Title VII of the Civil Rights Act of 1964

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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I. OVERVIEW: THE TITLE VII STATUTE

Congress enacted Title VII of the Civil Rights Act of 1964 to prohibit
discrimination based on sex, among other protected traits. Though oft used as a
route to litigation, Congress initially did not intend that Title VII become a
pathway to suit, but rather sought to, “encourage formal conciliation and . . .
foster voluntary compliance . . .” through, “the creation of . . . [anti-harassment]
policies and effective grievance mechanisms.” Many times amended, Title VII
states that employers may not:

discriminate against any individual with respect to . . . compensation,
terms, conditions, or privileges of employment, because of . . . sex . .
or (2) . . . limit, segregate, or classify his employees or applicants for
employment in any way which would deprive or tend to deprive an

U.S. 424, 429 (1971) (noted congressional intent to promote parity in employment opportu-
nities).
2. Stache v. Int'l Union of Bricklayers & Allied Craftsmen, 852 F.2d 1231, 1234 (9th Cir. 1988).
Congress sought to fortify “protections and remedies” available under Title VII); see also H.R. REP.
No. 92-238, at 3 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2139 (illuminates that Congress sought to
equip the Equal Employment Opportunity Commission with procedures necessary to counter employ-
ment discrimination).
individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex . . . .

The Supreme Court has illuminated that “sex” and the other traits protected by Title VII require “modifiers” to place their meaning into context. Modifiers for the term “sex” have become the basis of multitudinous suits. Title VII prevents employment discrimination based on gender; the statute does not prevent normal differences in the way that individuals of the opposite sex interact with each other, nor does Title VII prevent discrimination based on “mere personal dislike.”

With the influx of individuals from diverse origins into the American workplace, employment disputes between foreign workers and employers concerning allegedly discriminatory behavior remains a distinct possibility. Regarding undocumented workers’ access to specific Title VII remedies, the Ninth Circuit has determined that *Hoffman Plastic Compounds, Inc. v. NLRB,* a Supreme Court case denying illegal immigrants back pay under the National Labor Relations Act, does not necessarily preclude illegal immigrants from receiving back pay under Title VII. The Ninth Circuit posited that “the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII

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6. See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 601 n.9 (2004) (illuminates the difference between the broad definitions of traits that Title VII protects and the relatively narrow definition of age, the trait protected by the Age Discrimination in Employment Act).
7. See Jefferies v. Harris County Cmty. Action Ass’n, 615 F.2d 1025 (5th Cir. 1980) (concerns a female seeking protection of black women as a subclass).
8. See Grimes v. Tex. Dep’t of Mental Health & Mental Retardation, 102 F.3d 137, 143 (5th Cir. 1996) (court determines that plaintiff did not meet her burden of proof in showing that defendant employer disliked her).
9. See Peters v. Renaissance Hotel Operating Co., 307 F.3d 535, 548 (7th Cir. 2002) (in a Title VII race case, a supervisor’s comments illustrative of his dislike of the plaintiff did not demonstrate illicit motive in decision to terminate hotel loss prevention officer).
11. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1066-67 (*Hoffman* does not pertain to Title VII cases, because:

First, the NLRA authorizes only certain limited private causes of action, while Title VII depends principally upon private causes of action for enforcement . . . Second, Congress has armed Title VII plaintiffs with remedies designed to punish employers who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers . . . [which is why] Title VII’s enforcement regime includes . . . traditional remedies . . . [as well as] full compensatory and punitive damages . . . Third, under the NLRA [National Labor Relations Act], the NLRB [National Labor Relations Board] may award backpay [sic] to workers when it has found that an employer has violated the Act. Under Title VII, a federal court decides whether a statutory violation warrants a backpay [sic] award.

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cases.”12 The Circuit also noted that its decision corresponds with Equal Employment Opportunity Commission Enforcement Guidelines, which promote the “settled principle that undocumented workers are covered by the federal employment discrimination statutes.”13 At least one circuit has addressed the issue of Title VII protections for foreign nationals, holding that a foreign national must show authorization to work in the U.S. at the time of the disputed incident to receive Title VII protections.14

A. Employer Responsibility Under Title VII

Title VII requires that employers assume vicarious liability for decision-makers.15 However, the circuits differ in determining whether an employer must assume liability for the discriminatory actions of individuals who influence employment decisions, but do not make such decisions. In a decision by Judge Posner, the Seventh Circuit held that a plaintiff can buttress her Title VII claim with the prejudiced actions of an employee who is not normally a decision-maker, but who nevertheless influences contended decisions regarding the plaintiff.16 Alternatively, the Third Circuit and Fourth Circuit have held that employers can only be liable under Title VII for actions committed by decision-makers, not for actions by employees who “merely influence” the contested decision.17 However, the Third and Fourth Circuits do concede that a

12. Id. at 1069.
14. See Chaudhry v. Mobil Oil Corp. 186 F.3d 502, 504 (4th Cir. 1999) (complainant lacking documentation rendering him qualified to work in the U.S. not entitled to invoke Title VII).
15. See Burlington Indus. v. Ellerth, 524 U.S. 742, 754 (1998) (“Congress has directed federal courts to interpret Title VII based on [tort] agency principles.”). But see Kolstad v. ADA, 527 U.S. 526, 545 (1999) (quoting Kolstad v. ADA, 139 F.3d 958, 974 (1998), vacated by 527 U.S. 526, (Tatel, J., dissenting) (“In 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.’”)).
16. See Lust v. Sealy, 383 F.3d 580, 584 (7th Cir. 2004) (defendant employee’s recommendation to a decision-maker that plaintiff be turned down for a promotion caused the plaintiff’s injury, and thus justified the lower court’s finding). The Seventh Circuit did, however, hold that determining the reasonableness of justifications provided by an employer for contested behavior, requires only a consideration of the decision-maker’s actions. Id.; cf. Buie v. Quad/Graphics, Inc., 366 F.3d 496, 503 (7th Cir. 2004) (“We evaluate a claim of FMLA retaliation the same way that we would evaluate a claim of retaliation under other employment statutes, such as the ADA or Title VII.”); cf. Maarouf v. Walker Mfg. Co., 210 F.3d 750, 754 (7th Cir. 2000) (permitting the transfer of an employee’s bias to a decision-maker for purposes of Title VII suit when the an employee who made derogatory comments regarding plaintiff’s religion in a Title VII case influenced the decision to terminate plaintiff, a machine operator); accord Krchnavy v. Limagrain Genetics Corp., 294 F.3d 871, 876-77 (7th Cir. 2002).
decision-maker may not simply "rubber stamp" other employees’ decisions in order to protect such employees from liability.\(^{18}\)

B. SEX DISCRIMINATION UNDER TITLE VII

1. “Because of Sex”

Under Title VII, alleged illicit sex discrimination must occur “because of sex” to be actionable.\(^{19}\) Though little legislative history is available to illuminate the meaning of “sex”,\(^{20}\) courts have determined that Title VII’s “because of sex” clause protects individuals from unfavorable employment terms, conditions, and discriminatory acts based on gender.\(^{21}\) The clause protects both men and women.\(^{22}\) Determining whether behavior prompting Title VII discrimination claims occurs because of sex requires examining the context in which such behavior arose, as determined by the “surrounding circumstances, expectations, and relationships.”\(^{23}\)

The “because of sex” clause does not preclude individuals suffering from sex discrimination imposed by members of the same sex from receiving Title VII protections.\(^{24}\) In Oncale v. Sundowner Offshore Services, Inc., the Court indicated that Title VII protects individuals who are victims of job-related discrimination committed by an individual of the same sex.\(^{25}\) However, the Court revealed that Title VII does not necessarily provide protections for acts merely sexual in nature.\(^{26}\) In Rene v. MGM Grand Hotel, Inc., which also concerned same-sex discrimination, the Ninth Circuit held that Title VII prohibits “severe or pervasive same-sex offensive sexual touching,” because such harassment constitutes gender-based discrimination.\(^{27}\)

2. Gender Stereotyping

The High Court in Price v. Waterhouse has ruled that adverse employment actions rooted in stereotypical notions of proper comportment based on gender

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\(^{18}\) Hill, 354 F.3d 277 at 290-91; see also Foster, 98 Fed. Appx. at 88.
\(^{20}\) See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (provides commentary regarding the lack of legislative history construing the meaning of “sex” under Title VII).
\(^{21}\) See Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993); see also Willingham v. Macon Telegraph Publ’g Co., 507 F.2d 1084, 1091 (5th Cir. 1975).
\(^{23}\) Id. at 682. (“Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”).
\(^{25}\) Id.
\(^{26}\) See id. at 80-82.
\(^{27}\) Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002), cert denied, 538 U.S. 922 (2003).
violates Title VII.\textsuperscript{28} However, Title VII prohibitions against gender stereotyping do not necessarily preclude arguably pernicious sexual orientation stereotyping. Numerous circuits distinguish between discrimination motivated by one’s failure to conform to stereotypical gender expectations and discrimination based on sexual orientation, holding that Title VII prohibits the former, but does not pertain to the latter.\textsuperscript{29}

The recurring stereotype of woman as caregiver has generated numerous lawsuits.\textsuperscript{30} The Court has warned that perpetuating stereotypes of women as primary caregivers results in the persistence of such stereotypes and promotes negative depictions of the quality of women employees.\textsuperscript{31} The Second Circuit used this supposition to find that an employer’s articulations that work and motherhood are incompatible constituted gender stereotyping and served as evidence that the employer illicitly considered gender in an employment decision adversely affecting the plaintiff.\textsuperscript{32}

3. “Sex-Plus” Other Categories

Some courts have afforded specific protections to certain gender subclasses, among them minority women, women with children, and married women, dubbing such classes “sex-plus.”\textsuperscript{33} For a complainant to assert a sex-plus case, she must proffer evidence demonstrating that individuals of the opposite sex not possessing the “sex-plus” trait were treated differently than she or provide a “crystallized legal theory that . . . [suggests] a viable basis for such a cause of

\textsuperscript{28} Price Waterhouse v. Hopkins, 490 U.S. 228, 257 (1989) (plurality opinion) (Court rules discriminatory treatment of woman not conforming with employer company’s gender expectations constituted behavior violating Title VII).

\textsuperscript{29} See Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); see also Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (court upholds the dismissal of the Title VII complaint of a plaintiff allegedly subject to discrimination because of his sexual orientation, because “the law is well settled in this circuit and in all others that have reached the question that Title VII does not prohibit harassment or discrimination because of sexual orientation.”).

\textsuperscript{30} See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); see also Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 126 (2d Cir. 2004).

\textsuperscript{31} See Hibbs, 538 U.S. at 736.

\textsuperscript{32} See Back, 365 F.3d at 126.

\textsuperscript{33} Compare Jefferies v. Harris County Cmty. Action Ass’n, 615 F.2d 1025, 1032 (5th Cir. 1980) (in providing a remedy specifically for black women, the court reasoned that:

\textbf{[i]n the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, . . . [the court] cannot condone a result which leaves black women without a viable Title VII remedy.}

and Lam v. Univ. of Hawai’i, 40 F.3d 1551, 1162 (9th Cir. 1994), aff’d in part, rev’d in part on other grounds, 164 F.3d 1186, 1188 (9th Cir. 1998) (acknowledges that “[l]ike 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.”); with Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam) (court justifies a distinction between women with school-aged children and men with children of the same age if such distinction is “reasonably necessary to the normal operation of that particular business or enterprise.”).
However, not all gender subclasses are granted Title VII protections. The District Court for the Southern District of New York declined to protect a subclass even more specific than women with children, declaring that women with children who work part time are not a Title VII protected subclass.35

The recent surge of cases with both age and sex discrimination allegations has spurred some to argue that courts should consider older women to be a protected subclass.36 The Eastern District of Pennsylvania allowed a plaintiff’s sex-plus age claim to withstand judgment, asserting that because age is an “immutable characteristic,”37 older women constitute a protected subclass. However, other circuit courts have yet to acknowledge the validity of a sex-plus age claim.38 In fact, the Sixth Circuit declined to carve out a protected subclass based on sex and age, citing the lack of support for such a theory in other circuits.39

C. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REQUIREMENTS

Congress created the Equal Employment Opportunity Commission (EEOC), and charged the agency with enforcing Title VII.40 Congress initially intended that the EEOC facilitate mediation of discrimination disputes based on a plaintiff’s protected class.41 The EEOC maintains a significant role in Title VII proceedings, because the Commission develops guidelines and issues procedures governing claimants.42 When an EEOC-reviewed Title VII claim reaches the courts, the EEOC’s findings do not bind the courts.43 However, courts usually

34. See Higgins, 194 F.3d at 261; see also Fisher v. Vassar College, 70 F.3d 1420, 1446-47 (2d Cir. 1995) (plaintiff college professor alleging that sex discrimination prevented her from receiving tenure did not prevail on her sex-plus marital status claim, because she did not proffer evidence showing that married women were treated differently than married men).


36. See Nicole B. Porter, Sex-Plus Age Discrimination: Protecting Older Women Workers, 81 DENV. U. L. REV. 79, 110 (2003) (“[V]arious literature... supported the fact that there is not only a problem of discrimination against older women, but also that older women are victims of more severe and more frequent disparate treatment than older men or younger women.”); see also Roberson v. Alltel Info. Servs., 373 F.3d 647, 649-650 (5th Cir. 2004) (forty-eight year old male programmer alleged that his sex and age motivated his termination); Read v. BT Alex Brown, Inc., 72 Fed. Appx. 112, 113 (5th Cir. 2003) (plaintiff investment broker alleged age discrimination under the ADEA and sex discrimination under Title VII); Capruso, 2003 WL 1872653 at *5; Tirado-Arce v. Aramark Corp., 239 F.Supp. 2d 153, 164-65 (D.P.R. 2003), (plaintiff food worker brought claims under the Title VII and the ADEA, alleging age and sex discrimination motivated decision to lay the plaintiff off).

37. See Arnett v. Aspin, 846 F. Supp. 1234, 1241 (D. Pa. 1994) (female plaintiff, who was denied a secretarial position, constituted a member of a subclass of women over forty).

38. Porter, supra note 36, at 85-86.


41. See Stache, 852 F.2d at 1234.

42. 42 U.S.C. § 2000e-12(a) (West, WESTLAW through P.L. 109-2) (EEOC may “issue, amend, or rescind suitable procedural regulations to carry out the provisions of” Title VII).

defer to such findings.\textsuperscript{44}

1. Process Required When an Alleged Title VII Discrimination Victim Files With the Equal Employment Opportunity Commission

An employee alleging gender discrimination must exhaust state and local administrative remedies before filing Title VII charges with the EEOC.\textsuperscript{45} If the alleged discriminatory practice occurred in a location without a state or local agency charged with handling such discriminatory claims, then the claimant must file her claim with the EEOC within 180 days of the date when the alleged discrimination took place.\textsuperscript{46} If the alleged discrimination occurred in a state that has a state or local agency charged with handling such claims, then the claimant has 300 days from the date of the alleged illicit acts to file her claim.\textsuperscript{47} EEOC regulations require that a Title VII claimant provide a written statement identifying and detailing the allegedly discriminatory acts causing the claimant's injury and specifying why the claimant believes such acts are discriminatory.\textsuperscript{48}

Though a Title VII plaintiff must exhaust state and local remedies before filing with the EEOC, a claimant who files a Title VII charge with a state agency can also elect to simultaneously file with the EEOC.\textsuperscript{49} The EEOC must wait until the state agency has ceased actions regarding the named employer before it processes a Title VII charge.\textsuperscript{50} Such a charge is considered filed with the EEOC "upon the expiration of 60 (or, where appropriate, 120) days after deferral, or upon the termination of . . . [the state] agency proceedings, or upon waiver of the . . . [state] agency's right to exclusively process the charge, whichever is earliest."\textsuperscript{51} After a state agency resolves a Title VII dispute, the unsuccessful party can file suit in state court or, after securing a right-to-sue letter, discussed infra, federal court.\textsuperscript{52}

Prior employment agreements between a potential Title VII plaintiff and her

\textsuperscript{44} See id. at 65; see also Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).
\textsuperscript{45} 42 U.S.C. § 2000e-5(c) (West, WESTLAW through P.L. 109-2).
\textsuperscript{47} Id.; see generally Stepney v. Naperville Sch. Dist., 392 F.3d 236, 238 (7th Cir. 2004), (citing Lever v. Northwestern Univ., 979 F.2d 552, 556 (7th Cir. 1992), for an explanation regarding the application of the continuing violation doctrine, which may permit a court to consider acts that occurred before Title VII statute of limitations, when the plaintiff gains awareness of the discriminatory nature of the act within the limitations periods due to repetition of the act). The continuing violation doctrine does not negate the precept that "failure to remedy an unlawful employment action is not a discrete actionable violation." Id.
\textsuperscript{48} 29 C.F.R. § 1601.12(b)-16.0115(b) (West, WESTLAW through 2005); see also McGoffney v. Vigo County Div. of Family and Servs., 389 F.3d 750, 752 (7th Cir. 2004) (affirms summary judgment in employer’s favor on plaintiff job applicant’s Title VII claim, finding the “vague” language the plaintiff used in drafting her EEOC charge “[was] insufficient to place the EEOC or the . . . [defendant employer] on notice of the particular job applications to which she was referring.”).
\textsuperscript{49} See 29 C.F.R. § 1601.13(a) (West, WESTLAW through 2005).
\textsuperscript{50} 29 C.F.R. § 1601.13(a) (West, WESTLAW through 2005).
\textsuperscript{51} 29 C.F.R. § 1601.13(a) (West, WESTLAW through 2005).
\textsuperscript{52} Garcia v. Village of Mount Prospect, 360 F.3d 630, 642-43 (7th Cir. 2004) ("Simply because federal civil-rights claims must be considered first by . . . [the state agency] . . . and the EEOC in the case
former employer can also affect her ability to bring Title VII claims. A plaintiff submitting her claim for arbitration under a collective bargaining agreement does not in and of itself constitute a waiver of the plaintiff’s Title VII rights. However, a plaintiff employed by a government agency governed by a collective bargaining agreement can either file a Title VII claim or file a grievance procedure according to the collective bargaining agreement, but she cannot file both. Additionally, if a complainant employed by a federal agency finds herself the victim of an act that both violates Title VII and can be appealed under the Merit Systems Protection Board (MSPB), then she can seek remedy for her claims in a “mixed case.” The complainant can either file a “mixed case complaint” with the EEOC office governing her place of employment or file a “mixed case appeal” directly with the MSPB. A mixed-case plaintiff cannot bifurcate her claim by not including either the Title VII claim or MSPB claim in her initial action.

When an individual files a charge with the EEOC, the EEOC must investigate and determine whether there is reasonable cause to believe the charge. In investigating the claim’s validity, the EEOC may access all relevant material, which encompasses “virtually all material that might cast light on the allegations against an employer as it collects evidence in investigating a Title VII claim.” The High Court noted that courts tend to liberally construe the statute’s use of “relevant.” If the EEOC finds a lack of reasonable cause to believe a complainant’s charge, then the EEOC must dismiss the charge and inform the

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53. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (In explaining that a discrimination clause under a collective bargaining agreement could not constitute a waiver of an individual’s Title VII rights, the Court determined that the validity of a waiver of an individual’s Title VII rights would depend on whether such waiver was “knowing and voluntary.”).

54. 29 C.F.R. § 1614.301 (West, WESTLAW through 2005); see also Wright v. Snow, No. 02-7615, 2004 WL 1907687 (S.D.N.Y. 2004) (complainant barred from bringing a charge under Title VII concerning her lack of advancement with her former place of employment, the IRS, because complainant’s collective bargaining agreement allows the complainant to bring discrimination claims in a non-judicial forum). But see Macy v. Dalton, 853 F. Supp. 350, 355 (E.D. Cal. 1994) (citing 5 U.S.C. § 7121(d) and 29 C.F.R. §1613.219(b), the court relies on the cited authorities in determining that federally employed individuals who elect to pursue statutory remedies under Title VII must exhaust administrative remedies; similarly plaintiffs who elect a grievance procedure must exhaust such grievance procedures before pursuing a statutory remedy).

55. Valentine-Johnson v. Roche, 386 F.3d 800, 805 (6th Cir. 2004) (a mixed case “employee must navigate the administrative regime that governs Title VII as well as the procedures for challenging an adverse personnel action under the Civil Service Reform Act.”).

56. Id. (quoting Butler v. West, 164 F.3d 634, 638-39 (D.C. Cir. 1999)).

57. See Chappell v. Chao, 388 F.3d 1373, 1378 (11th Cir. 2004).


60. Id.

61. See id.
complainant of its decision to dismiss her charge.\textsuperscript{62} If the EEOC finds reasonable cause to believe the plaintiff’s charge, then the Commission will attempt to conciliate the employment dispute.\textsuperscript{63} If the involved parties do not resolve the disputed issues during informal conciliation, the EEOC may provide the complainant with a right-to-sue letter,\textsuperscript{64} sue the alleged discriminatory employer,\textsuperscript{65} intervene in an ongoing suit,\textsuperscript{66} or “appear as amicus curie in a private Title VII action.”\textsuperscript{67} If the EEOC elects to issue a right-to-sue letter to the complainant, the complainant must file a complaint, in a trial court, within ninety days of receiving the right-to-sue letter in order to bring a claim.\textsuperscript{68}

The EEOC can also elect to file suit.\textsuperscript{69} Congress amended Title VII in 1972 to enable the EEOC to file suit against employers and ensure that EEOC bore “the primary burden of litigation.”\textsuperscript{70} Although a plaintiff can relinquish her right to seek judicial relief under Title VII,\textsuperscript{71} such action does not limit the EEOC’s ability to seek victim-specific remedies,\textsuperscript{72} though the Supreme Court has held that the EEOC cannot pursue relief on behalf of an alleged victim whose case has already been adjudicated.\textsuperscript{73} Some circuits permit the EEOC to bring suit against an employer named in a private Title VII suit upon the private suit’s termination for other discriminatory practices violating Title VII.\textsuperscript{74} Alternatively, the Third Circuit has allowed the EEOC to bring a separate suit against a non-governmental

\textsuperscript{62} See id.


\textsuperscript{64} See 42 U.S.C. § 2000e-5(f)(1) (West, WESTLAW through P.L. 109-2) (in situations in which a claimant names a state or local government agency as the defendant, the Department of Justice is charged with providing the claimant a right-to-sue letter).

\textsuperscript{65} See id.

\textsuperscript{66} See id.

\textsuperscript{67} See Stebbins v. Keystone Ins. Co., 481 F.2d 501, 510 (D.C. Cir. 1973) (“Section 705(h) of Title VII, 42 U.S.C. § 2000e-4(g), specifically authorizes EEOC attorneys to represent the Commission as a party or as amicus curiae.”).


\textsuperscript{70} See id.

\textsuperscript{71} See id.

\textsuperscript{72} See id.

\textsuperscript{73} See id.

employer on its own behalf at any time, unhampered by preclusion restraints imposed by a Title VII plaintiff’s prior public suit concerning the same issue. 75 State limitations periods do not constrain the timeframe within which the EEOC may bring a Title VII claim. 76

When the EEOC files suit, the Commission does not act as a representative of the allegedly wronged party, but instead acts to “vindicate the public interest in preventing employment discrimination,” because the EEOC seeks to placate interests broader than those of any one individual plaintiff. 77 Several circuits agree that a correct interpretation of Title VII precludes the EEOC from filing suit unless the EEOC certifies that it does so in the interest of the public. 78

The EEOC can also intervene in an ongoing suit. 79 Some courts hold that the EEOC can intervene in an ongoing Title VII suit, but cannot file suit separately once a Title VII plaintiff has filed a complaint in a trial court after receiving a right-to-sue letter. 80 In addition, the EEOC can also appear as amicus curiae in an individual’s Title VII case. 81


Although the Circuits differ in their treatment regarding the necessity of various EEOC requirements pertaining to Title VII claims, many courts have held that the EEOC must have taken at least one procedural step, as a condition precedent to suit subject to waiver. Courts have focused particularly two initial steps—filing a charge and receiving a right-to-sue letter. The Supreme Court

Congress meant to avoid duplicative proceedings by limiting the EEOC to permissive intervention when the EEOC raises no substantially different issues and seeks no relief other than for the private party. An entirely different situation exists when the EEOC uses the filing of a charge simply as a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices; this investigation might frequently disclose, as in this instance, illegal practices other than those listed in the charge.;


76. Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-70 (imposing state statute of limitations on the EEOC would unjustly undermine Congressional intent to enable EEOC to investigate and conciliate claims, in light of the EEOC’s expansive responsibilities).

77. Id. at 326; see also Wafflehouse, Inc., 534 U.S. at 287.

78. See EEOC v. Cont’l Oil Co., 548 F.2d 884 (10th Cir. 1977); see also EEOC v. Harris Chemin, 10 F.3d 1286, 1292 (7th Cir. 2002); Kimberly-Clark Corp., 511 F.2d at 1363 n.15 (6th Cir. 1975); EEOC v. Missouri Pac. R.R., 493 F.2d 71, 74 (8th Cir. 1974).

79. See 42 U.S.C. § 2000e-5(f)(1) (West, WESTLAW through P.L. 109-2) (“Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general importance.”).

80. See, e.g., EEOC v. Harris Chemin, Inc., 10 F.3d 1286, 1293 (7th Cir. 1993) (court sought to prevent the EEOC from simultaneously bringing suit based on the same action as that of the Title VII plaintiff’s private suit).

declared that filing a charge with the EEOC is a step subject to "waiver, estoppel, and equitable tolling."\(^{82}\) Equitable tolling provides protections for minor claimants who have not filed a complaint until the young claimants reach legal age and for claimants who have not filed a complaint when they are not in the jurisdiction of the alleged discrimination.\(^{83}\) Many circuits have held that receipt of a right-to-sue letter is "a precondition [of suit] subject to waiver, estoppel, and equitable tolling."\(^{84}\) A plethora of rationales underlie this widely-held holding. Some courts herald the sensibility of applying the Supreme Court's holding in *Zipes*, "that the timely filing of an EEOC charge is not jurisdictional," to hold to all Title VII requirements listed in 2000e-5(f)(1), are "nonjurisdictional . . . [and] thus subject to waiver, estoppel and equitable tolling."\(^{85}\) Other courts reason that "because a timely filing with the EEOC necessarily precedes the return of a right-to-sue [letter] from the EEOC, such [a letter] must also be [a condition precedent that is] curable."\(^{86}\) The sheer force of precedent from persuasive courts also serves as a motivating factor in treating a right-to-sue letter as a condition precedent to suit.\(^{87}\)

Concerning other EEOC requirements, the Eleventh Circuit has declared that the proper naming of a party in an EEOC charge and right-to-sue letter, the timeliness of the EEOC charge, and whether an EEOC charge filed by one party can be used by the non-filing plaintiffs, are all condition precedents subject to estoppel.\(^{88}\) Later, the circuit expanded its already expansive view by stating that "all Title VII procedural requirements to suit are henceforth to be viewed as conditions precedent to suit rather than as jurisdictional requirements."\(^{89}\) On behalf of the Second Circuit, Judge Calebresi has noted that "when . . . decisions have turned on the question of whether proper administrative exhaustion is a jurisdictional prerequisite rather than a waivable condition precedent to bringing suit, . . . [the court has] consistently chosen the latter approach."\(^{90}\)
Title VII plaintiffs may also take measures to prevent courts from declaring their claims barred by *res judicata*. A plaintiff seeking to bring a Title VII claim rooted in actions buttressing a suit already brought by the plaintiff, can decrease the likelihood of *res judicata* rendering her Title VII claim futile. Such a plaintiff may request that the court handling her initial claim stay the proceedings and/or amend her initial complaint.91

3. Equal Employment Opportunity Commission Concerns

Though the High Court has prohibited practices preventing potential Title VII plaintiffs from redressing their claims, a plaintiff can relinquish or trust away her Title VII rights.92 Courts emphasize that a plaintiff must file suit within a timely manner, and they refuse to excuse plaintiffs from the ninety day statute of limitations for filing suit.93 The Seventh Circuit determined that a plaintiff can also lose her rights to resort to Title VII because of imprudent legal advice.94 Additionally, if a plaintiff delays in filing her claim, the laches doctrine, which prevents potential Title VII plaintiffs from pursuing proceedings against employers inordinately long after the alleged discriminatory incidents occurred,95 may

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91. Davis v. Dallas Area Rapid Transit, 383 F.3d 309, 315 (5th Cir. 2004) (citing cases from an array of circuits, including the First, Second, Third, Sixth, Seventh, Ninth, and Eleventh circuits, in which the presiding court barred plaintiff(s) from bringing a Title VII claim when the plaintiff(s) "failed to take measures to avoid preclusion under *res judicata* while they pursued the requisite Title VII remedies").


93. See, e.g., Williams v. Thomson Corp., 383 F.3d 789, 791 (8th Cir. 2004) (per curiam) (because the right-to-sue letter arrived at the most recent address plaintiff provided to the EEOC, plaintiff's explanation that she moved will not prevent dismissal of plaintiff's claims, for plaintiff failed to fulfill her duty to inform EEOC of her address change). But see Everson v. N.Y. City Transit Auth., 216 F. Supp. 2d 71 (E.D.N.Y. 2002).

94. See Riley, 881 F.2d at 374 ("The fact that plaintiff's counsel may have inaccurately conveyed the effect of the release or failed to draft language adequate to protect plaintiff's Title VII rights may be remedied through a malpractice action, but not through judicial interpretation of plaintiff's subjective intent.").

95. Amtrak v. Morgan, 536 U.S. 101, 121 (2002) (The Court stated:

> [An employer may raise a laches defense, which bars a plaintiff from maintaining a suit if he unreasonably delays in filing a suit and as a result harms the defendant . . . A laches defense requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."

preclude the plaintiff from filing her claim. The Eighth Circuit distinguished between situations out of the plaintiff's control causing plaintiff to miss the statute of limitations for filing suit, and situations in which a court dismisses plaintiff's claim because of plaintiff's failure to adhere to administrative procedures, holding that equitable tolling provides refuge only for plaintiffs in the former situation.

A Title VII plaintiff can also waive her right to bring a Title VII action under a voluntary settlement. However, the circuits utilize different approaches in determining the validity of such waivers. The Second and Third Circuits consider the totality of the circumstances in determining whether a plaintiff signed a contract relinquishing Title VII rights "knowingly and voluntarily." Alternatively, the Seventh and Eighth Circuits refuse to consider a waiving party's subjective intent absent fraud or duress; both courts seek to maintain the

96. See Smith v. Caterpillar, 338 F.3d 730, 734-735 (7th Cir. 2003) (affirming district court's ruling that the laches doctrine barred plaintiff's Title VII claim when the plaintiff initially pursued her Title VII claim with a state agency charged with handling such claims and then commenced proceedings with the EEOC nearly seven years later at the earliest. The court determined that "[t]he longer the plaintiff delays in filing her claim, the less prejudice the defendant must show in order to defend laches."). Compare Brown v. Kansas Cty. Power & Light Co., 267 F.3d 825, 827 (8th Cir. 2001) (affirms district court's holding that plaintiff's Title VII suit was barred by laches, because plaintiff, who brought suit more than six years after she filed EEOC charges, delayed in bringing suit, and the district court did not abuse its discretion in determining that such delay "was neither reasonable nor excusable."); with Davis v. Panasonic Co. USA, No. 02-1431, 2002 WL 31415726 (N.D. Ill. 2002) (the court determined that the ninety-day time limitation did not toll, because neither the plaintiff nor the plaintiff's attorney received the requisite right-to-sue letter, and the plaintiff would have timely filed suit if plaintiff had received the right-to-sue letter).


98. See Alexander, 415 U.S. at 52.

99. See Bormann v. AT & T Communications, Inc., 875 F.2d 399, 403 (2d Cir. 1989) (quoting EEOC v. Am. Express Publ'g Corp., 681 F. Supp. 216, 219 (S.D.N.Y. 1988) (factors useful in deciding whether a release of Title VII Rights include:

1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law' ... [and] whether an employer encourages or discourages an employee to consult an attorney.); cf. Coventry v. U.S. Steel Corp., 856 F.2d 514, 522 (3d Cir. 1988) (court applies a Title VII analysis in an ADEA case, and avers that:

[i]n Title VII cases, the determination of whether a waiver has been 'knowingly and willfully' made has been predicated upon an evaluation of several indicia arising from the circumstances and conditions under which the release was executed... In light of the strong policy concerns to eradicate discrimination in employment, a review of the totality of the circumstances, considerate of the particular individual who has executed the release, is also necessary.].

But see Alexander, 415 U.S. at 52 (a court would have to assess whether a waiver was voluntary and knowing; the Court did not determine whether a court making such a determination would consider subjective factors).
contract's sanctity. In emphasizing a plaintiff's adherence to procedural requirements and allowing plaintiffs to voluntarily waive their Title VII rights, courts do not wish to divest plaintiffs of those protections.

Significant litigation has arisen from businesses' efforts to reduce liability in Title VII discrimination cases. Cognizance of successor liability cases, in which a defendant employer transfers ownership and the new owner objects to the potential liability incurred, and integrated enterprise cases, which involve "separate entities [that] constitute . . . a single employer," may prove particularly relevant in today's merger-laden business atmosphere. Plaintiffs filing Title VII claims often do not participate in negotiations motivating such transfers of employer ownership, and accordingly are disadvantaged when such transfers occur. Several circuits have upheld the successor liability doctrine with respect to employment discrimination cases, albeit with different approaches. The Ninth Circuit has outlined a three-factor test for determining successor liability applicability when an employer's assets are transferred, a test also used by the Third Circuit. Alternatively, the Seventh Circuit has carved out a different

100. See Pilon v. Univ. of Minnesota, 710 F.2d 466, 468 (8th Cir. 1983). A plaintiff graduate student's settlement agreement to waive her Title VII rights constituted an adequate release; thus the court refused to inquire into the plaintiff's subjective intent, because the plaintiff had legal representation throughout the process and signed a negotiation agreement; accordingly, there was no evidence of fraud or duress. Plaintiff's waiver of Title VII rights applied, because plaintiff's attorney negotiated the unambiguous waiver. See id.; see also Fortino v. Quasar Co., 950 F.2d 389, 394 (7th Cir. 1991) (court dismissed plaintiff's Title VII claim, though the plaintiff business executive admittedly did not understand terms of a waiver of his Title VII rights and the plaintiff's legal "representation was indirect and the release was not negotiated." The court did not want to subjugate Title VII's settlement goals by allowing the plaintiff to avoid unfavorable results of his agreed upon settlement.).

101. See Morelli v. Cedel, 141 F.3d 39, 44 (2d Cir. 1998) (U.S. branches of foreign businesses can be held liable under the Age Discrimination in Employment Act).

102. See Brzozowski v. Corr. Physician Servs., 360 F.3d 173, 180-81 (3d Cir. 2004) (Title VII plaintiff was permitted to bring Title VII charges against the defendant, because the plaintiff named all the defendants of whom she knew at the time of filing her Title VII charge and the court refused to encourage "evasion through corporate transfers that would frustrate the equitable power of the Court to make the plaintiff whole.").

103. See Sandoval v. Boulder Reg'l Communications Ctr., 388 F.3d 1312, 1322 (10th Cir. 2004) (citing Bristol v. Bd. of County Comm'r's of the County of Clear Creek, 312 F.3d 1213, 1220 (10th Cir. 2002) (factors weighed in determining "whether two nominally separate entities constitute a . . . single employer [for Title VII purposes include]: (1) interrelations of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control.").)

104. Cf. John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964) (in a case concerning collective bargaining, the Court stated:

[employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership . . . [Thus, the] negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations.].

105. See Criswell v. Delta Air Lines, Inc., 868 F.2d 1093, 1094 (9th Cir. 1989) ("In an employment discrimination action, there are three principal factors relating to successor liability: (1) continuity in operations and work force of the successor and predecessor employers; (2) notice to the successor employer of its predecessor's legal obligation; and (3) ability of the predecessor to provide adequate relief directly."); see also Brzozowski, 360 F.3d at 177-78 (cites the aforementioned factors considerd in
balancing test, noting that successor liability does not apply in all situations in which employer assets change hands.\textsuperscript{106} The Sixth Circuit has noted that Title VII policy justifies the successor liability doctrine, but acknowledges that successor liability must be determined on a case-by-case basis.\textsuperscript{107} For circuits that recognize the successor liability doctrine, changed ownership of a business could possibly shield the business from injunction under Title VII.\textsuperscript{108}

4. Equal Employment Opportunity Commission’s Continued Prominence in Title VII

The High Court has aided in maintaining the viability of the EEOC as the mainstay of Title VII in a number of rulings. The Court has long prohibited interpretations of Title VII that prevent potential plaintiffs lacking legal help from filing suit.\textsuperscript{109} Additionally, the Court also afforded protections to the filing of EEOC complaints, by prohibiting employers from retaliating against plaintiffs who file such complaints.\textsuperscript{110} Further, the Court will not allow local procedural rules to frustrate the EEOC’s purpose; the justices upheld the validity of an EEOC Title VII complaint arriving at a local clerk’s office within the ninety day requirement, although the complaint did not meet local filing requirements.\textsuperscript{111}

D. REMEDIES

Title VII of the Civil Rights Act of 1964 aims “to make persons whole for injuries suffered on account of unlawful employment discrimination”\textsuperscript{112} and determining successor liability in employment discrimination cases; explaining that “[t]he mere substitution of a reasonable defendant for an insolvent one is not a basis for denying successor liability.”.\textsuperscript{106} EEOC v. Vucitech, 842 F.2d 936, 946 (7th Cir. 1988) (“[E]mphasis should be on balancing the interest in sanctioning unlawful conduct and the interest in facilitating the market in corporate and other productive assets.”).

107. EEOC v. MacMillan Bloedel Containers Inc., 503 F.2d 1086, 1091 (6th Cir. 1974) (“Title VII per se does not prohibit the application of the successor doctrine, but rather mandates its application. Title VII was designed to eliminate discrimination in employment and the courts were given broad equitable powers to eradicate the present and future effects of past discrimination.”).

108. Cf. Miles v. Indiana, 387 F. 3d 591, 601 (7th Cir. 2004) (Title VII racial discrimination case in which the court affirmed the United States District Court for the Southern District of Indiana’s findings that the plaintiff, an African-American state trooper, is not entitled to injunctive relief when the defendant employee, the Indiana State Police, was under a new administration).

109. See Love v. Pullman Co., 404 U.S. 522, 527 (1972) (though petitioner porter did not comply with EEOC requirements in filing his complaint, the Court enabled Title VII proceedings to continue, holding that doing so effects the intent of the Act and noting that the porter did not have legal assistance and the respondent company did not show that it would be prejudiced).

110. See, e.g., Stover v. Martinez, 382 F.3d 1064, 1071 (10th Cir. 2004) (“EEOC complaints are protected activity.”).

111. Loya v. Desert Sands Unified Sch. Dist., 721 F.2d 279, 281 (When a clerk refused to timely file a Title VII plaintiff’s complaint solely because the paper size did not meet the court’s requirements, the court held that plaintiff’s complaint was duly filed, holding “that for purposes of the statute of limitations the district court should regard as ‘filed’ a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules.”).

prevent future illicit discrimination. The 1972 amendments to the 1964 Act reveal that, "the Equal Employment Opportunity Commission shall have authority to enforce ... [Title VII provisions] ... through appropriate remedies." Upon a favorable finding, a victorious Title VII plaintiff may receive both equitable remedies and, as a result of the Civil Rights Act of 1991, legal remedies.

1. Equitable Remedies

a. Relief Available. To restore Title VII plaintiffs to the position in which they would have been absent the illegal discrimination, Congress enacted §706(g), which allows federal courts to order that employers in violation of Title VII provide appropriate equitable relief. Equitable remedies include injunctions, reinstatement, back and/or front pay, attorney’s fees and other equitable relief deemed necessary to make the plaintiff whole. Courts enjoin discriminatory behavior to both deter employers from future activities that contravene Title VII and eliminate the results of previous discrimination. Injunctive relief is appropriate when a defendant’s primary decision-makers comprise the discriminating individuals named in the plaintiff’s case.

A trial court may order that a plaintiff be instated or reinstated into a position for numerous reasons. The court may demand reinstatement to enable the plaintiff to continue in her position absent illicit discrimination, prevent employers’ retaliatory actions when an employee asserts Title VII rights, allow the employer to demonstrate to other employees that the employer adheres to Title VII provisions, and protect the plaintiff from financial loss stemming from Title VII discrimination. A “mixed motive” plaintiff, one subject to an adverse employment decision motivated by other considerations in addition to illicit discrimination, cannot receive instatement and reinstatement as remedies under Title VII.

In awarding back pay, courts seek to make prevailing plaintiffs whole and

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113. See id. at 421.
118. Id.
120. See, e.g., EEOC v. Ilona of Hung., 108 F.3d 1569, 1579 (7th Cir. 1997) (en banc) (citing EEOC v. Gurnee Inn Corp., 914 F.2d 815, 817 (7th Cir. 1990) (finding possibility that discrimination could persist where manager who had been aware of discriminatory conduct was still employed by the defendant)).
prevent future illicit employment discrimination. Thus, the Act enables district courts to award back pay up to two years prior to the filing of the applicable EEOC charge. A plaintiff can usually receive back pay from the date of the illicit discriminatory action to the date of her judgment. Some courts do not include time accrued in the back pay calculation, after the point at which the employer would have otherwise terminated the plaintiff. Because back pay seeks to put a Title VII plaintiff in the position she would have been absent the discriminatory action, courts award the Title VII plaintiff the compensation denied her because of the illicit practice.

In limited cases, instead of reinstating a plaintiff, a court can also award front pay, the equivalent of the compensation a plaintiff would have received if she were reinstated. Courts have considered several factors in determining the appropriateness of front pay, including the presence of intimidating behavior towards the plaintiff, the effect of the illicit action on the complainant's emotional health, and the feasibility of reinstatement in light of the employer-(former) employee relationship. In calculating front pay, courts can assess whether the plaintiff met her duty to mitigate damages, would have retained employment absent discrimination, and/or acted with "unclean hands." To receive attorney's fees in a Title VII suit, a plaintiff must substantially prevail on a "significant claim" pertaining to her suit, or the court will limit the

123. See, e.g., Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); see also Moysis v. DTG Datnet, 278 F.3d 819, 828 (8th Cir. 2002).
125. But see Gloria v. Valley Grain Prods., 72 F.3d 497, 499 (5th Cir. 1996) (per curiam) (denial of plaintiff's appeal for back pay up to the final judgment, because plaintiff accepted the lower court's settlement without complaint, and the court considered damages accumulating after the trial date as a separate issue).
126. See, e.g., McKennon v. Nashville Banner Publ. Co., 513 U.S. 352, 362 (1995) ("The beginning point in the trial court's formulation of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information [that would have resulted in complainant's termination] was discovered.").
130. See Rivera v. NIBCO, Inc., 384 F.3d 822, 832 (9th Cir. 2004) (since there is a statutory duty to mitigate damages, courts have held that a precondition for a claim for back pay 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 back pay period); see also Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 450-51 (11th Cir. 1993) (The court stated:

"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. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933). 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. Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (5th Cir. 1979), cert. denied, 445 U.S. 917, 100 (1980)."").
award, awarding fees commensurate with the plaintiff's success on her claim.\textsuperscript{132} Courts often use the lodestar method to calculate reasonable attorney's fees.\textsuperscript{133} The lodestar method requires that the plaintiff show the reasonableness of the time charged for the case and the reasonableness of the hourly rate charged.\textsuperscript{134} A court must peg plaintiff's claims as frivolous or unreasonable to award a defendant attorney's fees.\textsuperscript{135}

A court may order other equitable relief.\textsuperscript{136} Available equitable relief includes affirmative action designed to counter the effects of discriminatory practices\textsuperscript{137} and settlement agreements corresponding with the goals of Title VII.\textsuperscript{138}

\textit{b. Mixed Motive Cases.} The Civil Rights Act of 1991 codifies Title VII plaintiffs' right to receive limited relief in mixed motive cases—cases where discrimination based on Title VII protected classes constitutes at least one of the factors motivating actions spurring a Title VII plaintiff's claim.\textsuperscript{139} The 1991 Act, in relevant part, states that:

\begin{quote}
[A]n unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice;\textsuperscript{140} and if an individual proves a violation under section 2000e-2(m), the employer can avail itself of a limited affirmative defense that restricts the available remedies if it demonstrates that it would have taken the same action absent the impermissible motivating factor.\textsuperscript{141}
\end{quote}

In resolving a circuit split, the Supreme Court has determined that 2000 (e)-2(m) does not require direct evidence, so a Title VII plaintiff can thus use circumstantial evidence in seeking relief in a mixed-motive case.\textsuperscript{142} A plaintiff in a mixed motive case is only entitled to declaratory relief, limited injunctive relief, and

\begin{itemize}
\item \textsuperscript{132} Hensley v. Eckerhart, 461 U.S. 424, 435-36 (1983).
\item \textsuperscript{133} See id. at 443.
\item \textsuperscript{134} See Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 550 (7th Cir. 1999).
\item \textsuperscript{135} See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).
\item \textsuperscript{136} 42 U.S.C. § 2000e-5(g) (West, WESTLAW through P.L. 109-2).
\item \textsuperscript{137} See United States v. Paradise, 480 U.S. 149, 166 (1987).
\item \textsuperscript{138} Cf. EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 745 (1st Cir. 1996) (injunction affirmed against an employer's settlement agreements preventing employees from corresponding with the EEOC, because such a settlement would obfuscate Title VII policy).
\item \textsuperscript{139} See J. FRIEDMAN & G. STRICKLER, THE LAW OF EMPLOYMENT DISCRIMINATION, 986 (5th ed. 2001).
\item \textsuperscript{140} 42 U.S.C. § 2003e-2(m) (West, WESTLAW through P.L. 109-2).
\item \textsuperscript{141} 42 U.S.C. § 2003-5(g)(2)(B) (West, WESTLAW through P.L. 109-2).
\item \textsuperscript{142} See Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (Court determined that Congress' definition of "demonstrates" as used in Title VII does not indicate that Title VII plaintiffs must utilize direct evidence to show discrimination).
\end{itemize}
attorney's fees/costs if the respondent can show that he would have made the same adverse decision regarding plaintiff's employment.\textsuperscript{143}

2. Legal Remedies

Also in the 1991 Act, Congress made compensatory and punitive\textsuperscript{144} damages available under Title VII in cases where an employer has intentionally discriminated against a plaintiff in contravention of Title VII.\textsuperscript{145} The 1991 Act caps the amount of legal remedies recoverable; applicable caps depend on the employer's size.\textsuperscript{146} The caps do not apply to relief available before the 1991 amendment, such as back pay, front pay, and other previously available relief.\textsuperscript{147} Additionally, if a plaintiff resides in a state without a damages cap, the plaintiff can possibly bring the state claim in federal court to avoid the Title VII caps with respect to the state law claim.\textsuperscript{148} The Supreme Court has construed the 1991 Act's provision allowing the EEOC to provide appropriate remedies as permitting the EEOC to require discriminatory federal agency employers to pay compensatory damages to a wronged plaintiff.\textsuperscript{149} A complainant seeking compensatory and punitive damages can also elect to have her case heard by a jury.\textsuperscript{150} Punitive damages are only available when defendants act "with malice or reckless indifference to the federally protected rights of an aggrieved individual."\textsuperscript{151} A plaintiff cannot receive legal remedies for Title VII violations that took place before Congress enacted the 1991 Amendment.\textsuperscript{152} A mixed motive plaintiff also may not receive punitive damages if other factors motivated the disputed action in addition to illicit discrimination.\textsuperscript{153}

\begin{footnotes}
\item[144] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535 (1999) (section of the 1991 Act allowing punitive damages in Title VII cases "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind.").
\item[146] See 42 U.S.C. § 1981a(b)(3) (West, WESTLAW through P.L. 109-2). If defendant employer has more than fifteen but less than 100 employees, a plaintiff in a Title VII intentional discrimination case can receive up to $50,000 in compensatory and punitive damages. If the employer has 101 to 201 employees, the plaintiff can receive up to $100,000; for an employer with 201-500 employees, the plaintiff can receive up to $200,000; for an employer with over 500,000, $300,000 is the maximum amount of compensatory and punitive damages a plaintiff can receive. See id.
\item[148] See Passantino v. Johnson & Johnson Consumer Prod., Inc., 212 F.3d 493, 516 (9th Cir. 2000).
\item[150] See 42 U.S.C. § 1981a(c) (West, WESTLAW through P.L. 109-2).
\item[153] Landgraf v. Usi Film Prods., 511 U.S. 244 , 285-86 (1994).
\end{footnotes}
II. THE TITLE VII CASE

A. DISPARATE TREATMENT

Under Title VII, it is unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to her compensation, terms, conditions, or privileges of employment because of the individual's race, color, religion, sex, or national origin.\textsuperscript{154} It is also unlawful for an employer to limit, segregate, or classify her employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect her status as an employee, because of such individual's race, color, religion, sex, or national origin.\textsuperscript{155} In order to prevail on a Title VII disparate sex treatment claim, an employee only has to establish that, but for her sex, she would have been treated differently.\textsuperscript{156} Although the employee must prove that the employer acted intentionally, the intent does not have to be malicious.\textsuperscript{157} Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision.\textsuperscript{158} Disparate treatment is one of two theories of intentional discrimination recognized under Title VII, the other theory being one of pattern or practice discrimination.\textsuperscript{159} The Court has recognized, however, that disparate treatment is the most easily understood type of discrimination.\textsuperscript{160} Disparate treatment was the most obvious evil Congress sought to fight against with the passage of the 1964 Civil Rights Act.\textsuperscript{161}

Disparate treatment claims require proof of discriminatory intent either through direct or circumstantial evidence.\textsuperscript{162} Direct evidence establishes the

\textsuperscript{156} Jespersen v. Harrah's Operating Co., 329 F.3d 1076, 1079 (9th Cir. 2004).
\textsuperscript{157} See id.
\textsuperscript{159} See Cooper v. S. Co., 390 F.3d 695, 724 (11th Cir. 2004), \textit{citing} EEOC v. Joe's Stone Crab, 220 F.3d 1263, 1274 (11th Cir. 2000) (in a "pattern and practice" disparate treatment case, the plaintiff must prove, normally through a combination of statistics and anecdotes, that discrimination is the company's standard operating procedure).
\textsuperscript{160} See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 (1977) (The Court stated:

Disparate treatment such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.).
\textsuperscript{161} See id., \textit{citing} 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey) (Senator Humphrey stated:

"What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States"").
\textsuperscript{162} See Cooper v. S. Co., 390 F.3d 695, 723 (11th Cir. 2004).
existence of discriminatory intent behind an employment decision without requiring any inference or presumption. Since direct evidence involves blatant and transparent remarks, it is encountered infrequently. Because direct evidence of intentional discrimination rarely exists, employees have to rely on circumstantial evidence to prove intentional discrimination. When using circumstantial evidence to prove intentional discrimination, plaintiffs can use the framework established in McDonnell Douglas Corp. v. Green. This analysis, commonly known as the McDonnell Douglas burden-shifting framework, requires a plaintiff to show: 1) that she belongs to the protected class; 2) that she applied and was qualified for a job for which the employer was seeking applicants; 3) that, despite her qualifications, she was rejected; and 4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff’s qualifications.

The McDonnell Douglas test is the predominant form of pretext jurisprudence. The three parts of the test are: 1) the establishment of a prima facie case, 2) the defendant’s articulation of at least one legitimate non-discriminatory reason (LNR) for the job action, and 3) the pretext stage. In St. Mary’s Honor Center v. Hicks, the Court held that the McDonnell Douglas test was purely procedural. In the aftermath of Hicks, the McDonnell Douglas test merely forces the employer to respond to the plaintiff’s prima facie case by presenting evidence from which the fact finder can reach her own conclusion. The McDonnell Douglas test therefore serves as a tool to trigger the presumption of discrimination after the presentation of the prima facie case and also provides a structure for the defendant’s response in rebutting that presumption.

In mixed motive cases, both legitimate and illegitimate factors prompt an employment decision. To address this complexity, the Court added additional specificity to disparate treatment jurisprudence with the addition of the motivating factor test. In Price Waterhouse v. Hopkins, the Court employed a motivating factor test to be used when legitimate and illegitimate factors combine to bring about a job action. Title VII was amended in 1991 to require that any

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163. See Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001).
164. See Cooper, 390 F.3d at 724 n.15.
165. 411 U.S. 792 (1973); see also Cooper, 390 F.3d at 723-24.
169. Id. at 521.
170. See Chambers, supra note 167, at 88.
172. Chambers, supra note 167, at 84.
173. 490 U.S. 228 (1989).
174. See id. at 249-250 (The Court stated:

In [mixed motive cases], we emphasized [that] the employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the
illegitimate consideration of a protected trait in an employment decision constitutes a per se violation of Title VII, regardless of its proportional influence in the final decision. The Court has maintained that the standard of proof for a prima facie case of disparate treatment is a preponderance of the evidence, meaning that the weight of the evidence points to an illegitimate discriminatory motive. Once it is shown that the employer's employment practice was, by a preponderance of the evidence, discriminatory, the burden shifts to the employer to rebut the presumption and show a legitimate, non-discriminatory reason for the employment decision.

Since McDonnell Douglas and Price Waterhouse, disparate treatment cases have been grouped into three categories: standard, McDonnell Douglas pretext, and Price Waterhouse mixed motives. In the years since Price Waterhouse, the weight of these distinctions has been lessened and disparate treatment cases are generally treated the same.

1. Plaintiff's Prima Facie Case

a. Individual Disparate Treatment. Individual disparate treatment occurs when an employee alleges her employer discriminated against her because she is a part

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175. See Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(m)) (West, WESTLAW through P.L. 109-2) ("Except as otherwise provided in this subchapter, 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, 38-40 (1st Cir. 1998) (no error found when jury inquiry regarding meaning of term "motivating factor," specifically asking "how much weight is to be rendered to make decision," received instruction that plaintiff had burden to show "it is more likely than not that gender was a motivating or determining factor in the firing of the plaintiff by the defendant. . . . If you find that the plaintiff was discharged for reasons other than his gender you must find for the defendant," because reversal would "impose an unrealistic burden of perfection on a court facing the constant pressures of trial.").

176. See Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1982) (The Court stated: The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.).

177. See generally Chambers, supra note 167, at 84. Chambers suggests that since in St. Mary's Honor Center v. Hicks and Desert Palace, Inc. v. Costa, the Court eliminated the effect of the pretext test and the distinction between standard and pretext cases, they have interpreted the motivating factor test in a manner that eliminates the distinction between mixed motives and non mixed motives cases. Chambers explores whether this collapse in Title VII distinctions will result in shifting more discretion to trial judges. Id.
of a protected group based on race, sex, national origin, or religion. At all times the plaintiff carries the ultimate burden of proving to the fact finder that an employer intentionally discriminated against her. The following categories outline several ways in which a plaintiff claims intentional discrimination on the basis of sex: (i) failure to hire or promote, (ii) discharge, (iii) disciplinary action, (iv) constructive discharge, (v) compensation, and (vi) employer retaliation against an employee for filing a Title VII claim.

i. Hiring and Promotion. To establish a prima facie case of discrimination in hiring or promotion, an unsuccessful applicant or employee charging an employer with sex discrimination must prove that: 1) she is a member of a protected class, 2) she applied for and was qualified for a job or promotion for which the employer was seeking applicants, 3) despite the applicant's qualifications, she was rejected for the position, and 4) after the plaintiff's rejection the position remained open and the employer continued to seek applications from individuals with similar qualifications.

Courts distinguish under what conditions an employee can bring a claim of failure to promote. An employee cannot sustain a claim of discrimination in promotion if an employer monitors a formal system for hiring and promotion and the employee fails to express a desire to be promoted or expresses a desire to be promoted but does not follow the formal procedures.

178. See generally Burlington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999) (disparate treatment analysis focuses on the treatment of individual employees and not on general action towards a group.)

179. See id. at 1315 ("Because disparate treatment is a form of intentional discrimination, the plaintiff must prove that his employer acted with a discriminatory intent or motive.").

180. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (an employee claiming race discrimination must prove:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.);

see also Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.6 (1981) (prima facie elements as articulated in McDonnell Douglas applied in sex discrimination case.); Gu v. Boston Police Dep't, 312 F.3d 6, 10 (1st Cir. 2002) (female applicants made a prima facie case of discrimination, demonstrating that: (1) they are women; (2) they applied for or expressed interest in the positions; and (3) they did not receive either job.).

181. See Williams v. Giant Food, Inc., 370 F.3d 423, 430 (4th Cir. 2004) (The court stated:

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.;
ii. Discharge. A claimant who files a complaint against her employer for discrimination based on sex after being discharged must prove: 1) that she is a member of a protected class, 2) that her performance adequately met her employer’s expectations, 3) that despite her performance, she was discharged or demoted, and 4) that after her termination or demotion, the employer either sought a replacement candidate with similar qualifications or replaced the claimant with an employee who was not a member of the claimant’s protected class, or both.\textsuperscript{182} A split among the courts as to the fourth prong of the discharge test can be traced to the Supreme Court’s failure to clearly articulate a position regarding that prong.\textsuperscript{183} The majority of the circuit courts do not require that the claimant show that her successor was not a member of her protected class.\textsuperscript{184} Some courts deem the replacement’s characteristics to be important to, but not determinative of, their decision.\textsuperscript{185} Certain circuits mandate the employer replace
the employee with someone who was not a member of the employee’s protected group.\textsuperscript{186}

Similar prima facie case requirements exist when the complainant claims she was discriminated against during a reduction-in-force (RIF) layoff. In these cases the claimant must demonstrate that: 1) she is a member of a protected class; 2) she was selected for discharge from a larger group of employees; 3) she was performing at a level largely equivalent to the lowest category of the group maintained; and 4) the selection process for discharge resulted in more favored treatment for similarly situated employees who were not members of the claimant’s protected class.\textsuperscript{187}

iii. Disciplinary Action. In a claim of disparate treatment on the basis of sex in the manner in which an employee is disciplined, the plaintiff must show that: 1) she belongs to a protected class as specified in Title VII; 2) that she was qualified for the job that she holds or held; and 3) that a similarly situated employee engaged in identical or similar misconduct but received lesser or no discipline.\textsuperscript{188}

iv. Constructive Discharge. Courts may recognize situations where the work conditions are so unreasonably intolerable that a responsible employee would feel forced to resign. In order to demonstrate that a company’s actions amounted to a constructive discharge the plaintiff must show: 1) the deliberateness of the company’s actions, and 2) that a reasonable employee encountering such situation would leave her position.\textsuperscript{189} A constructive discharge claim involves the

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\textsuperscript{186} See Bradshaw v. Pac. Bell, 72 Fed. Appx. 532 (9th Cir. 2003) (African-American employee failed to establish prima facie case of racial discrimination under Title VII arising from his termination of employment, given lack of evidence that employee was replaced by someone outside of his protected class.); Lovas v. Huntington Nat’l Bank, 215 F.3d 1326 (6th Cir. 2000) (unpublished table decision), available at 2000 WL 712355, at *5 (“A prima facie case of sex discrimination under Title VII requires a plaintiff to demonstrate by a preponderance of the evidence that . . . she was replaced by a person outside of the protected class.”).

\textsuperscript{187} See Bellaver v. Quanex Corp., 290 F.3d 485, 494 (7th Cir. 2000); see also Verwey v. Ill. Coll. of Optometry, 43 Fed. Appx. 996, 999 (7th Cir. 2002) (When the discharged employee’s duties are absorbed by other employees, the “similarly situated” prong is inappropriate. This is situation is called a “mini-RIF,” even in cases where more than one employee has been terminated. A “mini-RIF” requires a plaintiff to demonstrate by a preponderance of the evidence that . . . she was replaced by a person outside of the protected class.).

\textsuperscript{188} See Alexander v. Fulton County, 207 F.3d 1303, 1336 (11th Cir. 2000).

\textsuperscript{189} See Pa. State Police v. Suders, 124 S. Ct. 2342, 2347 (2004) (The Court stated: For an atmosphere of sexual harassment or hostility to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment. A hostile-environment constructive discharge claim entails something more: a plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign.)
employee’s decision to leave and the precipitating conduct. To prevail on a disparate treatment claim asserting a constructive discharge, the employee must give her employer a reasonable amount of time to correct the unlawful discriminatory practice prior to her resignation. In most constructive discharge claims, the court examines whether the employer had notice of the harassing working conditions and whether the employee took advantage of the established avenues of redress or just unreasonably resigned.

v. Compensation. In order to establish a prima facie case of sex-based wage or salary discrimination, a plaintiff must show that she is intentionally paid less for performing substantially comparable work to the work performed by one or more members of the opposite sex. With the exception of the requirements for claims of “comparable worth,” the Title VII prima facie case of compensation discrimination based on sex is similar to the prima facie requirements under the Equal Pay Act. A key difference, however, is that per the McDonnell Douglas standard the claimant must offer at least inferential evidence that the salary disparity is a product of the employer’s intentional discrimination against her on account of her gender.

vi. Retaliation. Title VII prohibits an employer from discriminating against any employees or applicants for employment because they have opposed unlawful practices or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing. In order to prevail on a retaliation claim under Title VII, a plaintiff must prove that: 1) she engaged in

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190. See id. at 2355.
191. See id. at 2347.
193. See Belfi v. Prendergast, 191 F.3d 129, 140 (2d Cir. 1999) (“In order to make out a prima facie case of unequal pay for equal work under Title VII, a plaintiff must show that (1) she is a member of a protected class; and (2) she was paid less than non-members of her class for work requiring substantially the same responsibility.”); see also Lawrence v. CNF Transp., Inc., 340 F.3d 486, 493-94 (8th Cir. 2003) (employee prevailed on gender 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); Sprague v. Thorn Ams., 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 at 1013 at 1019 (11th Cir. 1994)). But see Adams v. CBS Broad., Inc., 61 Fed. Appx. 285, 288 (7th Cir. 2003) (Supreme Court has not articulated how the standard four-part McDonnell-Douglas analysis should be tailored to wage discrimination claims); Ghosh v. Ind. Dep’t of Envtl. Mgmt., 192 F.3d 1087, 1094 (7th Cir. 1999) (Title VII has no definitive standard for establishing prima facie case of compensation discrimination).
protected conduct under Title VII; 2) she suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. If, for instance, a wife and husband work at the same company and the wife experiences retaliatory discrimination for the acts of the husband, she may be able to bring a retaliation claim against her employer. Courts are split on whether Title VII retaliation protection extends to third parties.

In some circuits whether an employment action is "adverse" is considered on a case-by-case basis. Adverse acts carry "a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment pros-

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197. See, e.g., Annett v. Univ. of Kan., 371 F.3d 1233, 1237 (10th Cir. 2004); Erenberg v. Methodist Hosp., 357 F.3d 787, 793 (8th Cir. 2004); see also Walcott v. City of Cleveland, 2005 WL 14982 (6th Cir. 2005) (unpublished opinion) (The court stated:

To establish a causal connection between the protected activity and the adverse employment action, a plaintiff must present evidence 'sufficient to raise the inference that her protected activity was the likely reason for the adverse action.' Temporal proximity alone, without additional evidence of a retaliatory animus, will not suffice to support a finding of a causal connection;

Hilt-Dyson v. City of Chicago, 282 F.3d 456, 465 (7th Cir. 2002) (four requirements of modified McDonnell Douglass burden-shifting framework:

that the plaintiff 1) engaged in statutorily protected activity; 2) performed her job according to her employer's legitimate expectations; 3) suffered a materially adverse employment action despite meeting her employer's legitimate expectations; and 4) was treated less favorably than similarly situated employees who did not engage in statutorily protected activity);

Downs v. Postmaster General, 31 Fed. Appx. 848, 850 (6th Cir. 2002) (additional standard includes that plaintiff must show that defendant was aware of the right to be protected against retaliation).


199. See Hockman v. Westward Comms., LLC, 2004 WL 2980351 (5th Cir. 2004) (in determining whether a defendant's action constitutes an adverse employment action, courts are concerned solely with ultimate employment decisions; ultimate employment decisions include acts such as hiring, granting leave, discharging, promoting, and compensating); see also Clayton v. Rumsfeld, 106 Fed. Appx. 268, 270 (5th Cir. 2004) (Interlocutory or intermediate decisions that can lead to an ultimate decision are insufficient to support a prima facie case of retaliation. Consequently, the ultimate employment decision doctrine requires that actionable adverse employment actions have more than a mere tangential effect on a possible future ultimate employment decision); White v. Burlington Northern & Santa Fe Ry., 364 F.3d 789, 797-98 (6th Cir. 2004) (Reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims. A reassignment without salary or work hour changes, however, may be an adverse employment action if it constitutes a demotion evidenced by "a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."). But see Smith v. City of Salem, 369 F.3d 912, 922 (6th Cir. 2004) (where fireman was suspended for twenty-four hours, the employment action sufficiently satisfied the requirements of an adverse employment action. Since firemen work in twenty-four hour shifts, the suspension amounted to the equivalent of a loss of pay for 60% of the workweek.).
 Courts usually find that an “adverse employment action” does not encompass a mere inconvenience or a change in job responsibilities, but that the action must be “materially adverse” to the employee’s job status, such as a change in salary, benefits, or responsibilities. The retaliation may also take place after termination of employment.

b. Systemic Disparate Treatment. Systemic disparate treatment is a recurring practice, a consistent attitude, or prevalent attitudes and beliefs inculcated into the work environment that prove intentional discrimination on account of gender. In *International Brotherhood of Teamsters v. United States,* the defining case for systemic disparate treatment, the Court held that an employer who does not habitually discriminate should, over time, develop within its labor force an incidence of protected group representation not considerably less than that group’s representation in an available pool of qualified candidates. Systemic disparate treatment is demonstrated by a considerable labor force under-representation of a protected group relative to the incidence one would anticipate based on its members’ interest, availability, and qualifications.

200. See *Annett v. Univ. of Kan.*, 371 F.3d 1233, 1239 (10th Cir. 2004) (The court stated: We liberally define the phrase adverse employment action and do not limit such actions to monetary losses in the form of wages or benefits. In so defining the phrase, we consider acts that carry a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects. Therefore, an action that significantly harms a plaintiff’s future employment prospects may be considered an adverse action.).

201. See *DiBrino v. Dep’t of Veterans Affairs*, 118 Fed. Appx. 533, 2004 WL 2861673 (2d Cir. 2004) (“An adverse action must be a materially adverse change in the terms and conditions of employment. To be materially adverse, a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.”).

202. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (former employees are included under Title VII’s protections); see also *Fischer v. AT&T Corp.*, 1998 WL 78996 (7th Cir. 1998) (“Post-termination acts of retaliation that undermine a former employee’s future employment prospects or otherwise have a nexus to employment are actionable under Title VII.”).

203. See 1 *AFFIRMATIVE ACTION COMPILATION MANUAL* (BNA) 2:0005, cited in *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1301 (8th Cir. 1997) (The court stated: 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... Systemic discrimination... concerns a recurring practice or continuing policy rather than an isolated act of discrimination.).


206. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 (1977) (where special qualifications are at issue, the relevant statistical pool must refer to the number of members of the plaintiff class qualified for, interested in, and able to commute to the particular task); see also *Alexander v. Fulton County*, 207 F.3d 1303, 1327-28 (11th Cir. 2000) (laymen are not considerably qualified for the law enforcement positions in question, and observing that evidence of a minority’s under representation in an employer’s workforce by reference to the general population can make one infer discrimination only in the rare case “involving jobs with low skill levels where the applicant pool can be considered roughly coextensive with the general population”).
Hazelwood School District v. United States, the Court held that Title VII makes no explicit requirements that the workforce mirror the general population in its racial, ethnic, religious, or gender make-up.

Employment procedures that result in unequal representation are not saved by an employer’s good intentions or absence of discriminatory intent. Systemic disparate treatment can be proven from a facially discriminatory policy, from statistics on disproportionate outcomes, anecdotal evidence, or a combination of all of these factors. 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 to establish their prima facie case. Rather, the burden is to prove only that the discrimination was the company’s standard operating procedure. This may be done through statistics alone.

i. Formal Policies. Title VII prohibits formal employer policies which establish distinctions that classify certain occupations as male or female.
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positions,215 sex-specific employment guidelines without imposing comparable requirements for employees of the opposite sex,216 and the disparate compensation or provision of benefit plans which either provide benefits at different rates217 or require different contributions218 based on the employee’s sex are prohibited under Title VII.219 If an employer’s policy draws distinctions based on a prohibited characteristic a group of complainants can establish a disparate treatment claim based solely upon that policy.220

A policy that facially discriminates between employees on account of their sex is a per se violation of Title VII. The defendant may escape liability, however, by asserting a bona fide Occupational Qualification defense (BFOQ).221 This defense is not applicable in the context of race, and the defendant employer bears


216. See, e.g., Carroll v. Talman Fed. Sav. & Loan Ass’n, 604 F.2d 1028, 1029-1030 (7th Cir. 1979) (personal appearance regulations with differing requirements for women and men do not violate Title VII as long as requirement is justified by some commonly accepted social norm and it is reasonably related to employer’s business needs; however, an employer who imposes separate dress requirements for women and men performing same jobs will be in violation of Title VII when one sex can wear regular business attire and other is forced to wear not just specified business attire, but a uniform); O’Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (employer contends requirement that only women wear smocks is not a Title VII violation). But see Harper v. Blockbuster Entm’t Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (no Title VII violation found when employer enforced hair length policy for male, but not female employees because courts had rejected sex-specific grooming policies as violative of Title VII’s mandate of equal employment opportunities).

217. See, e.g., Ariz. Governing Comm. For Tax Deferred Annuity & Deferred Comp. v. Norris, 463 U.S. 1073, 1074 (1983) (Title VII violation found when companies selected to provide retirement benefits for employees calculated monthly benefit payments on sex-based mortality tables resulting in lower monthly benefits for females than similarly-situated males that contributed equal amounts during tenure).

218. See L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 712 (1978) (Title VII violation found when employer relied on actuarial tables based entirely on sex to require greater contributions from female employees); see also Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1074 (1983) (Title VII prohibits an employer from offering its employees option of receiving retirement benefits from one of several companies selected by employer, all of which pay a woman lower monthly retirement benefits than a man who has made same contributions).


221. 42 U.S.C. § 2000e-2(e) (West, WESTLAW through P.L. 109-2) (Stating:

it 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).
the burden of persuasion. The employer must 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 her job.

ii. Pattern and Practice. In order to prove that an employer’s pattern and practice of hiring, promotion, or other personnel and employment related activities constituted systemic disparate treatment against a protected group, a plaintiff must demonstrate, by a preponderance of the evidence, that sex discrimination was the organization’s standard operating procedure. "Sporadic discriminatory acts” are insufficient to state a Title VII claim.

Plaintiffs will often use statistical evidence to demonstrate that the discriminatory action is the employer’s standard operating procedure. Statistical evidence allows the court to draw an inference that the pattern of adverse actions against employees of one sex is the result of discriminatory treatment. If left unrebuted, this inference can carry the plaintiff’s burden of persuasion. Statistical evidence is useless, however, if it lacks a basis for comparison to the

222. See 29 U.S.C. § 623f (West, WESTLAW through PL. 109-2) (outlines areas where a bona fide occupational qualification defense is available).


224. See International Brotherhood of Teamsters v. United States, 431 U.S. 327, 336-37 (1977) (pattern and practice of discrimination found when African Americans and persons with Spanish surnames were rejected from employment or granted less desirable jobs with limited pay and limited power to bargain because employer’s reliance on seniority system perpetuated past discrimination); see also EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000) (The court stated: 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 establish by a preponderance of the evidence that discrimination is the company’s standard operating procedure - the regular rather than unusual practice.).

But see EEOC v. High Top Coal Co., 677 F.2d 1136, 1137 (6th Cir. 1987) (district court rejection of pattern and practice discrimination claim not clearly erroneous even though only one of 276 miners was female).


226. See id. at 339 ("Our cases make it unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue").

227. Id. at 340 n.20 (statistical evidence of "longstanding and gross disparity" may suffice to make out a prima facie case of pattern and practice discrimination under Title VII because "absent explanation, it is ordinarily to be expected that nondiscriminatory 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"); see, e.g., EEOC v. Olson’s Diary Queens, Inc., 989 F.2d 165, 169 (5th Cir. 1993) (pattern and practice of discrimination claim stated when both statistical and anecdotal evidence pointed to racial discrimination in hiring; lower court erred by failing to "fully" consider statistical "applicant flow" analysis provided by EEOC expert witness).
qualified labor pool. Therefore plaintiffs must provide an appropriate benchmark against which the court may evaluate a statistical disparity. While anecdotal evidence may strengthen a case evidence of disparate treatment, some courts have held that, where the disparities are gross, statistical disparities alone may not prove intentional discrimination. Plaintiffs do not have to prove discrimination with scientific certainty, however, statistical evidence displaying gross disparities in the representation of groups, coupled with anecdotal or circumstantial evidence, may establish a discriminatory pattern or practice.

Federal Rules of Civil Procedure and the EEOC allow pattern and practice claims to be brought by means of a private class action suit. Certification of class action status is dependent upon the court’s determination that the class action is “manageable.” Prior to filing a class action suit, however, at least one

228. See, e.g., Evans v. McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997) (no pattern and practice of discrimination found when assistant plant manager alleging racial discrimination in being passed over for manager position only demonstrated statistical evidence of disproportionately low number of African-American supervisory employees without proffering statistical evidence of African-American applicants for those positions because “statistics without an analytic foundation are ‘virtually meaningless’”).

229. 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.”); 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.”).

230. See Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (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.” (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977))); International Brotherhood of Teamsters, 431 U.S. at 340 n.20 (“Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though…Title VII imposes no requirement that a work force mirror the general population.”). “We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” International Brotherhood of Teamsters, 431 U.S. at 340.

231. 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.”).

232. See Gen. Tel. Co. v. EEOC, 446 U.S. 318, 320 (1980) (EEOC’s pattern and practice claim not subject to requirements of Federal Rule of Civil Procedure 23); see, e.g., EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869, 870 (7th Cir. 1996) (EEOC intervened in private class action suit brought by female employees for hostile environment sexual harassment claim).

233. See FED. R. CIV. P. 23(b) (class action may be maintained when, in addition to fulfillment of Rule 23(a) requirements, (1) proceeding individually would risk inconsistent rulings or earlier rulings would preclude later claims; (2) defendant’s actions were such that class-wide relief is appropriate, or (3) common questions of law predominate); Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) (The court stated:

As with any private class action, the legitimacy of a private Title VII suit brought on behalf of a class depends upon the satisfaction of two distinct prerequisites. First, there must be an individual plaintiff with a cognizable claim, that is, an individual who has constitutional standing to raise the claim (or claims) and who has satisfied the procedural requirements of Title VII. Second, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be
of the class representatives must exhaust all administrative remedies under Title VII.234

2. Elements of a Prima Facie Federal Sexual Harassment Case

a. Unwelcomeness. A plaintiff bringing a sexual harassment suit must first prove that the alleged conduct was unwelcome and unsolicited.235 A plaintiff must also show that she perceived the conduct as offensive.236 The defendant may introduce evidence of the plaintiff’s sexual conduct towards the accused harasser to demonstrate that the plaintiff welcomed the defendant’s behavior if the evidence is not prejudicial.237 The trier of fact determines unwelcomeness by asking whether the plaintiff’s conduct indicated that she did not welcome the alleged sexual advances, not whether her actual participation in sexual intercourse was voluntary.238

b. Because of . . . Sex Rationale. Title VII requires that sexual harassment occur as a result of the victim’s sex. The determination is based on whether an individual is treated differently in the workplace because of his or her status as a man or a woman.239 The critical issue in the “because of sex” inquiry is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.240 Courts often analyze this element by asking if the harassment would have occurred “but for” or “because of” the victim’s sex. This standard has been applied in cases of same sex sexual harassment,241 and the court has explicitly held that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely

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234. See also Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 164 (1974) (“Commonly referred to as ‘manageability,’ [Rule 23(b)] consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.” Manageability is a factor in Rule 23(b)(3) classes, but is not explicitly supposed to be a factor in Rule 23(b)(1) or Rule 23(b)(2) classes).


236. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.”).

237. See id.

238. See Meritor Savings Bank, 477 U.S. at 68.


because the plaintiff and the defendant are of the same sex."

In Ocheltree v. Scollon Productions, Inc., the defendant employer argued that the harassing conduct was not directed towards the plaintiff because of her sex, because it was heard by everyone in the shop and equally offensive to some of the male employees. The court found that while the harassment was out in the open, it was directed at plaintiff employee specifically because she was the only woman in the shop. Specifically, the court cited that there was no evidence that the conduct in question was aimed at embarrassing any of the men or that it was calculated to generate laughter at the expense of any man.

3. Types of Sexual Harassment

The terms "quid pro quo" and "hostile work environment" first appeared in academic literature and do not actually appear in the statutory text of Title VII. In Meritor Savings Bank, FSB v. Vinson, the Court first distinguished between quid pro quo and hostile environment claims, holding that both were cognizable under Title VII.

a. Quid Pro Quo.

Employees claiming quid pro quo harassment must demonstrate both that their employer took a tangible employment-related action against them and that they refused their unwelcome sexual advances. To establish a prima facie case of quid pro quo sexual harassment, the plaintiff must show that the defendant "explicitly or implicitly conditioned a job, a job benefit, or the absence of a job detriment, upon her acceptance of sexual conduct." The court has held that the supervisor does not need to be empowered to make the final determination on employment decisions for his or her behavior to constitute a quid pro quo action.

242. Id. at 79.
243. 335 F.3d 325 (4th Cir. 2003).
244. Ocheltree, 335 F.3d at 332.
245. Id.
246. Id.
250. See, e.g., Burlington Indus., 524 U.S. at 761-62 (hiring, firing, failing to promote, and other significant changes in the employee's status constitute tangible employment action).
252. Porter v. Cal. Dep't. of Corrections, 383 F.3d 1018, 1025 (9th Cir. 2004), quoting Heyne v. Caruso, 69 F.3d 1475, 1478 (9th Cir. 1995).
rather the power to make an effective recommendation is enough.253

b. Hostile Environment.

A hostile work environment claim consists of five elements: 1) the plaintiff belongs to a protected group; 2) she was subjected to unwelcome sexual harassment; 3) the harassment complained of was based on sex; 4) the harassment affected a term, condition, or privilege of her employment; and 5) her employer knew or should have known of the harassment and failed to take prompt remedial action.254 The Supreme Court first recognized the hostile work environment claim in *Meritor Savings Bank, FSB v. Vinson.*255 In determining whether a hostile work environment exists, courts have taken a “totality of the circumstances” approach.256 While no single factor is required, courts look to 1) the frequency of the discriminatory conduct; 2) its severity; 3) whether it is physically threatening or humiliating as opposed to a mere offensive utterance; 4) whether it unreasonably interferes with an employee’s work performance; and 5) whether the complained-of conduct undermines the plaintiff’s workplace competence.257

A hostile work environment claim comprises a series of separate acts that collectively constitute one unlawful employment practice.258 To establish a hostile work environment claim, the plaintiff must show that the harassment was sufficiently severe or pervasive to alter the conditions of her employment and create a hostile working environment and that the harassing conduct occurred because of her sex.259 In order for the harassment to be actionable, the harassing conduct must have been “so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of her employment were thereby altered.”260 The Court has specifically held that:

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

259. Lyon, 260 F. Supp. 2d at 512 (citing Harris v. Forklift Systems, 510 U.S. 17, 21 (1993); Alfano v. Costello, 294 F.3d 365,374 (2d Cir. 2002)).
260. *Lyon,* 260 F. Supp. 2d at 512 (citing Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002)).
conditions of the victim’s employment, and there is no Title VII violation.261

A single instance of sexual harassment can suffice to prove the existence of a hostile work environment.262 But as a general rule, incidents must be more than episodic; they must be sufficiently continuous and concerted to be deemed pervasive.263 To determine whether events constitute “one unlawful employment practice,” courts consider whether they were sufficiently severe or pervasive and whether the earlier and later events amounted to the same type of employment actions, occurred relatively frequently, or were perpetrated by the same managers.264

4. Employer Defenses

Section 703(e)(1) of Title VII allows an employer a defense to policies that expressly or facially discriminate on the basis of religion, national origin, or gender.265 Additionally, the courts have recognized several defenses for Title VII defendants who exercise disparate treatment of employees, including reductions in workforce,266 narrowly-tailored affirmative action programs,267 bona fide

261. Lyon, 260 F.Supp. 2d at 512 (citing Harris v. Forklift Systems, 510 U.S. 17, 21-22 (1993)).
262. See Ferris v. Delta Airlines, Inc., 277 F.3d 128, 136 (2d Cir. 2001); see also Brooks v. City of San Mateo, 229 F.3d 917, 925-27 (9th Cir. 2000).
263. See Lyon, 260 F.Supp. 2d at 512; see also Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (Title VII does not prohibit “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the “terms and conditions of employment.” These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a “general civility code.” Properly applied, they will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.”).
264. Porter v. Cal. Dep’t of Corrections, 383 F.3d 1018, 1027-28 (9th Cir. 2004).
265. See 42 U.S.C. § 2000e-2(a)(1) (West, WESTLAW through P.L. 109-2) (this provision forbids “an employer- ‘(l) 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 . . . sex.”).
266. See, e.g., Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1331 (11th Cir. 1998) (no Title VII violation found when employee failed to meet burden of persuasion because failed to show that RIF termination was pretextual), reh’g and reh’g en banc denied, 187 F.3d 1287 (11th Cir. 1999); Ailor v. First State Bank, 940 F.2d 658 (6th Cir. 1991) (unpublished table decision) (no Title VII violation found when, following net loss of $58,000, bank terminated male employee based on seniority and female employee to cut costs because economic necessity was acceptable justification for RIF termination), available at 1991 WL 150790, at *4.
267. See, e.g., Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987) (no Title VII violation found when employer considered candidates’ sex and promoted female candidate over male plaintiff because preferential treatment was pursuant to legitimate affirmative action plan). The plaintiff bears the burden of showing that the affirmative action plan is invalid. See id. at 627. A plan is valid when it is 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. See United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (no Title VII violation found when preferential treatment was based on acceptable affirmative action program adopted as temporary measure to eliminate manifest imbalance in
seniority systems, selections based on particular nondiscriminatory qualifications, and other legitimate business reasons. Employers are not allowed, however, to discriminate in post-hire terms and conditions of employment (compensation, promotion, discipline, harassment, or discharge), or practice any discrimination on the basis of race.

An employer can escape liability for disparate treatment on the basis of sex by either showing that she would have reached the same conclusion without considering sex, or that sex is a bona fide occupational qualification (BFOQ), which is reasonably necessary for the normal operation of business. The former instance limits an employer's liability to injunctive relief and attorneys' fees. The latter is limited to situations where the employee's sex interferes with her ability to perform the job. An employer must show, however, that its discriminatory practice relates to the "essence" of the business and bears a high correlation to the plaintiff's capacity to do her job. While this defense was workforce); see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (Title VII violation found when affirmative action program failed to limit scope of injury to non-minorities or duration of program because not sufficiently tailored to remedy past discrimination).

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

269. See, e.g., Arway v. Norwalk Dep't of Police Serv., 125 F.3d 843 (2d Cir. 1997) (unpublished table decision) (no Title VII violation found when male employee was promoted to Chief of Police over female candidate because she was less qualified), available at 1997 WL 589909, at *1; Smallwood v. Jefferson County, 95 F.3d 1153 (6th Cir. 1996) (unpublished table decision) ("desire to hire a more qualified applicant may constitute a legitimate business reason for a pay differential"), available at 1996 WL 490353, at *4.

270. In a pattern and practice case, the defendant must show that each employment decision was reached, not as a result of a discriminatory policy, but rather for legitimate business reasons subject to plaintiff's demonstration that the proffered reasons were pretextual. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 362 n.50 (1977) (defendant's justifications were subject to further evidence by government that purported reason for applicant's rejection was pretext for unlawful discrimination).

271. See EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1367 (9th Cir. 1986).

272. See 42 U.S.C. § 2000e-2(m) (West, WESTLAW through P.L. 109-2) (sex is prohibited as motivating factor in employment decisions); id. § 2000e-5(g)(2)(B) (prevailing plaintiff limited to declaratory relief, injunctive relief, attorneys' fees and costs under 42 U.S.C. § 2000e-2(m) when employer shows it would have made the same decision absent consideration of protected characteristic).

273. See, e.g., Dothard v. Rawlinson, 433 U.S. 321, 335-37 (1977) (Sex-based BFOQ found when placement of females in prison guard position "posed a substantial security problem, directly linked to the sex of the prison guard").

274. See 42 U.S.C. § 2000e-2(m) (West, WESTLAW through P.L. 109-2) (sex is prohibited as motivating factor in employment decisions); id. § 2000e-5(g)(2)(B) (prevailing plaintiff limited to declaratory relief, injunctive relief, attorneys' fees and costs under 42 U.S.C. § 2000e-2(m) when employer shows it would have made the same decision absent consideration of protected characteristic).

275. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (no sex-based BFOQ found when discrimination was based on desire to protect female employees' future children, not employees, because "permissible distinctions based on sex must relate to ability to perform the duties of the job").

276. See W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 417 n.24 (1985) (The Court stated: An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all
thought at the time of its creation to be considerably broad, the Court’s decision in *International Union, U.A.W. v. Johnson Controls*277 proves that the exception is a narrow one. There the Court clarified that the trait the employer targets with its discriminatory practice must be not only essential to the business as a whole, but also be tied only to the particular job in question.278 The Court did recognize, however, that discrimination could be tolerated when the safety of third parties is endangered because the employee’s gender “actually interferes with the employee’s ability to perform the job.”279

Some courts recognize a narrow BFOQ exception when the employer can show that it had reason to believe that its gender-based hiring policy was necessary to safeguard legitimate privacy interests of third parties.280 Some

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277. 499 U.S. 187, 206 (1991) (employer’s rule barred all still-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 that endangered the health of a fetus they might be carrying. The Court rejected the defense because, according to the record, “Fertile women . . . participate in the manufacture of batteries as efficiently as anyone else.”).

278. See id. at 201 (the defense fails unless the defendant demonstrates objectively 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”). Some courts require the employer to show that there were no available alternatives to the discrimination. See, e.g., Reed v. County of Casey, 184 F.3d 597, 600 (6th Cir. 1999) (sex-based BFOQ found when state law required presence of female prison guard when female prisoner was lodged in jail and transfer of female employee from first to third shift justified when no effective alternative existed due to logistical complications and unpredictability of need); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 704-05 (8th Cir. 1987) (sex-based BFOQ found when employer terminated unmarried, pregnant female employee because primary purpose of organization was to serve as role model for teenage girls and employee’s contact with girls was inevitable).

279. See *International Union, U.A.W.* 499 U.S. at 204. Compare Dothard v. Rawlinson, 433 U.S. 321, 322 (1997) (sex-based BFOQ found when position of prison guard entailed significant contact with male sex offenders in maximum security prison because placement of women in those jobs would “pose a substantial security problem, directly linked to the sex of the prison guard”), *with* *International Union, U.A.W.* v. *Johnson Controls*, Inc., 499 U.S. 187, 204 (1991) (no sex based BFOQ found when defendant discriminated against fertile women from jobs involving actual or potential or actual lead exposure to prevent birth defects because policy was not enacted to protect health of employees, but rather to protect health of unborn children).

280. See Olsen v. Marriott Int’l, Inc, 75 F. Supp. 2d 1052, 1069 (D. Ariz. 1999) (privacy-based BFOQ two-factor test required defendant to show that: (1) “legitimate privacy rights of patients, clients, or
courts require that the defendant show that there were no available alternatives to the discrimination.281

In the case of systemic disparate treatment, the employer’s defense must be “designed to meet the prima facie case” established by plaintiff’s statistical proof, the focus of its rebuttal case likewise “will not be on individual employment decisions.”282 Instead, to meet its rebuttal burden, the employer must demonstrate that the plaintiff’s statistical evidence “is either inaccurate or insignificant.”283

Employers can implement affirmative action programs to counter past discrimination and use those programs as a defense against discriminatory practices. The Court has held that an employer can lawfully take race into account in preferring African-American employees as a group for admission to an on-the-job training program.284 Likewise, employers may take gender into account to address the problem of the under-representation of women in the workforce. The employer must demonstrate that the affirmative action plan reflects the imbalances caused by past discrimination in the workplace,285 and the plaintiff bears the burden of proving that the affirmative action plan violates Title VII.

In Meritor Savings Bank, FSB v. Vinson,286 the Court rejected the view that employers are always automatically liable for sexual harassment by their supervisors.287 The Court realized, however, that the appellate courts struggled in the wake of the Meritor decision to find manageable standards to govern

immates 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) (privacy-based BFOQ three-factor test required defendant to show that: (1) it had “factual basis for believing that it is necessary” to employ person of particular sex in position to “protected the privacy interests” of third party; (2) third party’s “privacy interest if entitled to protection under the law”; and (3) “no reasonable alternatives exist to protect those interests other than the gender based hiring policy”), aff’d, 977 F.2d 731 (2d Cir. 1992) (per curiam).

281. See, e.g., Reed v. County of Casey, 184 F.3d 597, 600 (6th Cir. 1999) (sex-based BFOQ found when state law required presence of female prison guard when female prisoner was lodged in jail and transfer of female employee from first to third shift justified when no effective alternative existed due to logistical complications and unpredictability of need); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 704-705 (8th Cir. 1987) (sex-based BFOQ found when employer terminated unmarried, pregnant female employee because primary purpose of organization was to serve as role model for teenage girls and employee’s contact with girls was inevitable).


283. Id.


285. See, e.g., id. at 208 (Title VII does not prohibit race-conscious affirmative action policies by private sector employers taking steps to eradicate manifest racial imbalances in traditionally segregated job categories); Johnson v. Transportation Agency, 480 U.S. 616, 640 (1987) (agency was allowed to take the employee’s sex into account in determining her eligibility for promotion, as part of an affirmative action plan for gradual improvement in the representation of minorities and women in the agency’s workforce).


287. Id. at 73.
employer liability for a hostile work environment created by supervisory employees. The Court resolved this issue in *Faragher v. City of Boca Raton* and *Burlington Industrial v. Ellerth* by holding that vicarious liability was the appropriate standard for supervisory hostile work environment harassment.

In *Pennsylvania State Police v. Suders*, the key issue before the Court was whether an employer would be held strictly liable for a supervisor's conduct. The Court found that Title VII holds employers liable for constructive discharge, but that an employer is not always strictly liable. With regard to constructive discharge, the Court's ruling in *Suders* impacts the available employer defenses. The Court made a distinction between a constructive discharge that is attributable to a supervisor's official conduct and one that is attributable to a supervisor's unofficial conduct. If no official conduct is involved in the constructive discharge, the employer may defend against such a claim by showing both: 1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and 2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense is not available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she

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291. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) ("We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim."); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). The Court stated:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

*Id.*

We conclude that an employer does not have recourse to the Ellerth/Faragher affirmative defense (which otherwise applies strict liability) when a supervisor's official act precipitates the constructive discharge; absent such a tangible employment action, however, the defense is available to the employer whose supervisors are charged with harassment. We therefore vacate the Third Circuit's judgment and remand the case for further proceedings.);

would face unbearable working conditions. The Court also commented that if the hostile work environment leads to a tangible employment action against the employee, such as a reduction in pay, the employer cannot pursue the affirmative defense.

5. Pretext

After the defendant employer has presented specific, non discriminatory reasons for his conduct in a sex discrimination case, the plaintiff has the burden of rebutting the employer's evidence of a non discriminatory motive. If the employer meets the burden of articulating a legitimate, non discriminatory motive, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual.

In Reeves v. Sanderson Plumbing Products, Inc., the Court explained that the jury may find the ultimate fact of discrimination on a prohibited ground from evidence making out a prima facie case, along with "sufficient" evidence that the employer's proffered legitimate nondiscriminatory explanation is false.

When an employer asserts that he failed to hire an employee due to her lack of qualifications, a comparative analysis of other applicants for the same job may help in proving pretext. The defendant can escape liability, however, if it chooses an equally qualified applicant over another, barring any evidence of an unlawful motive. A showing of pretext is not just limited to final or formal decision makers; persons with actual, but not formal, decision-making authority

295. Id.
296. Id.
297. Raytheon Co. v. Hernandez, 540 U.S. 44, 50 n.3 (2003) (The Court stated:

The Court in McDonnell Douglas set forth a burden-shifting scheme for discriminatory-treatment cases. Under McDonnell Douglas, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual.).
299. Id. at 147 ("The fact finder's disbelief of the reasons put forward by the defendant, together with the elements of the prima facie case, may suffice to show intentional discrimination [and a] rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination") (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)).
300. See Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999) (quoting Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 247 (10th Cir. 1993)).
301. See id. at 1319 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248-259 (1981)). The differences between an unsuccessful candidate and a successful candidate must be "overwhelming" to be admitted as evidence of pretext. Id. at 1319 (quoting Sanchez v. Phillip Morris, Inc., 992 F.2d 244, 247-48 (10th Cir. 1993)); see, e.g., Bullington, 186 F.3d at 1319 (plaintiff alleged that other male applicants who had some qualifications as she were hired for position she applied for and as such, United Air Lines was discriminating against her because she was, among other things, a woman).
can serve as the basis for proof that discrimination motivated the employment decision.302

6. Plaintiff’s Ultimate Burden of Persuasion

The primary inquiry as to whether a claimant established a prima facie case loses all importance once the defendant presents its proof. After both sides have presented their cases, the jury has to evaluate all admitted evidence, including, but not limited to, the plaintiff’s prima facie evidence to determine whether the plaintiff carried the ultimate burden of persuasion.303 A plaintiff has met her burden of persuasion once she presents: 1) a strong prima facie case and 2) evidence that the defendant’s proffered non-discriminatory motives for committing the unlawful discriminatory practice are untrue.

B. DISPARATE IMPACT

Compared to the widely used disparate treatment theory, Title VII plaintiffs bring claims under the disparate impact theory much less frequently.304 A Title VII plaintiff invokes the disparate impact theory when asserting that a facially neutral policy has a disproportionately adverse impact on a protected class. A plaintiff alleging disparate impact does not have to show that the respondent acted with discriminatory intent, because the purpose of the theory is to thwart practices that disproportionately impact members of a protected class, where the employer did not purposefully discriminate.305 A complainant can invoke the

302. See Hill v. Lockheed Martin Logistics Mgmt., 314 F.3d 657, 668 (4th Cir. 2003) (The court stated:

In pretext cases our court and most other courts of appeals have rejected the view that the only relevant decision makers are those with final or formal authority. These pretext cases support the proposition that the discriminatory attitude of someone who is an actual, but not a formal, decision maker may prove that discrimination motivated the employment decision.).

303. See Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146 (2000) (“The ultimate question is whether the employer intentionally discriminated”). Once the defendant fails to persuade the court to grant a Rule 50(a) motion for judgment as a matter of law at the close of the plaintiff’s case, and defendant has offered evidence of a legitimate nondiscriminatory reason, the court should address the ultimate discrimination vel non, and the question whether the claimant established a prima facie case is no longer significant. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).


disparate impact theory to combat objective policies, such as standardized test scores,\textsuperscript{306} and subjective policies, such as decision makers' beliefs,\textsuperscript{307} that disproportionately affect the plaintiff's protected class.\textsuperscript{308} Disparate impact is regarded as an effective mechanism useful in eradicating employment policies that limit (prospective) employee opportunity.\textsuperscript{309} The theory has regularly been used to challenge height and weight requirements that disproportionately affect members of a protected class.

I. Plaintiff's Prima Facie Case and Employer's Defenses

A plaintiff alleging that her employer's policies disparately impact her protected class must only show that a "significantly discriminatory pattern" results from the employer's facially neutral policies.\textsuperscript{310} Then the defendant employer bears the burden of demonstrating that the contested policy has "a manifest relationship to the employment in question."\textsuperscript{311} If the employer can demonstrate that its business necessitates the policy or that the contested policy relates to the defendant's business, then a court may uphold the policy; in making such demonstration, the employer assumes the burden of production and persuasion.\textsuperscript{312} If the defendant employer makes such a showing, then to prevail, the plaintiff must show that other policies are available and the policies 1) do not similarly adversely impact the plaintiff, and 2) "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"\textsuperscript{313}

2. Plaintiff Reliance on Statistical Evidence

In making a prima facie case, a plaintiff does not have to use all available
evidence, but rather only evidence that "conspicuously demonstrates a job requirement's grossly discriminatory impact." \(^{314}\) As the disparate impact theory relies heavily on employment policies' effects on individuals who belong to a protected class, plaintiffs invoking the disparate impact theory often use statistical evidence to buttress their claims. \(^{315}\) When using statistical evidence to show a policy disparately impacted hiring, a plaintiff's evidence will not suffice if she only compares members of the plaintiff's protected class to individuals who do not belong to the plaintiff's protected class. \(^{316}\) Additionally, a plaintiff must 1) proffer evidence comparing the proportion of protected class members that applied for the contested position or similar positions to the proportion of class members who received the position and 2) show how that data compares to corresponding data of non-class members. \(^{317}\) A complainant must also identify a nexus between the allegedly discriminatory practices and the statistical disparities evident in proffered data. \(^{318}\) Statistical evidence need not incorporate all variables that may affect the outcome of a statistical analysis supporting a plaintiff's disparate impact claim. \(^{319}\) However, if relevant statistical analysis lacks several substantial variables, then courts may find the analysis insufficient to sustain a disparate impact claim. \(^{320}\)

C. GENDER NEUTRALITY, RACE, AND HETEROSEXISM: CHALLENGES FOR TITLE VII

From the beginning, Title VII policy and jurisprudence has been challenged by the realities of its normative concern for resolving difference and power associated conflicts within a white, heterosexist context. The law has traditionally conceived of gender identity in terms of heterosexual white women and racial

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317. See Ward Cove, 490 U.S. at 642; see also Foster, 98 Fed. Appx. at 85.


320. See Sandoval v. Boulder, 388 F.3d 1312, 1326 (Colo. 2004) ("a conclusory observation that... agencies... employ minorities and women in their upper ranks does not constitute 'statistical evidence' that... challenged hiring practices systematically disadvantaged minorities and women."); cf. Cooper v. S. Co., Ga. Power Co., 390 F.3d 695, 717-18 (11th Cir. 2004). In a Title VII racial discrimination case, after assessing the adequacy of the plaintiff's statistical report proffered to establish that employer's policies disparately impacted African-Americans, the court affirmed the district court's findings that evidence presented did not establish discrimination. Id. The court noted the lack of differentiation between types of positions, locations of the plaintiffs, and policies of departments and the plaintiff's failure to identify a policy or practice responsible for the alleged disparities. Id.
identity in terms of heterosexual black men. Through this narrow and single-axis framework the experiences and perspectives of women of color, homosexuals, and transgendered persons are muted, if considered at all. When considering the experiences of women of color and the growing reality of same sex sexual harassment, the manner in which courts decide cases increasingly requires the consideration of multiple and varied structures and experiences of subordination.

1. The Gender Neutral Approach and the Reasonable Woman Standard

The reasonable person standard is a foundational theory of American tort law; courts have often referred to a hypothetical person’s behavior to measure what conduct is reasonable and what is unreasonable. Courts first establish that Americans have a duty to act with reasonable and ordinary care and then evaluate if the particular plaintiffs and defendants have conducted themselves in such a manner. After the Supreme Court established the sexual harassment claim under Title VII, courts have evaluated plaintiffs’ cases by asking if a reasonable person would view the workplace in question as hostile.

As with other areas of tort law, courts have applied more specific standards than the reasonable person standard when dealing with instances of mental incompetence, children, and other extraordinary cases. These situations reveal the flaws in the belief in a “neutral” or “objective” standard that is not contingent on a particular experience or perspective. With respect to sexual harassment law, the reasonable woman standard is inadequate to the extent that it assumes a monolithic perspective on the experiences of women across race, class, and religious differences in confronting gender discrimination in the workplace.

The “reasonable person” standard does not take into account the differences

321. See, e.g., Bethel v. N.Y. City Transit Auth., 703 N.E.2d 1214, 1216 (N.Y. 1998) (defendant was 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 Estate of Lepage v. Horne, 809 A.2d 505, 511 (Conn. 2002) (appropriate inquiry was whether a daycare provider fulfilled her duty of care to a baby who died of sudden infant death syndrome).

322. See, e.g., Gordon v. Am. Museum of Natural History, 492 N.E. 2d 774 (N.Y. 1986) (museum was not liable for violating the standard of care because it did not have constructive notice of a slip of paper that caused the plaintiff to fall and injure himself).

323. See Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (to prevail on a hostile environment claim, the alleged harassment “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.”).

324. See Roberts v. Ramsbottom, 1 All E. R. 7 (Q.B.D. 1979) (defendant suffered stroke while driving but proceeded behind the wheel and was held liable for the damage caused by an ensuing crash; his argument that he should be judged by a different standard for those with impaired faculties was dismissed); Vaughan v. Menlove, 132 Eng. Rep. 490 (1837) (defendant was held liable for piling hay on his own property despite warnings that it was a fire hazard when a blaze burned down his neighbor’s house). But see Gould v. Am. Family Mut. Ins. Co., 543 N.W.2d 282, 287 (Wisc. 1996) (mentally impaired individual’s incapacity was taken into account in determining the appropriate standard of care); Lenuth v. Long Beach Unified Sch. Dist., 348 P.2d 887, 894 (Cal. 1960) (upheld jury instructions specifying that children should be held to a different standard of care than adults).

between how men and women experience sexual behavior. Women are more often the victims of sexual violence and rape, therefore conduct that may not offend a man may offend a woman. This fundamental difference in world view alters the manner in which basic communication is interpreted and relationships are managed.

The “reasonable woman” standard was first used in a dissent in Rabidue v. Osceola Refining Company. The Ninth Circuit agreed, adopting the “reasonable woman” standard because “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women... [a] gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men.”

The “reasonable woman” standard is best explained through “differences feminism or cultural feminism.” According to this theory, law should promulgate an “acceptance theory” embracing the differences between the sexes. Cultural feminist would note that the “reasonable person” standard is in actuality a “reasonable man” standard that purports to embrace both sexes but is actually only based on the male baseline of appropriate behavior. The evolution of this thinking is evident in the legal theory of Justice Ginsberg, who in United States v. Virginia revealed the evolution of her thinking on the recognition of gender differences in the law. While previously unsupportive of laws recognizing gender differences, Justice Ginsberg’s opinion stated, “inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial

326. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (The court stated:

We believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy. 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.).

327. 805 F.2d 611 (6th Cir. 1986) (C.J. Keith dissenting:

I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless 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.).

328. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (court upheld employee’s claim against a man who sent her letters with sexual content because a reasonable woman would find such correspondence objectionable).


332. Id. at 554.

constraints on an individual's opportunity."334 She goes on to observe a reparative framework for gender justice, stating that sex differences can be used to compensate women who have suffered economic disadvantages and to promote equal employment opportunities.335 While education and employment are different fields, Ginsberg's comments in *Virginia* indicate the promise that a more gender-conscious jurisprudence lies ahead in all fields of law.

The "reasonable woman" standard may hinder the cause of gender justice by reifying long held and deeply seated stereotypes about the differences between the genders.336 "Formal" or "liberal" feminists hold the view that women are like men in the ways that matter to the state and should be treated accordingly.337 This view holds that the male standard is, in fact, neutral or will become so in time.338 This view has made its way into Supreme Court decisions.339

2. The Intersection of Race and Gender

Courts have recognized the interaction of multiple sources of discriminatory animus when considering the claims of women of color.340 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.341 The experiences of women of color, and black women in particular, in bringing Title VII discrimination claims based on race and sex have been classified as "sex-plus" and a discrimination claim from a subclass of women cannot be undermined by a showing of non-discriminatory treatment towards the respective disaggregated classes of the subclass.342 While the "sex-plus" framework recognizes the unique discrimination black women face in the workplace, it fails to recognize the indivisible nature of the discrimination caused by their gender status and the discrimination caused by their racial status. These identities are not severable or stackable, but rather they are experienced simultaneously.


335. Id. at 533.

336. See Martha Chamallas, *Introduction to Feminist Legal Theory* 244 (1999); see also Ginsburg, *supra* note 333 (gender distinctions harm women).

337. See Bell Hooks, *Feminist Theory from Margin to Center* 809 (2002); see generally, *West*, *supra* note 329.


339. See Craig v. Boren, 429 U.S. 190, 199 (1976) (legislatures should adopt sex-neutral substantive laws; sex-based distinctions, such as the one in the Oklahoma statute imposing a different drinking age for boys than for girls, are unconstitutional); see also Reed v. Reed, 404 U.S. 71, 75-76 (1971) (invalidating sex and gender distinctions in the law).

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

341. Compare Harrington v. Cleburne County Bd. of Educ., 251 F.3d 935-37 (11th Cir. 2001) with McGowan v. All Star Maint., Inc., 273 F.3d 917, 925 n.9 (10th Cir. 2001).

342. See, e.g., Jefferies v. Harris County Cnty. Action Ass'n, 615 F.2d 1025, 1033 (5th Cir. 1980) (when Title VII plaintiff alleges that employer discriminates against black females, fact that black males and white females are not subject to the same discrimination, and therefore do not form any part of the basis for a finding that employer did not discriminate against black female plaintiff).
In *Degraffenreid v. General Motors*, four African-American women brought suit against General Motors, alleging that the employer's seniority system perpetuated the effects of past discrimination against black women. While General Motors did not hire black women prior to 1964, the court noted that General Motors hired female employees for a number of years prior to the enactment of the Civil Rights Act of 1964. The fact that General Motors hired only white women did not matter to the court in evaluating the General Motors' system of seniority. The court was unable to imagine that black women could have experiences separate and uniquely different from those of white women or black men. This oversight frames the expansion of Title VII jurisprudence that the "sex-plus" framework strives to achieve.

The complexities of joint racial and gender classification are not just the problems of black women. While not traditionally thought to be the concern of Title VII, black men have also faced specific and unique discrimination in employment settings. The statistical evidence of black male experiences in the labor market proves that black men do not share in the privileges of maleness enjoyed by their white counterparts. While each component of the black women's subjugation is commonly recognized as a protected class, the unique social position of black men is hard to conceptualize. When blackness is

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344. Id. at 483 (The court stated:

GM was free of unlawful discrimination against women in its hiring, seniority, and layoff policies for the following reasons: (1) GM's reliance on provisions of Missouri law relating to employment of women insulated it from charges of sex discrimination; (2) GM's seniority system did not perpetuate past discrimination because GM had hired female workers before the effective date of Title VII; and (3) assertions by plaintiffs that GM's illegal employment practices actually deterred several plaintiffs from applying for employment between 1965 and 1967, amount to "conc1usory allegations" which cannot support a valid claim to constructive seniority or other relief under Title VII.);


As the Court has stated above, counsel for plaintiffs, and the Court's own research, have failed to discover any case holdings which allow the creation of a new sub-category within Title VII that would generate such a new protected class of minorities. The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of "black women" who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box.

combined with maleness, black men are completely separated from white men in the labor market. 347

Few Title VII cases have recognized the unique status of black men. In Johnson v. Memphis Police Department, 348 the court found for a plaintiff who complained that the department's no beard policy discriminated against many black men who, unlike white men, suffer from a skin condition that makes it unhealthy to shave every day. 349 In Robinson v. Adams, 350 however, the Ninth Circuit rejected the argument that a black man had established a prima facie case of sex-and-race discrimination. 351 In light of cases like these a "race-plus" framework has been proposed for helping courts comprehend the unique discrimination faced by black men. 352 Furthermore, such a framework may help illustrate that black men need not establish that their grievance is one common to all black individuals working for a particular employer, but rather that the fact that they are black and male, they have been singled out for prejudice. 353

3. Same-Sex Sexual Harassment

Sexual harassment law traditionally has been concerned with interactions between men and women in the workplace. A growing number of sexual harassment cases, however, occur between members of the same sex. Title VII does not recognize sexual orientation as a classification and discrimination based on sexual orientation is not actionable under Title VII. 354 While the Supreme Court in Oncale v. Sundowner Offshore Services, 355 held that same-sex sexual harassment is an actionable claim under Title VII, the Court's language did not resolve how plaintiffs alleging same-sex sexual harassment prove that the conduct was "because of sex." 356 Consequently, the lower courts employ differing and conflicting methods of analysis to determine when and under what

349. Id. at 245.
350. 847 F.2d 1315 (9th Cir. 1987), cert. denied, 490 U.S. 1105 (1989).
351. Id. at (The Court stated:
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.).
353. Id.
circumstances plaintiff’s alleging same-sex sexual harassment have a valid claim.\(^\text{357}\)

The Court articulated in *Oncale* that a plaintiff alleging same-sex sexual harassment must prove that the discrimination was not just tinged with offensive sexual connotations, but that it actually constituted discrimination “because of sex.”\(^\text{358}\) Prior to *Oncale*, the Court ruled on gender stereotyping in *Price Waterhouse v. Hopkins*.\(^\text{359}\) In *Price Waterhouse*, the Court stated:

> 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 in 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.\(^\text{360}\)

The Court did not mention *Price Waterhouse* in *Oncale*. They have also declined to hear lower court cases dealing with same-sex sexual harassment since *Oncale*, leaving the lower courts with little guidance. Consequently, a number of conflicting approaches to addressing same-sex sexual harassment have been used. For instance, in *James v. Platte River Steel Co.*,\(^\text{361}\) the court held that the *Oncale* decision’s finding that same-sex sexual harassment is actionable under Title VII specifically dealt with same-sex sexual harassment tied to gender discrimination and that since James could not show that the harassment he faced was “because of ... sex,” he did not have an actionable claim under Title VII.\(^\text{362}\)

Circuit court splits have left same-sex sexual harassment an unresolved issue. The perspective of the lower courts fall into four categories: 1) courts that overlook *Price Waterhouse* and take a restrictive view of the meaning of “sex,” 2) courts that equate gender stereotyping with sexual orientation discrimination, 3) courts that recognize a gender stereotyping cause of action under Title VII but...
deny the particular claim and 4) courts that recognize a gender stereotyping cause of action under Title VII but affirm the claim. The Supreme Court has denied certiorari in many of the cases that fall into these categories.

In Bibby v. Philadelphia Coca Cola Bottling Company, the court recognized three ways in which a plaintiff can demonstrate that same-sex sexual harassment amounted to discrimination because of sex: the harasser was motivated by sexual desire, expressing hostility to the presence of a particular sex in the workplace, or acting to punish the victim's noncompliance with gender stereotypes. Other courts have used this framework to analyze same-sex sexual harassment cases and still found the evidence insufficient to support the claim.

The issues presented by the transformation of popular attitudes regarding sexuality and sexual orientation have brought lesser known aspects of Title VII into use. In Thorson v. Billy Graham Evangelistic Association, the Minnesota State Court of Appeals held that religious institutions and organizations can prohibit lesbians from positions of employment. Title VII recognizes a ministerial exception, insulating a religious organization's employment decisions regarding its ministers from judicial scrutiny under Title VII. While an existing state statute was the ultimate standard upon which Thorson's claim was rejected, the case illustrates how the ministerial exception in Title VII can be used to perpetuate discrimination against gays and lesbians.

CONCLUSION

Same sex sexual harassment represents a new and contested frontier in sexual harassment law specifically and sexual discrimination law generally. While the courts recognize that same-sex conflicts are legitimate claims and will likely be on the rise in a more sexually aware society, they have yet to expand the protections of Title VII fully to include same sex sexual harassment. The circuit splits on this issue, however, reveal that Title VII disparate treatment and sexual harassment jurisprudence continue to develop in a manner Congress likely did not anticipate in 1964. Ultimately Title VII must become an umbrella to protect against conflicts arising in the workplace at the intersection of identity, sex, and power.

363. See Fedor, supra note 356, at 468-69.
365. 260 F.3d 257 (3rd Cir. 2001).
366. Id. at 264.
370. See Thorson, 687 N.W.2d 652.