuality and texting relationships with other men did not substantially outweigh its prejudicial effect).

170. 42 U.S.C. § 2000e-2(a).

171. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) ("Male as well as female employees are protected against discrimination."); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam) ("[Title VII] requires that persons of like qualifications be given employment opportunities irrespective of their sex.").

172. *See* Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 80 (1998).

173. *See* Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 332 (4th Cir. 2003).

174. *See* 42 U.S.C. § 2000e-2(a).

175. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753–54 (1998) (discussing the history of the development of quid pro quo and hostile work environment sexual harassment).

176. *See* Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1312 (11th Cir. 2001) (denying summary judgment for plaintiff who failed to demonstrate connection between alleged refusal of sexual advances and denial of promotion).

(2) they suffered from a tangible adverse employment action;[177] and (3) the defendant "explicitly or implicitly conditioned a job, a job benefit, or the absence of a job detriment" upon sexual activity.[178]

b. Hostile Work Environment. A prima facie hostile work environment claim must establish that: (1) the plaintiff was subjected to unwelcome sexual harassment; (2) the harassment was based on sex; (3) the harassment affected a "term, condition, or privilege" of the plaintiff's employment; and (4) the employer knew or should have known of the harassment but did not take prompt remedial action.[179] To determine whether the fourth prong has been satisfied, the court looks to the totality of the circumstances, including whether the harassment was frequent and/or severe; physically threatening or humiliating, as opposed to merely offensive; responsible for unreasonably interfering with work performance; and/or undermining the plaintiff's workplace competence.[180] The fourth prong also requires the harassment to be both objectively and subjectively abusive.[181]

A hostile work environment claim comprises a "series of separate acts that collectively constitute one 'unlawful employment practice.'"[182] In other words, the "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive."[183] In analyzing a potentially unlawful employment practice, a court will consider whether (1) the earlier and later events amounted to the same type of employment actions; (2) the events occurred relatively frequently; or (3) the events were perpetrated by the same managers.[184] Only in rare cases can a single instance of sexual harassment create a hostile work environment.[185]

177. *See Ellerth*, 524 U.S. at 761–62 (stating that hiring, firing, failing to promote, or other significant changes in the employee's status constitute a tangible employment action).

178. *See* Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995).

179. *See* Succar v. Dade Cty. Sch. Bd., 229 F.3d 1343, 1344–45 (11th Cir. 2000) (citing Henson v. City of Dundee, 682 F.2d 897, 903–05 (11th Cir. 1982)).

180. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993); Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263, 270 (5th Cir. 1998) (adding the workplace competence factor).

181. *See Harris*, 510 U.S. at 21–22 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

182. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002).

183. *See* Lyon v. Jones, 260 F. Supp. 2d 507, 512 (D. Conn. 2003) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

184. *See* Porter v. Cal. Dep't of Corr., 419 F.3d 885, 893 (9th Cir. 2005).

185. *See, e.g.*, Ferris v. Delta Airlines, Inc., 277 F.3d 128, 136 (2d Cir. 2001) (noting that a single rape is "sufficiently egregious" to alter the conditions of employment).

Some special forms of hostile work environment claims include: (i) non-gender specific conduct as a hostile work environment claim,[186] (ii) hostile work environment for males and females under a single employer,[187] and (iii) common exposure to sexually offensive material.[188] These claims are described in more detail below. Notably, the *Ellerth-Faragher* defense is an affirmative defense to sexual harassment claims and is covered in detail in section II.A.2.

i. Non-Gender-Specific Conduct as a Hostile-Work-Environment Claim. In *EEOC v. National Education Association,* the Ninth Circuit held that although a supervisor's behavior was not on its face sex-related or gender specific, it could constitute a hostile work environment claim.[189] The court focused on whether the supervisor's conduct "affected women more adversely than it affected men."[190] In applying this differential effects standard, the Ninth Circuit held for the first time that "evidence of differences in subjective effects . . . is relevant in determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."[191] With this decision, the Ninth Circuit joined the First, Seventh, and Eighth Circuits in supporting the idea that "the fact that some men were also harassed, does not automatically defeat a showing of differential treatment" of women.[192] The Ninth Circuit reasoned that the alternative would be to deny protection to female employees who happened to work in predominantly female environments.[193]

ii. Hostile Work Environment for Both Males and Females under a Single Employer. The Seventh Circuit departed from traditional "because of sex" jurisprudence in *Venezia v. Gottlieb Memorial Hospital* which established a

186. *See, e.g.*, EEOC v. Nat'l Educ. Ass'n, Ala., 422 F.3d 840, 845–46 (9th Cir. 2005) (finding a hostile work environment claim valid even though the supervisor's behavior was not, on its face, sex related or gender specific).

187. *See, e.g.*, Venezia v. Gottlieb Mem'l Hosp., 421 F.3d 468, 471–72 (7th Cir. 2005) (finding co-plaintiffs of males and females can proceed with a Title VII claim when they suffer harassment by the same employer, but in different circumstances).

188. *See, e.g.*, Petrosino v. Bell Atl., 385 F.3d 210, 223 (2d Cir. 2004) (finding that a female plaintiff was not precluded from asserting a hostile work environment claim, even though the offensive material was not specifically directed toward her and men were equally exposed).

189. *Nat'l Educ. Ass'n, Ala.*, 422 F.3d at 845–46 (reversing summary judgment for the employer where a supervisor repeatedly shouted at and physically intimidated female employees but not their male coworkers).

190. *Id.* at 845.

191. *Id.* at 845–46.

192. *Id.* at 846; *see also* Rosario v. Dep't of Army, 607 F.3d 241, 249 (1st Cir. 2010) ("The record as a whole would thus permit a reasonable jury to conclude that Rosario was exposed to harassment that differed in both kind and degree from that imposed on male employees."); Haugerud v. Amery Sch. Dist., 259 F.3d 678, 695 (7th Cir. 2001) (reversing summary judgment on hostile-work-environment claim even though the "because of sex" determination was difficult where the plaintiff was the only female employee); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (reversing summary judgment where ten female and four male employees were harassed; the harassment was found to involve "primarily women," and the harassment could meet the "because of sex" standard).

193. *See Nat'l Educ. Ass'n, Ala.*, 422 F.3d at 847.

precedent in which male and female co-plaintiffs can proceed with a Title VII claim when they suffer harassment by the same employer, but under different circumstances.[194] In *Venezia*, a husband and wife both filed Title VII claims against their mutual employer.[195] Since the claims arose from "distinct harassing actions, at the hands of different people, albeit with a certain amount of overlap," the actions were sufficiently distinct and plaintiffs could proceed with their claims.[196]

iii. Common Exposure to Sexually Offensive Material. In *Petrosino v. Bell Atlantic*, the Second Circuit held that "common exposure of male and female workers to sexually offensive material [does not] necessarily preclude[] a woman from relying on such evidence to establish a hostile work environment based on sex."[197] *Petrosino* explained that the plaintiff was not precluded from asserting a hostile work environment claim, even though much of the offensive material was not specifically directed toward the plaintiff and it was likely that her male co-workers would have engaged in such conduct even if she were not present.[198] The court concluded that because the behavior demeaned women as a group, the fact that men were equally exposed did not defeat the plaintiff's claim.[199] The Second Circuit's decision is joined by the Eleventh, Sixth, and Fourth Circuits in deciding that the plaintiff need not be the direct recipient of discriminatory language in order for a hostile work environment to be formed.[200]

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194. *See* Venezia v. Gottlieb Mem'l Hosp., Inc., 421 F.3d 468, 471–72 (7th Cir. 2005).

195. *Id.* at 470.

196. *Id.* at 471. The court further explained that disallowing such claims would "exclude the possibility of a lawsuit by a husband and wife employed by the same large company, in which the wife reports to Supervisor A, who discriminates against women, and the husband reports to Supervisor B, who discriminates against men. It is easy enough to see how both wife and husband could file separate suits against the company and pursue their claims. The fact that they have joined together as plaintiffs against a common defendant, where common issues of fact may include what kind of workplace harassment policy the employer had and how was it disseminated to the employees, makes no legal difference." *Id.*

197. Petrosino v. Bell Atl., 385 F.3d 210, 223 (2d Cir. 2004); *see also* Patane v. Clark, 508 F.3d 106, 114–15 (2d Cir. 2007) (finding that female secretary's regular observation of supervisor's viewing of pornographic videos, regular handling of such videotapes in opening and delivering the supervisor's mail, and one-time discovery of pornographic websites viewed by her supervisor on her computer could constitute sufficient allegations of hostile work environment).

198. *See Petrosino*, 385 F.3d at 222.

199. *Id.* ("[T]he depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men. Such workplace disparagement of women, repeated day after day over the course of several years without supervisory intervention, stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues.").

200. *Id.*; *see also* Harris v. Mayor & City Council of Balt., 429 F. App'x 195, 200 (4th Cir. 2011); Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 811 (11th Cir. 2010) ("A final principle that guides us in this decision is that words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff."); Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 272 (6th Cir. 2009).

E. PREGNANCY DISCRIMINATION

In 1978, Congress passed the Pregnancy Discrimination Act, amending the language of the definitions section of Title VII.[201] The Act clarified that Title VII's "because of sex" terminology includes "because of or on the basis of pregnancy, childbirth, or related medical conditions."[202] Courts have interpreted this to mean that "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[203]

The second clause of the Act is less clear: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as persons not so affected but similar in their ability or inability to work."[204]

The Supreme Court in *Young v. United Parcel Service Inc*. assessed the application of this clause to an individual disparate treatment claim.[205] Young alleged that UPS violated the Pregnancy Discrimination Act by refusing to accommodate her pregnancy-related lifting restriction, even though the company accommodated other drivers with similar work restrictions.[206] The case, thus, turned on the interpretation of the phrase "as persons not so affected but similar in their ability or inability to work."[207] The Court held that an individual alleging a disparate treatment claim under the second clause of the Pregnancy Discrimination Act could do so via the *McDonnell Douglas* framework, discussed in section II.A.[208]

A plaintiff can make a prima facie case by showing (1) she belongs to a protected class; (2) that she sought an accommodation; (3) that the employer did not accommodate her; and (4) that the employer accommodated others who were "similar in their ability or inability to work."[209] The employer can then show its actions were justified by legitimate, nondiscriminatory reasons for denying her accommodation, but may not "consist simply of a claim that it is more expensive or less convenient" to accommodate pregnant women.[210] If the employer is able to offer legitimate and nondiscriminatory justifications, the plaintiff may then show that these reasons are pretextual by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers. For example, a plaintiff may provide evidence that "an employer accommodates a large

201. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

202. *Id*.

203. Hall v. Nalco Co., 534 F.3d 644, 647 (7th Cir. 2008) (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983)).

204. Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

205. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

206. *Id*. at 1344.

207. *Id*. at 1343–44.

208. *Id*. at 1353–54.

209. *Id*. at 1354. The Court appears to limit the application of this framework to instances where the plaintiff is relying on "indirect evidence" to show an "inference of intentional discrimination." *Id*. at 1353, 1355.

210. *Id*. at 1354.

percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[211] If the employer's legitimate, nondiscriminatory reasons are not strong enough to justify the burden, then the evidence gives rise to an inference of intentional discrimination.[212]

Notably, the Court did not foreclose the possibility of bringing pregnancy discrimination cases under disparate impact or pattern-and-practice theories in *Young*. However, in 2016, the Eleventh Circuit clarified that "disparate treatment liability attaches only when an employer *intentionally* harms members of a protected group."[213] *Young*'s holding does not stand for the proposition that a disparate treatment claim automatically gives rise to a disparate impact claim because the policy "has an unintended adverse effect on members of a protected group."[214] Thus, the core of the disparate treatment inquiry is still "whether the employer intentionally discriminated against particular persons on an impermissible basis, not whether there was a disparate impact on a protected group as a whole."[215] A plaintiff cannot state a disparate treatment claim by only alleging adverse consequences.[216]

III. DISPARATE IMPACT

Disparate impact is a type of employment discrimination that occurs when a facially neutral policy has a discriminatory effect.[217] When evaluating a disparate impact claim, courts have focused on the effects of the employment practice regardless of whether the policy was neutral in its intent.[218] While both disparate impact and disparate treatment claims involve discrimination, disparate impact claims involve unintentional discrimination whereas disparate treatment claims involve intentional discrimination.[219]

This section will address the (A) establishment of disparate impact, (B) plaintiff's prima facie case, and (C) employer's defense and plaintiff's rebuttal.

A. ESTABLISHMENT OF DISPARATE IMPACT

The Supreme Court first announced a disparate impact theory of discrimination in the context of Title VII in *Griggs v. Duke Power Co.*[220] In *Griggs*, the Supreme

211. *Id.*
212. *Id.*
213. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1025 (11th Cir. 2016) (emphasis in original). For a discussion on the differences between Disparate Treatment claims and Disparate Impact claims refer to section III, *infra*.
214. *Id.* at 1026.
215. *Id.*
216. *Id.*
217. *Id.* at 1032.
218. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1345 (2015).
219. *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1026.
220. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (prohibiting employment practices that operate to exclude blacks which cannot be shown to be related to job performance, notwithstanding the employer's lack of discriminatory intent).

Court held that a neutral employment policy requiring an employee to possess a high school degree and take general aptitude tests violated Title VII because the neutral policies did not relate to an employees' ability to perform the job successfully, and the policy, regardless of its original intent, resulted in discrimination on the basis of a protected class of people.[221]

The Supreme Court extended the disparate impact theory to cover age discrimination in *Smith v. City of Jackson*, where the Court held that the Age Discrimination Employment Act (ADEA) authorized disparate impact suits against employers.[222] In *Smith*, the Court based its decision on similarities in language and purpose between the ADEA and Title VII and found that Congress had "directed the thrust" of both Title VII and the ADEA "to the consequences of employment practices, not simply the motivation."[223] Disparate impact theory does not require a showing of discriminatory intent; therefore, a plaintiff must only show that they were adversely affected on the basis of their protected characteristic. Disparate impact claims are less common under Title VII than disparate treatment claims.[224]

B. PLAINTIFF'S PRIMA FACIE CASE

A plaintiff can invoke the disparate impact theory to combat objective policies, such as standardized test scores,[225] and subjective policies, such as management's beliefs,[226] that disproportionately affect the plaintiff. It is not sufficient for a plaintiff to identify a generalized policy that allegedly causes disparate impact; "[r]ather, the employee is responsible for isolating and identifying specific employment practices that are allegedly responsible for any observed statistical disparities."[227] A plaintiff alleging that an employer's policies disparately impact their protected class must only show that a "significantly discriminatory pattern" results from the employer's facially neutral policies.[228] In making a prima facie case, a plaintiff does not have to use all available evidence but, rather, only

221. *Id.* at 430–34.

222. Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

223. *Id.* at 233–34 (quoting *Griggs*, 401 U.S. at 432).

224. *See, e.g.*, Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) ("*Griggs* and the disparate impact theory of litigation remain largely untapped resources of enormous potential for plaintiffs."); *see also* Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 480–81 (2003) ("[C]ourts have chipped away at the premises of the disparate impact doctrine. This dilution of the disparate impact doctrine is troubling in a society in which many practices that disproportionately harm a protected class cannot neatly be traced to intentional discrimination.").

225. *See* Conn. v. Teal, 457 U.S. 440, 445 (1982) (finding that a standardized test requisite to acquire supervisor status disproportionately impacted African American applicants).

226. *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 991 (1988) (finding that the subjective views of individuals in a supervisory role may buttress disparate impact claims).

227. *Smith*, 544 U.S. at 241 (quoting Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656 (1989)).

228. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (invalidating facially neutral employment practices that perpetuate the effects of prior discrimination); *Teal*, 457 U.S. at 446 (stating that plaintiff,

evidence that "conspicuously demonstrates a job requirement's grossly discriminatory impact."[229]

Disparate impact theory relies heavily on the effects of employment policies on individuals belonging to a protected class. Plaintiffs invoking the disparate impact theory often use statistical evidence to buttress their claims.[230] A plaintiff cannot prevail on a disparate impact claim simply by demonstrating that their class was overrepresented in one position and underrepresented in another.[231] Rather, a plaintiff must compare the class representation in the job to the class representation in the qualified applicant pool for that job.[232] A plaintiff must also identify a nexus between the allegedly discriminatory practices and the statistical disparities evident in proffered data.[233] While statistical evidence need not incorporate all factors that explain the discrepancy,[234] the relevant statistical analysis may be deemed insufficient to sustain a disparate impact claim if it lacks substantial variables.[235]

C. EMPLOYER'S DEFENSE AND PLAINTIFF'S REBUTTAL

After the plaintiff has presented a prima facie case under the disparate impact theory, the employer bears the burden of production and persuasion to demonstrate that the contested policy has "a manifest relationship to the employment in question."[236] If the employer successfully demonstrates that the policy is necessary for business, then the policy may be upheld.[237] The burden then shifts to the

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as a member of a protected class, must show that a facially neutral employment practice significantly and disproportionately impacted that class).

229. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (finding that plaintiff proffered enough evidence to show that defendant employer's height and weight requirements disparately impacted women in violation of Title VII).

230. *See generally* BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 4–5, 97–101 (2d ed. 1983).

231. *See Wards Cove Packing Co*., 490 U.S. at 650–51 (stating that a disparity between the representation of whites and non-whites in two different positions was insufficient to support a disparate impact claim without evidence of the qualified applicant pool for the different jobs), *invalidated on other grounds*, 42 U.S.C. § 2000e-2(k).

232. *See id*.; Foster v. New Castle Area Sch. Dist., 98 F. App'x 85, 89 (3d Cir. 2004) ("Showing that there have been more male administrators than female administrators over the past three decades without evidence regarding the pools of applicants does not prove that a preference for coaches results in discrimination against women.").

233. *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988).

234. *See* Bazemore v. Friday, 478 U.S. 385, 400 (1986).

235. *See* Cooper v. S. Co., 390 F.3d 695, 717–18 (11th Cir. 2004) (finding that a plaintiff's disparate impact claim was unsupported because "[her] reports did not incorporate variables that would allow for the comparison of individuals who were similarly situated with respect to managerial decision makers, job types, locations, departments, and the specific criteria relevant for the jobs in question. [The plaintiff] did not tailor her analysis to the specific positions, job locations, or departmental and organizational structures in question; however, the wide-ranging and highly diversified nature of the defendants'' operations requires that employee comparisons take these distinctions into account in order to ensure that the black and white employees being compared are similarly situated."), *overruled on other grounds by* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-58 (2006).

236. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

237. *See* 42 U.S.C. § 2000e-2(k)(l)(A)(i).

plaintiff, who must demonstrate that "the employer's legitimate interest in 'efficient and trustworthy workmanship'" could have been satisfied with alternative policies that would not have adversely affected the plaintiff.[238]

IV. REMEDIES UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 aims "to make persons whole for injuries suffered on account of unlawful employment discrimination."[239] The 1972 amendments to the Act grant the EEOC the authority to remedy violations of Title VII provisions.[240] Upon a favorable finding, a Title VII plaintiff may receive equitable remedies[241] and legal remedies, both of which are subject to strict time limitations.[242]

This section will address (A) when an employer may be liable under Title VII, (B) legal remedies available to a plaintiff, (C) equitable remedies available to a plaintiff, and (D) how the statute of limitations affects claims under Title VII.

A. EMPLOYER LIABILITY UNDER TITLE VII

Under Title VII, an employer assumes vicarious liability for tangible (i.e., economically adverse) employment decisions made by its supervisors.[243] Even when a supervisor's harassment does not result in a tangible employment action, the employer may still be vicariously liable for the supervisor's creation of a hostile work environment, so long as the employer cannot establish an affirmative defense.[244]

The Supreme Court has never determined whether employer liability exists when employment actions are influenced, but not decided, by discriminatory individuals; the circuits are split on this issue.[245] The Ninth Circuit imputes bias to the employer if the action was instigated and influenced by a biased non-supervisor.[246] On the other hand, the Third and Fourth Circuits impose a higher burden on the plaintiff, holding that an employer is liable only if the decision maker

238. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1971) ("This burden arises . . . after the complaining party or class has made out a prima facie case of discrimination . . . .").

239. *Albemarle Paper*, 422 U.S. at 418.

240. 42 U.S.C. § 2000e-16(b).

241. § 2000e-5(g)(l).

242. 42 U.S.C. § 198la(b); *see* § 2000e-5(e)(l); *see also* Caviness v. Nucor-Yamato Steel Co., 105 F.3d 1216, 1218 (8th Cir. 1997) (discussing the effect of the 1991 Act on Title VII litigation).

243. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998) ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer."). *But cf.* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) ("[I]n the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." (internal quotations omitted)).

244. *See Ellerth*, 524 U.S. at 765; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

245. Ricci v. DeStefano, 557 U.S. 557, 606 (2009).

246. *See* Poland v. Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007).

himself was motivated by illicit discrimination[247] or simply "rubber stamped" a discriminatory employment action.[248] In the middle of the liability spectrum, the Seventh Circuit allows a plaintiff to buttress a Title VII claim by showing that the decision was substantially influenced by a biased non-supervisor.[249]

It is not possible to find liability for an individual supervisor under Title VII. After the Fourth Circuit's decision in *Lissau v. Southern Food Service, Inc*., the circuits agree that supervisors are not liable in their individual capacities for Title VII violations.[250] Certain courts have interpreted their own state's employment discrimination statutes to allow this individual liability, however, which affords plaintiffs another potential remedy.[251]

Since independent contractors are not covered by Title VII, a plaintiff must be able to show that they are an employee of the company or organization.[252] The Ninth Circuit addressed this issue in *Murray v. Principal Financial Group, Inc*. and held that the plaintiff in this case did not meet the statutory threshold of being an "employee," after analyzing the factors and circumstances of the plaintiff's employment.[253] There is no single test to determine whether an individual is classified as an independent contractor or an employee, and courts analyze various factors differently. When determining whether a party would be considered an employee under the law of agency, the hiring party's right to control the means and manner of production must be analyzed.[254] The Supreme Court considers other factors as well as, such as:

> "[1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of

247. *See* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004); Foster v. New Castle Area Sch. Dist., 98 F. App'x 85, 88 (3d Cir. 2004).

248. *See Hill*, 354 F.3d at 290–91; *Foster*, 98 F. App'x at 88.

249. *See* Lust v. Sealy, Inc., 383 F.3d 580, 584 (7th Cir. 2004) (explaining that if the decision would have been different but for a non-manager's sexist opinion, the non-manager's sexism has caused the plaintiff's injury); *see also* Maarouf v. Walker Mfg. Co., 210 F.3d 750, 754 (7th Cir. 2000) (noting that a plaintiff's Title VII claim is strengthened when a decision-maker is influenced by a biased supervisor's evaluation of the plaintiff's performance). *But see* Brewer v. Bd. of Tr. of Univ. of Il, 479 F.3d 908, 920 (7th Cir. 2007) (noting that even if an adverse action was instigated by a biased individual's allegations against a plaintiff, the employer avoids liability by conducting independent investigation before making the decision).

250. Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180 (4th Cir.1998), *accord* Jones v. Tyson Foods, Inc., 378 F. Supp. 2d 705, 708 (E.D. Va. 2004) ("[T]he Fourth Circuit Court of Appeals overruled *Paroline*, with its decision in *Lissau* . . . .").

251. *See, e.g*., Lopez v. Com., 463 Mass. 696, 711 (Mass. 2012) (interpreting the Massachusetts discrimination statute); Vivian v. Madison, 601 N.W.2d 872, 878 (Iowa 1999) (interpreting the Iowa Civil Rights Act).

252. *See* 42 U.S.C. § 2000e-2(a).

253. Murray v. Principal Fin. Grp., 613 F.3d 943, 945–46 (9th Cir. 2010).

254. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

> payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party."[255]

None of these factors are dispositive; instead, the court weighs them against each other in determining whether an individual is an employee or an independent contractor.[256]

B. EQUITABLE REMEDIES

In an attempt to successfully restore a Title VII plaintiff to the position they would have enjoyed in the absence of illegal discrimination, Congress allows federal courts to order appropriate equitable relief from employers.[257] Equitable remedies can take the form of injunctions, instatement or reinstatement, back pay, front pay, attorney's fees, and other equitable relief deemed necessary to make the plaintiff whole.[258] While settlement agreements are also permissible means of delivering equitable relief, the terms of such agreements may not undermine Title VII's goals.[259] In "mixed motive" cases, attorney's fees and costs are the only monetary remedies available to successful plaintiffs.[260]

1. Back Pay

In awarding back pay, courts seek to make prevailing plaintiffs whole and prevent future violations of Title VII.[261] A plaintiff may receive back pay for up to two years prior to the date on which they filed their discrimination charge with the EEOC.[262] Back pay cannot include time accrued after the point at which the employee would have otherwise been terminated for a non-discriminatory reason.[263]

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255. *Id*. at 751–52.

256. *Id*. at 752.

257. *See* 42 U.S.C. § 2000e-5(g)(1); Franks v. Bowman Transp. Co., 424 U.S. 747, 763–64 (1976) (emphasizing the breadth of the equitable discretion Title VII gave to federal courts).

258. *See* § 2000e-5(g)(1).

259. *See* EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 744–45 (1st Cir. 1996) (explaining that settlement agreements cannot prevent employees from communicating with the EEOC because such agreements would subvert Title VII's goals).

260. *See* § 2000e-5(g)(2)(B)(i).

261. *See* Moysis v. DTG Datanet, 278 F.3d 819, 828 (8th Cir. 2002); Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

262. *See* § 2000e-5(g)(l).

263. *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362 (1995) ("The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information [that would have resulted in complainant's termination] was discovered.").

2. Reinstatement and Front Pay

In *Pollard v. E. I. du Pont de Nemours Co*., the Supreme Court held that courts may award front pay to compensate a plaintiff, instead of ordering reinstatement.[264] Factors that may determine whether front pay is appropriate include: the feasibility of reestablishing a working relationship, managerial intimidation, and the effects of the past discrimination on the plaintiff's emotional well-being.[265] Furthermore, courts also consider whether the plaintiff: attempted to mitigate damages, would have retained employment with a non-discriminatory employer, or acted with "unclean hands."[266]

3. Attorney's Fees

To receive full attorney's fees in a Title VII suit, a plaintiff must substantially prevail on a "significant claim" pertaining to the lawsuit.[267] Otherwise, the court will limit the award commensurate with the plaintiff's success on the claim.[268] Courts often rely on the "lodestar" method in calculating reasonable attorney's fees.[269] Under the lodestar method, a plaintiff must demonstrate that their attorney charged reasonable rates and billed reasonable hours.[270] Additionally, a court may award attorney's fees to the defendant if the plaintiff's claims are deemed frivolous or unreasonable.[271]

C. LEGAL REMEDIES

Under the Civil Rights Act of 1991, Congress made compensatory and punitive damages available in Title VII cases where an employer intentionally discriminated against a plaintiff.[272] Though such damages are limited, a plaintiff who

264. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 853–54 (2001).

265. *See* EEOC v. W&O, Inc., 213 F.3d 600, 619 (11th Cir. 2000).

266. *See* Rivera v. NIBCO, Inc., 384 F.3d 822, 832 (9th Cir. 2004) (Bea, J., dissenting) ("[S]ince there is a statutory duty to mitigate damages, courts have held that a precondition for a claim for backpay and reinstatement or front pay under Title VII is that the plaintiff be in all manner ready, willing and legally capable of performing alternate work at the commencement and through the backpay period."); *see also* Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 450–51 (11th Cir. 1993) ("For a defendant to successfully avail itself of the doctrine of unclean hands, it must satisfy two requirements. First, the defendant must demonstrate that the plaintiff's wrongdoing is directly related to the claim against which it is asserted. Second, even if directly related, the plaintiff's wrongdoing does not bar relief unless the defendant can show that it was personally injured by her conduct." (internal citations omitted)).

267. *See* Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989).

268. *Cf.* Hensley v. Eckerhart, 461 U.S. 424, 440 (1983) (remanding involuntary civil commitment case to district court to reconsider the attorneys' fees award in light of plaintiffs' qualified success on the merits).

269. *See* Spegon v. Catholic Bishop of Chi., 175 F.3d 544, 550 (7th Cir. 1999) (citing *Hensley*, 461 U.S. at 433) (describing the lodestar method as multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate).

270. *Id.*

271. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

272. 42 U.S.C. § 198la(a)(l); *see* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535 (1999) (noting that an award of punitive damages in Title VII cases "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind").

resides in a state without a damages cap may file a state claim in federal court to avoid the Title VII caps.[273]

Title VII also restricts the availability of punitive damages. The EEOC cannot order federal agencies to pay punitive damages.[274] Punitive damages are only awarded when an employer has acted "with malice or reckless indifference to the federally protected rights of an aggrieved individual."[275] Thus, a plaintiff may not receive punitive damages if the adverse action was motivated by legitimate factors in addition to illicit discrimination.[276]

As of January 2021, multiple pieces of legislation have been introduced which may affect the legal remedies available under Title VII claims. The Fair Pay and Safe Workplaces Act of 2018 would require all parties contracting with the United States government to report any Title VII violations that have occurred within the last three years.[277] Several forms of legislation have also been introduced to protect unpaid interns from discrimination and workplace harassment.[278] For pregnant federal employees, the Pregnant Workers Fairness Act was introduced to eliminate discrimination and promote women's health by ensuring that they have workplace accommodations if their ability to perform their job tasks are limited by their pregnancy or a similar medical condition.[279] Finally, Congress is considering the EMPOWER Act to help prevent and handle claims arising out of workplace harassment.[280] Title I of the Act would disallow nondisclosure clauses in employment contracts, establish a confidential workplace tipline to report instances of workplace harassment, make companies more transparent to shareholders and the public about a company's past and current litigation for workplace harassment, and include professional training to company employees on workplace harassment.[281] Title II of the Act would disallow tax deductions given to companies from expenses paid during litigation for workplace harassment claims.[282]

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273. *See* Bradshaw v. Sch. Bd. of Broward Cnty., 486 F.3d 1205, 1207–08 (11th Cir. 2007); Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 66 (1st Cir. 2005).

274. *See* § 198la(b)(l).

275. *Id.*

276. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under sec 102 of the CRA of 1991 (1992), https://www.eeoc.gov/laws/guidance/enforcement-guidance-compensatory-and-punitive-damages-available-under-sec-102-cra ("[D]amages may not be available in certain cases where the employer acted with both legitimate and unlawful motives (mixed motives).").

277. Fair Pay and Safe Workplaces Act of 2018, S.3077, 115th Cong., 2d Sess. (2018).

278. *See, e.g.*, Unpaid Intern Protection Act, H.R. 651, 115th Cong., 1st Sess. (2017); Congressional Intern Protection Act of 2017, H.R. 652, 115th Cong., 1st Sess. (2017); Federal Intern Protection Act, H. R. 653, 115th Cong., 1st Sess. (2017).

279. Pregnant Workers Fairness Act, S. 1512, 114th Cong., 1st Sess. (2015).

280. EMPOWER Act, H.R. 1521, 116th Cong., 1st Sess. (2019).

281. *Id.*

282. *Id.*

D. TIME LIMITATIONS

A plaintiff must file their claim within the statutory period if they are to receive equitable or legal remedies.[283] Notably, Congress amended the statutory period available for filing pay discrimination claims.[284] Under the 2009 Lilly Ledbetter Fair Pay Act, an unlawful discriminatory act occurs, inter alia, "each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a [discriminatory compensation] decision or other practice."[285] The Act was passed in response to the 2007 Supreme Court decision in *Ledbetter v. Goodyear Tire Rubber Co.*, in which the Court dismissed the suit on statute of limitations grounds when the plaintiff had been unaware of the sex-based pay differential until years after discriminatory decisions had been made.[286]

The Supreme Court ruled in *Fort Bend County v. Davis* that federal courts have jurisdiction to hear unexhausted Title VII claims and the claiming process could be waived under exceptional circumstances.[287] This holding is significant because an employee who did not file a charge of discrimination with the EEOC prior to litigation may still bring suit in court."[288]

Furthermore, the tender-back rule may be relevant to Title VII time limitations. When the tender-back rule applies, an employee who previously agreed not to sue an employer must repay the consideration of that agreement in order to sue. The Sixth Circuit, along with several other Circuit courts, held that the tender-back rule did not apply to claims under Title VII.[289] The Sixth Circuit noted that the point of Title VII was to combat the deficiencies of the unequal bargaining power in employment contracts, so the tender-back rule barring parties from filing suit would be counterproductive to the Congressional intent of enacting Title VII. [290] Though the Supreme Court has not explicitly addressed this issue, the Court stated, "[W]e think it clear that there can be *no* prospective waiver of an employee's rights under Title VII," in reference to collective bargaining.[291] Perhaps relevant, two Supreme Court cases held that the tender-back rule did not apply to claims that fell under the ADEA.[292]

283. *See* 42 U.S.C. § 2000e-5(e)(1).

284. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

285. *Id.*

286. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642–43 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009); *see generally* Nancy Zisk, *Lilly Ledbetter, Take Two: The Lilly Ledbetter Fair Pay Act of 2009 and the Discovery Rule's Place in the Pay Discrimination Puzzle*, 16 WM. & MARY J. WOMEN & L. 1, 2 (2009).

287. 139 S. Ct. 1843, 1843 (2019).

288. *Id.* at 1852.

289. *See* McClellan v. Midwest Machining Inc., 900 F.3d 297, 305 (2018).

290. *Id.*

291. Alexander v. Gardner, 415 U.S. 36, 51 (1974).

292. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 428 (1998); Hogue v. S. R. Co., 390 U.S. 516, 516 (1968).

V. DEFINITION OF SEX

Because Title VII protects against employment discrimination based on sex, understanding how courts define "sex" and what types of claims are categorized as sex-based claims is imperative. This section will address (A) *Price Waterhouse* and sex stereotyping and (B) the current treatment of Title VII claims based on gender identity.

A. PRICE WATERHOUSE AND SEX STEREOTYPING

In *Price Waterhouse v. Hopkins*, the Supreme Court significantly expanded the traditional definition of "sex" by incorporating discrimination based on noncompliance with gender stereotypes into Title VII's prohibition on sex discrimination.[293] In *Price Waterhouse*, the plaintiff, Ann Hopkins, was rejected for partnership at an accounting firm because her employer felt she was too masculine and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[294] The Court determined that denying Hopkins partnership because she failed to comply with gender stereotypes was discrimination "because of sex."[295] The Court said of gender stereotyping:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[296]

LGBT plaintiffs have relied on *Price Waterhouse* to argue that discrimination on the basis of sexual orientation or gender identity is discrimination on the basis of noncompliance with gender stereotypes and therefore within the protection of Title VII's prohibition on sex discrimination. Such arguments have been met with varying degrees of success.[297] This changed with the Supreme Court decision of *Bostock v. Clayton County* in 2020. The Supreme Court expounded upon

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293. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1074, *as recognized in* Burrage v. United States, 134 S. Ct. 881 (2014).

294. *Price Waterhouse*, 490 U.S. at 235.

295. *Id.* at 236–37.

296. *Id.* at 251 (in part quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 (1978)).

297. *See* Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) (stating that firing a gay male because he did not conform to gender norms was a violation of Title VII). *But see* Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (noting that harassment or disparate treatment based upon nonconformity with sexual stereotyping may not provide protection for sexual orientation because "not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine").

Price Waterhouse and ruled that discriminating against a person for being homosexual necessarily meant they discriminated on the basis of sex.[298] The employer would have to take the employee's sex into account if they would not have taken action if the employee had been the same but heterosexual.[299]

In *Oncale v. Sundowner Offshore Services, Inc*, where a male employee alleged sexual harassment by his male supervisors and co-workers, the Supreme Court held same-sex sexual harassment is actionable sex discrimination under Title VII.[300] However, *Oncale* did not discuss *Price Waterhouse*, and consequently, a number of conflicting approaches have arisen to address same-sex sexual harassment. There are several different viewpoints and results: (1) courts that overlook *Price Waterhouse* and take a restrictive view of the meaning of "sex";[301] (2) courts that equate gender stereotyping with sexual orientation discrimination;[302] (3) courts that recognize that same-sex harassment is sometimes based on gender stereotyping but deny the particular claim before them;[303] and (4) courts that recognize that same-sex harassment is sometimes based on gender stereotyping and uphold a claim.[304]

B. CURRENT TREATMENT OF TITLE VII CLAIMS BASED ON GENDER IDENTITY DISCRIMINATION

There has been a complex history of sex discrimination claims under Title VII from transgender plaintiffs. Cases inched closer to providing protection for transgender individuals over the years until the 2020 Supreme Court decision in *Bostock v. Clayton County*. Leading up to *Bostock*, courts continued to expound upon the meaning of sex within the sex-stereotyping framework. The Sixth Circuit in *Smith v. City of Salem* first found that a gender non-conforming transgender person had a valid sexual harassment claim under Title VII.[305] The court emphasized that the *Price Waterhouse* definition of sex as "sex stereotype" went beyond biological sex.[306]

In 2012, the EEOC issued a decision in *Macy v. Holder* clarifying that claims of discrimination based on "gender identity, change of sex, and/or transgender

298. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

299. *Id.*

300. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77, 82 (1998).

301. *See* Spearman v. Ford Motor Co., 231 F.3d 1080, 1085–86 (7th Cir. 2000) (holding plaintiff's claim failed because Title VII does prohibit harassment because of one's sex but not because of one's homosexuality).

302. *See* Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

303. Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000).

304. *See* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also* EEOC v. Boh Brothers Const. Co., 731 F.3d 444, 456 (5th Cir. 2013) (applying intent-based inquiry to determine gender stereotyping, focusing on alleged harasser's subjective perception).

305. Smith v. City of Salem, 378 F.3d 566, 574–75 (6th Cir. 2004); *see also* Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) (finding that termination of transgender employee violated the Equal Protection Clause and noting that a finding that an employer acted on basis of gender-nonconformity would be sufficient to find a Title VII violation).

306. *Smith*, 378 F.3d at 573–74.

status" are cognizable under Title VII.[307] In making its determination, the EEOC explained that the statute's protections reach beyond that of just biological sex "in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[308]

The Attorney General issued a memo in 2017 regarding transgender employment discrimination under Title VII. He wrote that "Title VII's prohibition on sex discrimination . . . does not encompass discrimination based on gender identity *per se*, including transgender status" and that this would be the Department of Justice's official position moving forward.[309]

In 2020, the Supreme Court held "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" in *Bostock v. Clayton County*.[310] The Court reasoned that discrimination based on transgender status inherently discriminates based on sex because employers discriminate against individuals with one sex identified at birth and another one at present.[311] The Court interpreted Congress' broad language regarding discrimination on the basis of sex to mean an employer firing their employee for being transgender "defies the law."[312] As a result of the *Bostock* decision, transgender employees now have clear protection under Title VII.

VI. CHALLENGES FOR TITLE VII

Title VII policy and jurisprudence has largely sought to be gender blind in its resolution of employment conflicts. However, this approach disregards the experiences and perspectives of women of color and victims of same-sex sexual harassment. Courts should explicitly consider the multiple and varied structures and experiences of subordination when deciding Title VII cases. The application of Title VII to discrimination on the basis of sexual orientation or gender identity has had mixed results and provides an additional challenge. Likewise, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* has imposed a stricter evidentiary standard for large putative classes in employee class actions[313] and religion provides two potentially large exceptions to discrimination claims.

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307. Mia Macy, EEOC DOC 0120120821, 2012 WL 1435995, at *4 (Apr. 20, 2012).

308. *Id.* at *6.

309. Memorandum from the Attorney Gen. William Barr on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017); Exec. Order No.13087, 63 Fed. Reg. 30097 (May 28, 1998).

310. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020). The decision referred to as *Bostock v. Clayton County* was a combination of three separate cases: *Bostock v. Clayton County*, which was consolidated with *Zarda v. Altitude Express*, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*. *Bostock* and *Harris Funeral Homes* were argued separately in front of the Supreme Court but decided together.

311. *See id.* at 1746–47.

312. *Id.* at 1754.

313. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); *see also infra* Part V.D.

This section explores the challenges of Title VII for (A) employment discrimination against LGBT persons, (B) "sex-plus" categories and the intersection of race and gender, (C) the gender-neutral approach and the reasonable-woman standard, (D) class actions, and (E) religion.

A. EMPLOYMENT DISCRIMINATION AGAINST LGBT PERSONS

Title VII previously did not include sexual orientation among its protected traits, and most courts did not interpret the statute as prohibiting sexual orientation discrimination.[314] Individuals who challenge traditional notions of gender identity,[315] including transgender people,[316] also face employment discrimination, but gender identity is not explicitly included among Title VII's protected traits.

However, as discussed in Section V, the Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.* held that the "because of sex" provision can apply to victims of same-sex discrimination.[317] Although *Oncale* made certain same-sex discrimination claims actionable under Title VII if the plaintiff proves that the contested behavior actually constituted discrimination motivated by the plaintiff's sex, such same-sex discrimination claims often fail because the Court failed to articulate how plaintiffs alleging same-sex sexual harassment could prove that the conduct was "because of sex."[318]

In light of the *Bostock* decision discussed in Section V.B., the Equality Act, which was introduced in Congress before *Bostock*, garnered significant support. The Equality Act would amend existing civil rights law, such as the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection and Services Act, and several other laws, to explicitly include sexual orientation and gender identity as protected characteristics and prohibit

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314. 42 U.S.C. § 2000e; *see also* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Keith J. Hilzendeger, *Walking Title VII's Tight Rope: Advice for Gay Lesbian Title VII Plaintiffs*, 13 L. & Sexuality 705, 705–06 (2004).

315. *Sexual Orientation and Gender Identity: Terminology and Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Nov. 11, 2015) (defining gender identity as "one's innermost concept of self as male, female, a blend of both or neither–how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.").

316. This group is difficult to define, as no uniform definition of "transgender" exists within state or local laws.

317. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998) ("If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.").

318. *Id.* at 81; *see, e.g.*, James v. Platte River Steel Co., 113 F. App'x 864, 867–68 (10th Cir. 2004) ("James must still establish that he was personally discriminated against because of his gender . . . [W]hile it certainly appears that the general work atmosphere at Platte River was awash with childish and boorish behavior, James failed to put forth sufficient admissible evidence to establish, under *Oncale*, that he was unlawfully discriminated against 'because of sex' based on the general work atmosphere at Platte River. We therefore reject James' claim that the district court erred by failing to consider other alleged incidents of male-on-male sexual harassment involving other Platte River employees.").

discrimination in public spaces and services and federally funded programs on the basis of sex.[319] Specifically, the legislation aims to amend the Civil Rights Act of 1964 so that it prohibits discrimination in public spaces and services (with public spaces and services including banks, retail stores and transportation services) and federally funded programs on the basis of sex.[320]

B. "SEX-PLUS" CATEGORIES AND THE INTERSECTION OF RACE AND GENDER

Under Title VII, courts have recognized specific protections for some "sex-plus" plaintiffs—employees who are classified on the basis of sex in addition to some ostensibly neutral characteristic.[321] In *Phillips v. Martin Marietta Corp.*, the employer hired women, but not women with pre-school-age children. The Supreme Court reversed the grant of summary judgment to the employer because the policy resulted in "one hiring policy for women and another for men each having pre-school-age children."[322] Other "sex-plus" categories include minority women,[323] married women,[324] married women who keep their surnames,[325] and women over a certain age.[326] However, not all gender subclasses are protected.[327] In *Willingham v. Macon Telegraph Publishing Co.*, the Fifth Circuit found "distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics" and dismissed the plaintiff's claim because "[h]air length is not immutable."[328] The Ninth Circuit uses an "unequal burdens" test;[329] to prevail on a "sex-plus" claim, a plaintiff must demonstrate that individuals of the opposite sex who also possessed the plaintiff's additional characteristic were treated more favorably.[330]

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319. *The Equality Act*, HUM. RTS. CAMPAIGN (Jan. 23, 2021, 9:57 AM), https://www.hrc.org/resources/the-equality-act. (Public spaces and services include banks, retail stores and transportation services).

320. *Id.*

321. *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1088–89 (5th Cir. 1975).

322. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

323. *See* Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994), *aff'd in part*, *rev'd in part*, 164 F.3d 1186, 1188 (9th Cir. 1998) ("Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women."); Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (extending "sex-plus" protection to black women).

324. *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

325. *See* Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977) ("A rule which applies only to women, with no counterpart applicable to men, may not be the basis for depriving a female employee who is otherwise qualified of her right to continued employment.").

326. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038 (10th Cir. 2020) (holding female former employees sufficiently specified "plus-" characteristic as being forty or older, as required to state claim for sex-plus-age discrimination under Title VII based on disparate treatment).

327. *See, e.g.,* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1091–92 (5th Cir. 1975) (denying protection to men with long hair).

328. *Id.*

329. Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2005).

330. *See* Fisher v. Vassar Coll., 70 F.3d 1420, 1446–47 (2d Cir. 1995).

"Sex-plus" claims are particularly relevant for (1) African-American women, (2) African-American men, and (3) women over forty-years-old, or sex-plus-age.

1. African-American Women and "Sex-Plus"

In *DeGraffenreid v. General Motors*, five African-American women brought suit against General Motors, alleging that the employer's seniority system perpetuated the effects of past discrimination against black women. The Eighth Circuit held that there was no sex discrimination because although General Motors did not hire black women prior to 1964, it did hire white women.[331]

In the years since *DeGraffenreid*, courts have recognized the intersection of multiple sources of discriminatory animus when considering Title VII claims by women of color.[332] Some courts aggregate evidence of racial hostility with evidence of sexual hostility, while others deal with an adverse employment action based on two or more grounds separately.[333] A discrimination claim cannot be undermined by a showing of non-discriminatory treatment towards the respective disaggregated classes of the plaintiff's sub-class.[334]

2. African-American Men and "Sex-Plus"

The complexities of joint racial and gender classification are not limited to black female plaintiffs. Black men also face specific and unique discrimination in employment settings. The statistical evidence of black male experiences in the labor market indicates that black men do not share in the privileges of "maleness" enjoyed by their white counterparts.[335] Although each component of the subclass of black women is commonly recognized as a protected class, the unique social position of black men is harder for courts to conceptualize. When "blackness" is combined with "maleness," black men are completely separated from white men in the labor market.[336]

Few Title VII cases have recognized the unique status of black men. For example, in *Robinson v. Adams*, the Ninth Circuit held that a black man failed to establish a prima facie case of sex and race discrimination because there was no

331. DeGraffenreid v. Gen. Motors Assemb. Div., 558 F.2d 480, 483 (8th Cir. 1977); *see also* Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 356-57 (David Kairys ed., 1998).

332. *See, e.g.*, McCowan v. All Star Maint., Inc., 273 F.3d 917, 925 n.9 (10th Cir. 2001).

333. *Compare* Harrington v. Cleburne Cnty. Bd. of Educ., 251 F.3d 935, 938 (11th Cir. 2001), *with McCowan*, 273 F.3d at 925 n.9.

334. *See*, *e.g.*, Jefferies v. Harris Cnty. Cmty. Action Ass'n, 615 F.2d 1025, 1032-33 (5th Cir. 1980) (finding that where a plaintiff alleged that an employer discriminated against black females, the fact that black males and white females were not subject to discrimination was irrelevant and could not support a finding that the employer did not discriminate against black women).

335. *See* Kenneth A. Couch & Mary C. Daley, *The Improving Relative Status of Black Men* (Univ. of Conn. Dep't of Econ, Working Paper No. 2004-02, 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=530685.

336. *See* Jesse B. Semple, *Invisible Man: Black and Male Under Title VII*, 104 HARV. L. REV. 749, 764 (1991).

evidence that the employer's hiring practices had a discriminatory effect on blacks as a whole.[337] A "race-plus" framework has been proposed to help courts deal with the unique forms of employment discrimination faced by black men.[338] A "sex-plus" protection for black men was adopted in *Johnson v. Memphis Police Department*, in which the court found that a policy against facial hair discriminated against many black men who, unlike white men, suffer from a skin condition that makes it unhealthy to shave every day.[339]

3. Sex-plus-Age

In *Frappied v. Affinity Gaming Black Hawk, LLC*, female plaintiffs successfully brought "sex-plus-age" disparate impact and disparate treatment claims under Title VII and the ADEA, alleging that they were subject to discrimination because they were women over forty-years-old.[340] In light of *Bostock,* the court held, "if a female plaintiff shows that she would not have been terminated if she had been a man . . . this showing is sufficient to establish liability under Title VII."[341] The court continued, "termination is 'because of sex' if the employer would not have terminated a male employee with the same 'plus-' characteristic."[342]

C. THE GENDER-NEUTRAL APPROACH AND THE REASONABLE-WOMAN STANDARD

A foundational theory of American tort law is the "reasonable-person" standard,[343] but torts are not the only context in which courts refer to a hypothetical person's behavior to measure what conduct is objectively reasonable or unreasonable. Statute-based sexual harassment claims are also evaluated, at least in part, by asking if a "reasonable person" would view the workplace in question as hostile.[344] This "reasonable person" standard does not take into account the differences between how men and women experience sexual behavior.[345]

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337. Robinson v. Adams, 847 F.2d 1315, 1318 (9th Cir. 1987) ("Conceivably, the absence of any black male employees could result from racial stereotyping or have some other link to racial discrimination. [The plaintiff's] showing that Black males are statistically underrepresented cannot, standing alone, show a racially discriminatory impact when there is clearly no racially discriminatory impact on Blacks as a whole.").

338. *See* Semple, *supra* note 336, at 765–67.

339. Johnson v. Memphis Police Dep't, 713 F. Supp. 244, 247–48 (W.D. Tenn. 1989).

340. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1049 (10th Cir. 2020).

341. *Id*. at 1047.

342. *Id*. at 1046.

343. *See*, *e.g*., Bethel v. N.Y.C. Transit Auth., 703 N.E.2d 1214, 1216–17 (1998) (finding that defendant should be held to the ordinary standard of care instead of the heightened standard for a common carrier when its faulty bus seat caused plaintiff's injury); *see also* LePage v. Horne, 809 A.2d 505, 511–12 (Conn. 2002) (finding that the appropriate inquiry was whether a daycare provider fulfilled her duty of care to a baby who died of sudden infant death syndrome).

344. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) ("[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.").

345. *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("We believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we

The "reasonable woman" standard was first identified by the Sixth Circuit in a dissent in *Rabidue v. Osceola Refining Co.*[346] The Ninth Circuit ultimately adopted the "reasonable woman" standard because the "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women . . . [i]nstead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men."[347]

The "reasonable woman" standard is best explained through "differences feminism" or "cultural feminism." According to this theory, the law should promulgate an "acceptance theory" embracing the differences between the sexes.[348] Cultural feminists assert that although the "reasonable person" standard purports to embrace both sexes, it is actually based only on the male baseline of appropriate behavior.[349]

With respect to sexual-harassment law, however, critics allege that the "reasonable woman" standard is inadequate insofar as it assumes a monolithic perspective on the experiences and attitudes of working women across all races, classes, and sexual orientations.[350] Like the "reasonable person," the "reasonable woman" is said to be conceived as white, heterosexual, and middle class.[351] To make the reasonableness analysis more sensitive to differences among women, courts could create hybrid standards tailored to the facts of each case by incorporating sex-plus categories (e.g., the reasonable Asian-American woman standard, or the reasonable black-Muslim woman standard).[352]

D. CLASS ACTIONS

The viability of future Title VII class actions may be affected by the 2011 *Wal-Mart Stores, Inc. v. Dukes* decision, in which the Supreme Court rejected the certification of a class of 1.5 million current and former female Wal-Mart employees.[353] The putative class alleged that the company's general policy of granting local supervisors significant discretion in pay and promotional matters

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only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination . . . We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.").

346. 805 F.2d 611, 626 (6th Cir. 1986) (Keith, C.J., dissenting) ("[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."), *overruled on other grounds by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

347. *See Ellison,* 924 F.2d at 879.

348. *See generally* ROBIN WEST, CARING FOR JUSTICE, (1999).

349. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOL. THEORY AND WOMEN'S DEV. (1993).

350. *See generally* Meri O. Triades, *Finding a Hostile Work Environment: The Search for a Reasonable Reasonableness Standard*, 8 WASH. & LEE J. OF C.R. & SOC. JUST. 35, 35–36 (2002).

351. *See id.* at 45.

352. *See id.* at 72.

353. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2544, 2551 (2011).

resulted in widespread discrimination against women.[354] A five-justice majority ruled that the putative class had not demonstrated sufficient proof of common questions of law or fact so as to satisfy Federal Rule of Civil Procedure Rule 23 (a)(2).[355] The majority found that the studies and testimony presented by the putative class did not constitute "convincing proof of a companywide discriminatory pay and promotion policy," and thus it lacked a common question requisite for certification.[356] However, the dissent argued that this holding "blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer 'easily satisfied.'"[357] A potentially heightened hurdle in the class certification process may make it more difficult for class actions, a powerful tool of civil rights litigators, to go forward, when the allegations of discrimination are "premised on the theory of excessive subjectivity as discriminatory policy."[358]

Although the *Wal-Mart* majority cited *General Telephone Co. of Southwest v. Falcon* to justify "prob[ing] behind the pleadings"[359] when examining the proof of commonality for class certification, *Wal-Mart* also effectively limits acceptable methods of proof articulated in *Falcon*. As the Court in *Wal-Mart* acknowledged, footnote 15 of *Falcon* explicitly stated that "a biased testing procedure" for evaluating prospective applicants and incumbent employees or "significant proof that an employer operated under a general policy of discrimination" could "justify a class of both applicants and employees" if the discrimination manifested itself "in the same general fashion, such as through entirely subjective decision making practices."[360] In *Wal-Mart*, the Court stated that the plaintiffs' arguments amounted to an allegation of a "general policy of discrimination" that manifested itself through "subjective decision making practices,"[361] yet ruled that plaintiffs' allegations of discretionary decision-making practices by local supervisors, a corporate culture vulnerable to gender bias, and demonstrated statistical disparity between promotions of men and women workers were not sufficient for commonality. Rather, the Court found that class certification required a common policy, meaning that the discretionary decision-making practices were themselves similar in practice for all 1.5 million class members. Plaintiffs' anecdotal evidence was "too weak to raise any inference that all the individual, discretionary personnel

354. *Id.*

355. *Id.*

356. *Id.* at 2556–57.

357. *Id.* at 2565 (Ginsburg, J., dissenting) (citing 5 J. Moore et. al., Moore's Federal Practice § 23.23 [2], p. 23–72 (3d ed. 2011)).

358. Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. UNIV. L. REV. 34, 44 (2011). However, the Supreme Court has clarified that *Wal-Mart* "does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability." Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1048 (2016).

359. *Wal-Mart*, 131 S. Ct. at 2551.

360. *Id.* at 2553 (citing Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

361. *Id.*

decisions [were] discriminatory."[362] Such a strong requirement effectively inhibits the ability of future plaintiffs to bring Title VII class action suits against large corporations that operate on a national basis.[363]

E. RELIGION AND TITLE VII

Religion is also a complicating factor in addressing Title VII discrimination because it provides two potential exceptions to discrimination claims: (1) the religious organization exception and (2) the ministerial exception. The religious organization exception governs how institutions may make employment choices, while the ministerial exception addresses who is allowed to bring Title VII claims.

1. Religious Organization Exception

The religious organization exception allows religious institutions to give employment preference to members of their religion.[364] However, this exception does not allow institutions to make discriminatory employment choices based on any other protected characteristics, including sex.[365] Courts have held that the language and legislative history of Title VII make it clear that the religious organization exemption should be construed narrowly, and that it does not grant religious employers immunity from discrimination cases based on sex.[366]

2. Ministerial Exception

Under the ministerial exception, employees who serve in clergy roles are barred from bringing Title VII claims.[367] The ministerial exception is not derived explicitly from the text of the statute; instead, the exception stems "from the First Amendment principle that governmental regulation of church administration, including the appointment of clergy, impedes the free exercise of religion and constitutes impermissible government entanglement with church authority."[368] Individuals that fall under the scope of the ministerial exception include ordained

362. *Id*. at 2556.

363. *See* Tabor v. Hilti, Inc., 703 F.3d 1206, 1229 (10th Cir. 2013) ("After *Wal-Mart*, federal courts reviewing class certification questions have generally denied certification when allegedly discriminatory policies are highly discretionary, and the plaintiffs do not point to 'a common mode of exercising discretion that pervades the entire company.'" (internal citations omitted)). While the Court in effect imposed a stricter standard, the Court did not admit it was implementing a higher standard.

364. *See EEOC Compliance Manual*, EEOC, at 16 (2008), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

365. *Id*. at 18.

366. EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1367 (9th Cir. 1986) (holding that Fremont Christian School violated Title VII when it provided "head of household" health insurance benefits to employees that were single persons or married men, but not married women).

367. *Questions and Answers: Religious Discrimination in the Workplace*, EEOC, at 4–5 (2008), https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace.

368. *Id.*

clergy and those who act in the same capacity as ordained clergy, as well as individuals that are "intimately involved in religious indoctrination."[369]

The Court unanimously recognized the ministerial exception in 2012 in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*.[370] In *Hosanna-Tabor*, respondent Cheryl Perich brought an employment discrimination suit against her employer, a small school in Michigan that offered "Christ-centered education," alleging she was fired after being diagnosed with narcolepsy.[371] The court determined that the First Amendment protected the religious school because Perich held the title of "Minister of Religion, Commissioned," had religious educational training, presented herself as a minister, and was responsible for teaching religion and participating in religious activities with students.[372] Although the court determined that the ministerial exception was grounded in the Religion Clauses of the First Amendment, it specifically noted that it was relying on the specific facts of Perich's situation, and that it was "reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister."[373] Despite that statement, other courts have looked to *Hosanna-Tabor* for a list of factors to consider when determining if the ministerial exception applies.[374]

In 2020, the Supreme Court's seven-justice majority ruling in *Our Lady of Guadalupe School v. Morrissey-Berru* greatly expanded the scope of the ministerial exception by broadening the range of employees who are prohibited from bringing Title VII claims. In *Guadalupe*, teachers at two different Catholic elementary schools in California brought individual employment discrimination claims against their employers, one for age discrimination and one for disability discrimination.[375] Neither teacher was given the title of "minister," and they both had less religious training than Perich in *Hosanna-Tabor*.[376] Regardless, the Court determined that the ministerial exception applies because "[w]hat matters, at bottom, is what an employee does" and title or education level "are not inflexible requirements and may have far less significance in some cases."[377] It went on to conclude that "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith*" is considered an employee for the purposes of the exception.[378] The *Guadalupe* respondents were employees because they "both

369. *Section 2 Threshold Issues*, EEOC, at 50 (2000), https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-II-A-1-c.

370. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 188–89 (2012).

371. *Id*. at 177–78.

372. *Id*. at 191–92.

373. *Id*. at 190.

374. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063 (2020); Biel v. St. James Sch. 911 F.3d 603, 607 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 2049 (2020).

375. *Our Lady of Guadalupe Sch*., 140 S. Ct. at 2055.

376. *Id*.

377. *Id*. at 2064.

378. *Id*. (quoting *Hosanna-Tabor*, 565 U.S. at 199) (Alito, J., concurring) (internal quotations omitted).

performed vital religious duties" in that they were responsible for educating their students in the Catholic faith, a responsibility that was "at the core of the mission of the schools where they taught."[379] Overall, *Guadalupe* was used as an opportunity to clarify that whether an employee falls under the scope of the exemption does not matter on a set list of factors, but instead is based on the substance of an employee's work.[380]

Although the reach of the ministerial exception may now preclude a wide range of cases, it is not applicable to cases involving claims of sexual harassment. In such situations, a religious institution is "neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a constitutionally protected religious practice."[381] Therefore, while religious employees may be barred from bringing Title VII discrimination claims, they will still be able to find recourse by bringing sexual harassment claims.

VII. CONCLUSION

While a substantial portion of Title VII law is fairly well-established, one can expect to see a growing number of cases pushing for greater variety when defining discriminatory behavior and testing the meaning of gender within the statute's prohibition on sex discrimination. Often no one factor is dispositive when determining if an employer is liable or if an employee is able to recover under a Title VII disparate treatment or disparate impact claim, so a holistic approach must be taken when making a Title VII claim. Additionally, the remedies available when such claims are successful have shifted over time as new federal legislation has been introduced to address matters such as covering a broader range of claimants and expanding the statute of limitations. Furthermore, as notions of gender become increasingly fluid within mainstream society, the "because of sex" requirement continues to expand and will become even more difficult to articulate. As has been seen in high-profile Supreme Court cases in the twenty-first century, the applicability of Title VII to claims of discrimination based on sexual orientation or gender identity will continue to be tested. While decisions departing from traditional "because of sex" requirements signal hope for some Title VII plaintiffs, the tightening of constructive discharge requirements, narrowing definitions of supervisors, widened application of employer defenses, and recent barriers to class actions may cause hardship to others.

379. *Our Lady of Guadalupe* Sch., 140 S. Ct. at 2066.
380. *Id*. at 2067.
381. Bollard v. Ca. Province of the Soc'y of Jesus, 196 F.3d 940, 944 (9th Cir. 1999).