7 Employment Discrimination and Title VII

David Hòa Khoa Nguyễn, J.D., Ph.D.
Indiana University - Purdue University Indianapolis (IUPUI)

Introduction

Discrimination on the basis of race, color, religion, national origin, sex, age, or disability is prohibited under federal law and the provisions of many state laws, most of which are applicable to both public and private institutions of higher education. Courts have also ruled that discrimination of transgender individuals qualifies as sex discrimination under Title VII.[1] Principal among the federal statutes that cover employment discrimination are Title VII of the Civil Rights Act of 1964,[2] Title IX of the Education Amendments of 1972,[3] Section 504 of the Rehabilitation Act of 1973,[4] the Americans With Disabilities Act,[5] the Equal Pay Act,[6] the Age Discrimination in Employment Act,[7] Immigration Reform and Control Act of 1986,[8] and the Genetic Information Nondiscrimination Act of 2008.[9] While sexual harassment and claims under Section 504 and the ADA are addressed elsewhere in this text, employment discrimination continues to be guided by the burden of proof developed in litigation under Title VII of the Civil Rights Act. This chapter addresses the burden of proof applicable to cases of employment discrimination, as developed in litigation involving Title VII and applicable to other federal laws prohibiting discrimination in employment.

---

1 *See* Smith v. City of Salem, 378 F.3d. 566 (6th Cir. 2004).

2 42 U.S.C. § 2000e *et seq*.

3 20 U.S.C. § 1681 *et seq*.

4 29 U.S.C. § 794.

5 42 U.S.C. § 12101 *et seq*.

6 29 U.S.C. 206(d) (2004).

7 29 U.S.C. § 621 et seq. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits age-based discrimination in employment for persons 40 years of age or older. The law prohibits age discrimination in hiring, discharge, pay, promotions and other terms and conditions of employment. As part of the Fair Labor Standards Act, its application is to institutions with twenty or more employees and which affect interstate commerce. The standards for coverage parallel those of Title VII.

8 8 U.S.C. § 1101 *et seq*. Along with Title VII, the Immigration Reform and Control Act of 1986 prohibits discrimination against aliens.

9 42 U.S.C. Section 2000ff *et seq*.

While the U.S. Constitution does not explicitly address employment discrimination, the Fifth and Fourteenth amendments limit the power of federal and state governments to discriminate. While the Fifth Amendment explicitly requires that the federal government not deprive individuals of "life, liberty, and property"[10] without due process of law, section five of the Fourteenth Amendment[11] grants Congress the authority to enforce the Equal Protection Clause and enact federal antidiscrimination law. The theme of federal employment discrimination law is that similarly situated employees or prospective employees should receive equal treatment by employers. These laws are intended to ensure equality in the employment relationship for groups or individuals who are different in some respect, such as race or sex.

Because these laws have broad application to institutions of higher education (exceptions for private religious institutions are discussed in earlier chapters) and considering that many of these laws are mirrored in corresponding state statutes, this chapter will focus on the principal federal statute forbidding employment discrimination in colleges and universities, Title VII.

Job Fit and Employment Discrimination in Higher Education[12]

In the higher education setting, many professionals, both faculty and student affairs professionals alike, may be challenged by their "fit" during the interview, hiring, and job performance stages. The understanding of "fit" is a result of a persistent invisibility of intersectionality that includes gender, race, and sexual orientation due to society and the courts using lenses that are colorblind and gender- and hetero-normative.[13] The dominant culture's expectations of appearance and behavior of applicants can outweigh as well as conflict with institutions' promotion of diversity and inclusion.

These expectations can be seen widely in the various cases that arise in courts. One example of this intersection follows when a public state college president commented on how well a new administrator was performing in their role, but expressed concern that they were not "fitting in" within their department.[14] The president did not give substantive feedback with their comment, leaving the administrator to ponder what it meant to not "fit in."

How do faculty and higher education and student affairs practitioners determine if they will "fit in" with a department and campus culture, especially

---

[10] United States Const., Fifth Amendment.

[11] United States Const., Fourteenth Amendment, section five.

[12] *See generally* David Hòa Khoa Nguyễn and LaWanda W.M. Ward, *Innocent Until Proven Guilty: A Critical Interrogation of the Legal Aspects of Job Fit in Higher Education* (pp. 27 – 48)*,* In Brian J, Reece, Vu T. Tran, Elliott N. DeVore, and Gabby Porcaro (Eds.), Debunking the Myth of Job Fit in Higher Education and Student Affairs (2019).

[13] *See generally* Devon W. Carbado, *Colorblind Intersectionality,* 38 Signs: J. of Women in Culture and Society 811 (2013).

[14] *See generally* William G. Tierney, *Organizational Culture in Higher Education: Defining the Essentials,* 59 J. Higher Educ. 2 (1988).

if their skills, knowledge, and disposition match a job description? Applicants may possess the educational background, relevant experiences, and proven skills for a position, but their personality or "fit" is not always easily determined from their resumes or curriculum vitae. Title VII, applied rigidly to a perceived wrongful employment action such as hiring, firing, or demotion, makes it difficult to prove "fit" is a cloaked method for discrimination because courts are reluctant to allow the effects of historic and current systemic exclusionary behavior toward marginalized populations to serve as evidence.

Fit has been a central focus in organizational theory since the 1960s, and it is relevant because prior studies have revealed that "individuals were most successful and satisfied when their skills, aptitude, values, and beliefs matched the organizations."[15] Evaluating in what ways "fit" becomes a proxy for discrimination in higher education and student affairs is necessary to ensure inclusive-centered approaches are utilized and not ones that "collude to maintain disparities and reinforce social inequity."[16]

As a result, Kezar identified two key criticisms regarding the concept of organizational fit. First, historically marginalized people are challenged with how to best present themselves among dominant environments to be viewed as the right fit for positions.[17] Second, the likelihood of assimilation to dominant cultures increases because of the expectation to meet unspoken norms that may not align with one's own unique expression and values.[18] This assessment of "fit" is needed because it may be difficult for marginalized people in society to present themselves in an authentic way that will be considered the right "fit" for an organization.

Title VII Overview

Title VII is the most comprehensive of the federal antidiscrimination statutes and prohibits discrimination in employment on the basis of race, sex, religion, and national origin.[19] As the United States Supreme Court has pointed out, "(I)n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."[20] The law prohibits discrimination in individual employment decisions, as well as employer policies or patterns of conduct that discriminate broadly against members of protected groups.

---

[15] Adriana Kezar, *Investigating Organizational Fit in a Participatory Leadership Environment,* 23 J. Higher Educ. Pol'y and Management 85, 87 (2001).

[16] Renee Crystal Chambers, Law and Social Justice in Higher Education, 10 (2017).

[17] *See generally* Devon W. Carbado and Mitu Gulati, *Working Identity*, 85 Cornell L.Rev. 1259 (2000).

[18] *See generally* Kezar, *supra* note 15.

[19] Civil Rights Act of 1964, 701-716, 78 Stat. 241, 253-66 (1964) (current version at 42 U.S.C. 2000e-5 (2000)).

[20] Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976).

Within the protected classifications of Title VII, it is unlawful to discriminate against any employee or applicant for employment with regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. The law extends to employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals. Discrimination on the basis of an immutable characteristic associated with race—such as skin color, hair texture, or certain facial features—violates Title VII, even though not all members of the race share the same characteristic.

Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude marginalized populations and that are not job-related.[21] Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic-based organizations or groups; or attendance or participation in school or places of worship generally associated with certain minority groups. The statute's standard of nondiscrimination is found in Section 703(a) and makes it unlawful for an employer to:

1. 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 or employment, because of such individual's race, color, religion, sex, or national origin; or

2. limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive an 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.[22]

Title VII has been amended to include pregnancy-based discrimination in its prohibition of gender-based employment discrimination. The Pregnancy Discrimination Act provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise."[23] Similarly, the Family and Medical Leave Act[24] outlines similar requirements for pregnancy leave and pregnancy-related conditions to ensure that women are not unfairly discriminated against for their leave.

In 2009, the language of Title VII was expanded with a narrow focus to counteract damage created by a 2007 U.S. Supreme Court decision[25] in which

---

[21] *See, e.g.,* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (examining intentional discrimination); Dothard v. Rawlinson, 433 U.S. 321 (1977) (examining unintentional discrimination).

[22] 42 U.S.C. § 2000e-2(a) (2003).

[23] *Id.* at § 2000e(k).

[24] 29 U.S.C. § 2601-2654 (2006).

[25] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

the Court determined that the statute of limitations runs from the date of a pay decision setting a discriminatory wage, rather than from the date of any paycheck affected by the prior discriminatory pay decision. That decision severely limited the ability of employees to successfully challenge discriminatory actions, given the extremely short timeline to not only learn of the discriminatory action, but also challenge it. While considering new legislation[26] to offset the effect of that ruling, Congress found that the outcome of the case "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."[27] In ultimately adopting the Lilly Ledbetter Fair Pay Act of 2009, Congress added language to Title VII that provides:

> [U]nlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[28]

Title VII also prohibits discrimination on the basis of a condition that predominately affects a protected group, unless the practice is job-related and consistent with business necessity, termed a Bona Fide Occupational Qualification or BFOQ. BFOQ's may apply to situations involving religion or sex.[29] The protected characteristics of race and national origin are excluded as a BFOQ for college and university positions.[30]

Harassment is another form of employment discrimination that is in violation of Title VII of the Civil Rights Act. It is defined as unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age, disability, or genetic information. Harassment is unlawful when 1) one endures offensive conduct as a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. The U.S. Supreme Court has recently made it more challenging for an employer to be liable for a hostile work environment by broadening employer latitude. In *Vance v. Ball State University,* the Supreme Court addressed who would be considered a supervisor for the purposes of Title VII hostile work environment harassment.[31] Since a supervisor can trigger hostile work environment liability more easily than a coworker, the interpretation of who is a "supervisor" is important.[32] The

---

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

[27] *Id* at 5.

[28] 42 U.S.C. § 2000e-5(e)(3)(A).

[29] *Id* at § 2000e-2(e)(1).

[30] William A. Kaplin and Barbara A. Lee, The Law of Higher Education 200 (3d. ed. 1995).

[31] 133 S. Ct. 2434 (2013).

[32] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65 (1998).

Court defined "supervisor" narrowly, finding that for the purposes of hostile work environment harassment, a supervisor is an employee who can affect significant change in employment status, such as hiring, firing, promotion, reassignment, etc.[33] Based on this limited definition, Ball State University was not found to be liable for a hostile work environment because the harasser was found to be a coworker and not a supervisor.[34]

Title VII is enforced by the Equal Employment Opportunity Commission, which has issued a series of regulations and guidelines.[35] As a regulatory enforcement body, it may receive, investigate, and resolve complaints of unlawful employment discrimination. In addition, it may initiate lawsuits against violators or issue right-to-sue letters to complainants.[36] In order for an individual to succeed, Title VII gives employees two possible causes of action. Under a theory of disparate impact, plaintiffs allege that an employer's facially neutral policies have a discriminatory effect on a protected group, and the employer cannot justify the policies by business necessity. Under a theory of disparate treatment, plaintiffs allege that an employer intentionally discriminated against a member or members of a protected group and a shifting burden of proof applies to the determination of liability. Disparate treatment is more common in postsecondary education and can manifest when an individual is denied a job, promotion, tenure, or claims to be treated less favorably than his/her colleagues because of his/her race, sex, national origin, or religion and is subjected to a detrimental working condition.[37] Below, we examine how these two claims apply.

Disparate Impact

A plaintiff proves disparate impact by establishing that a particular employment practice has an adverse effect on employees of the plaintiff's race or sex, regardless of the employer's intent. In *Griggs v. Duke Power Company*,[38] for example, the employer required workers seeking promotion to achieve a particular score on aptitude tests.[39] The plaintiffs established that the test had an adverse effect on African American workers because they passed at a significantly lower rate than did other workers. The test was not shown to bear a reasonable relationship to the requirements of the job, as a passing score on the test was not predictive of success on the job. In *Griggs*, the test led to the employer's selection of a significantly greater proportion of white employees than of African Americans for promotional opportunities within the company. The test was said to have a disproportionately adverse effect on African Ameri-

[33] Vance, 133 S. Ct. at 2443.
[34] *Id.* at 2453.
[35] 29 C.F.R. Parts 1600 – 1610.
[36] 29 C.F.R. Part 1601.
[37] *See* Lynn v. Regents of the Univ. of California, 656 F.2d. 1337 (9th Cir. 1981) (plaintiff alleged sex discrimination after being denied of tenure).
[38] 401 U.S. 424 (1971).
[39] *Id.* at 427.

cans and, by using the test as the basis for selection, the employer effectively discriminated against the plaintiffs because of their race.

What distinguishes disparate impact claims based on the reasoning established in *Griggs* is that the plaintiffs were successful without proving that the employer intended to discriminate on the basis of race. The test was neither job-related, nor did it select employees for promotion opportunities at random. If the test had selected at random, the success rates of African Americans and other employees would have been representative of the proportions of these employees taking the test. The test would have had no adverse effect and would have been legal. Since the test was shown to have a disparate impact on a minority, the employer's use of the test to decide whom to promote meant the employer effectively made decisions based on race, whether it was the employer's intention to do so or not.[40]

The *Griggs* Court unanimously concluded that a facially neutral employment practice that has a disproportionately adverse effect on a minority cannot be used unless it is justified by a standard known as "business necessity."[41] Section 703(k)(1)(A) of Title VII**,** as amended by the Civil Rights Act of 1991, provides:

> An unlawful employment practice based on disparate impact is established under this subchapter only if (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position and consistent with business necessity.[42]

Disparate impact analysis has not been extensively litigated in higher education, and courts have provided little guidance on the nature of a plaintiff's proof and the requirements of an employer's business necessity defense.[43] Several factors may account for the lack of reliance on disparate impact theories. The Civil Rights Act of 1991 mandated that no compensatory or punitive damages are available under this theory, and this limitation on damages may discourage plaintiffs who seek more than equitable relief.[44] In addition, disparate impact claims involve compliance with the rigorous requirements of

---

[40] This reasoning begs the question of whether claims of disparate impact are constitutional under the Section Five enforcement provision of the Fourteenth Amendment. Violations of equal protection require deliberate intention to engage in invidious discrimination. Does a federal law aimed at prohibiting subconscious discrimination qualify as legislation enforcing equal protection?

[41] 401 U.S. at 432.

[42] 42 U.S.C.A. § 2000e-2(k)(1)(A).

[43] For a discussion of the potential application of disparate impact in employment settings, *see* E.W. Shoben, *"Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?,"* 42 Brandeis L.J. 597 (Spring 2004).

[44] *See* M. Rothstein et al., Employment Law, Vol. 1 § 2.31 (3rd ed. 2004).

class-action lawsuits under federal law, which may tend to restrict the number of individual plaintiffs who seek relief under this theory.

Perhaps most significant for higher education institutions, however, is the fact that selection devices such as aptitude tests and diploma requirements are seldom used as a basis for employment decisions. For example, faculty selection decisions are more often characterized by subjective, though job-related, criteria related to research, service, and teaching. Even for non-academic personnel, employment decisions are typically based on selection devices that have been validated as job-related and screened to reduce the possibility of invidious bias in test items.

Disparate Treatment

With respect to disparate treatment, the principal United States Supreme Court decisions interpreting Title VII have involved how to prove discriminatory intent. Under the standard most invoked in litigation, *McDonnell Douglas Corp. v. Green,*[45] a test of circumstantial evidence has evolved. However, in *Price Waterhouse v. Hopkins,*[46] a standard of "direct evidence" has received judicial recognition. With guidance from these two cases, lower federal courts have applied a standard in which a plaintiff may establish a claim of Title VII discrimination either by introducing direct evidence of discrimination or by proving circumstantial evidence that would support an inference of discrimination. A plaintiff need only prove direct evidence or circumstantial evidence because the two claims were mutually exclusive. Under the direct-evidence approach, once the plaintiff introduced evidence that the employer terminated him or her because of his or her race or other protected status, the burden of persuasion shifts to the employer to prove that it would have terminated the plaintiff even if it had not been motivated by discrimination.[47]

Direct evidence is "evidence, which if believed, proves [the] existence of [the] fact in issue without inference or presumption."[48] When a plaintiff offers direct evidence and the trier of fact accepts that evidence, the plaintiff has proven discrimination.[49] However, a proof based on direct evidence of discrimination is often difficult to establish in a higher education context be-

---

[45] 411 U.S. 792 (1973).

[46] 490 U.S. 228 (1989). What suffices as "direct evidence," and whether "direct vs. circumstantial" evidence remains an important issue may have been undercut by the Supreme Court's decision in Desert Palace, Inc. v. Costa*,* 539 U.S. 90 (2003). *See* Clark v. Claremont University, 6 Cal. App. 4th 639 (Cal. Ct. App. 1992) for an example of direct evidence of discrimination where an assistant professor who was denied tenure introduced evidence of numerous racial remarks that the court found to provide substantial evidence of race discrimination.

[47] *See* Kline v. Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

[48] Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1987).

[49] McCarthney v. Griffin-Spalding Cnty Bd. of Educ., 791 F.2d 1549, 1553 (11th Cir. 1986).

cause vague and subjective judgments related to employee qualifications and performance are prevalent, particularly when faculty issues are involved.[50]

The influence of the *McDonnell Douglas* "circumstantial evidence" standard in application to federal antidiscrimination law has been pervasive. The first step of the standard requires a plaintiff to meet a modest proof in support of a prima facie case and seems to favor the plaintiff. After the employee establishes a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for the adverse employment decision. Once the employer does so, the plaintiff must demonstrate that the proffered reason was pretextual, a subterfuge masking intent to discriminate.[51] Applications of the test in higher education settings abound.

Racial and National Origin Discrimination

Historically, racial discrimination has been a primary issue in Title VII cases. Under the shifting burden of proof, also known as the "tripartite test" first articulated in *McDonnell Douglas,* a plaintiff challenging an employer's hiring practices must first carry an initial burden of proof. This may be done by showing that he belongs to a racial minority group; that he applied and was qualified for a job for which the employer was seeking applicants; that, despite his qualifications, he was rejected; and that after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualification.[52]

The plaintiff's initial burden of proof in disparate treatment cases involving race or national origin is illustrated in a number of cases in which higher education institutions were defendants. In one case, an African American environmental research analyst was given a negative performance rating by a white supervisor. The analyst was subject to disciplinary measures that included restrictions on funding for professional conferences and the requirement to maintain daily written logs of his activity. His white male supervisor called him "space pilgrim," "lazy," and accused him of "shifting positions all the time." Alleging that these comments were racial slurs, the analyst filed an internal grievance alleging discrimination by the supervisor. On the recommendation of the university's grievance committee, the analyst was reassigned to another supervisor, but negative evaluations of his performance continued. When he was terminated in what the institution described as a layoff occasioned by a reduction-in-force, he filed a claim alleging disparate treatment. A federal appeals court affirmed a summary judgment motion for the university, concluding that the analyst failed to establish a prima facie claim of disparate

---

[50] *See* Ben-Kotel v. Howard Univ., 319 F.3d 532 (D.C. Cir. 2003) in which a claim of direct evidence of discrimination under Title VII was dismissed on appeal because the plaintiff, a national origin minority, failed to argue this claim in the district court.

[51] *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 355 (1977). The court noted, "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment."

[52] 411 U.S. at 802.

treatment.[53] The appeals court found that the analyst relied on his own perceptions and the findings of the institution's grievance committee in building his case, but reasoned that his perceptions were not evidence and the grievance report failed to provide the required inference of bias behind the institution's actions, stipulating only that personality conflicts appeared to motivate the supervisor's actions.

In another case, the Eighth Circuit applied the *McDonnell Douglas* test in granting summary judgment to a higher education institution. An African American chair and professor claimed direct evidence of racial discrimination, as well as disparate treatment, when his institution failed to promote him to a position as dean and hired a white applicant from outside the institution. The professor had not applied for the position at the time it was filled and claimed that the institution had not provided a definitive application process, yet had a history of appointing from within. The federal appeals court found that the circumstances provided no direct evidence of discrimination, but the court proceeded to evaluate the professor's claim under the shifting burden of proof. Despite the fact that the institution had hired several senior administrators from within, the court adopted the view that many positions at universities are necessarily filled in different ways, depending on the nature of a position, its responsibilities, and other factors. The court concluded that a reasonable fact-finder could not infer intentional race discrimination from the decision to consider outside applicants when seeking a qualified individual for a position as dean, and given the professor's failure to make timely application for the position, summary judgment was granted in favor of the university.[54]

If the plaintiff is successful in establishing a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action.[55] Although a higher education institution must articulate a legitimate, nondiscriminatory reason for its employment decision, given the subjective and scholarly nature of judgments that typically apply to employment decisions in academe and the reluctance of courts to intervene in employment decisions that involve faculty qualifications, an institution generally meets this requirement. For example, in a case in which a former business professor, who is an African male of Ethiopian origin, contended his nonrenewal was a pretext for Title VII disparate treatment, the institution prevailed by articulating a legitimate, nondiscriminatory reason for nonrenewal, namely, student evaluations of the professor's instructional performance that were regarded as below college standards.[56]

---

[53] Pilgrim v. Trs. of Tufts College, 118 F.3d 864 (1st Cir. 1997).

[54] Lockridge v. Bd. of Trs. of the Univ. of Ark., 294 F.3d 1010 (8th Cir. 2002).

[55] Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 254 (1981).

[56] Girma v. Skidmore College, 180 F.Supp.2d 326 (N.D.N.Y. 2001). *See* Nguyen and Ward, *supra* note 12. (Case study examining this specific case utilizing a Critical Race Theory lens and its implications on "fit").

In *Guseh v. North Carolina Central University*,[57] a tenured professor who is a Liberian native and naturalized American citizen alleged that administrators at his university denied him a department chairmanship due to national origin. In each of the four times the department position became available, it was given to someone native to the United States and from outside the department. Further, the plaintiff alleged that each individual selected for the position was less qualified than he. The defendants acknowledged the plaintiff's qualifications, but argued that the appointed candidates were selected because the consensual scholarly and subjective judgment of the defendants was that the selected individuals would make better administrators. In rebuttal, the plaintiff simply offered a reiteration that his academic credentials surpassed those of the other candidates. As a result, the University moved to have the claims dismissed.

In considering the case, the United States District Court for the Middle District of North Carolina assumed for argument's sake that the plaintiff had established a prima facie case. When the university then provided legitimate, nondiscriminatory reasons for the employment action, the burden shifted back to the plaintiff to show that those reasons were simply pretexts for discrimination. As the plaintiff's rationale that he was better qualified did not meet that burden, and the courts generally tend to avoid becoming entangled in reasonable employment decisions, particularly those in academe, the court dismissed the plaintiff's claims.

To compound the plaintiff's difficulties, once the institution articulates its reason for the adverse employment decision, the burden shifts back to the plaintiff to persuade the court that he or she has been the victim of intentional discrimination and that the institution's proffered reason is a veil to disguise the intent to discriminate. For lower federal courts, it has frequently not been enough for the plaintiff to prove that the employer's legitimate, nondiscriminatory reason is pretextual; the plaintiff must also show that it is a pretext concealing a discriminatory motivation. This standard has led some federal courts to require a proof of discriminatory intent, while other courts have adopted the position that if the employer's reason is unworthy of belief, it can be assumed to be a disguise of a discriminatory motivation.

By way of illustration, a candidate for a position as director of a language program at a New York university challenged the decision of a selection committee that rejected his candidacy in favor of an external candidate. The candidate, who was on the institution's faculty and had served in the role of interim director, met the burden to establish a prima facie case under Title VII and challenged the institution's proffered reason for the hiring decision, which related to teaching effectiveness. The rejected candidate contended that the institution's claim that it simply appointed the best candidate was pretextual, in light of evidence that the process of recruitment and selection deviated from normal institutional procedures; the search committee was made up of individu-

[57] 423 F. Supp. 2d 550; 2005 U.S. Dist. LEXIS 41126.

als who could not speak Spanish, yet was charged to assess the candidates on the basis of their teaching competence in a model Spanish lesson; and that this atypical search committee was created because of the administration's belief that the interim director would likely win the position if normal procedures were followed. Although a federal district court granted summary judgment to the institution, a federal appeals court reversed, noting that the plaintiff's evidence permitted an inference of discrimination on the basis of national origin, and remanding for further findings. The court noted that the articulated reason for the employment decision was that an evaluation had been made that one candidate was better than another, yet the challenged decision was made only after the institution had deviated from its normal selection procedures, had appointed advisors who lacked proficiency in the skills they were asked to evaluate, and had informed another potential candidate that the interim director's candidacy would not be considered seriously. From this evidence, the appeals court concluded that there were genuine issues of fact as to whether the institution's explanation was a pretext to mask unlawful discrimination.[58]

The fact-intensive inquiry involved in the tripartite test is illustrated in a case in which a black assistant professor from the West Indies, who was hired on a tenure track, was issued a one-year contract and ultimately released by the institution. The trial court held the assistant professor met his initial burden of proof and went on to consider whether the institution articulated a legitimate, nondiscriminatory reason and assess whether that reason was pretextual. The institution defended its decision by presenting evidence of substandard performance evaluations, negative student evaluations, and failure to produce scholarly work and obtain the doctoral degree, which was expressly determined to be a requirement for maintaining the assistant professor's tenure-track position. The assistant professor presented evidence to rebut the institution's articulated reasons for the adverse employment decision, including evidence that the college had retained a white professor who did not have his doctorate and that student evaluations of teaching were tainted by a conspiracy among white students. While the trial court ruled in favor of the black professor, the federal appeals court reversed this ruling on the basis that the court's factual findings were clearly erroneous. The Fourth Circuit Court of Appeals held that the comparison with the white professor was inappropriate because he had been hired at an earlier time when the requirement for an advanced degree was not required. It also concluded that the trial court erred in inferring that the student evaluations were tainted, finding, for example, that student expressions indicating the assistant professor was difficult to understand might reasonably be interpreted as expressing a concern about effective communication, rather than discriminatory animus based on race or national origin.[59]

In *Mezu v. Morgan State University,*[60] the U.S. Court of Appeals for the Fourth Circuit dismissed a professor's untimely discrimination claim, finding

[58] Stern v. Trs of Columbia Univ. in the City of New York, 131 F.3d 305 (2d Cir. 1997).
[59] Jimenez v. Mary Washington College, 57 F. 3d 369 (4th Cir.1995).
[60] 2010 U.S. App. LEXIS 3301 (4th Cir. Feb. 19, 2010).

that a pending internal appeal did not halt the statute of limitations from running. Mezu, an African American woman of Nigerian origin, began teaching as a non-tenure-track lecturer and five years later earned a position as an associate professor. Four years later, in 2002, she applied for a promotion to full professor. Upon denial of the promotion, Mezu filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and suit in federal court, alleging discrimination based on race and national origin. The district court dismissed the claim, and the Fourth Circuit affirmed that decision.

In 2004, she applied a second time for full professor and was denied. In 2005, she applied a third time for full professor and, although the departmental promotion committee recommended promoting her to full professor, the chair recommended against promotion and advised that additional scholarly publication should be pursued. On April 6, 2006, she was informed of the fact that she was denied promotion and of her right to appeal the decision, which she did within a few days. The university did not act and, in the belief that it would not comply with the appeal procedures, she filed a second EEOC claim on March 25, 2007, followed by a suit in federal court. The district court dismissed the claim as untimely, as did the Fourth Circuit on appeal, which found that the letter of April 6, 2006, triggered the limitations period, despite the pending internal appeal. As such, the *Mezu* decision makes clear the imperative nature of awareness of the actual calendar of the limitations period.

Religious Discrimination

Private religious schools are often exempt from some of the religious restrictions imposed by Title VII.[61] It is also important to note that Title VII prohibitions on disparate treatment also extend to religious discrimination,[62] although religious institutions that are owned, supported, controlled, or managed by a religious organization, or that have a curriculum that is generally directed toward the propagation of a particular religion, are permitted to exercise religious preferences. Issues of religious discrimination have prompted several cases at religious institutions. A Catholic faculty member was fired from a Presbyterian college for conducting surveys of other faculty members. After the survey incident, he allegedly did not receive raises, or received less than the average faculty member, for seven years. He sued, and the court dismissed his suit. The court held that if the college discharged him because of his religious views, it could lawfully do so under Title VII.[63] In a similar situation, a private university that established a divinity school hired a professor to teach in both the divinity school and in the departments of religion and English. Differing theological views came between the professor and the dean of the divinity school, causing the professor to be released from his position

[61] *See* Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 132 S. Ct. 694 (2012) (recognizing a ministerial exception to Title VII).

[62] 42 U.S.C. § 2000e-2(e).

[63] Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185 (W. D. Mo. 1998).

there. The professor filed suit under Title VII.[64] As the university received a portion of its annual budget from the Alabama Baptist Convention, the court held that the university qualified as an educational institution protected by the exemptions of Title VII.[65]

The issue of preferential hiring by religious or religiously affiliated institutions has been the subject of several lawsuits. For example, when preferential treatment was used for hiring by a religious university, the university was challenged by a Jewish faculty member. In this instance, a Jewish part-time lecturer in the university's philosophy department objected when the university began requiring that seven of the department's thirty-one, tenure-track faculty positions be held by Jesuit priests, arguing that their presence enhanced the character of the university. The court found that membership in a preferred religious denomination can be a bona fide occupational qualification falling within the meaning of Title VII.[66] In a related case at another Catholic university, a rejected applicant for a theology position claimed the university's actions constituted sex discrimination. Twenty-seven, full-time faculty positions in the theology department were held by Jesuits. The court ruled that its action fell within Title VII's Section 702 exemption allowing religious schools/groups to hire employees of a particular religion, here Catholic. The trial court dismissed the case and the appellate court affirmed, based on the plaintiff's failure to establish a prima facie case of sex discrimination.[67]

In cases where Title VII's exemptions for religious institutions are not applicable, employees may assert alternative theories of religious discrimination: disparate treatment and failure to accommodate. In general, higher education institutions are required to reasonably accommodate an employee's religion unless the employer can demonstrate an undue hardship.[68] The Equal Employment Opportunity Commission has issued guidelines on the duty employers have under Title VII to provide reasonable accommodation for religious practices of their employees and applicants.[69] A non-higher-education case offers guidance relative to the employer's burden in cases involving religious accommodation. A public-school teacher requested to use the personal days provided in the union contract agreement allowing for paid leave for religious holiday observance. Additional days for religious observance would be afforded, but the employer would grant the additional days as unpaid leave. The schoolteacher sued the board of education, arguing religious accommodation should include additional days of paid leave. The United States Supreme Court held that an employer does not need to accede to the preferred accommoda-

---

[64] Killinger v. Samford Univ., 113 F. 3d 196 (11th Cir 1997).
[65] § 703(e)(2) of Title VII of the Civil Rights Act of 1964.
[66] Pime v. Loyola Univ. of Chicago, 803 F. 2d 351 (7th Cir. 1986).
[67] Maguire v. Marquette Univ., 814 F. 2d 1213 (7th Cir 1987).
[68] 42 U.S.C. § 2000e(j).
[69] 29 C.F.R. Part 1605.

tions of the employee and may offer its own accommodations, as long as they meet a standard of reasonableness.[70]

To prove a claim of religious discrimination under the disparate treatment theory, the evidentiary burdens of an employee alleging religious discrimination mirror those of an employee alleging race or national origin discrimination. In *Rubinstein v. Administrators of the Tulane Educational Fund*,[71] a plaintiff, who was Russian and Jewish, had been denied salary increases and promotion to full professor. The associate professor established his prima facie case and presented evidence that a senior faculty member within the department referred to him as a "Russian Yankee" and made an antisemitic remark concerning Jewish frugality. The institution justified the employment decisions on the basis that the professor's teaching evaluations were low and his service record was inadequate.

The appeals court affirmed summary judgment on the disparate treatment claim for the institution, finding that the evidence of student evaluations demonstrated that the associate professor was a poor teacher and was not entitled to the promotions he sought. The court reasoned that since salary increases were predicated upon merit and the available funds were limited, it was not improper for the institution to rely on these evaluations, together with memoranda and faculty reviews substantiating the professor's ineffective mentoring of students and his low participation rate on faculty committees, as a basis for denying him salary increases. The appeals court's judgment ultimately turned on the professor's failure to substantiate that the institution's articulated reasons for denying him promotion and salary increases were a pretext for discrimination. The appeals court agreed with the district court that the evidence of poor teaching performance was so overwhelming that the suggestion that some of the evaluations had been tampered with could not overcome the manifest weight of the evidence. As to the lack of service on committees, the appeals court recognized that discriminatory animus on the part of the department chair might have influenced the associate professor's opportunities for committee assignments, but this was not regarded as sufficient evidence of discriminatory intent. The court also concluded that the discriminatory comments by a faculty member who served on the promotion and pay raise committees would not defeat summary judgment on the claims of discrimination. In this case, the comments of the faculty member, alluding to the associate professor as a "Russian Yankee" and stating that "Jews are thrifty," were stray remarks not shown to be proximate in time or otherwise related to the employment decisions at issue.

However, there are instances in which an institution's articulated reasons may permit an inference that the employment decision was motivated by a discriminatory intent. In a representative case, *Abramson v. William Paterson College of New Jersey*,[72] the college hired the plaintiff, an Orthodox Jew, as a

[70] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).
[71] 218 F.3d 392 (5th Cir. 2000).
[72] 260 F.3d 265 (3d Cir 2001).

tenure-track associate professor. At the beginning of her first year at the college, the professor informed her department chair that she would not be able to teach on Jewish holidays, and accommodations in her teaching schedule were permitted. However, a new department chair took exception to the arrangement, and this issue became a matter of contention between the administration and the professor as she progressed toward a tenure decision. Relations with the department chair and dean continued to strain over the issue of the professor's religious absences, leading to a recommendation to discontinue the professor's employment. After filing a grievance under the institution's guidelines and initiating a complaint with the EEOC, the professor litigated under Title VII.

The Third Circuit Court of Appeals reversed a lower federal court decision granting summary judgment to the institution. In addition to establishing a claim based on a hostile work environment, the professor succeeded in convincing the appeals court that she met the requirements for a prima facie case under disparate treatment and that the institution's articulated reason for the adverse employment decision had shifted in the course of her dismissal. The appellate court stated that if a plaintiff demonstrates that the reasons given for termination do not remain consistent, beginning at the time they are proffered and continuing throughout the administrative proceedings, this may be viewed as evidence tending to demonstrate pretext. Based on the record as a whole, the appellate court ruled that the professor successfully established that the college's justification for tenure denial was sufficiently implausible and inconsistent enough that a fact-finder could reasonably disbelieve the articulated reasons.

Sex Discrimination

The shifting burden of proof in employment discrimination cases has application to claims of disparate treatment based on gender discrimination. A substantial number of these cases have involved allegations of gender discrimination in tenure denial. Institutions prevail in many of these cases on the basis that the proffered reasons for denying promotion and tenure were not pretextual. The college or university's rationale for tenure denial typically involves a judgment of faculty and administrative leadership that courts are reluctant to overturn in the absence of compelling evidence of pretext.[73] It is also unlikely that irregularities in the tenure review process will invalidate an adverse decision. While some irregularities, such as falsifying hiring criteria or documentary records, might lead to an inference of discrimination, subjective evaluative criteria, changes in the criteria over time, or lack of uniformity in procedures have been regarded as insufficient to establish pretext.[74] However, while institutions enjoy substantial discretion and judicial deference in making tenure and promotion decisions, institutional policies should be refined to

[73] *See*, for example, Lawrence v. Curators of the Univ. of Missouri, 204 F.2d 807 (8th Cir. 2000) in which subjective faculty assessments about the "quality of research" were largely unscrutinized by the reviewing court, despite a vigorous dissent by the chief judge of the appeals court.

[74] Aquilino v. Univ. of Kansas, 83 F.Supp. 1248 (D.Kan. 2000).

reduce the possibility of unequal treatment and to insure a documentary record that will provide evidence of consistency in the evaluation process. Standards of quality should not be so subjective that they cannot be effectively communicated and consistently assessed at any stage of the faculty evaluation process.

Evidence of lack of uniformity in the treatment of similarly situated male and female candidates can be a significant factor in judging the likelihood of discriminatory intent under Title VII. Evidence substantiating discrimination based on gender in tenure and promotion decisions has included a showing that similarly situated male candidates received counseling to assist them in the tenure process and were advised of a requirement for a terminal degree when the female candidate was not so advised.[75] In another instance, a court upheld the claim of an assistant professor and awarded tenure to her based on a finding that the university president's sexist remarks about the English department had established gender bias.[76] The university, in this latter case, had denied tenure despite unanimously favorable endorsement from department colleagues and support at administrative levels.

In *Leibowitz v. Cornell University*,[77] a federal appeals court vacated summary judgment on a strong demonstration of pretext and held that the nonrenewal of a teaching contract, even that of a nontenured individual, could form the basis for a Title VII claim. Leibowitz was a nontenured Senior Extension Associate, who had been teaching with the university since 1983. Although the program is based in Ithaca, she was teaching in Cornell's extension facilities in New York City. While in a dispute regarding reimbursement of her travel expenses, the university did not renew her contract in 2002, citing "budgetary exigencies."[78] Although she was allowed to continue teaching in 2002-03, she retired in December 2002 to preserve her benefits. She filed suit under Title VII, the ADEA, and state and local law.

Leibowitz presented evidence that supported her claim that Cornell's stated budgetary concerns were merely a pretext for discrimination. Specifically, she asserted that the budgetary concerns stated in 2002 had diminished over that year and the school was in "solid financial shape" by 2003[79]; the Extension Division had enough money to hire twelve new employees during the relevant time period; although the school laid off six employees, these employees were all women over age 50; although her requests for reimbursement of travel funds was cited as one reason for nonrenewal of her contract, negotiation for reimbursement of such funds was common practice among her male counterparts, and none of them were faced with nonrenewal or termination; she was not considered for positions that became vacant following her nonrenewal; a younger male was hired to fill a vacant teaching position in 2002; and she

---

[75] Kunda v. Muhlenberg College, 621 F. 2d 531 (2d Cir. 1980).

[76] Brown v. Trustees of Boston Univ., 891 F. 2d 337 (1st Cir. 1989).

[77] Leibowitz v. Cornell Univ., 584 F.3d 487 (2d Cir. 2009).

[78] *Id.* at 494.

[79] *Id.* at 504.

was also not considered for an opening in 2003.[80] Although the court makes reference to unequal treatment among male and female instructors, as well as among younger and older employees, the gender and age components were not specifically underscored as part of the decision. The Second Circuit reversed the district court's award of summary judgment and rejected its holding that a teacher could only show adverse employment action by offering proof that she held a tenured position.[81]

In general, an institution's tenure and promotion process is extensive and multi-layered. It will require distinction in research or teaching, depending on institutional mission, and no evidence of significant deficiencies in any of the three relevant categories of research, teaching, and service. While plaintiffs in these cases may raise a number of issues, the burden to establish sufficient evidence that the institution's proffered reason is a pretext for discrimination is difficult to carry. For example, in *Bickerstaff v. Vassar College*,[82] a female African American associate professor challenged the institution's decision to deny her promotion to full professor. Because the associate professor held positions in both the African studies and education departments, institutional policy required two separate advisory committees to make recommendations on promotion, with one committee voting for the candidate's promotion and the other rejecting it. Based on internal and external appraisals of the candidate's research and evidence from student evaluations, the institution denied her promotion. The candidate presented statistical evidence indicating differences in salary paid to faculty based on sex and race, as well as further statistical evidence tending to show that racial bias influenced student evaluations of her performance. Affirming summary judgment for the institution, the federal appeals court reasoned that the candidate failed to demonstrate "that the proffered reason was not the true reason for the employment decision and that race was."[83] In the appeals court's view, the associate professor's burden was to persuade the trier of fact that she was the victim of intentional discrimination in that an illegal discriminatory reason played a motivating role in the decision not to promote. On this question, the court found that no genuine issue of material fact existed that would support the associate professor's claim of intentional discrimination.

The appeals court emphasized that while statistical reports may establish an inference of discrimination, the statistical evidence in this case was so incomplete that it was inadmissible, as well as irrelevant since it failed to account for all the applicable variables that might account for the perceived disparities in salary and evaluation outcomes. Although reliance on these student evaluations of instruction may involve subjective judgments and hair-splitting when it comes to determining the point at which evaluations indicate "marked distinction," the appeals court noted first that the institution possessed

---

[80] *Id.* at 505.
[81] *Id.* at 510.
[82] 196 F.3d 435 (2d Cir. 1999).
[83] *Id.* at 446.

the expertise and the discretion to make such judgments, and second that the evidence in this case clearly reflected the candidate's declining effectiveness in the classroom.

The court reviewed evidence from a visiting faculty report that concluded there was opposition to the African studies program at the college and that the program was subject to hostility by some departments. However, when the full report was reviewed, the court noted that the visiting faculty had commented favorably on the program's support from the college administration and from other departments on the campus. Moreover, the court emphasized that any perceived resistance to the African studies program could not have established discriminatory intent in the candidate's promotion process.

In cases involving disparities in compensation, statistical evidence may play a role in establishing a plaintiff's prima facie case and meeting the burden to show the institution's reason is a pretext to mask discrimination.[84] When a female professor in a medical science field challenged the institution's decision to pay a similarly situated male professor at a significantly higher level of compensation, she presented two statistical studies that indicated gender significantly affected faculty salaries at the university. After adjusting for factors such as rank, degree, tenure, duration at the institution, and age, women tended to earn lower salaries than men. The institution countered that the studies failed to distinguish faculty salaries among medical specialties.

When a jury subsequently returned a verdict for the plaintiff on the issues of sex discrimination under Title VII and unequal pay under the Equal Pay Act (EPA), a federal appeals court reasoned that statistics evidencing an employer's pattern and practice of discriminatory conduct, though not determinative of an employer's reason for the action, are still helpful to confirm a general pattern of discrimination. Since the university failed to present evidence at trial rebutting the conclusions of the reports, the reports were sufficient to establish a prima facie case of sex discrimination.

The plaintiff, having met the initial burden of proof, then rebutted the university's affirmative defenses to explain the wage differential. The university first contended that the newly hired male professor was more productive in his ability to secure grants than the plaintiff, but the female professor established pretext by showing that the amount of grant funding she generated exceeded that of the new professor. As a second articulated reason for the disparity in compensation, the institution asserted the new male professor was offered a higher salary than that of the plaintiff as an incentive to retain the male professor's wife based on market forces. However, the appeals court rejected this defense as well by noting that market forces were not a tenable argument in

---

[84] Cases involving claims of sex discrimination that involve disparities in compensation often involve both Title VII and the Equal Pay Act. As one federal appeals court has noted, the Equal Pay Act and Title VII must be "construed in harmony, particularly where claims made under the two statutes arise out of the same discriminatory pay policies." Lavin-McEleney v. Marist College, 239 F.3d 476, 481 (2d Cir. 2001).

this case, since they simply served to perpetuate the salary discrimination that Congress sought to alleviate in both Title VII and the EPA.[85]

While both Title VII and the EPA apply the same burden-shifting standard articulated in *McDonnell Douglas*, if the plaintiff is successful in demonstrating a prima facie case under the EPA, the employer may then respond with an affirmative defense to establish that the pay differential is due to a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or any factor other than gender. For example, in *Markel v. Board of Regents of University of Wisconsin*,[86] a plaintiff successfully demonstrated a pay disparity between herself and a similarly situated male consultant, thus establishing a prima facie case. The burden then shifted to the institution to provide evidence to justify the disparity in compensation, and the university explained that the male colleague's pay was based on the longer number of years he had worked for the institution and the fact that he had held a higher position. This was a legitimate rationale, not based on gender, for the disparity in compensation, a finding that harmonized both the requirements of the EPA and Title VII.

Statistical models tend to show that disparities in compensation between a plaintiff and a class of institutional employees are not typically sufficient to establish a claim of disparate treatment unless the plaintiff can also produce an actual opposite-sex comparator for purposes of the Title VII or EPA claim.[87] However, once the plaintiff has identified an actual opposite-sex comparator, statistical models may be employed to show disparities, provided that the analysis incorporates relevant variables that could account for salary disparities on the basis of factors unrelated to gender bias.[88]

In recent years, the Lilly Ledbetter Fair Pay Act of 2009,[89] discussed earlier, has come into play in sex discrimination cases. For example, in *Gentry v. Jackson State University*,[90] a federal district court upheld a professor's discrimination claim in reliance on an expansively interpreted Ledbetter Act, finding that an otherwise untimely denial of tenure claim is permitted when intertwined with a successful demonstration of a discriminatory compensation decision, as a Title VII violation can occur each time a discriminatory paycheck is issued. In *Gentry*, a professor initially filed a discrimination claim with the EEOC in 2006 after being denied tenure in 2004. She alleged that tenure was denied due to her gender. She later filed suit in U.S. District Court, further alleging that the denial of tenure and resulting discriminatory pay violated Title VII, as well as claiming that the university retaliated against her for filing the EEOC claim. The university argued that her claim was untimely, as her EEOC claim was filed two years after the denial of tenure, and filed a motion for sum-

---

[85] Siler-Khodr v. University of Texas Health Science, 261 F.3d 542 (5th Cir. 2001).

[86] *See* Markel v. Bd. of Regents of Univ. of Wisconsin, 276 F.3d 906 (7th Cir. 2002).

[87] *See* Houck v. Virginia Polytechnic Institute and State Univ., 10 F.3d 204 (4th Cir. 1993).

[88] Lavin-McEleney v. Marist College, 239 F.3d 476 (2nd Cir. 2001).

[89] Ledbetter Act, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[90] 610 F. Supp. 2d 564 (S.D. Miss. 2009).

mary judgment. Gentry responded that in fact it was timely, as it qualified as a compensation decision under the Ledbetter Act. The district court agreed with the professor and denied the motion for summary judgment.

The university also filed motions for summary judgment on the professor's claim of gender discrimination related to pay disparity, as it alleged she was unable to identify a male comparator, as well as for summary judgment on her retaliation claim. The district court also denied these motions based on factual disputes for later resolution at trial and because the claim grew out of the unequal pay claim, respectively. At subsequent trial, the professor was awarded $100,000 on the retaliation claim and, while the jury rejected her sex discrimination claim (for denial of tenure and disparate pay), it awarded her the total damages requested under all claims.

Sexual Orientation and Gender Identity Discrimination

Sexual orientation discrimination law under Title VII is emerging. While sexual orientation discrimination is not prohibited by Title VII nationally, nor is there any federal law directed at such discrimination, there is a circuit split on interpretations of Title VII and sexual orientation-based claims. Many states and municipalities have passed state legislation or ordinances prohibiting employment discrimination on the basis of sexual orientation in both public and private sectors, and many have even added protections for gender identity and expressions. Issues related to sexual orientation go beyond discipline, hiring, discharge, and promotion; they also include access to benefits for unmarried same-sex partners and housing reserved for heterosexual couples.

Sexual orientation discrimination claims can be brought to the EEOC, and many states have been responsive to these claims bringing them under 42 U.S.C. § 1983 violations of the Fourteenth Amendment's Equal Protection Clause. For example, in *Miguel v. Guess*,[91] the state appellate court denied the employer's motion to dismiss a claim brought by the hospital employee alleging a Section 1983 claim that her dismissal was a result of her sexual orientation. Although the employee was allowed to move forward with her claim, she lost on public policy grounds because the state had not yet enacted law in this area. In *Lovell v. Comsewogue School District*,[92] the federal district court found that the basis of sexual orientation discrimination was different than the other types and, if proven, would be an Equal Protection Clause violation and actionable under Section 1983.

Plaintiffs have also been fruitful in their claims of sexual orientation discrimination using the Supreme Court's *Price Waterhouse* standard on sex stereotyping. Under this standard, plaintiffs allege that they were harassed, discharged, or not hired because they did not fit the image of a "typical" man

[91] 51 P.3d. 89 (Wash. Ct. App. 2002).
[92] 214 F. Supp. 2d. 319 (E.D.N.Y. 2002).

or woman. For example, in *Lewis v. Heartland Inns of America*,[93] the plaintiff claimed that she was denied a position as a front desk clerk of a hotel because she looked like Ellen DeGeneres, who is a prominent gay celebrity, rather than a "Midwestern" girl. The appellate court reversed a summary judgment for the employer, ruling that the plaintiff presented sufficient evidence of sex discrimination to proceed to trial.

Although there is no federal law prohibiting employment discrimination on the basis of gender identity or expression, commonly known as transgender status, many states and municipalities have adopted laws to recognize this kind of discrimination. The EEOC has ruled that discrimination based on gender identity/transgender status is a form of sex discrimination and violates Title VII.[94] Although Title VII does not specifically provide protection for transgendered individuals, some have had success challenging their discrimination under the *Price Waterhouse* theory of sex stereotyping.[95]

For example, in *Schroer v. Billington,* the plaintiff applied for a position at the Library of Congress. The plaintiff presented as a male during the job interview and was later offered the job.[96] However, when the plaintiff informed his prospective supervisor that he would be transitioning into the female gender, the offer was rescinded. The individual had an extensive career and was well qualified for the position, but the supervisor stated that she did not believe the plaintiff could be effective in the position as a transgender person. The court applied the *Price Waterhouse* standard and Title VII, and allowed the plaintiff to state a claim of sex discrimination and sexual stereotyping. The court ruled that the Library of Congress' reasons for rescinding the offer were pretextual and facially discriminatory. The plaintiff was awarded over $500,000 in compensatory damages.[97]

Transgender individuals can also state claims under the Equal Protection Clause.[98] Also, claims of harassment of transgendered individuals can be made

---

[93] 591 F.3d 1033 (8th Cir. 2010). *See also* Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3d Cir. 2009) a federal appellate court reversed a summary judgment for employer in a claim brought by a male employee who claimed that he was harassed because he was perceived to be gay.

[94] *See* Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012). *See also* Schroer v. Billington. 577 F. Supp. 2d 293 (D.D.C. 2008).

[95] *See* Smith v. City of Salem, Ohio, 378 F.3d. 566 (6th Cir. 2004), where male firefighter was able to state a claim for being disciplined after he began sex reassignment. *See also* Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005), where federal appellate court affirmed jury verdict for police officer who alleged transgendered discrimination.

[96] 577 F. Supp. 2d 293 (D.D.C. 2008).

[97] *See also* Lopez v. River Oaks Imaging & Diagnostic Group, 542 F.Supp. 2d 653 (S.D. Tex. 2008) where the court denied summary judgment because "Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."

[98] *See* Glenn v. Brumby, 724 F. Supp. 2d. 1284 (N.D. Ga. 2010) where a biological male employee had begun the transition to the female gender and was dismissed. Manager stated that it was "inappropriate" and the court determined that the plaintiff established a prima facie case of sex discrimination.

under Title VII on the basis of gender identity or expression and under state law.[99] Although some states do not afford legal protections against discrimination based on sexual orientation and identity/expression, many colleges and universities have included these populations as protected categories in their policies. Laws and policies in this area are ever-changing. In 2012, the U.S. Equal Employment Opportunity Commission found that discrimination on the basis of gender identity, change of sex, or transgender status is a form of sex discrimination and a violation of Title VII.[100]

As mentioned above, there is a circuit split whether or not sexual orientation-based claims can be brought under Title VII.[101] While the Eleventh Circuit held that sexual orientation-based claims were not actionable under Title VII, the Second and Seventh Circuits held otherwise. In the Eleventh Circuit, the plaintiff claimed employment discrimination resulting from her sexual orientation.[102] The district court dismissed both claims, and the Eleventh Circuit Court of Appeals reversed regarding the gender-conformity claim because under *Price Waterhouse v. Hopkins*[103] discrimination based on an employee's failure to conform to a gender stereotype is sex-based discrimination. The appeals court, however, affirmed dismissal regarding the sexual orientation-based claim. The Eleventh Circuit cited that "[d]ischarge for homosexuality is not prohibited by Title VII."[104]

After *Evans*, the Seventh Circuit ruled a different conclusion in *Hively v. Ivy Tech Community College of Indiana*,[105] *where the* plaintiff alleged discrimination based on sexual orientation. Because of precedence, the trial court dismissed her claim and the original appellate panel affirmed. En banc, the court reversed and overruled prior precedent and offered two justifications why sexual orientation discrimination is sex discrimination. First of all, using the "comparative method," the plaintiff being a lesbian epitomizes the fundamental case of failure to conform to the female stereotype because she is attracted to other women, not men. Secondly, from the "associational theory," the court contrasted the facts to cases of interracial couples, who are protected from race-based discrimination under Title VII. As a result, the

---

[99] *See* Mitchell v. Axcan Scandipharm, Inc., 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. 2006) (finding that the *Price Waterhouse* standard precludes dismissal of the plaintiff's sexual harassment and discrimination claims under Title VII). *See also* Del Piano v. Atlantic County, 2005 Dist. LEXIS 20250 (D.N.J. 2005) (finding that a cause of action exists under state law for a corrections worker who was allegedly harassed and discriminated against for cross-dressing on his own time).

[100] *See* Macy v. Holder, EEOC Appeal No. 0120120821 (April 21, 2012).

[101] *See generally* J. Dalton Courson, *Circuits Split on Interpretations of Title VII and Sexual-Orietntation-Based Claims,* Amer. Bar Assoc. (Mar. 19, 2018), *available at* https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2018/circuits-split-on-interpretations-of-title-vii-and-sexual-orientation-based-claims/.

[102] *See* Evans v. Georgia Regional Hospital, 850 F.3d 1238 (2017), *cert. denied*, 138 S. Ct. 557 (2017).

[103] 490 U.S. 228 (1989).

[104] *See* Blum v. Gulf Oil Corp., 587 F.2d 936 (5th Cir. 1979)).

[105] 853 F.3d 339 (7th Cir. 2017) (en banc).

court found that discrimination against gays and lesbians implicates sex in the same manner that discrimination against a member of an interracial couple implicates race. Also, Title VII must be interpreted in light of Supreme Court cases recognizing that certain kinds of discrimination on the basis of sexual orientation are unconstitutional.[106]

More recently, the en banc Second Circuit issued *Zarda v. Altitude Express, Inc.*[107] *Zarda* agreed with *Hively* and overruled contrary precedent. The court found that sexual orientation discrimination is a form of sex discrimination because one cannot fully define a person's sexual orientation without identifying his or her sex; as a result, sexual orientation is a function of sex. The court also found that sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. It is likely that other appeals courts may be called to address this issue, and the Supreme Court may be requested to resolve the split.

Retaliation

Punishing an employee for exercising the right to challenge an employment decision under Title VII is prohibited.[108] However, lower federal courts have been divided on the degree of harm the employee must suffer before retaliation claims are actionable. As to retaliation claims, the United States Court of Appeals for the Ninth Circuit, in *Ray v. Henderson*,[109] explained that the federal circuits have developed different standards for assessing the severity of an adverse employment decision. As the Ninth Circuit characterized the issue, the circuits have aligned themselves with either a broad, restrictive, or intermediate position as to what constitutes an adverse employment decision actionable under Title VII.[110] In addition, employees must establish the causal connection between any adverse employment decision and the exercise of rights under Title VII.[111] Previously, the close temporal proximity between an employer's knowledge of a protected activity (filing a Title VII claim) and an adverse employment action will be sufficient to establish causality. Also, a material employment action might have included situations for graduate student assistants involving "retaliatory conduct that does not relate to employment or which occurred outside the … graduate student assistant workplace" that "could well dissuade a reasonable … graduate student, TA, or research assistant from making or supporting a charge of discrimination."[112] Further, it was held that anti-retaliation provisions also extended to those employees who may respond

[106] *See generally* Romer v. Evans, 517 U.S. 620 (1990); Lawrence v. Texas, 539 U.S. 558 (2003); U.S. v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. ___ (2015).

[107] No. 15-3775, 2018 U.S. App. LEXIS 4608 (2d Cir. Feb. 26, 2018) (en banc).

[108] 42 U.S.C. 2000e-3(a). The retaliation provision makes it "an unlawful employment practice for an employer to discriminate" against someone who has opposed an employer's unlawful behavior or participated in a Title VII proceeding.

[109] 217 F.3d 1234 (9th Cir. 2000).

[110] *Id.* at 1240-41.

[111] Clark Cnty Sch. Dist. v. Breeden, 532 U.S. 268 (2001).

[112] Kovacevich v. Vanderbilt Univ., 2010 U.S. Dist. LEXIS 36054 (M.D. Tenn. April 12, 2010).

to questions posed regarding discriminatory activity as part of an employer's internal investigation,[113] as well as third-parties claiming retaliation resulting from the actions of another.[114]

More recently, the Court in *University of Texas Southwestern Medical Center v. Nasser* narrowed this causal connection standard and ruled that the higher but-for causation standard used in ADEA non-retaliation cases should also apply to Title VII retaliation cases.[115] In this case, Dr. Naiel Nasser was a physician of Middle Eastern descent who was a specialist in infectious diseases and HIV/AIDS treatment. From 1995 to 1998 and 2001 to 2006, he served on the faculty of the University of Texas Southwestern Medical Center and was also a member of the medical staff of the hospital. He also served as Associate Medical Director of the hospital's Amelia Court Clinic. After the hospital hired Dr. Beth Levine to direct the clinic and supervise Nasser, Dr. Nasser complained several times about Dr. Levine's treatment of him, claiming that she treated him differently than the rest of the medical staff. Dr. Levine said, in Nasser's presence, "Middle Easterners are lazy." He met often with Dr. Gregory Fitz, the medical school's Chair of Internal Medicine and Levine's supervisor, to complain of her behavior. Levine encouraged Nasser to apply for promotion to associate professor, which he received, but he continued to claim harassment. Because of his continued discontentment, Nasser tried to become an employee of the hospital instead of just being on its medical staff. As a result, he would have to resign from the medical school faculty. When Nasser resigned, he cited Levine's discrimination as a cause in his resignation letter to Fitz. In order to exonerate Levine, Fitz moved to block Nasser's employment at the hospital.[116] Nasser claimed this block of employment at the hospital was retaliation for his claim of harassment by Levine; however, Fitz claimed that physician positions at the hospital were first priority for faculty members.

Justice Anthony Kennedy wrote that when Congress added Section 2000e-2(m) to Title VII in 1991, it did so only for the five status claims and not for retaliation claims. As a result, the Court found that under Title VII retaliation claims, they must be proved under traditional principles of but-for causation and not the lessened causation standard outlines in Section 2000e-2(m). This higher standard requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongdoing by the employer. This is key, since proving that retaliation is the but-for cause of an employment action is the most difficult form of causation to prove. Justice Ruth Bader Ginsburg filed a dissenting opinion, arguing that the retaliation for complaining is closely associated to the core prohibition of the status-based discrimination.

In it, the retaliation provision of Title VII has been interpreted to focus on whether the employer's conduct, even if it falls short of a termination or tangible act, would deter the reasonable person from engaging in protected

---

[113] Crawford v. Metropolitan Government of Nashville, 555 U.S. 271 (2009).
[114] Thompson v. North American Stainless, LP, 562 U.S. 170 (2011).
[115] 135 S. Ct. 2517 (2013).
[116] Nasser v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d. 448 (5th Cir. 2012).

activity.[117] Although the EEOC's interpretation of Title VII does not have the force of law, it is considered persuasive evidence of congressional intent. The manual explains that "[t]here is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment."[118]

The question of how much harm the employee must have experienced as a result of an employer's retaliatory action was addressed in *Stavropoulos v. Firestone*,[119] in which the Eleventh Circuit, in considering a First Amendment claim, emphasized that the retaliatory action "must involve an important condition of employment."[120] In that case, the plaintiff alleged she suffered emotional distress when University of Georgia officials sent her negative memos, including a mental illness memo, and encouraged faculty members with negative comments about the plaintiff to come forward. Relying on Title VII case precedent, the federal appeals court concluded that the alleged harm was too insubstantial because other agents of the university eventually overrode the decision.

On the other hand, what constitutes an adverse employment action that rises to the level of retaliation under Title VII may include actions that fall short of termination. In *Mota v. University of Texas Houston Health Science*,[121] the university argued, first, that a professor who alleged same-sex harassment did not demonstrate the existence of an adverse employment action. The United States Court of Appeals for the Fifth Circuit disagreed, however, stating that in finding that the university had retaliated against the professor, the jury implicitly found that an adverse employment action had been taken. A rational jury, according to the court, could have concluded both that no tangible employment action resulted from the sexual harassment and that the university subsequently retaliated against the professor for filing a complaint concerning the harassment. In this case, the professor did not lose any job benefits when he refused to comply with requests for sexual favors from his department chair, but he was subjected to unfavorable assignments, denied a paid leave, stripped of a stipend he regularly received, removed as the principal investigator on certain grants, and subjected to ridicule when he filed an internal complaint about the harassment.

The university argued that many of the actions asserted by the professor did not rise to the level of "adverse employment actions." The professor proffered eleven separate examples of events that he contended were causally linked to the filing of his complaints with the university. Although the court of appeals found that some of them did not qualify as "ultimate employment decisions," it concluded that at least four of the actions allegedly taken by the university

---

[117] U.S. Equal Employment Opportunity Comm'n, No. 915.003 Compliance Manual 8-II(D)(3) (1998), available at http://www.eeoc.gov/docs/retal.pdf

[118] *Id.* 8, at IV.

[119] 361 F.3d 610 (11th Cir. 2004).

[120] *Id.* at 619.

[121] 261 F.3d 512 (5th Cir. 2001).

met this definition, giving particular attention to the denial of paid leave and the loss of a stipend he regularly received.[122]

In *Russell v. Board of Trustees of University of Illinois*,[123] the plaintiff alleged that the university hospital in which she worked suspended her for five days in retaliation for her complaints about her supervisor and his treatment of female staff members. She brought the complaints against her supervisor after he initiated a disciplinary proceeding against her for inaccurately completing timecards. The plaintiff, in a disciplinary meeting, was subsequently found to have violated hospital policy and was suspended without pay for five days. She appealed the suspension, arguing that the decision to discipline her was tantamount to sexual harassment in retaliation for her complaints about her supervisor and his treatment of female staff members.

The federal appeals court reasoned that in order to establish a prima facie case of retaliation under Title VII, the plaintiff must present sufficient evidence that she engaged in statutorily protected activity, that she suffered an adverse employment action, and there exists a causal link between the protected expression and the adverse employment action. Although the appeals court found that a five-day suspension was a sufficiently adverse employment decision to invoke Title VII's retaliation standards, the court found no evidence of a causal link between the punishment and the protected activity. The court affirmed a finding that there was no evidence the members of the institution's disciplinary committee had any reason to believe that the supervisor triggered the disciplinary proceedings for reasons turning on retaliation, nor was there any record that they were aware of the plaintiff's complaint. Thus, the appellate court ruled in favor of the university, concluding that it could not be liable under a theory of retaliation because the plaintiff failed to meet the third prong of a prima facie proof, presentation of evidence of a causal link between the employee's actions and the adverse employment action.

In *Rubinstein v. Administrators of the Tulane Educational Fund*,[124] the Fifth Circuit Court of Appeals affirmed a district court's determination that the evidence of retaliation for filing a discrimination claim was sufficient to overcome a summary judgment claim for the denial of a pay raise. The associate professor's testimony that his dean had advised him that filing a discrimination claim was not a step a "good colleague" would take was corroborated in part by the testimony of the dean, who, although he attempted to distance himself from the meaning of the comment, admitted that he had urged the associate not to bring suit. In the view of the appeals court, this evidence was sufficient to allow a jury to conclude that the institution illegally retaliated against the associate professor.

Similarly, in *Abramson v. William Paterson College of New Jersey*,[125] a federal appeals court found that a professor's complaints of religious discrimi-

[122] *Id.* at 522-523.
[123] 243 F.3d 336 (7th Cir. 2001).
[124] 218 F.3d 392 (5th Cir. 2000).
[125] 260 F.3d 265 (3d Cir 2001).

nation and harassment to the college, formal or informal, oral and written, were sufficient to satisfy the first prong of the prima facie case for retaliation. Further, the professor's termination constituted an obvious adverse employment action. In light of the timing of her termination and the demonstration of ongoing administrative antagonism that established a causal nexus between the adverse employment action and the protected activity, the court of appeals concluded there was ample evidence from which a reasonable jury could draw inferences establishing a prima facie case for retaliation. In *Crawford v. Nashville*,[126] the Supreme Court reversed district and circuit court decisions and held that the protection of the antiretaliation provision extends to an employee who simply reports discrimination as part of an employer's internal investigation, even when that action is not taken on her own initiative and is, rather, the result of an investigation of complaints made by others. In this case, a school district was investigating rumors of sexual harassment by its employee relations director. As part of the investigation, the plaintiff was asked if she witnessed any inappropriate behavior.[127] She provided details in the affirmative. Shortly following the conclusion of the investigation, she and two other employees were terminated. The district court granted summary judgment for the school district, holding that the opposition clause of Title VII could not be satisfied because she had not initiated the complaint, and the Sixth Circuit Court of Appeals affirmed the decision. Noting that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question,"[128] the Supreme Court ruled that an employee need not initiate a complaint or report of discrimination in order to receive protection under the opposition clause of Title VII. However, in *Mato v. Baldauf*,[129] the Fifth Circuit rejected a claim based on an employee's assertion that her termination in the course of a reorganization was based on her protected activity. The protected activity that the plaintiff alleged involved encouraging and assisting other women to file sexual harassment complaints. The court noted that approximately a year and a half passed between the last sexual harassment complaint and the plaintiff's termination, a time period that did not support an inference of retaliation. Moreover, she failed to present any evidence that the director who initiated the reorganization even knew that she had aided female coworkers in filing sexual harassment claims, all five incidents of which took place before the director began working for institution. The plaintiff contended that the institution's decision to require a Ph.D. for the curator's position, and the consequential termination of her employment in the reorganization, was the act of retaliation. However, the appellate court found that the plaintiff failed to present sufficient evidence that would allow a jury to conclude that the reorganization decision was a pretext to retaliate against her.

---

[126] 555 U.S. 271 (2009).

[127] *Id.*

[128] *Id.* at 278.

[129] 267 F.3d 444 (5th Cir. 2001).

The court stated that the first step was to determine whether the director acted independently in deciding that the new curator would be required to hold the Ph.D. degree, or whether he was prevailed upon by others in the organization who were motivated by a retaliatory animus to create this requirement as a pretext for terminating the plaintiff's employment. The court ruled that the plaintiff produced no evidence which would allow a jury to conclude that a retaliatory animus was the impetus for this action.

The Supreme Court once again expanded the scope of retaliation claims in *Thompson v. North American Stainless, LP*,[130] with its unanimous decision to afford protection to those employees who have not engaged in protected activity themselves but who claim to have been retaliated against for the protected activity of another. In it, a female employee filed a sex discrimination complaint against her employer with the EEOC. Her fiancé, Thompson, who also worked for the same employer, was subsequently terminated; he claimed that his termination was in violation of Title VII, as it was in retaliation for her filed charges. As stated by the Court, such third-party retaliation claims are limited to those who fall "within the zone of interests sought to be protected by Title VII."[131]

Although it is difficult to establish specific guidelines for which relationships would be protected in a third-party situation, it is reasonable to infer that termination of a close relative of an employee engaging in a protected activity will almost always rise to the level of unlawful retaliation under Title VII. In its reasoning, the Court relied on its prior holding in *Burlington Northern & Santa Fe Railway Co. v. White*,[132] in that "Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct"[133] and that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment,"[134] but rather prohibits action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[135] In the immediate case, Thompson's termination rose to the level of unlawful retaliation, as a reasonable employee might well have been dissuaded from engaging in the protected activity of filing the discrimination charge if she were aware that her fiancé would risk termination. Ultimately, the Court reiterated its *Burlington* reasoning that "the significance of any given act of retaliation will often depend upon the particular circumstances."[136]

---

[130] 562 U.S. 1041 (2011).

[131] *Id.*

[132] 548 U.S. 53 (2006).

[133] *Id*.

[134] *Id*. at 64.

[135] *Id.* at 68.

[136] *Id.* at 69. Although the *Thompson* decision creates some uncertainty, as the Court declines to provide a precise list of relationships that fall within the "zone of interests," an employer's best course of action to minimize potential impact remains consistent application of well-vetted policies and procedures, and detailed documentation related to adverse employment decisions.

Reverse Discrimination/Affirmative Action

The passage of Title VII as part of the Civil Rights Act of 1964 would suggest that it was primarily intended to protect minorities and women from discrimination in the workplace. However, the provisions of the law have also been characterized as applying to all races, religious groups, and people of both genders. In 1976, the United States Supreme Court addressed a case of reverse discrimination in which it concluded that Title VII "was intended to cover white men and women and all Americans."[137] The Court applied Title VII to a case in which two white workers had been fired by their employer for stealing, but a third employee caught stealing, who was black, was not fired. When the two white workers brought suit, the Court stated that Title VII's "terms are not limited to discrimination against members of any particular race."[138] This concept is supported in the 2009 Supreme Court decision in *Ricci v. DeStefano*,[139] discussed in detail later in this chapter.

However, the Court also addressed an affirmative action plan based on a collective bargaining agreement between the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation that seemed to undercut the "colorblind" reading of Title VII. In *United Steelworkers of America v. Weber*,[140] the Court examined a bargaining agreement that called for company training programs in an effort to promote more black workers, and earmarked a percentage of available slots in the training programs for these employees. The plaintiff in this case was a white worker who was denied a place in the training program, despite the fact that he was a more senior employee than any of the black employees selected. In deciding *Weber*, a majority of the Supreme Court rejected the view that the private company's affirmative action program negotiated with a union violated Title VII's prohibitions against racial discrimination in employment. The majority reasoned that Congress did not intend to condemn all private, voluntary, race-conscious affirmative action plans, and the affirmative action plan under consideration, which was designed to eliminate traditional patterns of conspicuous racial segregation, was permissible under Title VII. The Court's decision was influenced in part by the fact that the affirmative action plan did not require the discharge of white workers, its replacement with new black hirees did not create an absolute bar to the advancement of white employees, and the plan was a temporary measure not intended to maintain racial balance but simply to eliminate a manifest racial imbalance.[141]

As these differing opinions would suggest, the application of Title VII has not been easily adapted to claims of reverse discrimination. Claims in which a white male seeks redress under Title VII have resulted in agreement that

---

[137] McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).
[138] *Id.* at 276.
[139] 557 U.S. 557 (2009).
[140] 443 U.S. 193 (1979).
[141] *Id.* at 205-206.

the reverse discrimination plaintiff may establish a claim under the "direct evidence" standard. Lower courts, however, have not uniformly adopted a similar approach in instances where the reverse discrimination plaintiff has asserted disparate treatment based on circumstantial evidence. Direct evidence of discrimination could be shown by the employer's admissions of a discriminatory intent, but the likelihood of such an admission against interest seems remote in the more sophisticated academic setting in which subjective hiring and promotion decisions would veil direct evidence of discrimination.

When whites or men are the "minorities" in the institution in which they work, the shifting burden of proof in disparate treatment tends to work in the same way as it would in a traditional *McDonnell Douglas* context. In these cases, a majority plaintiff may show "intentionally disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority."[142] In an illustrative case, a white female professor of home economics at a historically black college established a prima facie case of racial discrimination under Title VII. The faculty member, who was in a racial minority at an institution where blacks outnumbered whites approximately two-to-one, both on the faculty and in the student body, claimed constructive discharge in that her decision not to continue at the institution was predicated on the hostility of her superiors. Although the institution insisted that nonrenewal would have been justified based upon charges of incompetence and lack of rapport with students, the faculty member presented compelling evidence that her superior had rejected claims of academic deficiencies and that department faculty had engaged in a systematic campaign to remove her from the department. This evidence included instigating student unrest and coercing students to sign a petition opposing the white professor's continued employment. When these findings were combined with evidence of the hiring of an African American faculty member to replace the white professor, the federal appeals court affirmed a lower court decision that because of her race, the white professor's failings were treated more harshly than similar failings in a black teacher would have been, and that her contract would have been renewed but for the fact that she was white.[143]

When background circumstances confirm that a white employee is suing a predominately white higher education institution under Title VII, different proof would appear to be required. Clearly, the plaintiff is unlikely to establish that the institution typically discriminates against the majority. Initially, the reverse discrimination plaintiff must establish a prima facie case, including a showing that the plaintiff is a member of a protected class under Title VII. Even if this hurdle is overcome, the *McDonnell Douglas* shifting burden of proof has emphasized that an institution of higher education need only meet a burden of production, insofar as the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. The plaintiff-employee, however, must meet a burden of persuasion in which the ultimate burden is to

[142] Parker v. Baltimore & Ohio Railroad Co., 652 F.2d 1012, 1017 (D.C. Cir. 1981).
[143] Lincoln v. Bd. of Regents, 697 F.2d 928 (11th Cir. 1983).

persuade the court that the challenged decision was the result of discriminatory motivation.

In some cases, the minority or female plaintiff's proof that the articulated reason put into evidence by the institution was not the true reason is sufficient for the fact-finder to draw the inference that the true reason involved a discriminatory purpose. This inference is plausible because the institution's failure to put into evidence a credible nondiscriminatory reason may suggest that the real reason is discrimination, given the history of societal prejudice against minorities and women. However, when a white male plaintiff challenges an employment decision against a predominantly white higher education institution, it is more difficult to draw the inference that the employer acted because of discrimination against white males, even where a legitimate reason for the adverse employment decision has been negated. For example, a male assistant professor sued when he was denied tenure for failure to publish sufficiently, alleging that women were held to a lesser standard. The jury agreed and found a violation of Title VII, and the predominately white university appealed. On the issue of direct discrimination, the appellate court held that statements by the interim dean, that females and males were judged on different standards, was not probative evidence that the tenure decision was motivated by gender. In addition, the court concluded that the plaintiff did not establish either that he was qualified for tenure or that he was denied tenure in circumstances permitting an inference of discrimination. Because the evidence, in the view of the appeals court, did not support the jury's findings, the case was reversed and remanded.[144]

Many reverse discrimination cases arise in the context of institutionally adopted affirmative action plans designed to increase the representation of minorities and women in the workforce, or to correct alleged inequities in pay and promotion. When these plans are challenged under Title VII, the majority plaintiff can meet the prima facie burden to show unequal treatment, since the institution's plan consciously uses race or gender to advance the employment opportunities of minorities and women. However, if the institution's plan is valid, the institution can advance a legitimate reason for the use of race or sex in employment decisions. This rationale requires a reverse discrimination plaintiff to show that the institution's plan discriminates against the plaintiff and that the plan itself is invalid. In many of these cases, the plaintiff will challenge the plan on both equal protection and Title VII grounds. The United States Supreme Court has applied a standard of strict scrutiny to recent cases

[144] Krystek v. Univ. of S. Mississippi, 164 F. 3d 251 (5th Cir 1999).

in which a public employer has adopted an affirmative action plan favoring minorities.[145]

Reverse discrimination cases in higher education suggest that federal courts may be predisposed to recognize instances of reverse discrimination in affirmative action plans. In 1980 and 1989, as part of a settlement for gender-based discrimination claims, the University of Minnesota entered into consent decrees. The 1989 decree required female faculty members to take part in the distribution of $3 million. A male professor argued that the provisions of the consent decree discriminated against him because of his sex and sought damages by filing a Title VII and equal protection claim. The case was complicated, because the plan in question was implemented pursuant to a consent decree and was not a voluntary affirmative action plan. However, it was established that the plan mandated by the consent decree was not imposed after a judicial finding of intentional discrimination on the part of the university. After considering three statistical models measuring the differences in salaries between females and males, the district court granted summary judgment to the university on the male professor's claims. However, the appellate court reversed the summary judgment. The male professor met his burden to demonstrate that there was a genuine issue of material fact on the question of whether the variety of statistical models established a manifest or conspicuous imbalance in faculty salaries based on gender. Although this ruling left unanswered the question of whether the salary plan unreasonably discriminated against the male faculty member, the ruling established that the white professor was entitled to pursue his Title VII discrimination claim.[146]

In *Hill v. Ross*,[147] a college dean raised objections to the appointment of a male candidate for a faculty position, insisting that the department fill the position with a female. The dean had imposed hiring goals on the department that included increasing the number of women and minority faculty. He stipulated in e-mail communications that he was unwilling to send male candidates forward, and he ultimately refused to forward the name of the male candidate selected by the faculty. The university defended its decision to leave the position vacant, rather than hire the professor, on the basis that the dean's decision was made pursuant to a valid affirmative action plan.

The Seventh Circuit Court of Appeals reversed a district court's grant of summary judgment, noting three factors in the record that suggested a possible violation of Title VII. First, the appeals court was persuaded that a jury might reasonably conclude that the dean of the college used sex as the sole criterion for his decision not to recommend hiring the male applicant. Reasoning that

---

[145] *See* Adarand Constructors v. Pena, 515 U.S. 200 (1995) in which the Court held that all racial classifications developed as part of an affirmative action plan by any government —state, local or federal—are to be strictly scrutinized, and Richmond v. J.A. Croson, 488 U.S. 469 (1989), in which the Court applied strict scrutiny under the Fourteenth Amendment's Equal Protection Clause to a city's affirmative action program requiring a 30% set-aside for minority subcontractors.

[146] Maitland v. Univ. of Minnesota, 155 F.3d 1013, 1019 (8th Cir. 1998).

[147] 183 F.3d 586 (7th Cir. 1999).

the dean's imposition of hiring goals involving minorities and women might have exceeded the permissible application of an affirmative action plan, the court noted that the university did not contend its affirmative action plan, which was essential to the eradication of the consequences of past discrimination, either in the academic department or elsewhere in the institution. Second, the existing affirmative action plan at the institution did not require that the dean insist upon the hiring of a female candidate. Finally, the court emphasized that the plaintiff carried the burden to show that reliance on the affirmative action plan might be pretextual. By presenting evidence that the express terms of the affirmative action plan did not support the dean's decision to block the appointment, coupled with the university's admission that it had not engaged in past discrimination, the plaintiff effectively shifted the burden to the institution to come forth with a justification for the use of sex in the hiring decision. Since neither the university's plan nor its brief addressed that justification, it was compelled to offer an "exceedingly persuasive justification." The plaintiff then could have borne the burden of overcoming it.

In deciding *Ricci v. DeStefano*,[148] the Supreme Court set a new rule of law on when an employer can intentionally discriminate to avoid a lawsuit. In *Ricci*, a test was given by the city to determine which firefighters would advance to vacant lieutenant and captain positions. Upon receipt of the results, it was discovered that the white candidates had outperformed the minority candidates, and the city discarded the results to avoid a potential lawsuit due to the disparate impact of the test on minority candidates. As a result, the white and Hispanic firefighters who passed the test sued in federal court, alleging racial discrimination. The trial court ruled for the city, reasoning that if the city had gone through with certifying the test results, it may have been liable under Title VII for adopting a practice resulting in disparate impact on the minority firefighters, and the appeals court affirmed. However, a five-person majority of the Supreme Court reversed, remanded, and ultimately held that the city had improperly discarded employment test results on which minority candidates had underperformed disproportionately.

As Title VII not only prohibits intentional acts of discrimination but also policies and practices not intended to be discriminatory that nevertheless disproportionately impact a protected group, the Supreme Court recognized that the City found itself in an untenable situation. It essentially was faced with a choice to impose disparate impact on the minority firefighters, or effect disparate treatment on the firefighters who would have been eligible for promotion given the results of the test. The Court, therefore, was presented with considering whether intentional action to avoid disparate impact liability for one group under Title VII outweighs the possibility of that action resulting in disparate treatment discrimination for another.

The Court determined that the disparate treatment would only be justified if there were a "strong basis in evidence" that test certification would have

[148] 557 U.S. 557 (2009).

created liability for disparate impact. Because the court reasoned that the City undertook significant care in developing the test, and thus could have shown it to be "job related" and consistent with "business necessity," it held that there was not enough evidence to support the theory that the city would have faced liability if it had certified the test results.[149] Further, the Court argued that an equally valid, less discriminatory alternative could not have been identified by the minority candidates. In ordering the city to reinstate the test results, the Court warned that "fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."[150]

Filing a Complaint with the Equal Employment Opportunity Commission (EEOC)

An individual who has experienced discrimination based on the various protected classes mentioned above may file a complaint with the Equal Employment Opportunity Commission (EEOC), which enforces Title VII. The EEOC may receive, investigate, and resolve complaints of unlawful employment discrimination, and it may also initiate lawsuits against violators or issue right-to-sue letters to complainants. Employees have two possible causes of action, disparate impact or disparate treatment. Disparate treatment is more common in postsecondary education. This manifests when an individual is denied a job, promotion, or tenure or claims to be treated less favorably than their colleagues because of their race, sex, national origin, or religion, and is subjected to a detrimental working condition. All employment discrimination laws that are enforced by the EEOC, except for the Equal Pay Act, require complaints to be filed with the EEOC before civil lawsuits may be commenced against the alleged discriminator. It is critical to note that a complainant has to file a complaint with the EEOC within 180 days of the incident.

While complaints can be filed with the EEOC, Carbado and Gulati argued there are three problems with antidiscrimination law in proving discrimination in the workplace.[151] First, courts do not give credence to applicants who are members of marginalized populations and how their positionality subjects them to stereotypes and misconceptions regardless of the applicant's credentials. Because evidence, direct or circumstantial, is expected to support claims of discrimination, it is challenging to establish fault with an individual or the organization, especially because institutions will rely on their nondiscriminatory policies.

Secondly, when producing evidence to support the claim, institutions of higher education have established policies and programs that portray a persona of being inclusive and nondiscriminating environments. Since an applicant will

---

[149] *Id.* at 559.
[150] *Id.* at 592.
[151] *See generally* Carbado & Gulati, *supra* note 17.

only have limited interactions with the institution during the interview process, it may be difficult to show how a person was not hired unless someone says or does something that is deemed discriminatory.

The third and final question that must be answered for all discriminatory claims is: "Was there intentional discrimination based on the plaintiff's membership in a protected class, such as race, gender, or disability?" So long as an employer can show nondiscriminatory reasons, this is difficult to prove. If there is evidence that hiring officials said or did something discriminatory, "fit" will be couched in nondiscriminatory language despite the candidate knowing what they experienced. Plaintiffs in most cases have to rely on circumstantial evidence of intentional discrimination, and evidence would need to illustrate the alleged discrimination similarly to the assertion made by the applicant.

Re-examining Plaintiff's Burden

In *Desert Palace, Inc. v. Costa,*[152] a unanimous United States Supreme Court concluded that the 1991 amendments to Title VII allow a plaintiff to advance a mixed- motive discrimination claim against an employer. The essence of a mixed-motive claim is that the plaintiff alleges the employer's adverse employment action is predicated on both legitimate and illegitimate motives. The decision contradicts the generally accepted presumption associated with *Price Waterhouse v. Hopkins*[153] that precludes a finding of mixed-motive discrimination if the employer could prove it would have made the same employment decision with regard to the employee in the absence of discrimination. The essence of the *Costa* decision is that a plaintiff could prevail on a Title VII claim by showing, through a preponderance of direct or circumstantial evidence, that a discriminatory purpose was a motivating factor in the challenged employment decision.

In *Costa*, the Supreme Court held that the changes in Title VII make no mention of a heightened direct-evidence requirement for a plaintiff.[154] The Court read the statute to require that a plaintiff "demonstrate that an employer used a forbidden consideration with respect to any employment practice."[155] The Court noted, "[I]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[156] The requirement for "sufficient evidence" does not contemplate the necessity for "direct evidence" and would permit a plaintiff in a Title VII action to prove discrimination on the basis of circumstantial evidence. By allowing plaintiffs to proceed with a Title VII mixed-motive discrimination claim solely on the

[152] 539 U.S. 90 (2003).
[153] 490 U.S. 228 (1989).
[154] *Id.* at 2153.
[155] *Id.* (quoting 42 U.S.C. § 2000e-2(m) (2002)).
[156] *Id.* at 2154-55.

basis of circumstantial evidence, the Court's decision in *Costa* may make it easier for plaintiffs to succeed against employers in some cases.

While this decision appears to compromise *Price Waterhouse*, *Costa* does not modify the shifting burden of proof in *McDonnell Douglas.* The decision does not change the plaintiff's ultimate burden of persuading the fact-finder that he or she was a victim of intentional discrimination. However, the plaintiff may now succeed in this proof either directly, by persuading the fact-finder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence.[157] Whether *Costa* will be interpreted by lower courts to reduce the plaintiff's ultimate burden of persuasion in Title VII cases has yet to be determined, but lower federal courts will be tasked to make that determination on a case-by-case basis.

In one such decision, *Rachid v. Jack in the Box, Inc.*,[158] the Fifth Circuit Court of Appeals applied a new analysis that leaves the initial stages of *McDonnell Douglas* intact. In this modified or merged proof structure, the plaintiff must establish a prima facie case, and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. The Fifth Circuit then proposed that a plaintiff must produce sufficient evidence to create a genuine issue of material fact either that the defendant's articulated reason was a pretext for discrimination (a pretext alternative), or that the defendant's reason is true but another motivating factor for the decision was discrimination based on a protected characteristic (a mixed-motives alternative).[159]

Conclusion

Title VII remains the principal vehicle for pursuing claims of employment discrimination involving race, religion, national origin, and gender. Particularly in cases involving disparate treatment, the shifting burden of proof applicable to Title VII claims has been adopted as the appropriate standard when pursuing claims under the provisions of other federal and state antidiscrimination laws. However, federal and state courts will continue to refine the shifting burden in response to case-by-case analyses and legislative modifications of Title VII.

Two emergent issues will occupy federal courts in the immediate future. First, judges will be compelled to determine the extent to which claims of reverse discrimination will be actionable when brought against predominantly white institutions. It should be anticipated that challenges to affirmative action hiring and promotion plans will be among the challenges brought by white males under the auspices of both Title VII and the Fourteenth Amendment's Equal Protection Clause. In a larger sense, courts must ultimately assess whether differing standards in reverse discrimination suits are constitutional under the Fourteenth Amendment. Second, the shifting burden of proof as

---

[157] Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).
[158] 376 F.3d 305 (5th Cir. 2004).
[159] *Id.* at 312.

established in *McDonnell Douglas* seems destined for revision in light of new Supreme Court decisions interpreting legislative changes to federal antidiscrimination law.

Discussion Questions

1. Title VII covers what kinds of employment discrimination?
2. What kinds of discrimination claims may employees assert against their employer?
3. How may employees assert claims against their employer for sexual orientation discrimination? How about gender identity or transgendered status discrimination? Do the laws apply the same everywhere nationally?
4. What are some of the arguments raised in cases alleging reverse discrimination?
5. Besides Title VII of the Civil Rights Act of 1964, list five other federal statutes that aim to curtail employment discrimination.