WHERE BREAKING GLASS CEILINGS LEADS TO GLASS WALLS: GENDER-DISPARATE MANAGERIAL DECISION-MAKING POWER AND AUTHORITY

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Today, litigation over plainly discriminatory employment practices is much less common than it was in the two decades following Title VII's enactment as employers have largely reformed practices that most obviously violate employment discrimination law. But many less obvious employment practices, particularly those embedded in implicit bias or unconscious sex stereotyping, remain. One example is employers' distribution of managerial decision-making power and authority based on assumptions about sex. Although this particular employment practice has not yet been litigated, there is a strong argument that a legal challenge to this practice could succeed.

This Note argues that female managers can and should seek legal redress under Title VII when they are given less decisional authority under conditions that can only be explained by some implicit bias or sex stereotyping. Both disparate treatment theory and disparate impact theory provide viable paths for a litigant to pursue. Upon weighing the incentives and drawbacks under each theory, this Note concludes that disparate treatment theory offers the most promising and beneficial remedial pathway for potential litigants.

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INTRODUCTION

While employers have grown increasingly more compliant with employment laws that bar overt forms of sex discrimination in the workplace, they have failed to address less perceptible but critical forms of inequity. As one scholar notes, "Smoking guns— . . . [like a] rejection explained by the comment that 'this is no job for a woman'—are largely things of the past. . . . Cognitive bias, structures of decision making, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality."[1] Existing literature addresses unconscious discrimination that prevents women from ever reaching desirable management positions.[2] However, there is little attention paid to the discrimination women face even after breaking the so-called "glass ceiling."

One manifestation of this subtle discrimination is in the distribution of authority and decision-making power between men and women in managerial positions. This Note defines this problem as gender inequity in decision-making processes. Although women are increasingly attaining managerial titles, these titles often carry a lower level of meaningful authority

1. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) (footnote omitted).

2. *See, e.g.*, Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 6 (2003).

than is expected from men in the same roles.[3] For example, it is problematic that sex or gender stereotyping results in female managers receiving decision-making power over less financially important divisions in their workplace. Another troubling consequence is female managers receiving less authority over high-profile projects or personnel than their male colleagues.[4]

When such discrimination occurs to female managers at the higher echelons of decision-making, it is hard to believe that they can achieve redress from their employers, who have created and sustained the inequity. No litigation seeking relief for unequal decision-making power exists. Thus, it appears that female managers facing gender inequity in decision-making processes have no path toward reform or redress.

Courts have not sufficiently addressed or relieved subtle forms of employment discrimination.[5] There exists litigation and literature addressing employees who are harmed by managers' excessively subjective decision-making processes, but few courts or scholars tackle the disparate power between decision makers themselves.[6] The law must grapple with the inequity that exists among individuals in the decision-making bodies themselves.[7]

Despite the absence of case law addressing gender inequity in decision-making processes, this Note argues that Title VII provides a cause of action for female managers who face this form of discrimination. Part I introduces the existence and causes of disparate decisional roles that male and female managers assume, and why this problem matters. Part II presents the evolution of Title VII's application to sex discrimination claims. It also presents the procedural and substantive legal requirements for filing a viable employment discrimination suit. Part III applies two separate Title VII legal

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3. *See generally* Barbara F. Reskin & Catherine E. Ross, *Jobs, Authority and Earnings Among Managers: The Continuing Significance of Sex*, 14 WORK & OCCUPATIONS 342 (1992) (describing ways in which female managers' professional experiences differ from their male counterparts).

4. *See, e.g.*, Mohamad G. Alkadry et al., *Beyond Representation: Gender, Authority, and City Managers*, REV. PUB. PERSONNEL ADMIN., 2017, at 1, 15–16 (describing the sex disparity in municipal managers' "authority profile," which considers the budget amount and personnel that a manger oversees); Caroline Fairchild, *More Women Business Leaders Does Not Mean More Power*, FORTUNE (Sept. 24, 2014), http://fortune.com/2014/09/24/women-boards-power/ [https://perma.cc/4RAH-ZS79]. Fairchild explains that women in senior management positions are concentrated in service or support roles rather than operational roles. *Id.* The high concentration of women in "service" management positions supports the findings that even as managers, women are generally confined to less important projects.

5. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 540–44 (2003) (providing examples of subtle forms of discrimination that have not seen legal redress).

6. *See, e.g.*, Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005); Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1331 (1995).

7. *See* Beth Mintz & Daniel H. Krymkowski, *The Ethnic, Race, and Gender Gaps in Workplace Authority: Changes over Time in the United States*, 51 SOC. Q. 20, 20–21 (2010) (explaining that gender-disparate authority remains even after the influx of women into management positions in the late twentieth century).

theories to gender inequity in managerial decision-making processes and concludes that a disparate treatment suit presents the most promising legal avenue for a plaintiff. Part III also identifies existing roadblocks to the proposed use of Title VII. After addressing these hurdles, this Note concludes that courts should recognize that the next stage of Title VII's evolution is tackling this new frontier of unconscious or subtle sex-based discrimination.

I. INEQUITABLE DISTRIBUTION OF MANAGERIAL DECISION-MAKING POWER AND AUTHORITY

Understanding the gravity of the discriminatory distribution of managerial decision-making power is essential to recognizing managers' need for a legal remedy. Where female managers cannot resolve such discrimination through internal workplace channels, their careers depend on a viable form of legal redress. Part I.A explains several ways in which disparate managerial decision-making power and authority manifest in the workplace. Part I.B identifies possible causes behind this problem, which are necessary to demonstrate at trial if a manager files a suit against her employer. Part I.C highlights the value that alleviating this form of discrimination will have for employers, the managers that experience inequity, and their subordinates.

A. Manifestations of the Problem

Imagine a woman who began working with her employer as a low-ranking employee. She worked her way to a supervisory level and was later promoted to a managerial role. She possesses years of experience and the requisite education to wholly justify her promotions. Over time, however, she begins to notice subtle but substantive differences between her authority and that of her male colleagues in the same position. She consistently manages fewer personnel and has decisional power over projects with less financial importance.[8] In fact, she manages a noticeably smaller proportion and less financially impactful segment of the department's budget. When she offers her input on larger, more impactful financial decisions, nothing comes of it. Her employer distributes work informally in an open market, yet she is never able to assume her title's power and authority to the same degree as many of her male colleagues.[9]

To some, this is merely the way that their workplaces operate, and they see nothing discriminatory about it. Rather, such decisional power distribution is perceived as a consequence of the employer's informal infrastructure, which lacks objective evaluative metrics or a structured hierarchical chain of command. But in fact, these processes reflect an ingrained discriminatory

8. *See generally* Alkadry et al., *supra* note 8 (presenting data showing that female city managers direct a disproportionately smaller number of employees and oversee a smaller portion of their agency's budget than their male counterparts).

9. Power can be defined as "control over resources, people, and things," and a manager's decision-making authority exercises that power. *See* James R. Elliott & Ryan A. Smith, *Race, Gender, and Workplace Power*, 69 AM. SOC. REV. 365, 366 (2004).

outlook. As Susan Sturm acknowledged in her piece, "Second Generation Employment Discrimination: A Structural Approach," "*Structures of decisionmaking*, opportunity, and power fail to surface these patterns of exclu[ding nondominant groups], and *themselves produce differential access and opportunity*."[10] This differential access and opportunity, specifically with regard to decisional processes, exist across all employment sectors, not just corporate ones.[11] Therefore, this Note does not focus solely on corporate managers in its analysis.

One explanation for gender gaps in decisional power and authority is that women are simply entering managerial roles that offer less authority than other types of managerial positions.[12] However, this Note addresses a very particular circumstance in which there exists unequal gender-based decisional authority between men and women holding the *same* role or rank. Regardless of the decisional power and authority inherent across various managerial positions, employers' sex-based distribution of power among those with the same position is legally impermissible.

B. Causes and Contributing Factors

Gender inequity in decision-making processes can manifest in a variety of ways, and it follows that there are differing causes behind this problem. First, employers' inertia and their continuing "homosocial reproduction" are interrelated causes behind the inequitable allocation of decisional power and authority. Second, employers' reliance on soft skills linked to sex or sex stereotypes associated with a managerial role can contribute to the problem. Third, employers' unclear guidance or informal processes for distributing decisional power can contribute to the gender disparity. Fourth, the temporal order in which male and female managers exercise their power can cause and even perpetuate the gender disparity. Finally, the opportunities that an employer provides for managers to develop projects over which they will exercise power can contribute to the problem.

Organizational inertia and homosocial reproduction, a pair of related phenomena, are responsible for gender-disparate decision-making power.[13] Until the late twentieth century, men maintained a virtual monopoly over managerial roles, which was ascribed, to a great degree, by sex.[14] Against this historical backdrop, employers developed an untested assumption that managerial roles are closely associated with male traits, and, in some cases, "management was equated with masculinity."[15] Employers that do not investigate or reform their distribution of managerial responsibilities continue to adhere to the historical norms and assumptions, which are

10. Sturm, *supra* note 1, at 460 (emphasis added).
11. Elliott & Smith, *supra* note 9, at 366.
12. *See* Mintz & Krymkowski, *supra* note 7, at 38.
13. Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 212 (2000).
14. *Id.* at 211.
15. *Id.*

predisposed to favor men based on their sex.[16] Employers' inaction can be conscious and protective.[17] From their perspective, turning away from historical norms may be considered a risky business decision because the business's management impacts productivity and profit.[18] Continuing to assign responsibilities to those who fit the traditional mold is deemed a safer option because it offers employers predictability.[19] Despite these seemingly rational business calculations, employer inertia is irrational and discriminatory when, by default, male managers are consistently allocated more decisional power than their more capable female counterparts. Even in instances where male managers are equally skilled or qualified, it remains discriminatory for employers to unfailingly assume that one sex will outperform the other.

Employers' consistent predisposition towards male managers also reveals a clear reliance on sex as a basis for power distribution, which is known as homosocial reproduction.[20] Employers continue to distribute power, authority, and discretion to those that they identify as in-group members of the workplace, which in the managerial context is most often white men.[21] Data reflects that the percentage of women in an occupation contributes negatively to the authority differential between men and women.[22] Specifically, jobs comprised of fewer women reflect greater gender gaps in authority. Even the education level between male and female managers does not contribute to such a differential.[23] Such data supports the theory of homosocial reproduction as a contributing factor behind gender-disparate decisional power.

Sex- or gender-linked stereotypical traits are a second cause of gender inequity in managerial decision-making power. Specifically, the closer the perceived relationship between a soft quality and a particular gender, the more weight the evaluator will give to that quality.[24] Women are often associated with being more emotional and less objective decision-makers.[25]

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16. *Id.* at 212–13.

17. *See* SAMUEL ESTREICHER & GILLIAN LESTER, EMPLOYMENT LAW 192 (2008) (discussing research which indicates that employers make "personnel investment[s]" in their historical workforce populations, leaving them unwilling to accommodate newer, minority workers).

18. *Id.*

19. *See* Reskin & McBrier, *supra* note 13, at 212. The authors discuss employer rationales behind employers retaining more men in management jobs overall; however, the same rationale applies to distributing actual power and authority away from men once women assume the same managerial titles. *Id.*

20. Elliott & Smith, *supra* note 9, at 369.

21. *See id.*

22. *See* Mintz & Krymkowski, *supra* note 7, at 35.

23. *Id.* Men, however, do experience a greater return on their educational investment. *Id.* at 23.

24. Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1051 (1991).

25. *See generally* THERESE HUSTON, HOW WOMEN DECIDE: WHAT'S TRUE, WHAT'S NOT, AND WHAT STRATEGIES SPARK THE BEST CHOICES 29–40 (2016) (describing ways in which women are considered to be inferior decision makers).

Despite the research finding that men are in fact more eager to take risks and act with less control in times of stress,[26] both men and women tend to be more skeptical of women's decision-making skills.[27] Research shows that men are much more reactive when their decisions indicate a level of achievement, which leads them to make more disadvantageous decisions.[28] In contrast, women typically reflect more balanced decision-making because their decision-making ability is less reactive to achievement stress.[29] Specifically, women exhibit less mental disruption about their decision-making and perform better in stressful situations that test for achievement.[30] Despite such findings, employers' institutional reliance on stereotypes contributes to gender inequity in decision-making processes.

Employers' implicit gender bias can also be reflected in their professional-development training for managers in positions that are socially labeled as masculine. Women in predominantly "male" manager roles are "often regarded as less capable and are therefore denied access to the training needed to succeed regardless of whether they comply with organizational norms."[31] Unequal training can come in the form of a female manager's projects, which have comparatively lower financial importance or complexity than to those of her male colleagues. Projects can offer managers the opportunity to gain increased institutional knowledge and hone their skills. When male managers are given decisional authority over substantive, challenging, or significant projects, they can learn and professionally develop more than their female counterparts. Emphasizing an employment position's social label as masculine or feminine can cause employers to perpetuate gender inequity in decisional processes by professionally supporting some managers more than others.

A third contributing factor is employers' evaluation and work distribution systems, which can amplify sex stereotypes and biases. Many workplaces today have shifted away from the traditional, hierarchical management structure and instead have adopted informal or even completely unstructured processes to evaluate managers.[32] Sex discrimination more likely exists where the metrics used to review employees are vague or unclear.[33] Vague evaluative metrics cause the employer or persons reviewing managers to

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26. *See id.* at 146–53; Ruud van den Bos et al., *Stress and Decision-Making in Humans: Performance Is Related to Cortisol Reactivity, Albeit Differently in Men and Women*, 34 PSYCHONEUROENDOCRINOLOGY 1449, 1454–55 (2009) (explaining that men exhibit higher cortisol levels when making decisions in stressful conditions, which makes them more immediately sensitive to rewards than women in the same conditions).

27. *See* HUSTON, *supra* note 25, at 21.

28. *E.g.*, van den Bos, *supra* note 26, at 1455.

29. *Id.*; *see* HUSTON, *supra* note 25, at 221–29.

30. *See* van den Bos, *supra* note 26, at 1454–55. The authors note that in their experiment, men performed more poorly because of their focus on meeting a goal, whereas women balanced the risks and benefits better to achieve higher performance. *Id.* at 1455.

31. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1111 (2014).

32. *See* Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 639–40 (1998).

33. *See* Fiske et al., *supra* note 24, at 1050.

instead rely on stereotypic metrics.[34] As applied to decisional power, a less systematic management regime might not offer an objective basis for assigning managers to certain projects and subordinates.[35] Informal evaluations therefore also remove the assurance that all individuals in decision-making positions are exercising their power equitably. Without structured, objective metrics to abide by, evaluators' underlying gender biases towards particular groups are more likely to emerge and manifest in assigning or reviewing decision-making power and authority.[36] In the long run, this means that employers' implicit biases become a proxy for merit-based justifications behind the amount of decisional power that managers are given.

Fourth, the temporal nature of managers' decision-making power can cement the gender imbalance based on employers' self-fulfilling prophecies about their abilities. Specifically, there may exist a "dogsled problem" whereby women have decision-making powers over the preparation of a project, yet lose or concede these powers to men on "race day," or at the zenith of a project.[37] The sheer fact that some female managers will exercise their decision-making authority prior to their male colleagues can cause it to be considered inferior. Female managers will often strategically assemble and direct subordinates to fulfill a project's objective, but they are then forced to defer to male managers when it comes time to present the project's conclusions to a client or to make the final, more public execution of the project.[38] In this instance, the sequence and appearance of the different decision-making powers that men and women exhibit can lead employers, and even the public, to form an implicit bias that the male decision makers have executed *all* of the critical decisions.[39] Moreover, placing men at the forefront of final decisions gives credence to the notion that they deserve to be rewarded with even greater decision-making powers in the future.[40] Such a conclusion can lead to a self-perpetuating cycle. Thus, the times at which male and female managers exercise their decisional power and authority can cause a substantial disparity in their perceived and actual decisional power and authority.

Finally, the types of opportunities that certain managers are directed toward can contribute to women holding unequal decision-making power in the form of substantively inferior or lower-profile projects. By way of illustration, some law firms provide male partners with more opportunities to

34. *Id.*

35. *Id.* (noting that "when [evaluative] information about [an employee] is ambiguous, it is most open to interpretation" and that "subjective judgments of interpersonal skills and collegiality are quite vulnerable to stereotypic biases").

36. *See* Sturm, *supra* note 32, at 665.

37. Kathy Caprino, *How Decision-Making Is Different Between Men and Women and Why It Matters in Business*, FORBES (May 12, 2016, 10:12 AM), https://www.forbes.com/sites/kathycaprino/2016/05/12/how-decision-making-is-different-between-men-and-women-and-why-it-matters-in-business/ [https://perma.cc/23UH-3ELJ].

38. *Id.*

39. *Id.*

40. *Id.*

develop new business relationships while maintaining female "service partners" who instead churn out the work.[41] The ability to network for and acquire new clients, cases, or projects represents opportunities for female partners to collect and exercise great decision-making power. Although the role of a law firm partner is not identical to a manager in other professions, the underlying problem plaguing female partners at law firms is similar to that facing female managers who must also network informally to obtain projects that require substantive decisional power and authority. Without employers allowing them an equal opportunity to network or investing equal resources in their professional development, female managers cannot make the connections necessary to augment their decision-making powers at the same pace as their male colleagues.

Pinpointing the causes behind disparate levels of managerial decision-making power between men and women in a workplace is critical for an individual seeking legal redress. Being able to identify, describe, and substantiate the discriminatory employment practice resulting in the inequitable level of decisional power helps a manager convince a jury or a judge that her disparate treatment is based on systematic but subtle discrimination.

C. Why Gender-Disparate Decision-Making Power Matters

Workplaces and employees stand to gain from removing discriminatory barriers to managerial decision-making power. In addition to the job-specific knowledge that female managers have, research has demonstrated that certain traits more common in women can benefit workplaces. For example, the level of social sensitivity in a group has been found to be a significant predictor of its collective intelligence.[42] Women are associated with higher levels of social sensitivity than men.[43] Thus, employers can foster more productive group decision-making where they give women the equal opportunity contribute meaningfully. This is just one way that female managers can bring value and uniquely contribute to the productivity in their workplaces.

From the employee perspective, disparate decisional power and authority robs female managers of an equal status among their colleagues and the self-worth that comes with it. Employment "not only provides the means to live; it also confers social status, dignity, and a sense of self."[44] Further, in the most obvious sense, it is inherently unfair for an employee to work toward a management position and ultimately find herself unable to exercise the decisional authority associated with her job because of her sex. The gender

41. Elizabeth Olson, *Lawsuit Presses the Issue of Lower Pay for Female Law Partners*, N.Y. TIMES: DEALBOOK (May 7, 2017), https://www.nytimes.com/2017/05/07/business/dealbook/law-firm-pay-gender-bias.html [https://perma.cc/5QA9-5YEV].

42. *See* Anita Williams Woolley et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups*, 330 SCIENCE 686, 688 (2010).

43. *Id.*

44. *See* Schultz, *supra* note 31, at 1005–06.

gap also sets an unfair precedent that limits future female managers from exercising the power inherently associated with their positions.

In addition to concerns about dignity and fairness, the manager's material earnings and career trajectories are also jeopardized. If a manager has been given lesser decisional power over a long period of time, her pay is unlikely to remain at parity with her male colleagues who have been given greater decisional power. Therefore, her salary trajectory will be diminished from years of not being given the power, and therefore not being able to demonstrate her ability, to make high-level decisions.

Gender inequity in managerial decision-making power is a unique and important problem stemming from a diversity of causes. It leaves female managers in a unique position where they appear to have cracked the glass ceiling but continue to face an infrastructural barrier that limits their career, pay, and dignity. Female managers can and should utilize the most appropriate resource to break the glass walls they face: the law.

II. A BACKGROUND IN GENDER IMBALANCED DECISION-MAKING POWER AND SEX DISCRIMINATION LAW

Following a foundational understanding of gender inequity in managerial decisional power and authority, this Part lays out the legal framework pertinent to this problem. Specifically, Part II explains employment discrimination law and its appropriateness as a remedy for managers. Part II.A explains why managers require a legal remedy to this problem rather than pursuing alternative measures. Part II.B introduces employment discrimination law and its evolution and concludes with an overview of where the law stands today. Part II.C describes the various procedural requirements that a potential claimant must meet in order to file a viable lawsuit. Part II.D first illustrates a different legal theory that a claimant can pursue as part of her suit and the practical mechanics behind that theory. It then offers a brief overview of the remedies available to a successful claimant.

A. Why the Law Must Address This Problem

A growing number of scholars contend that seeking legal redress for implicit forms of employment discrimination, such as unequal decision-making power, is not promising.[45] However, this Note disagrees with that perspective because the alternative is to rely on employers undertaking their

45. *See, e.g.*, Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 323–25 (2007).

own reforms. Even with increased research[46] and journalism[47] that addresses the fault in labeling jobs by sex- or gender-based traits, employers continue to rely on implicit biases and stereotypes.[48] Any employer initiative would need to come from a group of high-level decision makers in the workplace—the same group perpetuating the discrimination at issue. It is unlikely that change will actually arise internally. Instead, an external force, such as the law, is required for employers to become incentivized to recognize and actively root out the subtle, impactful sex discrimination in their workplaces.

Seeking a legal remedy to gender inequity in the decision-making processes is important for both the individuals directly impacted by the inequity as well as for their coworkers. Employees perceive their workplace to be more diverse when they see female leaders.[49] The diversity of gender among managers also has the potential to affect personnel policies such as hiring and compensation.[50] Yet if female managers cannot exercise the decisional power that is expected to correlate with their positions, then having more women in these roles is essentially meaningless. Moreover, managers who face inequitable decision-making power will not stay long with their employer; rather, they will seek opportunities in equitable workplaces.[51] Even if these managers leave and are replaced by other female managers, the same possibility of attrition remains.

Gender inequity in managerial decision-making processes simultaneously causes employees to face culturally incompetent human resources (HR) policies. When decision-making bodies are nominally diverse but practically homogenous, the programs and policies they create will reflect closed-group thinking.[52] Managerial decisions impact employees' lives in material ways. By offering only one managerial group's view of healthcare, childcare, job protection, and other job-related benefits, employers may end up presenting

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46. *See, e.g.*, *id.*; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1200 (1995); Reskin & McBrier, *supra* note 13, at 210.

47. *See, e.g.*, Stav Ziv, *Male and Female Co-Workers Switched Email Signatures, Faced Sexism*, NEWSWEEK (Mar. 10, 2017, 4:34 PM), http://www.newsweek.com/male-and-female-coworkers-switched-email-signatures-faced-sexism-566507 [https://perma.cc/5GV4-46MF].

48. Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 408–09 (2003) ("Managers themselves described successful women managers as more competent, active, and potent than women as a whole; however, these same managers described women managers as 'decidedly more deficient' in these qualities than their male counterparts.").

49. Cailin S. Stamarski & Leanne S. Son Hing, *Gender Inequalities in the Workplace: The Effects of Organizational Structures, Processes, Practices, and Decision Makers' Sexism*, 6 FRONTIERS IN PSYCHOL., Sept. 2015, at 1, 6.

50. Reskin & McBrier, *supra* note 13, at 211.

51. *See* Schultz, *supra* note 31, at 1062 (explaining that even employers' seemingly neutral methods for executing gender-biased employment decisions can drive women away from their high-ranking jobs or the workforce entirely).

52. *See* Stamarski & Hing, *supra* note 49, at 3 ("HR-related decision-making occurs when organizational decision makers (i.e., managers, supervisors, or HR personnel) employ HR policy to determine how it will be applied to a particular situation and individual.").

insufficient or limited HR support to their employees.[53] It is unrealistic to expect that the same decision-making bodies that need to be reformed will implement policies to ensure that its members are given truly equal decision-making power. That is why this Note explores the viability and effect that litigation can have in response to gender-disparate managerial decision making.

B. A Brief History and Evolution of Sex Discrimination Law

Two employment laws largely form the basis for sex-based discrimination litigation: (1) the Equal Pay Act and (2) Title VII of the Civil Rights Act of 1964. The Equal Pay Act pertains to employees' compensation—not other practices in a workplace, such as unequal decision-making power—and is therefore inapplicable to this Note.[54] Title VII, on the other hand, offers promising legal redress for novel causes of action. This statute prohibits employment practices that discriminate against employees on the basis of race, color, religion, sex, and national origin.[55] Further, it protects employees who are both experiencing discrimination and openly opposing it.[56]

The U.S. Supreme Court has repeatedly recognized that Title VII is meant to remove arbitrary barriers to "professional development that ha[ve] historically been encountered by women and . . . other minorities."[57] Importantly, later legislative history, discussing the need to amend Title VII, indicates that Congress understood employment discrimination law to extend beyond "intentional wrongs" and to address complex infrastructural problems.[58]

This Note focuses exclusively on Title VII as a remedy for unequal decision-making power among managers. Courts have recognized Title VII sex discrimination claims arising from a variety of discriminatory employment practices, including job assignments, transfers, promotions, prerequisite tests for employment, and hiring practices.[59] Title VII's application to employee assignments and transfers reflects the statute's broad prohibition on employment practices unassociated with compensation or

53. *See id.* at 3–4.

54. 29 U.S.C. § 206(d) (2012).

55. 42 U.S.C. § 2000e-2 (2012).

56. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 347 (2013) (explaining that Title VII protects employees who oppose discriminatory employment practices or file a complaint alleging employment discrimination).

57. Connecticut v. Teal, 457 U.S. 440, 447 (1982) (explaining the purpose behind Title VII).

58. S. REP. NO. 92-415, at 5 (1971). The report on this proposed amendment to Title VII stated, "Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs . . . ." *Id.*

59. *See generally* Russell Specter & Paul J. Spiegelman, Annotation, *Employment Discrimination Action Under Federal Civil Rights Acts*, 21 Am. Jur. Trials 1 (2017) (providing examples of various sex discrimination cases).

other material awards to employees.[60] Analogously, managerial decisional power is not immediately associated with compensation or other material reward, but rather a difference in job conditions. Although disputes over distributing unequal managerial decision-making power have not made their way to the courts, Title VII contains two provisions in support of such a claim. Each of these provisions is analyzed in greater detail in Part III.

Title VII prohibits employers from discriminating against their employees on certain bases. The two relevant provisions of the statute make it unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[61]

Congress's inclusion of the term "sex" as a basis for Title VII discrimination was a late amendment to the statute but should be granted equal importance to the other bases.[62] Representative Howard Smith proposed the term in an amendment two days before the bill passed the House, stating that it would help white women to compete for employment against prospective African American female candidates.[63] This opinion was not unique. Representative Martha Griffiths also relied on a race-based rationale to justify the prohibition of sex-based discrimination in the bill.[64] Although there is no official record of the individual votes for the amendment, it is understood that its support largely derived from Republicans and Southern Democrats in Congress.[65] This same coalition of congressmen disfavored civil rights for African Americans.[66] It is widely believed that some of the amendment's proponents intended to use the amendment to defeat the bill's passage in Congress.[67] Other legislators

60. *See generally* Daniel M. Le Vay, Annotation, *Sex Discrimination in Job Assignment or Transfer as Violation of Title VII of Civil Rights Act of 1964*, 123 A.L.R. Fed. 1 (2011) (collecting cases of unlawful employment practices).

61. 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

62. *See* Schultz, *supra* note 31, at 1014–15.

63. *See* 110 CONG. REC. 2583 (1964) (remarks of Rep. Smith). Despite his stated position, Smith's proposal is thought to have been intended to quash the bill. *See* Schultz, *supra* note 31, at 1014–16. In fact, Smith did not vote for the amended bill's passage through the House. 110 CONG. REC. 2804 (1964).

64. *See* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968, at 179 (1988).

65. *See* Katherine Krimmel, Rights by Fortune or Fight? Re-Examining the Addition of Sex to Title VII of the Civil Rights Act 2 (Jan 17, 2018) (unpublished manuscript) (on file with author).

66. *Id*.

67. *See id.* (manuscript at 6, 11).

voiced concerns about the potentially harmful ramifications of the bill's broadened scope, with the inclusion of amendments such as sex-based discrimination.[68]

Given the amendment's late inclusion in the bill, the conventional interpretation is that the legislative history does not reflect a coherent legislative intent to combat sex discrimination.[69] Yet, some congressional intent to make sex a meaningful component of the bill can be gleaned from the multiple opportunities that congressmen had, but did not take, to remove the term "sex."[70] One scholar argues that, in fact, some members of Congress possessed political will to include sex as a status protected from discrimination.[71] In the decades preceding the proposal of the sex discrimination amendment, feminist coalitions so consistently—and it seems effectively—advocated for such statutory reform that the Republican and Southern Democratic electorates eventually reflected an inclination to afford greater legal rights to women by the mid-twentieth century.[72] Therefore, the conventional wisdom that there was not a true congressional intent behind the inclusion of sex-based discrimination in Title VII, or that it was nothing more than a tactic to defeat the bill, does not convey the whole story. Besides reflecting political willpower to enhance legal protections for women, the plain statutory language requires that sex discrimination be afforded the same seriousness as Title VII's other bases for discrimination.

Soon after Title VII's passage, sex discrimination did not receive much priority. Equal Employment Opportunity Commission (EEOC) officials tasked with furthering Title VII's implementation initially considered sex-based discrimination to be unimportant.[73] The first successful cases delving into sex-based discrimination claims rested on applying the statute's plain meaning to the most obvious instances of discrimination. For instance, the Supreme Court held that an employer violated Title VII where it accepted only male applicants with preschool children without considering female applicants with children.[74] Sexual harassment claims, however, were not initially regarded as an obvious form of sex discrimination. They posed greater difficulty for plaintiffs because courts could not rely on legislative history to determine whether the alleged misconduct was within the statute's scope.[75] As demonstrated by early case law, the courts were reluctant to

68. 110 CONG. REC. 2577 (1964) (statement of Rep. Emanuel Celler, Chairman, H. Comm. on the Judiciary) (asking the Committee to "[i]magine the upheaval that would result from adoption of blanket language requiring total equality").

69. *See* Krimmel, *supra* note 65 (manuscript at 2).

70. *Id.* (manuscript at 3).

71. *Id.* (manuscript at 2).

72. *Id*.

73. Multiple EEOC directors conveyed that sex discrimination was a lesser concern for the agency and voiced an intent to avoid becoming known as the "sex commission." *See* HARRISON, *supra* note 64, at 187–89.

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

75. *See* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (distinguishing Title VII's purpose, based on judicial interpretations of its legislative history, from a remedy to sexual harassment), *vacated*, 562 F.2d 55 (9th Cir. 1977); *see also* Barnes

apply the statute beyond instances of plain violations. The first district courts to review this issue in the late 1970s denied sexual harassment claims, and they did not recognize unwanted sexual advances in the workplace as inextricably sex-based.[76] The courts reasoned that Title VII did not apply to a plaintiff faced with sexual harassment because the treatment she received was prompted by her decision to reject her supervisor's advances against her and not on her sex.[77] Ultimately, many of these district courts were reversed years later by their circuit courts, which recognized that the sexual advances that plaintiffs faced were prompted by their sex as females.[78]

In 1989, the Supreme Court in *Price Waterhouse v. Hopkins*[79] expanded its interpretation of sex-based discrimination to include an employer's reliance on sex stereotypes to deny a promotion to a female employee.[80] In *Price Waterhouse*, the Court held that disparate treatment based on sex exists where an employer expects female employees to conform to behavioral stereotypes, such as speaking "more femininely" or wearing makeup.[81] Importantly, the Court interpreted Title VII's language to "mean that gender must be irrelevant to employment decisions."[82] By going beyond the word "sex" and including the term "gender" in Title VII's purview, the Court recognized that the statute applied to societally constructed roles for each sex. In doing so, the Court expanded Title VII's scope beyond a mere biological distinction of sex and recognized that it encompasses social expectations of sex, too.[83]

Nearly a decade later, the Court in *Oncale v. Sundowner Offshore Services, Inc.*[84] reiterated a broad conception of Title VII. Acknowledging that the statute's application does not end with the "principal evil" that the legislature intended to dissolve at the time of the statute's enactment, the Court

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v. Costle, 561 F.2d 983, 986–87 (D.C. Cir. 1977) ("Unfortunately, the early history of [Title VII] lends no assistance to endeavors to define the scope of [sex discrimination] more precisely, if indeed any elucidation were needed."). The *Barnes* court ultimately found the Title VII applied to sexual harassment but it did so on the basis of legislative clarifications about Title VII in the Equal Employment Opportunity Act of 1972, the Supreme Court's progressive interpretation of the statute in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and its fellow circuit courts' application of Title VII to a variety of sex-based barriers in the workplace. *Id.* at 987.

76. *See, e.g.*, Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Barnes v. Train, No. 1828-73, 1974 WL 10628 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

77. *See, e.g.*, *Barnes*, 1974 WL 10628, at *1 ("The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmonious personal relationship.").

78. *See, e.g.*, *Barnes*, 561 F.2d at 989.

79. 490 U.S. 228 (1989).

80. *Id.* at 250–51.

81. *Id.* at 235.

82. *Id.* at 240.

83. *See id.* at 244 (finding that "an employer may not take gender into account").

84. 523 U.S. 75 (1998).

recognized that the law extends to "reasonably comparable evils."[85] Thus, it is fitting to include gender inequity in decisional processes as actionable under Title VII because it is a comparable evil to the more obvious discriminatory practices, and it is rooted in impermissible employer policies such as sex stereotyping.

C. Qualifications for Bringing a Title VII Claim

In addition to understanding Title VII's statutory history and evolution, it is important to address the basic procedural requirements for litigants to bring a viable suit under this statute. Title VII does not apply to all employment relationships and practices. To qualify as an "employer" under Title VII, the person or business entity must be in an industry affecting commerce.[86] Further, the employer must employ fifteen or more persons for each working day in each of twenty or more weeks in the current or previous year.[87] An employee is anyone employed by such an employer, with the exception of individuals holding state or local public office, or their personal staff or policy advisors.[88]

Employment discrimination suits may be brought by the EEOC,[89] the Attorney General behalf of the United States in alleged "pattern-or-practice" discrimination cases,[90] or by a private party.[91] A charging party must file its claim with the EEOC within 180 days, or about six months, following the alleged unlawful employment practice's occurrence.[92] The EEOC must act upon cases within a limited statutory period.[93] If the agency fails to review cases expeditiously, it must notify the charging party, which then has ninety days to file the action in district court.[94] If a charging party experiences additional events that appear discriminatory, the EEOC may amend the original complaint or require that the charging party file another claim altogether if the events do not overlap with the existing claim.[95]

The EEOC does not have the authority to adjudicate all employment disputes on its own. With respect to nonfederal employers, the agency uses its statutory powers to obtain compliance for an employee in the federal

85. *Id.* at 75 (applying Title VII to sexual harassment in the form of physical assaults and threats of rape towards a heterosexual male from his other male coworkers).
86. 42 U.S.C. § 2000e(b) (2012).
87. *Id.*
88. *Id.*
89. *Id.* § 2000e-5(b).
90. *Id.* § 2000e-6(a).
91. *Id.* § 2000e-5(b).
92. *Id.* § 2000e-5(e).
93. *Id.* § 2000e-5(f).
94. *Id.*
95. *See What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/process.cfm [https://perma.cc/UK5F-A9SA] (last visited Aug. 24, 2018); *see also, e.g.*, Bayless v. Ancilla Domini Coll., 781 F. Supp. 2d 740, 764 (N.D. Ind. 2011).

courts.[96] For disputes involving federal employers, the EEOC participates in the adjudicatory process.[97] After a federal employee files a discrimination complaint and receives a post-investigation notice from the EEOC, the employee may either request a hearing before an EEOC administrative judge or request that the federal employer issue a decision over the matter.[98] If an employee-claimant pursues a hearing, the judge will ultimately issue a decision and order relief where it is warranted.[99] If the decision favors the employee-claimant, the federal employer may still issue its own order rejecting the judge's decision.[100] In this event, the federal employee may file an appeal with the EEOC and file a civil action in federal district court.[101] Beyond these procedural steps, a successful plaintiff must satisfy the substantive requirements for an employment discrimination suit as explained in the following section.

D. Types of Discrimination Suits

Under Title VII, an employee may establish an unlawful employment practice through one of two legal theories: disparate treatment or disparate impact. This section presents the prima facie requirements for each theory of discrimination as well as plaintiffs' strategies for successful litigation.

1. Disparate Treatment Theory

Disparate treatment theory concerns employment practices demonstrating intentional discrimination, or conduct that is unexplainable by any cause other than discrimination, toward an employee based on a protected status such as sex.[102] All disparate treatment claims are subject to the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[103] The framework functions in three steps: (1) the employee-plaintiff's prima facie burden; (2) the employer's rebuttal; and (3) the employee-plaintiff's response.

First, the plaintiff must establish a prima facie case of discrimination. To do so, the plaintiff must "demonstrate the following: (1) she was within the protected [Title VII] class; (2) she was qualified for the position; (3) she was

96. Tracy Bateman Farrell et al., Annotation, *Introduction to the Equal Opportunity Commission*, 21 Fed. Proc. Law. Edition § 50:1 (2008).

97. *Hearings*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/federal/fed_employees/hearing.cfm [https://perma.cc/9DKD-NLAB] (last visited Aug. 24, 2018).

98. *Filing a Formal Complaint*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/federal/fed_employees/filing_complaint.cfm [https://perma.cc/3VPE-HMVW] (last visited Aug. 24, 2018).

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* Sturm, *supra* note 1, at 473 & n.45.

103. 411 U.S. 792, 802 (1973).

subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination."[104]

The first three prongs of a prima facie case are fairly straightforward. The fourth and final prong requires the plaintiff to link the employment practice with discrimination. If the plaintiff seeks to establish that the adverse employment action was centrally motivated by an impermissible purpose, she can refer to those similarly situated to her to demonstrate differential treatment.[105] She may use also statistical data, similar to that used by class action plaintiffs, to support an inference of intentional discrimination.[106] By way of illustration, the Supreme Court has compared a class's representation and treatment in a given workplace to the class's existence in the relevant labor market.[107] Geography and the job itself will define the parameters of the "relevant labor market."[108] Similarly, individuals claiming intentional discrimination may use statistical evidence to establish the employer's subjective intent to treat them differently based on a protected, minority status.[109]

In the absence of a single, direct causal link between the employee's minority status and the employer's differential treatment, a plaintiff can still establish a prima facie disparate treatment claim through a mixed-motive test.[110] Under this analysis, the employee need not establish that the discriminatory motive was the sole or primary motive behind the employer's conduct.[111] A plaintiff may sufficiently make a claim by establishing that the employee's protected status was a substantial motivating factor behind the employment practice.[112] The mixed-motive test interprets the statutory language, "because of . . . sex," as having a broader application than was earlier interpreted.[113] The previous interpretation held that "because of" meant that "but for" the employee's protected status, the employer would not have acted in the way it did.[114] The current analysis allows employees to

104. Leibowitz v. Cornell Univ., 584 F.3d 487, 498 (2d Cir. 2009); *accord McDonnell Douglas Corp.*, 411 U.S. at 802–04.

105. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 38 (3d ed. 2010).

106. *Id.* at 58.

107. Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977) (explaining that statistics can be an important source of proof in employment discrimination cases, and gross statistical differences can even establish prima facie proof of discrimination).

108. *Id.* at 308.

109. RUTHERGLEN, *supra* note 105, at 58.

110. *Id.* A mixed-motive test does not extend to retaliation or ADEA claims. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013) (finding that the motivating-factor test did not extend to Title VII retaliation claims); Gross v. FBL Fin. Servs., 557 U.S. 167, 170 (2009) (finding that the motivating-factor test did not apply to ADEA claims).

111. RUTHERGLEN, *supra* note 105, at 58.

112. *See* 42 U.S.C. § 2000e-2(m) (2012) ("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."). This reasoning was first introduced in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

113. RUTHERGLEN, *supra* note 105, at 58–59.

114. *Id.*

establish liability where the employer had both legal and illegal motives, and the latter was a factor in the employer's decision to discriminate against the employee.[115] In a mixed-motive claim, the court can award attorney's fees, as well as injunctive and declaratory remedies.[116]

Second, the burden shifts to the employer if the employee successfully meet its prima facie burden.[117] The employer must then establish that it had a "legitimate, nondiscriminatory reason" for the employment practice in question.[118] Specifically, where an employee's sex is a "bona fide occupational qualification" for the job and that qualification is reasonably necessary for regular business operations, the employer is not acting unlawfully.[119] If the employer fails to rebut the discrimination charge, the employee prevails.

Finally, the burden shifts back to the employee-plaintiff if the employer establishes sex as a legitimate occupational qualification.[120] The employee is "given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [the employment action] were in fact a coverup for a . . . discriminatory decision."[121] A successful plaintiff must establish this by a preponderance of the evidence.[122] If the plaintiff successfully rebuts the employer's proposed defense as mere pretext for discriminatory practices, the case enters the remedy stage. When a case reaches the remedy stage, the employer assumes the burden of persuasion regarding how much it owes the plaintiff in damages.[123]

To escape a robust award to the plaintiff, an employer can avail itself of an affirmative defense that it would have taken the same action against the plaintiff notwithstanding its proven discriminatory motivating factor.[124] In doing so, the employer can dodge substantive liability, leaving only the payment for opposing party's attorney's fees and costs.[125] However, if the employer fails to establish such an affirmative defense, the court may "award any type of Title VII relief."[126]

Ultimately, a plaintiff can prevail and seek remedy regardless of whether the protected status, such as sex, was the employer's central motivation or one of many motivations behind its unfavorable employment practices. As Part III will discuss in greater detail, disparate treatment theory provides

115. Frederick K. Grittner, Annotation, *Mixed Motives*, 9 West's Fed. Admin. Prac. § 11391 (Supp. 2017).
116. *Id.*
117. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972).
118. *Id.*
119. 42 U.S.C. § 2000e-2 (2012).
120. *McDonnell Douglas Corp.*, 411 U.S. at 803.
121. *Id.* at 804–05.
122. RUTHERGLEN, *supra* note 105, at 48.
123. *Id.*
124. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94–95 (2003).
125. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2012). However, some courts have interpreted the statute to use permissive rather than mandatory language with respect to awarding fees. *See, e.g.*, Canup v. Chipman-Union Inc., 123 F.3d 1440, 1442 (11th Cir. 1997).
126. Grittner, *supra* note 115.

relief for an employee where her employer consciously or unconsciously excludes her from employment opportunities.[127]

2. Disparate Impact Theory

Disparate impact theory addresses facially neutral employment practices that cause a significant discriminatory impact.[128] This section presents a brief history of disparate impact theory as well as its evolution in meaning and import in Title VII jurisprudence. Thereafter, the section lays out the theory's mechanics and its value to plaintiffs.

The Supreme Court first recognized the disparate impact theory in *Griggs v. Duke Power Co.*[129] In *Griggs*, the Court recognized a Title VII cause of action against a facially neutral employment practice that produced a disparate effect on a protected minority class and that was not justified by a business necessity.[130] Nearly two decades later, however, the Court in *Wards Cove Packing Co. v. Atonio*[131] narrowed the applicability of disparate impact theory by increasing the onus on plaintiffs seeking to establish a prima facie case. In *Wards Cove*, the Court found that an imbalance in race or some other minority status among employees is, in and of itself, insufficient to establish a prima facie case for disparate impact.[132] Rather, the Court in *Wards Cove* set a requirement that plaintiffs must prove: (1) that there is a disparity between the proportion of a minority class in an occupation and the proportion of that minority class in the labor market for that occupation;[133] and (2) that a particular employment practice caused this disparity.[134] Additionally, the Court held that the burden remained with the plaintiffs through the course of litigation, meaning they would need to disprove a defendant's proposed business-necessity defense, regardless of its validity.[135] Consequently, under *Wards Cove*, only a narrow subset of claimant cases would be viable.[136]

In response to the Court's decision, Congress passed the Civil Rights Act of 1991, which appeared to partially broaden a disparate impact claim's scope back to pre-*Wards Cove* levels.[137] One section of the Act expressly

127. *See infra* Part III.

128. *See* Sturm, *supra* note 1, at 467 & n.21.

129. 401 U.S. 424 (1971).

130. *Id.* at 431 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

131. 490 U.S. 642 (1989).

132. *See generally id.*

133. *Id.* at 652–54.

134. *Id.* at 656. With this additional requirement, *Wards Cove* went beyond *Hazelwood*'s requirement of statistical evidence on the labor market.

135. *Id.* at 670 (Stevens, J., dissenting).

136. *See* Schultz, *supra* note 31, at 1099 & n.556.

137. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(C) (2012)) ("The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'"). In this section, Congress sought to apply a section of Title VII as it was interpreted the day before the Court set forth its *Wards Cove* opinion.

indicated in its legislative history that the discrimination law pertaining to causation was to return to the pre-*Wards Cove* legal doctrine.[138] Specifically, this legislation effectively reversed the *Wards Cove* requirement that plaintiffs must bear the burden of persuasion throughout a case. Instead, employers are required to propose a business-necessity defense, and they must prove that defense's validity for it to be considered.[139] A plaintiff is therefore no longer required to rebut a business-necessity defense that is invalid. The Act also permits plaintiffs to argue that certain complex employment practices should be reviewed as a single employment process rather than as individual elements.[140] The Act did not completely reject the Court's decision in *Wards Cove*, but it did codify the plaintiff's burden to identify the particular employment practice causing the alleged disparate impact.[141] The Act did not clarify the necessary elements for establishing a disparate impact finding.[142] Neither the Court nor Congress has clarified exactly how to establish such a claim besides using statistical support to show disparate impact.[143]

Following the Act's passage in 1991, the Court in *Ricci v. DeStefano*[144] still maintained a narrow interpretation of disparate impact claims. In *Ricci*, the Court reviewed a mandatory aptitude test for any New Haven firefighter seeking promotion.[145] Some critics of the test alleged that it was discriminatory because white firefighters were projected to be the test's predominant beneficiaries, and the few minority firefighters still had a relatively low chance of receiving the promotion.[146] In response, the city of New Haven did not certify the test or its results.[147]

A class of firefighters who stood to gain promotion from the test results sued the city.[148] The Court held that New Haven's refusal to certify the test was intentional reverse discrimination, reasoning that the city's failure to certify would have been justified only if it was responding to a legitimate

138. *See id.* § 105(b), 105 Stat. at 1075 (codified as 42 U.S.C. § 1981 note (2012)) ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.").

139. *Id.* § 104, 105 Stat. at 1074 (codified at 42 U.S.C. § 2000e) (defining "demonstrates" as "meets the burdens of production and persuasion" where the employer "demonstrates" a business necessity defense).

140. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2012). The plaintiff must establish that the employment process cannot be separated into elements. *Id.*

141. *Id.*; *see also* RUTHERGLEN, *supra* note 105, at 77.

142. *See* RUTHERGLEN, *supra* note 105, at 80–81.

143. One scholar notes that partly because both disparate treatment and disparate impact claims can rely on statistical data, plaintiffs do not have any clear instruction for precisely what more they must prove for the latter claim. *Id.* at 81.

144. 557 U.S. 557 (2009).

145. *Id.* at 571.

146. *Id.* at 562.

147. *Id.*

148. *Id.* 562–63.

disparate impact claim.[149] The Court concluded that minority firefighters would not been successful if they brought a disparate impact claim in response to the certified test, and it therefore dismissed the possibility of the city facing a legitimate disparate impact claim.[150] The Court's decision in *Ricci* effectively hinders well-meaning employers' abilities to defend against reverse discrimination claims, while strengthening all employers' abilities to ward off disparate impact claims.[151] Further, it affirms the burden on plaintiffs to propose an alternative practice that the employer could have pursued to meet its legitimate business needs while having a smaller disparate impact.[152] Thus, while disparate impact theory once permitted a wide breadth of suits, the Court has increasingly narrowed the theory's applicability and expanded the plaintiff's obligations in making a successful case.

Currently, to establish a prima facie claim, an employee must first establish that the employment practice or policy has an unequal impact on a protected class.[153] To defend against liability, the employer must then successfully establish that it is acting due to a business need in question and that the challenged practice relates to the job position.[154] Only if an employer's business-necessity defense is valid must an employee establish that the proposed justification is pretext for discrimination.[155]

While disparate impact litigation once provided employees with a vehicle to remedy the subtle discriminatory practices or infrastructure in their workplaces, the recent litigation over this theory indicates its diminishing force. With increased burdens on the plaintiff, such as presenting an alternative feasible employment practice, disparate impact theory produces many hurdles for litigants.

E. Litigation Remedies

Title VII's remedial framework is set up so that a successful charging party can be "placed, as near as may be, in the situation [s]he would have occupied if the wrong had not been committed."[156] In cases where an employer's

149. *Id.* at 585 ("[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability . . . .").

150. *Id.* at 587–90.

151. *See* RUTHERGLEN, *supra* note 105, at 91. The Court's holding that New Haven unjustifiably discriminated against white firefighters based on race for recognizing that its tests produced a negative impact on minority firefighters reflects a reasoning wedded to *Wards Cove* rather than the subsequent Civil Rights Act of 1991. *See* Henry L. Chambers, Jr., *Reading Amendments and Expansions of Title VII Narrowly*, 95 B.U. L. REV. 781, 793 (2015).

152. *Ricci*, 557 U.S. at 578 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C) (2012)).

153. Connecticut v. Teal, 457 U.S. 440, 446 (1982). Employers cannot, however, use the business-necessity defense against a disparate treatment claim that alleges that they are intentionally discriminating. *See generally* 42 U.S.C. § 2000e-2 (2012).

154. *Id.*

155. *Teal*, 457 U.S. at 447.

156. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–19 (1975) (quoting Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867)).

single motive was to discriminate against an employee, the remedy can include both injunctive and monetary relief.[157] Injunctive relief can "include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[158] However in the context of a mixed-motive case, if an employer proves that it would have committed the same employment practice even without its discriminatory motivation, the employee cannot recover damages beyond injunctive relief, declaratory relief, or attorney's fees and costs.[159]

Monetary relief usually takes the form of compensatory damages, which serve to make the plaintiff whole.[160] In discrimination cases involving federal employers, an additional set of remedies is available, including an unconditional offer to place employees where they ought to have been placed and a commitment by the employer to take preventative measures in the future.[161] Federal employees who are discriminated against in ways that cannot be remedied with job promotion or placement are owed a "full opportunity to participate in the employee benefit denied."[162]

In its 1991 amendment to Title VII, Congress introduced the availability of punitive damages against nongovernmental employers in disparate treatment, but not disparate impact, cases.[163] However, the Supreme Court interpreted this amendment narrowly and made such damages available only on the basis of employer intent. An employer who discriminated against employees without perceiving even the risk of violating federal law, or who acted with a "distinct belief that its discrimination [was] lawful," is exempt from punitive damages.[164] Further, the employer is not vicariously responsible by way of punitive damages for discriminatory actions by its managerial agents.[165]

The remedies available from a Title VII claim can impact an individual's choice of discrimination theory as well as her decision to litigate at all. The ensuing analysis delves into determining which legal theory is the most promising for a potential plaintiff.

III. A PIONEERING SEX DISCRIMINATION SUIT: TITLE VII LEGAL THEORIES APPLIED TO GENDER INEQUITY IN DECISION-MAKING

While both disparate treatment and disparate impact claims could theoretically provide recourse for a manager facing inequitable decisional

157. 42 U.S.C. § 2000e-5(g).
158. *Id.*
159. *Id.* § 2000e-5(g)(B).
160. *Id.* § 2000e-5(g). The language of the statute reflects an intent to isolate the available remedies for Title VII to only equitable relief. *Id.* The subsection lists equitable forms of relief for a prevailing charging party followed by the phrase "or any other equitable relief." *Id.* This broad final phrase can be read to characterize other actions listed.
161. *See* 29 C.F.R. § 1614.501(a) (2017).
162. *See id.* § 1614.501(c)(5).
163. 42 U.S.C. § 1981a(a)(1)–(b)(1) (2012). Congress has not enacted additional amendments since 1991.
164. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 536–37 (1999).
165. *Id.* at 545.

power, they each present unique hurdles. This Part will explore how a potential plaintiff can approach litigation under either theory to seek relief from gender inequity in decisional processes. Part III.A presents the preliminary arguments and statutory interpretation necessary to litigants preparing an employment discrimination case. Part III.B analyzes how a litigant would approach a disparate treatment suit and the hurdles she would face. Part III.C analyzes how a litigant would fare in a disparate impact suit tackling the same statutory provisions. Finally, this Part concludes that disparate treatment theory offers a more promising path because the risks a plaintiff faces can be outweighed by the benefits leading to a successful claim.

A. Preliminary Considerations for Sex Discrimination Suits

A manager given disparate decisional power can obtain forceful and long-lasting relief by utilizing the law. Although litigation of this exact nature has not yet entered state or federal courts,[166] Title VII offers both a viable and promising resolution to the problem at hand.

Two provisions in Title VII exist to provide redress to managers for disparate decision-making power and authority.[167] The first concerns whether an employee faces discriminatory terms and conditions during her employment; the second concerns whether an employee is limited or classified in a way that adversely affects her employment.[168] As an initial matter, the Supreme Court has acknowledged that novel Title VII actions can arise from interpretations of each provision in the statute.[169] The Court has cautioned that employment practices or procedures that present "built-in headwinds" for minority groups are prohibited.[170] Moreover, the guidelines by which the EEOC reviews sex-based discrimination claims permits the agency to address new issues in that arena.[171] By acknowledging that the agency may continue to review problems relating to sex discrimination on a case-by-case basis, the guidelines leave room to bring long-existing discriminatory employment practices into court.[172] Sexual harassment claims serve as a paradigmatic example of Title VII's evolving interpretation beyond obvious applications of the statute.

While Title VII does not expressly include a sexual harassment claim, lawyers and activists utilized Catharine MacKinnon's scholarship, which

166. *See supra* Introduction.
167. 42 U.S.C. § 2000e-2 (2012); *see supra* Part II.A.
168. *See supra* Part II.D.
169. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440, 447–48 (1982) ("Title VII [is directed toward] 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and professional development that had historically been encountered by women . . . ." (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))).
170. *Griggs*, 401 U.S. at 432 (describing Congress's intent behind Title VII's application as focused on an employment practice's consequences, and not merely the employer's motivation).
171. 29 C.F.R. § 1604.1(c) (2017).
172. *Id.*

interpreted sexual harassment as a form of sex-based discrimination, to prevail in litigation.[173] This established sexual harassment as an unlawful employment practice.[174] In the same vein, it is possible to establish novel causes of action against employers whose practices of distributing decisional power permit or encourage gender-inequitable decision-making power and authority.

The first pertinent provision of Title VII makes it unlawful for an employer "to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment" because of her sex.[175] To apply this provision, a plaintiff must first understand what "terms" and "conditions" mean. Although Title VII does not define "terms and conditions," the statute provides certain examples in the employment context: "grievances, labor disputes, wages, rates of pay, [and] hours."[176] Additionally, litigation pertaining to "hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits" has been considered to fall within the terms and conditions of employment.[177] Job transfers based on sex are also discriminatory.[178] The Court has held that terms and conditions apply to both contractual provisions and "'the entire spectrum of disparate treatment of men and women' in employment."[179] With these considerations in mind, the next section focuses on disparate treatment theory as applied to gender-inequitable decision-making processes and the hurdles this theory poses.

B. Pursuing a Disparate Treatment Lawsuit

A novel disparate treatment claim for unequal decision-making powers is cognizable based on Title VII precedent. The Court has understood the phrase "because of . . . sex" to include sex stereotyping (i.e., expecting men and women to match the social constructs created for their respective genders).[180] The Court has taken a broad reading of the legislative intent behind the text prohibiting sex-based discrimination.[181] More recently, the Court has further recognized that Title VII extends to "reasonably comparable evils" beyond those that Congress originally intended to

173. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 9 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

174. *Id.*

175. 42 U.S.C. § 2000e-2(a)(1) (2012).

176. *Id.* § 2000e(d).

177. *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/sex.cfm [https://perma.cc/2PTE-F4H5] (last visited Aug. 24, 2018).

178. *See, e.g.*, Harless v. Duck, 619 F.2d 611, 615 (6th Cir. 1980).

179. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

180. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989).

181. *Id.* at 251 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for . . . 'Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" (quoting *Manhart*, 435 U.S. at 707 n.13)).

eradicate with Title VII.[182] Accordingly, an employee-plaintiff can establish a disparate treatment claim by showing that her employer was motivated by sex stereotyping.[183] The employee-plaintiff may also establish that other causes behind gender inequity in decisional processes[184] are sex or gender based.

From a manager's perspective, decision-making power and authority can exist within two categories of job terms and conditions: (1) those which are expressly found in work contracts, and (2) those which are presumed to be associated with the job title. Decision-making power may be explicit from a manager's written responsibilities, but such authority is also implied in managerial duties. Recognized terms and conditions, such as job assignments and transfers, concern whether an employer changes its employees' substantive duties. Decision-making power similarly affects managers' substantive duties since it reflects their day-to-day responsibilities.

"The critical issue, Title VII's text indicates, 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."[185] Distributing decisional power based on gender stereotypes about a female manager's personality traits,[186] assumptions about her sex and race,[187] or her socially defined responsibilities outside of work[188] can all be construed as sex discrimination. Arguably, it is an implicit term of a manager's position that she has an equitable share of the incremental decision-making powers that her colleagues of the same rank and title obtain. Therefore, an employee-plaintiff may argue that inequitable distribution of power and authority between sexes is a disadvantageous term for her.

Without equal decisional power or authority, female managers stand to lose any future claims of discrimination based on the earlier discriminatory distribution of power. Particularly, continued gender disparity in decisional power can begin to justify an employer's future unequal distribution in decision-making.[189] For example, if male managers are given early opportunity to wield decisional power and do so in a productive manner, then they are more likely to be considered for additional opportunities in the

182. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

183. *See supra* Part I (describing sex stereotyping as one potential cause behind gender inequity in decisional processes).

184. *See supra* Part I.

185. Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

186. *See Price Waterhouse*, 490 U.S. at 250; *see also supra* Part I.

187. *See, e.g.*, Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (recognizing black females collectively as "a distinct protected subgroup" under Title VII); *see also supra* Part I.

188. *See, e.g.*, Chadwick v. WellPoint, Inc., 561 F.3d 38, 46–47 (1st Cir. 2009) (explaining that if a jury found that an employer's concern about employees' children was a reason for denying her promotion, the employer committed sex discrimination). The court noted that this would be an example of a "sex plus" Title VII claim. *Id.* at 43.

189. *See supra* Part I.C.

future. Female managers who are not offered those earlier opportunities cannot prove their capabilities in a similar fashion, even if they possess similar or greater talent. Consequently, lengthy periods of gender inequity in decisional authority can then become the foundation for employers to justify imposing unequal pay or promotion opportunities between its male and female managers. At this later stage, the differing levels of pay or authority may appear justified based on the female manager's history of fewer or less important exercises of decision-making power.

When an employer exhibits implicit bias in distributing decision-making authority, legal precedent would also support a manager's discrimination claim. For example, in a disparate treatment case, a circuit court found implicit bias where a city offered a minority-owned business an economic development loan containing more stringent conditions than those reflected in its loan offerings to white-owned businesses.[190] Rather than alleging racial bias, the plaintiff-business presented facts surrounding its interactions with the city "from which animus might be inferred."[191] By eliminating the plausible, legitimate reasons for the city's disparate treatment between the minority-owned business and the white-owned businesses, the plaintiff presented implicit bias as the only rational explanation for the city's behavior.[192] This strategy has been effective in several cases involving implicit racial bias.[193] A similar strategy can be helpful to a plaintiff who eliminates all of the permissible causes behind her employer's distribution of decisional power, which leaves only the discriminatory ones.[194]

Another court supported a finding of implicit bias by highlighting a supervisor's inconsistent behavior and total absence of written criteria for his decisions concerning the plaintiff.[195] Such behavioral evidence can be useful by a plaintiff making a claim of discriminatory distribution of power and authority. An employee can build part of her argument from evidence that her employer facilitates informal decisional structures that do not explain why certain managers are unequally allocated their respective decisional power.[196] Even in the seemingly subtler examples of discrimination, plaintiffs can utilize prior courts' understanding that "subjective decision-

190. *See generally* Woods v. City of Greensboro, 855 F.3d 639 (4th Cir. 2017).

191. *Id.* at 654.

192. *See id.*

193. *See* Tanya Katerí Hernández, *One Path for "Post-Racial" Employment Discrimination Cases—the Implicit Association Test Research as Social Framework Evidence*, 32 LAW & INEQUALITY 309, 327–33 (2014) (describing cases where plaintiffs effectively removed all possible explanations for an employer's behavior besides implicit bias to provide a "coherent rationale" for the discriminatory employment practice). Professor Hernández explains that where an employer assesses objective work product differently in accordance with a worker's race, implicit bias framework "helps explain the unexplainable." *Id.* at 328.

194. *See supra* Part I.B (delineating causes and contributing factors behind gender inequity in decisional processes). The link between the cause and sex would need to be established if an employee-plaintiff is to present them to the court. *See supra* Part II.B.

195. *See* Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 776 (E.D. Wis. 2010).

196. *See supra* Part I.B.

making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of."[197] By applying previously successful legal strategy, highlighting the absence of sex-neutral reasons for her receiving lesser decision-making power, and offering the court with long-standing social-science research about sex stereotypes and implicit bias, a plaintiff can establish a strong prima facie case for disparate treatment and a rebuttal to her employer's proposed bona fide occupational qualification defense.[198]

A plaintiff may also succeed under Title VII's second applicable provision. The statute makes it unlawful for an employer "to limit, segregate, or classify" an employee in any way that deprives that person of "employment opportunities" or "adversely affect[s her] status as an employee" because of her sex.[199] Applying this provision to disparate treatment theory, a manager can argue that an employer that permits factors such as organizational inertia or homosocial reproduction to informally weigh managers' sex as proxies for their abilities as decision makers would be legally impermissible.[200] A plain reading of the statute shows that informal or formal processes that give disproportionately greater authority to male managers as compared to female managers limit and segregate females from the opportunities commensurate with their rank and title.[201] Such a distribution process deprives managers of opportunities to engage in and learn from projects where they would have greater decision-making power. This process also "adversely affects" a manager's status as an employee because with less experience and decisional power, she becomes a less valuable manager respective to her male colleagues, who have disproportionately greater power.[202]

One hurdle that may deter a plaintiff from filing suit is Title VII's burden-shifting framework.[203] A proposed cause of action may appear unworkable within the third step in the *McDonnell Douglas* burden-shifting framework. For parties to reach this step, an employee must establish a prima facie discrimination claim, which is often accomplished through circumstantial evidence.[204] The next step places a minimal burden on the employer to provide some legitimate, nondiscriminatory business reason for its employment action.[205] If the employer does so, the employee must

197. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004).
198. *See supra* Part II.D.1.
199. 42 U.S.C. § 2000e-2(a)(2) (2012).
200. *See supra* Part I.B.
201. *See generally* 42 U.S.C. § 2000e-2(a)(2).
202. *See supra* Part I.C.
203. *See supra* Part II.D.1.
204. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (finding that comments about the employee's lack of femininity evidenced sex as a motivating factor behind employment discrimination). It is rare for plaintiffs to support their claim with direct evidence because overt discrimination itself is much rarer. *See supra* Part I.
205. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (implying that the employer need not convince the court that it acted based on its proffered reason because the plaintiff retains the burden of persuasion).

demonstrate that the proposed legitimate business reason is merely a pretext for a discriminatory motive.[206] In the context of disparate treatment cases, this step is often interpreted to involve unearthing some conscious duplicity on the employer's part.[207] Such an interpretation poses a problem for a novel gender-disparate decision-making power claim. As discussed, the gender inequity in decision-making processes is likely the result of unconscious discrimination such as sex stereotyping, implicit bias, and homosocial reproduction.[208] Unconscious discrimination lacks the requisite duplicity that an employee is expected to uncover when rebutting her employer's proposed motives under the third step in this framework.

Plaintiffs can and must overcome a court's expectation that they show their employer to be deceitful. First, the statutory language itself does not require a plaintiff to prove her employer's duplicity to prevail in a discrimination claim.[209] A plain reading of the cited provisions does not indicate a requirement to uncover an employer's deceit. Moreover, even the Supreme Court has acknowledged as much since *McDonnell Douglas*. The Court has indicated that "[p]roof that the defendant's explanation is unworthy of credence is *simply one form*" of evidence that a plaintiff can offer to overcome her burden.[210] The plaintiff must establish enough evidence to persuade a fact finder that the "employer's asserted justification is false,"[211] not necessarily a lie. Courts certainly need to more uniformly acknowledge this understanding. However, a plaintiff can support this interpretation by making arguments grounded in statutory interpretation and language from Court opinions.

After highlighting the Court's evolved stance on *McDonnell Douglas*'s third step, a plaintiff can offer examples of her employer's prior treatment toward her, troubling procedural irregularities, or even "the use of subjective criteria" through informal or unstructured evaluation schemes to rebut an allegedly legitimate business reason.[212] Documentation revealing that, in reality, the distribution of decisional power is based on stereotypes or implicit biases linked to a manager's sex, rather than profit- or business-related

206. *Id.* at 253 ("[P]laintiff must then have an opportunity to prove . . . that the legitimate reasons offered by the defendant were not its true reasons . . . .").

207. *See, e.g.*, Foster v. Biolife Plasma Servs., LP, 566 F. App'x 808, 811 (11th Cir. 2014) (explaining that the belief that "[a] plaintiff cannot show pretext merely by showing that an employer's good faith belief . . . is mistaken"); Millbrook v. IBP, Inc., 280 F.3d 1169, 1175 (7th Cir. 2002) (finding that "pretext" means that the employer was deceitful and covered up the true motive behind the employment practice).

208. *See supra* Part I.A.

209. *See* 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

210. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (emphasis added).

211. *Id.* at 148.

212. *See* Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1217 (10th Cir. 2002) (acknowledging a number of ways that a plaintiff may rebut a defendant's proposed legitimate reason for its action).

reasons, could be sufficient.[213] A plaintiff can overcome the third step in the *McDonnell Douglas* framework even in instances where the employer truly did not believe it was discriminating. Ultimately, even the burden-of-proof issue that disparate treatment theory poses is not a prohibitive hurdle if a manager frames the alleged business reason as objectively unsound in light of other events in or aspects of her workplace.

C. Pursuing a Disparate Impact Lawsuit

Title VII's second applicable provision makes it unlawful for an employer "to limit, segregate, or classify" an employee in any way that deprives that person of "employment opportunities" or "adversely affect[s her] status as an employee" because of her sex.[214] This provision allows for a challenging, but feasible, disparate impact claim for sex-based decision-making power disparities.

Applying this provision to a disparate impact claim, a plaintiff must dissect and show that her employer's system of distributing decision-making authority and power is a facially neutral employment practice that has a discriminatory impact. Aspects of an employer's practices, such as vague evaluative metrics, employer inertia, or homosocial reproduction, can serve as exemplary causes of a distributional scheme that adversely impacts women.[215] The Supreme Court has held that an employer's use of a mandated, non-job-related aptitude test to determine which temporary supervisors it would award a permanent status is unlawful.[216] Only 54 percent of provisional African American supervisors passed the test, while 68 percent of provisional white supervisors passed.[217] The Court reasoned that because this test effectively barred African American supervisors from being eligible for a permanent status based on nonjob criteria, they improperly lost employment opportunities.[218] Similarly, an employer's failure to change its distribution scheme in a way that produces equitable decisional power for qualified members of each sex should be considered an improper employee classification system.

Historically, "objective" tests have been most susceptible to successful disparate impact litigation, and employers' informal processes to assign decisional power can be argued to serve as one large test.[219] Congress's

213. *See supra* Part II.D (explaining that one strategy to create an inference of discrimination is to eliminate all of the employer's plausible explanations for its conduct, leaving only the discriminatory one).

214. 42 U.S.C. § 2000e-2(a)(2).

215. *See supra* Part I.B.

216. *See* Connecticut v. Teal, 457 U.S. 440, 455–56 (1982); *cf.* Washington v. Davis, 426 U.S. 229, 251–52 (1976) (affirming the acceptability of an employer test that positively related to employee training performance).

217. *Id.* at 443.

218. *See id.*

219. *See* Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1527 (2002) (discussing employers' abandonment of objective tests, which are most vulnerable to disparate impact litigation, and noting an overall decrease in such suits); *see also* John J. Donohue III & Peter

intent behind allowing tests or metrics to measure an employee's qualifications in Title VII[220] is embedded in the notion that an employer should judge an employee "so that . . . sex become[s] irrelevant."[221]

While employers' distribution processes for managerial decision making may not be as transparent as a written test, managers facing discrimination can present their employers' entire distribution scheme as evidence of an unlawful employment practice. Employment practices that effectively "'freeze' the status quo" from prior practices, such as shifting from a structured[222] to an informal distribution system, form the basis for a disparate impact claim.[223] The particular methods by which employers practice homosocial reproduction in distributing decisional power also may be explained as freezing the status quo.

A plaintiff may dissect many elements in her workplace that cause a disparate impact. Even if a plaintiff cannot separately identify each element of an employer's distribution process, she may establish a claim by treating the process as a single employment practice.[224] By way of example, programs that protect in-group members and disfavor a recent entrance of out-group members would be characterized as an exercise of homosocial reproduction.[225]

Analogous arguments have succeeded in court. Specifically, a court found that a layoff policy based on seniority, known as a "last-hired, first-fired" program, violated Title VII where it disproportionately disfavored female police officers.[226] The court did not consider the police department's system to be a bona fide seniority system under Title VII because it was preventing a newer generation of officers, which included many more women than previous generations, from reaching their earned seniority.[227] While the department offered multiple opportunities for its male officers to sit for a patrolman examination, the same exam was only offered twice annually to female officers.[228] The court concluded that if a female officer could establish that but for her sex, she would have been promoted to a more senior position such that she would not have been susceptible to the "last-hired,

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Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991) (estimating that disparate impact cases accounted for less than 2 percent of all discrimination suits filed between January 1, 1985, and March 31, 1987).

220. Title VII provides that an employer may act upon the results of an ability test if that test is "not designed, intended, or used to discriminate." 42 U.S.C. § 2000e-2(n) (2012).

221. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

222. For the purposes of this Note, a "structured" distribution scheme involves objective evaluative metrics with multiple levels of oversight to place a check over any single subjective opinion of a manager.

223. *Griggs*, 401 U.S. at 430; *see also supra* Part I.

224. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2012).

225. *See supra* Part I.B.

226. Acha v. Beame, 531 F.2d 648, 653–55 (2d Cir. 1976).

227. *Id.*

228. *Id.* at 650. Additionally, even when the department imposed a hiring freeze on all officers, male officers were still able to receive a promotion to police trainee—an opportunity unavailable for female officers. *See id.*

first-fired" policy, then the layoff violated Title VII.[229] In that case, unequal opportunities to sit for exams among male and female officers helped to establish causation. The gender disparity in officers subject to the last-hired, first-fired policy is analogous to those managers facing gender-inequitable distribution of decisional power founded on homosocial reproduction or employer inertia. More frequent testing opportunities and greater decisional power are both results of processes favoring a homogenous group of employees in jobs that are historically dominated by men.

In the face of a prima facie disparate impact claim, the employer may nonetheless prevail using a business-necessity defense. Such a defense exists under the rationale that businesses should maintain a level of autonomy over their business decisions.[230] An employer who distributes decisional power inequitably between managers of different genders or sexes may justify its policy as a business necessity. One possible "necessity" could be that an informal process for distributing decisional power maintains quality working relationships. Another possible justification is that its distribution process ensures a fluidity for the employer to assign managers for unforeseen needs. An employee-plaintiff may overcome such a defense by pointing to manifestations of homosocial reproduction in her workplace and providing evidence of a feasible alternative employment practice that the employer could have taken to obtain a less disparate effect.[231]

An alternative practice, for example, would be a multifactor process that weighs job-related qualifications or aptitude over more subjective measures. Job-related factors would include the monetary effectiveness of a manager's decision making, such as an efficient use of the budget or increased productivity from the personnel she manages. Employers' reliance on their managers' positive effect on the business or institutional goals would reduce or even eliminate the sex disparity in decisional power by removing distribution schemes that enable stereotypes, implicit biases, or employer inertia to thrive.

Under particular circumstances, a manager can prevail under either disparate treatment or disparate impact theory. While each bears unfavorable characteristics, one theory likely is more promising and preferred than another.

D. The Most Viable Path to Success

Disparate treatment litigation presents more favorable odds of success and less challenging impediments than a lawsuit based on disparate impact theory. Beyond the relatively less challenging prima facie case to establish,

229. *Id.* at 654.

230. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2518 (2015) ("[D]isparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain . . . the free-enterprise system.").

231. *See* Ricci v. DeStefano, 557 U.S. 557, 558 (2009).

disparate treatment also offers greater incentive for an employee to pursue litigation in the first place.

One prohibitive aspect of disparate impact litigation is the statutory scheme's available remedies.[232] Particularly, punitive damages are unattainable in disparate impact suits, which may contribute to the dearth of litigation in this class of cases. As high-ranking employees, managers stand to lose their reputations, jobs, and wealth in pursuing a novel discrimination claim over decision-making power distribution. For managers working in niche markets, where there are few alternate firms for employment, managers' decisions to seek legal redress could have acute repercussions on their careers. Their lawsuits would brand these managers as litigious and potentially close them off from employment elsewhere. Therefore, as a logistical calculation, the remedy a manager receives from the litigation must outweigh the risks associated with it. The equitable remedies that disparate impact cases offer may make a manager whole, however, they probably would not outweigh the risk of stigma from filing the case in the first place.

Conversely, those pursuing disparate treatment claims are eligible to obtain punitive damages.[233] In order to do so, plaintiffs must establish their employer's "malice" or "reckless indifference" towards employees' rights.[234] With subtle infrastructural processes often causing gender inequity in decision-making processes,[235] proving a claim for punitive damages certainly could be challenging. But this remedy is not unattainable and it helps to balance a potential plaintiff's risk analysis. In lieu of punitive damages, a court should otherwise apply an equitable reinstatement remedy to successful plaintiffs. Beyond correcting the imbalanced distribution of decision-making power, a court may direct the employer to reinstate a female manager to the same position that her previously advantaged male colleagues have reached.[236] For instance, if certain advantaged male managers are deemed more immediately deserving of a future bonus or promotion, previously disadvantaged female managers should be meaningfully considered alongside them. Employers may also be directed to reinstate a female manager by removing any previously created ranking system of its managers and starting afresh. These equitable solutions would reduce the risk that future plaintiffs assume through litigation and increase their incentive to pursue legal remedies because even if they face stigma following their suit, that stigma does not affect their professional status.

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232. *See supra* Part II.E.
233. *See supra* Part II.E.
234. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 535 (1999).
235. *See supra* Part I.
236. *See supra* Part II.E (explaining that a court may grant injunctive relief or whatever relief it sees fit once a plaintiff establishes liability and overcomes any of an employer's affirmative defenses).

E. Judicial Unawareness

The complete lack of case law raising the issue of sex-disparate decision-making power suggests that the judiciary may not be aware of the problem. Where employers impose subtle but distinct sex-based expectations upon their male and female employees, those expectations can become professional norms that go unquestioned.[237] Historically, women's rights activists eroded such norms by questioning the thinking behind employers' presumptions of sex-based differences between employees—presumptions that seemed to warrant their differing expectations.[238] Importantly, cases that attacked an employer's presumptions about sex differences among its workers were brought to court.[239] The only way to raise judicial awareness of this novel claim is to bring litigation and once again question contemporary presumptions about sex differences.

CONCLUSION

As the more overt forms of employment discrimination have subsided, women in leadership roles continue to endure inequity that hinders not only their careers but also their workplaces' overall success. The subtler forms of sex discrimination are not at all new; however, they merit more attention today. The plain language of Title VII supports a novel sex discrimination claim targeting inequitable decision-making power. Despite the legal hurdles that exist for a plaintiff to successfully establish her claim, litigation is a promising way to genuinely relieve the institutional discrimination she faces. Managers are unlikely to find success from internal complaints in their workplaces because their employers have little incentive to suddenly reform their processes for distributing decision-making power. Distributing unequal managerial decision-making power and authority can be subtle and even understated if an employer maintains a historical disposition in favor of male managers. Litigation offers long-lasting reform to employment practices that produce gender-disparate decision-making power. By applying existing law to less perceptible discrimination and changing industry standards of decisional power distribution, female managers can secure their own professional futures and ensure that their successors are substantively reaching the roles they have always worked toward.

237. *See* Schultz, *supra* note 31, at 1105–06 (describing how gender-based expectations over employees' appearance, such as makeup for women or short hair for men, become self-perpetuating cycles causing a social expectation to become a professional norm).

238. *Id.* at 1107.

239. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).