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TITLE VII AT AGE-50: STILL ROOM FOR CREATIVITY?
Developing New Defenses and Testing New Claims

Mark S. Dichter[1]
W. John Lee
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

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I. NEW SUBSTANTIVE USES OF TITLE VII

A. Sexual Orientation And Gender Identity

1. Issue: Whether Title VII prohibits discrimination on the basis of sexual orientation or gender identity.

2. Statutory Authority: Presently, Title VII does not expressly recognize sexual orientation or gender identity as a protected class.[2] In November 2013, however, the Senate passed the Employment Non-Discrimination Act (ENDA) and referred it to the House of Representatives. The law, as proposed, would expressly prohibit employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity. It is limited, however, to disparate treatment claims. It also contains an exemption for religious organizations and prohibits EEOC from compelling the collection or production of statistics on sexual orientation or gender identity. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. §§ 4, 6, 7 (2013). Speaker of the House John Boehner has said that he will not bring the bill to the floor because it "will increase frivolous litigation and cost American jobs, especially small business jobs." Jeremy W. Peters, *Bill Advances to Outlaw Discrimination*, N.Y. TIMES, Nov. 14, 2013.

3. Judicial Interpretations: Given the lack of statutory protection, courts have consistently refused to recognize claims of discrimination on the basis of sexual orientation or gender identity. *See, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) ("[T]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of sexual orientation." (citations and quotation marks omitted)); *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011) ("Under Title VII, sexual orientation is not a prohibited basis for discriminatory acts. A claim premised on sexual-orientation discrimination thus does not state a claim upon which relief may be granted." (citations and quotation marks omitted)); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.").

4. Actions by Plaintiffs: Plaintiffs have pressed claims related to sexual orientation or identify using other theories of discrimination.

   a. Claims based on same-sex harassment theory under *Oncale*:

[2] Seventeen states and Washington, D.C., however, currently have laws that prohibit employment discrimination based on sexual orientation and gender identity. Further, four states have laws that prohibit employment discrimination based on sexual orientation only. *See Statewide Employment Laws and Policies, Human Rights Campaign, available at* http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf.

(i) *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (holding that same-sex harassment claims are cognizable under Title VII, even where the conduct is not motivated by sexual desire). *Oncale* provides three evidentiary paths for plaintiffs to prove same-sex harassment claims: (1) by offering evidence that the harasser was homosexual; (2) by offering evidence that the harassment is *framed* "in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by hostility" to the presence of individuals of the same sex as him/her in the workplace; or (3) by offering direct comparative evidence to show that the harasser treated members of the other sex differently.[3] *Id.* at 80-81.

(ii) Successful same-sex harassment claims related to sexual orientation after *Oncale*:

(a) *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) (holding that gay employee subjected to harassment by other males had viable Title VII claims because "[t]hat the harasser is, or may be, motivated by hostility based on sexual orientation is . . . irrelevant" and that it is enough if the harassing conduct is "sexual in nature")

(b) *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 456-57 (5th Cir. 2013) (holding that list of evidentiary routes for proving same-sex harassment set forth in *Oncale* is not exhaustive and plaintiff could use gender stereotyping theory to prove same-sex harassment claim)

(c) *Seim*, 2011 WL 2149061, at *3-4 (allowing Title VII same-sex harassment/discrimination claim to proceed past summary judgment where plaintiff put forth evidence that discriminatory conduct was on the basis of his perceived sexual orientation by other males)

[3] Circuit courts have uniformly held that this list of evidentiary routes is not exhaustive. *See, e.g.*, *Seim v. Three Eagles Commc'ns, Inc.*, No. 09-CV-3071-DEO, 2011 WL 2149061, at *3-4 (N.D. Iowa June 1, 2011) ("Every circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature.").

(iii) Unsuccessful same-sex harassment claims related to sexual orientation after *Oncale*:

(a) *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (granting employer's summary judgment motion on same-sex harassment claim because plaintiff only showed that harassment was because of his sexual orientation, not because of his sex)

(b) *King v. Super Serv., Inc.*, 68 F. App'x 659, 663-64 (6th Cir. 2003) (holding that same-sex bullying related to plaintiff's sexual orientation, and bullies' perceived belief that plaintiff wanted to perform oral sex on them was not "because of sex" because plaintiff failed to put forth the type of necessary evidence described in *Oncale*)

b. Claims based on gender-stereotyping theory under *Price Waterhouse v. Hopkins*

(i) *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII prohibits discrimination on basis of failure to conform with traditional gender stereotypes because "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" (citation and quotation marks omitted))

(ii) Successful gender-stereotyping claims related to sexual orientation after *Price Waterhouse*:

(a) *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that male plaintiff who was subjected to homophobic comments such as "faggot" and "female whore" had viable hostile work environment claim under theory that harassment arose out of co-workers' belief that he "did not act as a man should act" and "did not conform to their gender-based stereotypes")

(b) *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (noting, in dicta, that transgender plaintiff terminated "based on the sheer fact of the transition" would have viable Title VII claim because the termination was on basis of plaintiff's

failure to conform to an employer's gender stereotypes)

(iii) Unsuccessful gender-stereotyping claims related to sexual orientation after *Price Waterhouse*:

(a) *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (recognizing that plaintiffs should not be able to bootstrap claims for sexual orientation discrimination by tying them to gender-stereotyping claims)

(b) *Kiley v. Am. Soc'y for Prevention of Cruelty to Animals*, 296 F. App'x 107, 109 (2d Cir. 2008) ("[A] plaintiff may not use a gender stereotyping claim to bootstrap protection for sexual orientation into Title VII." (citations and quotation marks omitted))

5. EEOC Guidance:

a. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012) (declaring EEOC position that a claim of "discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII")

b. EEOC extended the sex stereotyping theory set forth in *Price Waterhouse* to reach the conclusion that any time discrimination occurs based on someone's being transgender, that discrimination is always "because of sex" under Title VII.

6. Conclusion: As currently enacted, Title VII does not expressly prohibit discrimination on the basis of sexual orientation or gender identity, and courts should continue to interpret the statute by its terms. Congress should determine the contours of any amendment to Title VII that creates new protected classes, and is currently doing so in considering ENDA. Still, employers should be mindful of state laws that prohibit discrimination on the basis of sexual orientation or gender identity as well as creative Title VII claims such as those described above based on *Oncale* or *Price Waterhouse*-like theories.

B. Definition Of "Religion" Under Title VII

1. Issue: How courts should apply the definition of "religion" under Title VII in light of the increasing diversity of religious beliefs in America.

2. Statutory Authority: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer

demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-(j).

3. EEOC Guidance: "Although there is usually no reason to question whether the practice at issue is religious or sincerely held, if the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation." EEOC Questions and Answers: Religious Discrimination in the Workplace, *available at* http://www.eeoc.gov/policy/docs/qanda_religion.html.

4. Leading Caselaw: The caselaw on what constitutes a religion under Title VII borrows the definition of "religion" set forth by two U.S. Supreme Court cases involving conscientious objectors to the military draft. *See Welsh v. United States*, 398 U.S. 333, 339 (1970) (citing *United States v. Seeger*, 380 U.S. 163, 176 (1965) ("The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition [of religion].")).

   a. EEOC expressly adopted the definitions set forth in *Seeger* and *Welsh* in crafting its definition of religion under Title VII. *See* 29 C.F.R. § 1605.1 (2005) ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970).").

5. Judicial Inquiry into Validity of Religious Belief or Practice:

   a. Courts are generally hesitant to inquire into the validity of a religious belief or practice. *See, e.g., Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993) (citing *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953)) ("[I]t is no business of courts to say . . . what is religious practice or activity.").

   b. *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978) (treating as religious, without analysis, plaintiff's belief that members of the Seventh-Day Adventist Church should not contribute to labor organizations)

c. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir. 1988) (treating atheism as a "religion" without analysis or dispute from employer)

d. *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, No. 1:11-CV-00917, 2012 WL 6721098, at *4 (S.D. Ohio Dec. 27, 2012) (finding that veganism could be protected religious belief under Title VII where the belief is "sincerely held with the strength of traditional religious views")

e. *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918, 929 (W.D. Tenn. 2010) (treating plaintiff's desire to have entire day off for Easter as a protected religious activity because "it is no business of courts to say . . . what is religious practice or activity")

f. *Favero v. Huntsville Indep. Sch. Dist.*, 939 F. Supp. 1281, 1286 (S.D. Tex. 1996) (treating as religious, without analysis, plaintiff's beliefs stemming from membership in the Worldwide Church of God requiring plaintiff to take a leave of absence from work for five to eight consecutive workdays to attend annual feast)

6. Judicial Inquiry into Whether Religious Belief or Practice is Sincerely Held:

a. *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) (holding that factfinder could inquire into sincerity of plaintiff's belief in the Seventh-Day Adventist faith's opposition to union membership "because the sincerity of an employee's religious belief [is a] quintessential fact question")

b. *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (rejecting plaintiff's claim that his personal religious creed that a certain cat food brand was contributing to his well-being was a "religion" under Title VII because "the 'religious' nature of a belief depends on (1) whether the belief is based on a theory of man's nature or his place in the Universe, (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere" (citations and quotation marks omitted))

c. *Slater v. King Soopers, Inc.*, 809 F. Supp. 809, 810 (D. Colo. 1992) (rejecting claim that white supremacist ideology and Ku Klux Klan membership constituted "religion" under Title VII because those beliefs were "political and social in nature")

d. *Peterson v. Wilmur Commc'ns, Inc.*, 205 F. Supp. 2d 1014, 1021 (E.D. Wis. 2002) (holding that a belief system whose central tenet was white supremacy was a religion for Title VII purposes because

the belief system "function[ed] as [a] religion in the life of the individual before the court" and "occup[ied] the same place in the life of the [individual] as an orthodox belief in God holds in the life of one clearly qualified," and because "courts must give great weight to the plaintiff's own characterization of his or her beliefs as religious" (citations and quotation marks omitted))

7. Conclusion: Courts should carefully analyze whether a purported belief is sincerely held by the plaintiff to avoid abuse of the broad definition of "religion" that courts have developed under Title VII in light of First Amendment considerations. The facts in *Brown v. Pena*, discussed above, highlight the potential for abuse of the broad definition of "religion," and scrutiny of whether such a belief is sincerely held can monitor these situations.

C. Employer's Duty To Reasonably Accommodate Religious Beliefs

1. Issue: How courts should analyze an employer's duty to reasonably accommodate an employee's religious beliefs or practices under Title VII.

2. Statutory Authority: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-(j).

3. EEOC Regulation: "After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship." 29 C.F.R. § 1605.2(c)(1).

4. Leading Caselaw: *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that to require employer "to bear more than a *de minimis* cost" is an undue hardship in the context of religious accommodation and thus airline employer was not required to give an employee Saturdays off to observe his Sabbath); *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986) ("[W]here the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship.")

5. Cases Finding Employer Met Duty to Accommodate or Proposed Accommodation Would Impose Undue Hardship:

a. *Webb v. City of Phila.*, 562 F.3d 256, 260 (3d Cir. 2009) (holding that requiring city to permit a Muslim police officer to wear religious hijab (head scarf) with her uniform would place an undue hardship on the city and noting that "*Hardison* strongly suggests that the undue hardship test is not a difficult threshold to pass")

b. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1128 (10th Cir. 2013), *reh'g en banc denied* (Feb. 26, 2014) (holding that employer had no duty to accommodate Muslim applicant's desire to wear hijab (in contravention of company's "Look Policy") because applicant never directly informed employer that she would need the accommodation, and thus the duty to accommodate was never triggered)

c. *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (holding that employee's proposal for accommodation would impose undue hardship where proposal would either put employer at risk of violating state safety code or impose more than a *de minimis* burden on coworkers)

d. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999) (holding that requiring employer to accommodate employee's refusal to provide his Social Security number on grounds that doing so would violate his religion would impose undue hardship because employer was required by federal law to obtain Social Security number before hiring and stating that "an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law")

e. *EEOC v. Kelly Servs., Inc.*, 598 F.3d 1022, 1032 n.9 (8th Cir. 2010) (holding that temp agency's decision to not refer employee to client who had facially neutral, safety-driven dress policy prohibiting all employees and temps from wearing headwear of any kind was nondiscriminatory because "[s]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business" (citations and quotation marks omitted))

f. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (holding that employer was not required to accommodate employee's desire to express his "devout Christian" beliefs in the form of posting anti-gay messages in his cubicle because "an employer need not accommodate an employee's religious belief if

doing so would result in discrimination against his co-workers" and because "Title VII [does not] require an employer to accommodate an employee's desire to impose his religious beliefs on his co-workers")

g. *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011) (holding that employer was not required to permit employee to admonish gays as a religious accommodation because "such an accommodation would place Wal-Mart on the 'razor's edge' of liability by exposing it to claims of permitting workplace harassment")

h. *EEOC v. Oak-Rite Mfg. Corp.*, No. IP 99-1962-C H/G, 2001 WL 1168156, at *14 (S.D. Ind. Aug. 27, 2001) (holding that requiring employer to accept employee's proposed accommodation of wearing specific type of skirt, in violation of employer's pants-only safety policy, would impose undue hardship by "increasing the risk of injury to its employees, as well as by increasing the risk of legal liability for such injuries through worker's compensation")

6. Cases Finding Employer did not Meet Duty to Accommodate:

a. *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 11-CV-03162-YGR, 2013 WL 4726137, at *11 (N.D. Cal. Sept. 3, 2013) (rejecting undue hardship defense where Abercrombie failed to provide more than generalized subjective beliefs that permitting an employee to wear hijab would negatively affect the company's sales or brand)

b. *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 451 (7th Cir. 1981) (finding that employee who objected to paying union dues because of religious beliefs but proposed to instead pay fees to charity had created genuine issue of material fact as to whether the proposed accommodation was reasonable)

c. *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1053 (9th Cir. 1999) (clarifying that mere presence of a bona fide seniority system is not a defense to a religious discrimination claim if reasonable accommodation can be made without impact on the seniority system and with no more than a *de minimis* cost to employer)

d. *Dixon v. The Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) (finding triable issues of fact on issue of whether employer could have reasonably accommodated, without undue hardship, employees who were terminated for refusing to remove religious artwork from their offices)

7. Conclusion: Courts should continue to apply the *de minimis* standard in the reasonable accommodation analysis, as this standard appropriately balances the broad definition of "religion" described above. A more demanding accommodation standard would place hardship on employers, as it may invite more requests for accommodations based on a wide variety of purported religious beliefs that could be disruptive to the workplace.

D. "Reverse" Discrimination Claims And "Background Circumstances"

1. Issue: Whether courts should require white plaintiffs to put forth additional "background circumstances" evidence to prove "reverse" discrimination claims under Title VII.

2. Statutory Authority: Title VII prohibits employment discrimination on account of an individual's race, and does not distinguish between majority and minority races. 42 U.S.C. § 2000e-2(a)(1), (2).

3. Leading Caselaw: The Supreme Court held that Title VII prohibits discrimination against members of a majority class under the same standard as it prohibits discrimination against members of a minority protected class. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976) ("We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes.").

4. Judicial Interpretations: The Circuit Courts are split as to whether a white plaintiff must offer any additional evidence to satisfy the first element of the *McDonnell Douglas* framework (i.e., whether the plaintiff belongs to a racial minority).

   a. The D.C., Sixth, Seventh, Eighth, and Tenth Circuits require white plaintiffs to show "background circumstances" to present a *prima facie* case. *See Parker v. Balt. & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981) (explaining that in lieu of showing that he belongs to a racial minority, a white plaintiff relying on the *McDonnell Douglas* framework must show that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority"); *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 837 (6th Cir. 2012), *reh'g denied* (Apr. 6, 2012) (same); *Good v. Univ. of Chi. Med. Ctr.*, 673 F.3d 670, 678 (7th Cir. 2012) (same); *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997), *abrogated on other grounds* (same); *Stover v. Martinez*, 382 F.3d 1064, 1076 (10th Cir. 2004) (same).

   b. The Third, Fifth, and Eleventh Circuits, however, have rejected the background circumstances approach. *See Iadimarco v. Runyon*,

190 F.3d 151, 160-61 (3d Cir. 1999) (rejecting the background circumstances test because, *inter alia*, it requires employees to initially present proof that would otherwise only become relevant to rebut the employer's explanation of the challenged conduct); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 426 (5th Cir. 2000) (holding that reverse discrimination plaintiff need only show that he is a member of a "protected group," and that whites are a protected group); *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1325 n.15 (11th Cir. 2011) ("We, however, have rejected a background circumstances requirement.").

5. Conclusion: Courts should apply the background circumstances test in evaluating reverse discrimination claims.

E. "Reverse" Discrimination Challenges To Employer Diversity And Affirmative Action Efforts

1. Issue: How courts should handle reverse discrimination challenges to employers' remedial efforts to avoid disparate impact claims. The majority of these challenges to date have arisen in the public sector.

2. EEOC Regulation: "The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to [T]itle VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of [T]itle VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in [T]itle VII." 29 C.F.R. § 1608.1(c).

3. Leading Caselaw: *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (holding that where a facially neutral employment test creates results having disparate impact on protected class, employer must be able to show "strong basis in evidence to believe it will be subject to disparate-impact liability" before taking a race-conscious action to address adverse impact of test)

4. Judicial Interpretations Following *Ricci*: After *Ricci*, employers may still take race-conscious remedial action to address potential disparate impact claims, but must put forth evidence satisfying *Ricci*'s "strong basis in evidence" standard.

   a. *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 95 (2d Cir.), *cert. denied*, 134 S. Ct. 119 (2013) (rejecting claim of white police officer that city violated Title VII when it decided to vacate

results of promotion examination and not promote him, despite his having highest score on that exam, because under *Ricci* employer is still permitted to generally overhaul its promotion criterion)[4]

b. *Hofmann v. City & Cnty. of S.F.*, No. 11-4016 CW, 2013 WL 6734091, at *4 (N.D. Cal. Dec. 20, 2013) (denying city's summary judgment motion where evidence showed that city abandoned its initial method of applying test results in its promotion process and did not put forth any legitimate nondiscriminatory reason for changing to new method)[5]

5. Conclusion: Most employers will want to avoid taking remedial actions based on protected characteristics that will be subject to *Ricci*'s "strong basis in evidence" test. Rather, employers should consider alternative, race-neutral and gender-neutral measures for remedying adverse impact, such as developing a multiple regression compensation model that does not account for the protected characteristics of employees and using statistical analyses to conduct a targeted review of individual employment decisions.

F. Pregnancy Discrimination

1. Issue: Both EEOC and the private plaintiffs' bar have shown an increased focus on pregnancy discrimination claims.

2. Statutory Authority: Title VII was amended to include the following language: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or

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[4] In *Maraschiello*, the plaintiff officer had received the highest score on the city's promotion exam in effect at the time the position became vacant. 709 F.3d at 88. At that time, however, the city was in the process of overhauling its testing procedures because of concerns that the current exam was having a disparate impact on minorities. Before the position became vacant, the plaintiff declined the opportunity to take the new test. *Id.* at 94-95. On this basis the court distinguished this case from *Ricci*: "Maraschiello cannot demonstrate that the generalized overhaul of departmental promotional requirements amounted to the sort of race-based adverse action discussed in *Ricci*. Indeed, *Ricci* specifically permits an employer to 'consider[ ], before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of race.'" *Id.* at 96 (citing *Ricci*, 557 U.S. at 585).

[5] In *Hofmann*, although the city argued that the decision to switch methods was not racially motivated, it did not put forth a legitimate nondiscriminatory reason (i.e., a strong basis in evidence under *Ricci*) for the decision. The court, therefore, found that plaintiffs' evidence that the decision was racially motivated to increase the pool of minority candidates eligible for promotion was sufficient to survive summary judgment.

inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise." 29 U.S.C. § 2000e-(k).

3. EEOC Guidance and Statements: EEOC's most recent Strategic Enforcement Plan identified "accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act and the Pregnancy Discrimination Act" as an "emerging [and] developing issue." EEOC Strategic Enforcement Plan 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm; *see also* Press Release, EEOC, Reed Pierce's Pays $20,000 to Settle EEOC Pregnancy Discrimination Suit (Feb. 14, 2013), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/2-14-13.cfm ("This case is just one example of the widespread problem of pregnancy discrimination in the workplace. . . . The EEOC stands poised to target these violations in court.").

4. Recent Successful Claims of Pregnancy Discrimination:

   a. *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 428, 430 (5th Cir. 2013) (holding that EEOC established *prima facie* case of pregnancy discrimination where it alleged employee was fired because she was lactating and wanted to express milk at work because "lactation is a related medical condition of pregnancy for purposes of [Title VII]")

   b. *Brown v. YRC, Inc.*, 490 F. App'x 952, 958 (10th Cir. 2012) (reversing the district court's grant of judgment as a matter of law in favor of YRC, concluding that inadequate performance was pretext for pregnancy discrimination based on evidence of positive employment assessments put forth by the terminated employee)

   c. *E.E.O.C. v. WW Grp., Inc.*, No. 12-11124, 2013 WL 6230095, at *12 (E.D. Mich. Dec. 2, 2013) (finding that Weight Watchers failure to hire pregnant woman for group leader position because woman did not meet the company's "goal weight" for that position presented genuine issue of material fact as to whether the "goal weight" policy was truly a *bona fide* occupational qualification)

5. Recent Unsuccessful Claims of Pregnancy Discrimination:

   a. *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 470-71 (S.D.N.Y. 2011) (dismissing, on summary judgment, EEOC's pattern or practice claim alleging that company discriminated against women who were pregnant and took maternity leave because EEOC relied solely on anecdotal evidence and did not present statistical evidence, an explicit discriminatory policy, or evidence of an "inexorable zero" to support claim of discrimination)

b. *EEOC v. CTI Global Solutions, Inc.*, 815 F. Supp. 2d 897, 911 (D. Md. 2011) (denying EEOC's motion for summary judgment on claim that female employee was removed from project because of pregnancy because employer put forth evidence that she was actually removed because of her inability to perform the lifting and climbing functions of the position)

c. *EEOC v. Decker Transp. Co.*, No. 09-13116, 2011 WL 1792763, at *3 (E.D. Mich. May 11, 2011) (granting employer's motion for summary judgment where EEOC alleged that employer refused to let pregnant driver return from medical leave even after she provided letter from physician saying she should be cleared from medical hold because employer put forth evidence that all drivers were subjected to the same stringent, nondiscriminatory medical clearance policy)

6. Conclusion: Though EEOC and the plaintiffs' bar have demonstrated an increasing interest in pregnancy discrimination claims, courts have rightfully required plaintiffs to put forth more evidence than the mere fact that they were pregnant and subjected to an adverse employment action.

II. NEW PROCEDURAL ISSUES IN TITLE VII ACTIONS BROUGHT BY EEOC

A. EEOC's Subpoena Power

1. Issue: The appropriate scope of EEOC's subpoena power, and the extent to which courts should limit this scope.

2. Statutory Authority: "In connection with any investigation of a charge filed under 2000e-5 of this title, the Commission . . . shall at all reasonable times have access to, for purposes of examination, and the right to copy evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." 29 U.S.C. § 2000e-8(a); *see also* 29 C.F.R. § 1601.16(a) ("To effectuate the purposes of Title VII . . . any member of the Commission shall have the authority to sign and issue a subpoena requiring: (1) The attendance and testimony of witnesses; (2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and (3) Access to evidence for the purposes of examination and the right to copy.").

3. Leading Caselaw: *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) ("[T]he Commission is entitled to access only to evidence 'relevant' to the charge under investigation. That limitation on the Commission's investigative authority is not especially constraining. . . . [C]ourts have generously construed the term "relevant" and have afforded the

Commission access to virtually any material that might cast light on the allegations against the employer. . . . On the other hand, Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders it a nullity.").

4. Recent Cases Supporting Broad Application of EEOC Subpoena Power:

a. *EEOC v. Aerotek, Inc.*, 498 F. App'x 645, 647 (7th Cir. 2013), *reh'g denied* (Mar. 12, 2013) (holding that employer waived its right to challenge enforcement of subpoena by not timely filing its petition within five business days as provided in 29 C.F.R. § 1601.16)

(i) Aerotek argued that the subpoena demanded irrelevant information because it sought seventeen categories of documents from six of Aerotek's facilities, yet the charge had claims by only two individual plaintiffs. The Seventh Circuit did not reach the merits of the relevance argument, but did mention that the requirement that the employer challenge enforcement within five days is particularly important where the objection is based on "relevance or particularity."

(ii) EEOC has used this decision to discourage employers from challenging subpoenas: "The EEOC consistently prevails in court with its subpoena enforcement actions. Prudent and penny-wise employers should consider using subpoenas as an opportunity to show the government that they complied with EEO laws and produce the material they have, in lieu of expending resources to delay the investigation. Courts, as the Seventh Circuit did here, defer to [] EEOC's determination as to what should be investigated." Comments of EEOC Regional Attorney John Hendrickson, Press Release, Equal Employment Opportunity Commission, Aerotek Required by Federal Appeals Court to Comply with EEOC Subpoena (Jan. 13, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-16-13.cfm.

b. *EEOC v. Kronos Inc.*, 694 F.3d 351, 364 (3d Cir. 2012), as amended (Nov. 15, 2012) (holding, in ADA context, that EEOC could enforce subpoena issued to nonparty where defendant employer purchased employment tests from nonparty and used those tests as part of its hiring practices because EEOC had to prove that tests did not relate to the position at issue and was not consistent with business necessity, and thus it is "a proper inquiry

for the EEOC to seek information about how these tests work, including information about the type of characteristics they screen out and how those characteristics relate to the applicant's ability to fulfill his or her duties for the prospective position")

c. *EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc.*, 639 F.3d 366, 369 (7th Cir. 2011) (enforcing, over employer's relevance objections, EEOC subpoena seeking information about employer's hiring practices where EEOC did not allege hiring discrimination but rather only alleged that black employee was treated differently in terms and conditions of employment because "information regarding employer's hiring practices will 'cast light' on [employee's] race discrimination complaint")

d. *EEOC v. Schwan's Home Serv.*, 644 F.3d 742 (8th Cir. 2011) (finding that even if female employee's systemic gender discrimination charge were invalid, EEOC was still within its authority to issue subpoena seeking information relevant to systemic discrimination claim because EEOC's investigation of individual claim revealed potential systemic gender discrimination claim)

5. Recent Cases Limiting EEOC Subpoena Enforcement Power:

a. *EEOC v. HomeNurse, Inc.*, No. 1:13-CV-02927-TWT, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013) (quashing EEOC subpoena because subpoena sought information relating to companywide disability, age, race, and genetic discrimination but the charging party was not disabled, under age forty, or Caucasian, and had no pre-existing genetic condition)[6]

b. *EEOC v. Sterling Jewelers Inc.*, No. 11-CV-00938, 2013 U.S. Dist. LEXIS 141489, at *20-21 (W.D.N.Y. Sept. 23, 2013) (declining to enforce, in part, EEOC subpoena because it was overly broad and sought irrelevant documents where EEOC purported to seek only information that might shed light on company's policy against discussing pay, but subpoena actually sought information relating to all violations of the company's code of conduct (citations and quotation marks omitted))

[6] The court in *HomeNurse* also harshly admonished EEOC's tactics in conducting the investigation: "The EEOC launched its investigation of the Charge in May 2010 by conducting a raid on [the employer's office] as if it were the FBI executing a criminal search warrant. The EEOC showed up unannounced with subpoenas in hand, intimidated the staff of that small office, and began rifling through [the employer's] confidential personnel and patient files." 2013 WL 5779046 at *1 (citations omitted).

c. *EEOC v. McLane Co.*, No. CV-12-02469-PHX-GMS, 2012 WL 5868959, at *4-5 (D. Ariz. Nov. 19, 2012) (appeal filed, No. 13-15136 (9th Cir. June 3, 2013)) (declining to enforce EEOC subpoena seeking personal information of every individual who took employer's physical capacity exam that allegedly had discriminatory impact on disabled individuals because (i) charging party was not disabled, and thus not an aggrieved party, so EEOC had no jurisdiction to investigate and (ii) information sought was irrelevant to the gender discrimination claims over which EEOC did have jurisdiction)

d. *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) (holding, in ADA context, that EEOC cannot seek "plenary" discovery to the point of seeking information regarding how employer keeps track of every current and former employee across the country for purposes of creating a "carefully-tailored request . . . for substantive information [of pattern or practice discrimination]" where the actual EEOC charge focuses only on individual claims and makes no mention of pattern or practice claims)

6. Conclusion: Courts should limit EEOC's subpoena power to the factual allegations contained in the charges so that EEOC may not use its investigative powers as a "fishing expedition." Still, courts generally grant EEOC substantial discretion with respect to its subpoena power. Accordingly, employers should attempt to negotiate with EEOC to narrow the scope of subpoenas rather than challenging EEOC's powers outright. Although the existence of a charge of discrimination is confidential, a subpoena enforcement action makes the charge and its allegations public.

B. EEOC's Duty To Conciliate

1. Issue: Whether courts can review EEOC's presuit conciliation efforts.

2. Statutory Authority: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b).

3. EEOC Regulation: "Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such

practice by informal methods of conference, conciliation and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief." 29 C.F.R. § 1601.24.

4. EEOC Position: "Title VII certainly does not authorize judicial review of conciliation; indeed, it precludes review. Title VII commits the pre-suit conciliation process to the EEOC's discretion alone. . . . Judicial review of conciliation not only delays and diverts the court from the central question before it—whether an employer has engaged in discrimination—but it also undermines the conciliation process itself by destroying the confidentiality necessary for effective conciliation and by encouraging employers to treat conciliation not as a forum to resolve disputes but as an opportunity to collect defenses for a larger fight to come." Brief for Plaintiff-Appellant EEOC at i, ii, No. 13-24655 (7th Cir. July 31, 2013).

5. Judicial Interpretation of EEOC's Duty to Conciliate: There is significant variation among the circuits as to the appropriate standard for evaluating EEOC's conciliation efforts.

   a. The Second, Fifth, Eighth, and Eleventh Circuits all require EEOC to give employers a meaningful opportunity to conciliate and, in some instances, courts in these circuits have gone as far as to dismiss suits where EEOC did not meet that duty. In these Circuits, to fulfill its duty to conciliate, EEOC must (1) outline to the employer the reasonable cause for its belief that the employer is in violation of the law (2) offer an opportunity for voluntary compliance, and (3) respond in a reasonable and flexible manner to the reasonable attitude of the employer. *See, e.g.*, *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996).

      (i) *Johnson & Higgins, Inc.*, 91 F.3d at 1535 (holding, in ADEA context, that EEOC satisfied its duty to conciliate, but only after finding that EEOC notified employer it had reasonable cause to believe that mandatory retirement policy violated the ADEA and invited employer to effect voluntary compliance through informal methods of conciliation, but employer maintained that its policy did not violate law and refused to accommodate EEOC's repeated requests for information about salaries of retired directors to negotiate question of damages)

      (ii) *EEOC v. Bloomberg L.P.*, No. 07 CIV. 8383 LAP, 2013 WL 4799150, at *8 (S.D.N.Y. Sept. 9, 2013) (granting summary judgment for failure to satisfy conciliation duties

of EEOC's discrimination and retaliation claims on behalf of nonintervening claimants because employer offered to discuss cases of any identified individuals that EEOC believed may have legitimate grievances, but EEOC refused to identify the names or request contact information of any of the nonintervening claimants)

(iii) *EEOC v. Agro Distribution*, LLC, 555 F.3d 462, 469 (5th Cir. 2009) (district court correctly concluded that EEOC did not conciliate in good faith where EEOC repeatedly failed to communicate with or respond to employer in a reasonable and flexible manner and made a "take-it-or-leave-it demand for more than $150,000 [that] represents the coercive, 'all-or-nothing' approach previously condemned by this court" (quotation marks omitted))

(iv) *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676 (8th Cir. 2012) (affirming summary judgment dismissal for EEOC's failure to conciliate where EEOC failed to *investigate and identify names* of class members and size of class during conciliation and thus denied employer meaningful opportunity to conciliate)

(v) *EEOC v. Asplundh Tree Expert Co*., 340 F.3d 1256, 1260 (11th Cir. 2003) (affirming dismissal of suit and awarding of attorneys' fees to employer where EEOC failed to identify any theory of liability, quickly rejected employer's good-faith efforts to resolve dispute, and rushed into court, because EEOC's conduct "smacks more of coercion than of conciliation" (citation and quotation marks omitted))

b. The Fourth and Sixth Circuits are much more deferential to EEOC with respect to its conciliation efforts.

(i) *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.")

(ii) *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (EEOC met conciliation duty because "[t]he law requires . . . no more than a good faith attempt at conciliation" and EEOC met this requirement by sending employer invitation to conciliate, travelling to employer's

facility to meet and discuss the charges and, three months after meeting at employer's facility, suggesting another meeting to discuss the feasibility of a settlement")

c. The Tenth Circuit has not articulated a clear standard, but appears to at least require a "sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements." The Tenth Circuit, however, will be much more deferential to EEOC where the employer does not meaningfully engage in the conciliation process.

(i) *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985) (EEOC must make "a sincere and reasonable effort to negotiate" but also finding that dismissal would be particularly inappropriate where employer "made no meaningful response")

d. The Seventh Circuit, most recently, significantly diverged from these standards when it held that EEOC's conciliation efforts are not judicially reviewable and, therefore, there is no good-faith requirement.

(i) *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 183 (7th Cir. 2013) ("[W]e see no reason to import a judicially reviewable requirement of good faith into the informal and confidential process of conciliation when the statute does not require it.")

(ii) The Seventh Circuit recognized that its decision created a circuit split (or, at the very least, complicated an already existing circuit split): "Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split." *Id.* at 182.

6. Conclusion: Courts should review EEOC's presuit conciliation efforts under the standard adopted by the Second, Fifth, Eighth, and Eleventh Circuits. Courts should recognize the distinction between EEOC's taking an aggressive position regarding its settlement demands and impermissibly failing to provide sufficient information during conciliation to support the basis for its position or making only a take-it-or-leave-it demand. Employers can most effectively benefit from the conciliation process by substantively engaging in the process, such as by inquiring into the basis

of EEOC's demand, the relationship between the charge and the demand, and, in systemic matters, the scope of the putative class. This will better position any challenges to EEOC's conciliation efforts, as opposed to directly challenging the demand itself or the length of time that EEOC spent conciliating. Because Title VII provides that the conciliation process should be confidential, there is an advantage to employers for settling at the conciliation stage.

C. Statute Of Limitations For Pattern or Practice Claims Brought by EEOC

1. Issue: Whether the limitations period set forth in Section 706(e) of Title VII applies to Section 707 pattern or practice claims brought by EEOC.

2. Statutory Provisions:

   a. Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5, expressly provides a statute of limitations for all charges filed under that section: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred."

   b. Section 707, 42 U.S.C. § 2000e-6, which permits EEOC to bring "pattern or practice" cases, provides no express statute of limitations. EEOC has argued that this absence indicates that Congress did not intend to impose a statute of limitations on charges filed by EEOC. Employers, however, argue that Section 707(e) incorporates Section 706's statute of limitations by its provision that all Section 707 claims "shall be conducted in accordance with the procedures set forth in [Section 706]," and thus the statute of limitations also applies to charges filed by EEOC.

3. Leading Caselaw: No federal circuit court has addressed this issue, and there is a significant split of authority in the district courts that have faced the question. *See EEOC v. U.S. Steel Corp.*, No. CIV.A. 10-1284, 2012 WL 3017869, at *5 (W.D. Pa. July 23, 2012) (noting that no circuit court has addressed the issue yet and citing cases illustrating the split in authority in district court decisions).

a. Recently, several district courts have held that the Section 706 statute of limitations applies to Section 707 claims. *See, e.g.*, *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 523 (S.D. Tex. 2012) (holding that EEOC is bound by 300-day limitation period and noting that "[i]f Congress intended to make an exception for the EEOC to revive stale claims under Section 706 and 707, it should have said so" (citations omitted)); *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 623 (N.D. Ohio 2011) (holding that 300-day limitation period is applicable to claims brought by EEOC and that "[n]o exception exists in the statute allowing the EEOC to recover damages for individuals whose claims are otherwise time-barred").

b. Other district courts, however, have held that the Section 706 statute of limitations is inapplicable to claims brought by EEOC. *See, e.g.*, *EEOC v. Sterling Jewelers, Inc.*, No. 08-CV-706, 2010 WL 86376, at *6 (W.D.N.Y. Jan. 6, 2010) (holding that 300-day limitation is not applicable to claims brought by EEOC because "a suit by EEOC is not confined to claims typified by those of the charging party. . . . The charge incites the investigation, but if the investigation turns up additional violations the Commission can add them to the suit." (citations omitted)); *EEOC v. Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1022 (N.D. Ill. 2009) ("The failure of individual class members to file timely charges of harassment does not prevent the EEOC from seeking monetary damages on their behalf.").

4. Conclusion: The limitations period set forth in Section 707 should apply to pattern or practice claims brought by EEOC. The text of Title VII does not permit EEOC to recover on behalf of individuals who themselves have stale claims, and expressly provides that Section 707 claims "shall be conducted in accordance with the procedures set forth in" Section 706, including the limitations period.

III. RECENT TITLE VII LITIGATION TRENDS

A. Plaintiffs Continue to Press Title VII Class Action Claims After *Dukes* and *Comcast*

1. Issue: Many commentators opined that the Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) and in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (U.S. 2013) signaled the end of employment discrimination class actions. The plaintiffs' bar has continued to pursue Title VII claims on a class action basis even after the *Dukes* and *Comcast* decisions. Although some courts have denied certification based on these precedents, other courts have distinguished them to permit plaintiffs to pursue Title VII claims on a classwide basis.

2. Key Holdings from *Dukes*:

   a. Federal Rule of Civil Procedure 23(a) commonality: plaintiffs must identify a common question that is capable of classwide resolution, meaning that "determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." The *Dukes* court explained that commonality in the Title VII context can be shown by either (1) a uniform biased testing procedure or (2) "significant proof" that an employer operated under a general policy of discrimination.

   b. Rule 23(b)(2): plaintiffs' claims for individualized relief, such as backpay, could not be certified under Rule 23(b)(2) and, instead, must be certified under Rule 23(b)(3). The *Dukes* court further rejected the Ninth Circuit's "trial-by formula" approach to calculating backpay as it would impermissibly prevent Wal-Mart from litigating individual defenses.

3. Key Holdings from *Comcast*:

   a. Rule 23(b)(3): plaintiffs failed to establish the predominance requirement of Rule 23(b)(3) because individualized damages questions would predominate over any question where plaintiffs' damages model failed to show that damages were capable of measurement on a classwide basis, and plaintiffs failed to demonstrate a link between their damages model and their liability theory.

4. Cases in Which Courts have Rejected Certification of Title VII Claims Based on *Dukes*:

   a. *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 980, 987 (9th Cir. 2011) (vacating district court's grant of class certification of Title VII claims and instructing district court to apply *Dukes*' "rigorous analysis" standard of each factor under Rule. 23(a) and determine whether monetary relief could be granted on a classwide basis, without having to make individualized determinations as to each employee's eligibility). As discussed below, despite the Ninth Circuit's decision, the district court on remand certified the class.

   b. *Bolden v. Walsh Const. Co.*, 688 F.3d 893, 898 (7th Cir. 2012) (overturning class certification and holding that alleged policies that delegated discretion to supervisors were insufficient to establish commonality, and stating, "*Wal-Mart* tells us that local discretion cannot support a companywide class no matter how cleverly lawyers may try to repackage local variability as uniformity")

c. *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 121 (S.D.N.Y. 2012) (holding that *Dukes* strips former employees of standing to seek injunctive/declaratory relief under Title VII on a classwide basis)

5. Cases in Which Courts Have Certified Title VII Claims After *Dukes*:

a. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490, 492 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (2012) (applying Rule 23(c)(4) issue certification and holding that liability question of whether company's teaming and account distribution policies for financial advisors had disparate impact was appropriate for class treatment and distinguishing *Dukes* on the basis that plaintiffs in *McReynolds* had pointed to decision by upper management to issue a companywide policy that gave nonmanagerial employees (brokers and financial advisors) the discretion to form teams, in contrast to *Dukes*, which involved the delegation of discretion to local managers nationwide). Notably, after the court certified a class only on Rule 23(b)(2) grounds for only liability and injunctive relief (and not damages), this ruling led to a $160 million settlement, one of the largest ever in the context of a Title VII race case. *See* Final Approval Order, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-C-6583 (N.D. Ill. Nov. 21, 2013).

b. *Ellis v. Costco Wholesale Corp*., 285 F.R.D. 492, 544 (N.D. Cal. 2012), *appeal dismissed* (Jan. 16, 2013) (holding on remand from Ninth Circuit that class certification is appropriate under a "hybrid" approach whereby the class claims for issues of liability, injunctive relief, and punitive damages could be certified at this stage, and individual claims for monetary damages, if any, could be resolved on an individualized basis at a later stage, and distinguishing *Dukes* on grounds that the *Ellis* class was smaller and involved only two positions, and that plaintiffs challenged specific Costco policies)

6. Conclusion: Although *Dukes* and *Comcast* provide employers with a stronger basis to oppose class certification of Title VII claims than before those decisions, the plaintiffs' bar continues to press these claims and courts have certified class actions by distinguishing *Dukes* or by using Rule 23(c)(4) issue certification. In addition, EEOC, which is not subject to Rule 23 in pursuing pattern or practice claims, has placed a priority on systemic matters in its Strategic Enforcement Plan. Courts have yet to address the extent to which the principles in *Dukes* and *Comcast* should apply to EEOC litigation. The controlling principle should be whether proof of the named plaintiffs' or charging parties' claims will prove claims of the entire class or those alleged to be "similarly situated."

B. Renewed Focus On Disparate Impact Claims

1. Issue: There has been a renewed focus on disparate impact class action claims, particularly in the class action context after *Dukes*, and courts are split as to whether plaintiffs asserting disparate impact claims must identify a facially neutral policy.

2. Leading Caselaw: *Dukes*, 131 S. Ct. at 2554 (2011) (explaining that to bring a Title VII disparate impact claim as a class, "[t]he plaintiff must begin by identifying the specific employment practice," and "merely proving that the discretionary system [i.e., giving discretion to local managers] has produced a racial or sexual disparity *is not enough*" (citation and quotation marks omitted) (emphasis in original)); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (superseded by statute on other grounds) ("[T]he plaintiff's burden in establishing a prima facie case . . . must begin by identifying the specific employment practice that is challenged.").

3. Recent Cases Approving Disparate Impact Claims Even, in Some Instances, Where Plaintiffs Failed to Identify a Facially Neutral Policy:

   a. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490 (7th Cir.), *cert. denied*, 133 S. Ct. 338 (U.S. 2012) (discussed above). Notably, after the court certified a class only on Rule 23(b)(2) grounds for only liability and injunctive relief (and not damages), this ruling led to a $160 million settlement, one of the largest ever in the context of a Title VII race case. *See* Final Approval Order, *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-C-6583 (N.D. Ill. Nov. 21, 2013).

   b. *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d 113, 123 (S.D.N.Y. 2012) (holding that a plaintiff need not expressly use the words "disparate impact" or "facially neutral" in an EEOC charge to satisfy the administrative exhaustion requirements to bring a disparate impact suit)

   c. *Adams v. City of Indianapolis*, No. 12-1874, 2014 WL 406772, at *8-9 (7th Cir. Feb. 4, 2014) (dismissing disparate impact claims for lack of factual support but stating that "[d]isparate-impact claims may be based on any employment policy, not just a facially neutral policy [because] [t]he word 'neutral' does not appear anywhere in [Title VII's] text" and determining that *Watson* stands for the proposition that any employment practice, not just facially neutral ones, may be the subject of disparate impact claims)

   d. *Lucas v. Gold Standard Baking, Inc.*, No. 13-1524, 2014 WL 518000, at *3 (N.D. Ill. Feb. 10, 2014) (citing *Adams* for the

proposition that "[d]isparate impact claims may be based on any employment policy, not just a facially neutral policy" (citation and quotation marks omitted))

4. Recent Cases Rejecting Disparate Impact Claims and/or Requiring Plaintiffs to Identify a Facially Neutral Policy:

   a. *Bolden v. Walsh Constr. Co*., 688 F.3d 893, 897-98 (7th Cir. 2012) (explaining that, after *Dukes*, class certification of disparate impact claims is inappropriate where the only "policy" identified by plaintiffs is that the employer gives discretion to local supervisors to make employment decisions)

   b. *Bennett v. Nucor Corp*., 656 F.3d 802, 818 (8th Cir. 2011) (affirming summary judgment dismissal of race discrimination disparate impact class action because plaintiffs failed to identify a "*particular* employment practice that *causes* a disparate impact" (emphasis in original))

   c. *Attard v. City of New York*, 451 F. App'x 21, 24 (2d Cir. 2011) (applying Title VII caselaw to affirm summary judgment dismissal of ADEA disparate impact claim because plaintiff "failed to identify a facially neutral practice")

   d. *Padron v. Wal-Mart Stores*, Inc., 783 F. Supp. 2d 1042, 1049-50 (N.D. Ill. 2011) (granting employer's motion to dismiss disparate impact claims because "[p]laintiffs' EEOC charges failed to identify a facially-neutral policy or practice that disproportionately impacted a class of Cuban warehouse employees" and thus "[p]laintiff's charges, fairly read, allege disparate treatment, not disparate impact")

5. Conclusion: Courts should require plaintiffs bringing Title VII disparate impact claims to clearly identify the alleged policy or practice that they purport to challenge, and should do so at an early stage of the proceedings In addition, courts should require plaintiffs to identify a facially neutral policy. Moreover, courts should not permit plaintiffs to premise a disparate impact claim on an alleged policy of delegating decision-making authority to lower level managers, as *Dukes* forecloses premising a disparate impact claim on an alleged policy of delegating discretion alone.

C. Use Of Social Science Experts And Research To Prove Discrimination

1. Issue: Whether and how courts should evaluate recent social science research and related expert opinions in assessing Title VII claims.

2. Use of Social Science in Class Action Discrimination Cases:

a. Courts' Acceptance of Social Science in Class Action Cases Pre-*Dukes*

(i) *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 259 (S.D.N.Y. 2007) (finding plaintiffs' expert's report "sufficiently persuasive . . . to permit a conclusion, at this preliminary [class certification] stage, that plaintiffs have raised a common question about whether [Novartis's] system is structured in such a way that facilitates discrimination, and not merely a collection of individual claims of particular unfair evaluations")

(ii) *Home Depot Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1265 (N.D. Cal. 1997) (permitting plaintiffs' social science expert, Dr. William Bielby, to testify at trial against Home Depot regarding how "arbitrary, subjective, ambiguous and unvalidated employment practices can lead to discrimination against women and the specific barriers to the advancement of women")

b. Supreme Court's Rejection of Social Science Expert in *Dukes*

(i) *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011) (rejecting plaintiffs' attempted use of social science to prove allegations that Wal-Mart had common corporatewide culture that permitted subconscious bias against women to affect discretionary decisionmaking of its thousands of store managers nationwide)

(ii) "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking is the essential question on which respondents' theory of commonality depends. If [plaintiff's social science expert] admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from significant proof that Wal-Mart operated under a general policy of discrimination." (citations and quotation marks omitted).

c. Class Action Cases Involving Social Science Experts or Research Post-*Dukes*

(i) *Pippen v. Iowa*, No. LACL 107038, slip op. (Iowa Dist. Ct. Polk Cnty. Apr. 17, 2012), appeal filed, No. 12-0913 (Iowa Ct. App. May 16, 2012) (rejecting plaintiff's expert's testimony that state's hiring and promotion system was

vulnerable to implicit bias because even if taken as true, the testimony did not prove that the system actually caused the purported discrimination)

(ii) *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 520 (N.D. Cal. 2012) (appeal dismissed Jan. 16, 2013) (distinguishing *Dukes* and accepting social science analysis offered to prove that "Costco's culture fosters and reinforces stereotyped thinking, which allows gender bias to infuse the promotion process from the top down")

3. Use of Social Science in Single-Plaintiff Discrimination Cases:

a. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989) (crediting testimony of social psychologist expert who analyzed remarks made in partners' evaluations of plaintiff and concluded that Price Waterhouse's partnership selection process was likely influenced by sex-stereotyping)

b. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 60 n.14 (1st Cir. 1999) (citing *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 864 (D. Minn. 1993) (noting, in dicta, that expert testimony regarding sexual stereotyping can be relevant to a single-plaintiff disparate treatment claim)

4. Conclusion: Courts should use caution in relying on social science research in the context of Title VII claims and rely on *Daubert* to scrutinize carefully social science research before admitting it into evidence or otherwise relying on it for any purpose. Preeminent social scientists do not believe that the implicit bias theory has been properly vetted scientifically such that it should be relied upon as evidence in a discrimination suit.