1995

Through the Looking Glass: Can Title VII Help Women and Minorities to Shatter the Glass Ceiling

Rafael Gely
University of Missouri School of Law, gelyr@missouri.edu

Ramona L. Paetzold
University of TexasA & M Mays Business, rpaetzold@tamu.edu

ARTICLE

THROUGH THE LOOKING GLASS: CAN TITLE VII HELP WOMEN AND MINORITIES SHATTER THE GLASS CEILING?

Ramona L. Paetzold[*] *& Rafael Gely*[**]

Table of Contents

[*] Assistant Professor, Department of Management, Texas A&M University, B.A., Indiana University, 1974; M.B.A., Indiana University, 1977; M.A., Indiana University, 1978; D.B.A., Indiana University, 1979; J.D., University of Nebraska, 1990.

[**] Assistant Professor, Department of Management, Texas A&M University; B.S., Kansas State University, 1984; A.M., University of Illinois, 1987; J.D., University of Illinois, 1987; Ph.D., University of Illinois, 1992.

I. INTRODUCTION

The employment patterns of "nontraditional"[1] workers in the United States show two conflicting characteristics. On the one hand, researchers have observed a continuing increase in the rate of participation of nontraditional workers at multiple levels in the work force. For example, the proportion of women white collar workers increased from twenty-two percent in the late 1960s to forty-six percent in 1992.[2] Similarly, the average job tenure for nontraditional workers has also increased.[3] For example, although males in the thirty-five to forty-four year old age group have experienced a small decline in job tenure, women in the same group have seen increasing participation in the high tenure categories.[4]

---

1. We use the word "nontraditional" to refer to workers that have in the past had lower participation rates in the labor market. Although we primarily refer to women and racial minorities, our arguments also apply to workers who are disabled or older, who are also covered under federal antidiscrimination statutes similar to Title VII such as the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. V 1994).

2. Rochelle Sharpe, *The Waiting Game*, WALL ST. J., Mar. 29, 1994, at A1.

3. *See* Paul Osterman, *Internal Labor Markets in a Changing Environment: Models and Evidence*, *in* RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 273, 278-79 (David Lewin et al. eds., 1992) (reporting an increase in female employees who remain with the same employer for more than 6 to 16 years).

4. *Id.* at 280. Using data from the Current Population Survey, Professor Osterman shows the following patterns regarding tenure of employment within an organization:

	Men 35-44 Years Old		Women 35-44 Years Old	
Tenure	1979	1988	1979	1988
0-2	22.7	28.2	44.8	39.3
3-5	15.9	18.0	22.1	20.6
6-10	20.4	19.4	17.2	20.1
11-15	20.5	15.1	9.6	11.2
16	15.3	18.6	6.1	8.7

On the other hand, nontraditional workers have also experienced the phenomenon of the "glass ceiling."[5] This glass ceiling is a barrier that prevents women and minorities from moving to high level managerial positions of power and authority within organizations.[6] The glass ceiling has recently been documented as existing at a lower level in organizations than originally thought.[7] One recent study of Fortune 1000 companies indicated that although about thirty-seven percent of employees are women and about fifteen percent are minorities, only seventeen percent of all managers are women, and only six percent of all managers are minorities.[8] At executive level managerial positions the discrepancies are even larger: only about six percent are women, and only three percent are minorities.[9]

The advancement of women and minorities in the work force, as illustrated by their increased labor force participation numbers, has in part been attributed to the protection provided under Title VII.[10] Title VII has been fairly successful in eliminating barriers to entry into some positions previously closed to women and minorities.[11] Early efforts at combatting discrimination were aimed at lower level, often entry level, jobs, because they represented the greatest number of employment opportunities and had the smallest number of

---

5. The term "glass ceiling" appears to have been coined in the late 1980s. It has been defined as a barrier that keeps women from rising above a certain level in a corporation. ANN M. MORRISON ET AL., BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATIONS? xi-xiii (1987). The U.S. Department of Labor has defined the glass ceiling as "those artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward in their organization." U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 1 (1991).

6. Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 483-84 (1990) (arguing that while establishing women in the work force was relatively easy, women have faced significant barriers when attempting to secure high level jobs).

7. U.S. DEP'T OF LABOR, *supra* note 5, at 13.

8. *Id.* at 6. A recent survey conducted by the Wall Street Journal found that women held less than one-third of all managerial jobs during 1992. Sharpe, *supra* note 2, at A1, A10.

9. U.S. DEP'T OF LABOR, *supra* note 5, at 6. This report cites findings by Korn/Ferry International and the UCLA Anderson Graduate School of Management in KORN/FERRY INTERNATIONAL'S EXECUTIVE PROFILE 1990: A SURVEY OF CORPORATE LEADERS (1990), which concluded that from 1980 to 1990, there has been only a slight increase in the representation of minorities and women in top executive positions of the nation's 1000 largest corporations.

10. 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. V 1994).

11. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 947-48 (1982) (noting Title VII's success in fighting discrimination in lower level jobs, but also criticizing its failure in regard to upper level jobs).

requirements for qualification, including education and experience.[12] In particular, Title VII has helped reduce barriers that prevent women and minorities from entering nontraditional areas of employment.

If Title VII has been successful at the entry level, we might expect it to be similarly successful in protecting women's and minorities' interest in advancement to higher levels of employment. Instead, however, Title VII has ineffectively dealt with the glass ceiling problem. That is, Title VII has been less successful at helping nontraditional workers move upward to mid-level and upper level management positions within organizations.[13] Most occupations remain either gender- or minority-segregated, or gender- or minority-stratified.[14] In elite professions in particular, women and minorities cluster at the lowest level.[15] The reasons why Title VII has failed to facilitate upward movement of nontraditional workers are the focus of this Article.

We argue that a major factor explaining Title VII's failure to deal with the glass ceiling problem is that advancement and promotion decisions occur at a different market level than entry level employment decisions. While entry level employment decisions operate for the most part in the external labor market, advancement and promotion decisions tend to take place in the internal labor market. We argue that Title VII, as interpreted, does not provide a framework capable of dealing with the problems nontraditional workers face within the context of the internal labor market. The courts' interpretation of Title VII has not been sufficiently sensitive to the subtle ways in which women and minorities come to be excluded from mid-level and upper level positions within organizations—ways so subtle that employers themselves are not always aware of them. As a result, nontraditional workers have entered internal labor markets with expectations of advancement, but when

---

12. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793-94 (1973) (regarding employment of mechanics and lab technicians); Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971) (holding an employment scheme that relegated blacks to the lowest paying and most menial jobs in violation of Title VII).

13. *See* DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 161, 163 (1989) (noting that women have predominately remained in low status, low paying, traditionally female-dominated vocations).

14. *Id.*; U.S. DEP'T OF LABOR, *supra* note 5, at 13-17; *see* Patricia A. Roos & Barbara F. Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, *in* SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATION, REMEDIES 235, 256 (Barbara F. Reskin ed., 1984) (concluding that many barriers are institutionalized in the workplace and labor market).

15. RHODE, *supra* note 13, at 163.

that advancement has not been forthcoming, Title VII has not been useful in enforcing the internal labor market promise.

We first discuss how the internal labor market operates, noting specific problems that can arise for nontraditional workers.[16] We then argue that Title VII does not facilitate upward movement of nontraditional workers in internal labor markets. At the same time, because Title VII has allowed greater influx of nontraditional workers from the external market into entry level positions—in fact, has *required* it—it is now necessary for frustrated nontraditional workers to avoid internal labor market employers and to move into jobs and career opportunities that rely on the external labor market.[17]

II. LONG-TERM EMPLOYMENT, PROMOTION, AND ADVANCEMENT

A. External and Internal Labor Markets

The external labor market (ELM) is where workers seek new jobs by searching across many different firms for the best conditions of employment.[18] ELMs are characterized by large numbers of workers and large numbers of employers.[19] In general, ELMs are considered relatively competitive due to the mobility of workers and the competition among firms for these new workers.[20] Discrimination can occur in the ELM, however, when factors such as lack of information, lack of mobility, or an oversupply of labor exist. Discrimination is possible under such conditions because the market is unable to serve as a check that penalizes discriminatory behavior by employers.[21]

Not all employment transactions, however, occur in the ELM. As workers and firms establish ongoing relationships, the ELM becomes less relevant.[22] Internal labor markets (ILMs) are considered an alternative to the ELM. Traditionally, the ILM has been defined in the economics literature as a set of explicit or implicit agreements between a firm and its workers.[23] These agreements incorporate various aspects of

16. Refer to Part III *infra*.
17. Refer to Parts III & IV *infra*.
18. Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1356 (1988).
19. *Id.* at 1357.
20. *Id.*
21. *See id.* (noting that the external labor market is subject to normal supply and demand economic forces).
22. *Id.* at 1357, 1359.
23. *See generally* Michael L. Wachter & Randall D. Wright, *The Economics of*

the employment relationship such as rules governing wages, working hours, promotion opportunities, and grievance procedures.[24] Enforcement mechanisms can also be included in these agreements, as well as provisions making the agreement contingent on such future events as changes in the firm's product market or changes in the macro economy.[25]

ILMs arise because of the ELM's inability to deal with employment transactions when there is a need for skills that are specific to a firm.[26] In such situations, ILMs provide an alternative to exclusive reliance on the use of ELMs.[27] By internalizing parts of the employment relationship, firms can potentially encourage workers to make long-term investments with them, which in turn produces technological and cost efficiencies for the firm.[28]

Central to the ILM rationale is the expectation that the employee will be attached to the firm for a long period of time and will have opportunities for advancement within that firm. The employer would arguably not want to lose an employee with specialized training because this would require the training of another employee and result in a corresponding loss in productivity during the training period.[29] The employee, on the other hand, will possess skills that are not readily transferable and will therefore be reluctant to leave employment

---

Internal Labor Markets, *in* THE ECONOMICS OF HUMAN RESOURCE MANAGEMENT 86, 86-87 (Daniel J.B. Mitchell & Mahmood A. Zaidi eds., 1990). The development of the ILM concept traces back to Clark Kerr, *The Balkanization of Labor Markets*, *in* LABOR MOBILITY AND ECONOMIC OPPORTUNITY 92, 101-02 (E. Wight Bakke ed., 1954), who identified "ports of entry" inside firms and noted that these ports are the main link between the external labor market and labor mobility within organizations.

24. One common example of explicit contracts are collective bargaining agreements negotiated under the National Labor Relations Act, 29 U.S.C. §§ 141-187 (1988 & Supp. V 1994), by the employer and the designated workers' representatives.

25. Wachter & Wright, *supra* note 23, at 86.

26. *See* Wachter & Cohen, *supra* note 18, at 1358-64 (distinguishing between firm-specific skills that are not easily transferable to other firms and general skills that are easily transferable across firms within the same industry); *see also* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 29-31 (1964) (arguing that different skills require different types of training, including generalized schooling and job-specific training).

27. *See* Wachter & Cohen, *supra* note 18, at 1358 (asserting that ILMs arise because of the costs of job- or company-specific skills).

28. *Id.* at 1360-61.

29. The employer recovers her investment during the employee's mid-career years. *Id.* at 1361. At that stage, the employee's marginal productivity is believed to exceed the wage paid by the employer. *Id.* at 1363. At both earlier and later stages in the employee's career, the employer "invests" in the employee by paying a wage that is higher than that employee's marginal productivity. *Id.* at 1361. Note, however, that the incentives for the employer to comply with the implicit contract are significantly reduced once the employer has recouped her investment. *Id.* at 1364.

voluntarily until after she has recovered all of her investment.[30]

As long as the expectation of a long-term employment relationship exists, both parties are likely to perform their obligations under these implicit agreements.[31] Employees are constrained by the need to remain with their employer in order to recoup their investments, while employers are constrained by concern for their reputations. Reputation may not provide sufficient constraint on employers, however. Consequently, depending on their degree of firm-specific investment, employees may have stronger incentives to remain with the firm than employers have to keep them. Once employers have recovered their investments, they have strong incentives to appropriate the employees' investments by breaching the implicit ILM agreements.[32] One way in which employers may attempt to avoid their obligations is by denying employees career advancement opportunities, perhaps as a means of avoiding payment of increased compensation. The employees, having already made firm-specific investments, may find themselves unable to counter this opportunistic behavior by their employers. Thus, in the absence of outside regulation or its effective enforcement, opportunities for strategic behavior by employers may be enhanced.

In recent years, nontraditional workers have gained access to professions, such as business management, that were previously closed to them.[33] Many other professions are characterized by the existence of ILMs.[34] Thus, nontraditional workers entering these professions are expected to engage in firm-spe-

---

30. The employee invests early in her career while learning the skills required to perform a job by agreeing to the employee's opportunity wage, a lower wage than she could potentially get elsewhere in the market. *Id.* at 1363. This investment is recovered at a later point in the employee's career when her actual wage is higher than her opportunity wage. *Id.*

31. In this sense, these implicit agreements are believed to be self-enforcing because each party has a motivation to reveal its otherwise private information. *Id.* at 1361. We argue that Title VII as currently enforced has distorted the self-enforcing mechanisms of these implicit agreements, leaving nontraditional workers in a position that is very likely subject to the employer's strategic behavior. Refer to Parts III & IV *infra.*

32. Wachter & Cohen, *supra* note 18, at 1364.

33. Robert L. Dipboye, *Progress and Problems of Women in Management, in* WORKING WOMEN: PAST, PRESENT, FUTURE 118, 118-19 (Karen S. Koziara et al. eds., 1987). Scholars in the early 1980s encouraged movement within ILMs as a way of circumventing problems in ELMs. *See, e.g.*, Patricia Y. Martin et al., *Advancement for Women in Hierarchical Organizations: A Multilevel Analysis of Problems and Prospects*, 19 J. APPLIED BEHAV. SCI. 19, 27 (1983).

34. *See* Osterman, *supra* note 3, at 280-89 (tracing the development and role of ILMs in manufacturing, management, and production careers within organizations).

cific investments. For example, in law firms the associates are expected to cultivate relationships with clients who will remain with the firm if the individual associate leaves.[35] Once these firm-specific investments have been made, ILM employees are, as explained above,[36] potentially subject to opportunistic behavior by their employers.

B. Is Opportunistic Behavior Blind to Color and Gender?

The applicability of our analysis to discrimination issues could be questioned on the grounds that the opportunistic behavior which may arise in the ILM context may occur regardless of race or gender considerations. That is, any employee who invests in firm-specific skills is a potential target of opportunistic behavior by the employer.

Our argument is, however, that although opportunistic behavior can be considered to be color- and gender-blind, its prevalence is particularly acute for nontraditional workers. Our rationale for this assertion is twofold. First, by successfully reducing entry level discrimination, Title VII has caused the unintended effect of subjecting nontraditional workers who made firm-specific investments to opportunistic behavior. By failing to adequately address advancement and promotion decisions in the ILM, Title VII has left these employees unprotected.

Second, although opportunistic behavior can occur in spite of race or gender considerations, problems unique to nontraditional workers such as stereotyping, informal access to upper level positions, and various work environment issues increase the vulnerability of these employees within the ILM context.[37] Gender and racial stereotyping have been manifested in various forms. Women and minorities are less likely to obtain positions in "fast track" line functions and are more likely to end up in "dead end" staff positions.[38] Assignment of positions may involve stereotyping of women and minorities.[39]

---

35. Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 577-78 (1989); *see also*, Douglas R. Wholey, *Determinants of Firm Internal Labor Markets in Large Law Firms*, 30 ADMIN. SCI. Q. 318, 320-22 (1985) (discussing ILMs in law firms).

36. Refer to note 31 *supra* and accompanying text.

37. Refer to Part V *infra*. In fact, analyzing discriminatory practices from the internal labor market perspective may provide insights into possible solutions for the glass ceiling dilemma.

38. *See* U.S. DEP'T OF LABOR, *supra* note 5, at 16.

39. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (reporting that

Similarly, performance appraisal systems are often informal, subjective, and give considerable discretion to the rating official.[40] Subtle stereotyping can also therefore infect appraisal systems.[41]

Informal access problems relate to the formal and informal networks that form within and across business organizations and that serve as primary sources of information and opportunities.[42] Mid-level and upper level managerial positions tend to be filled from within the organization, via the ILM. This type of promotion-from-within system often involves informal networks and referrals that tend to exclude women and minorities.[43] Similarly, women and minorities are often excluded from developmental programs, training, relocation opportunities, and key assignments, and they are often without mentors or sponsors within the organization.[44] Both stereotyping and the dearth of women and minorities at the top have been implicated in such results.[45]

Finally, once women and minorities do begin to move into positions that they have not traditionally held, they may experience sexual and racial harassment. Such harassment may prevent women and minorities from succeeding or remaining within the organization.[46]

Hopkins was criticized for her perceived masculinity and was advised to walk, talk, and dress more femininely, as well as to wear makeup, style her hair, and wear jewelry); *see also* Julie A. Lopez, *Study Says Women Face Glass Walls as Well as Ceilings*, WALL ST. J., Mar. 3, 1992, at B1 (noting that long standing types of discrimination against women and minorities are being maintained with those glass barriers); Radford, *supra* note 6, at 479, 485 (arguing that organizations block access to women not conforming to gender norms).

40. *See Price Waterhouse*, 490 U.S. at 235-37 (noting how a subjective appraisal system incorporates individual gender bias). Refer to Part III(B) *infra*.

41. For example, masculine traits may be strongly correlated with successful job performance. *See* ANN HARRIMAN, WOMEN/MEN/MANAGEMENT 221-23 (1985) (reporting evidence of an overall male bias in evaluation systems).

42. *See Women Lack Access to Communication Lines, Miss Out on Senior Management Positions*, Daily Lab. Rep. (BNA), at D10 (Mar. 2, 1994) [hereinafter Daily Lab. Rep.] (reporting that a recent labor law firm survey found that women were often excluded from informal networks of communication crucial for determining top management promotions).

43. U.S. DEP'T OF LABOR, *supra* note 5, at 19-20; JOHN P. FERNANDEZ, BLACK MANAGERS IN WHITE CORPORATIONS 124 (1975); Roos & Reskin, *supra* note 14, at 245.

44. U.S. DEP'T OF LABOR, *supra* note 5, at 21-22.

45. *Id.* at 15, 21-22.

46. *See* Susan E. Martin, *Sexual Harassment: The Link Between Gender Stratification, Sexuality, and Women's Economic Status*, *in* WOMEN: A FEMINIST PERSPECTIVE 54, 63 (Jo Freeman ed., 3d ed. 1984) (reporting findings from several surveys that suggest high job turnover and absenteeism may correlate to the existence of sexual harassment in the workplace); Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 89 (1986) (noting that

Thus, stereotyping, informal access, and work environment issues may play a role in preventing nontraditional workers' upward mobility within the ILM arrangement. Ideally, these problems could be remedied by Title VII, but the existing nature of the models of discrimination under Title VII preclude satisfactory resolution of these and other problems.

III. TITLE VII AND NONTRADITIONAL WORKERS IN ILMS

Title VII bans intentional discrimination on the basis of gender, race, color, ethnicity, and religion and also bans some discrimination that is not intentional but which has the effect of disproportionately burdening one protected group.[47] Additionally, Title VII requires that discrimination alter a term, condition, or privilege of employment in order to be actionable.[48] Although Title VII has been fairly successful in eliminating discrimination at lower levels within organizations, similar success has not materialized at higher levels of employ-

---

some victims resigned or were fired as a result of sexual advances by co-workers); Anita F. Hill, *Sexual Harassment: The Nature of the Beast*, 65 S. CAL. L. REV. 1445, 1446-47 (1992) (arguing that women who report incidents of harassment are punished in various, substantial ways and that such punishment reinforces their social inferiority, thereby relegating them to lower level positions); Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Hostile Environment Sexual Harassment in the United States: Post-*Meritor *Developments and Implications*, 1 GENDER, WORK & ORGANIZATION 50, 50 (1994) (describing problems for women in establishing the more subtle form of sexual harassment known as "hostile work environment" harassment); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures*, 46 AM. PSYCHOLOGIST 497, 497 (1991) (reporting that women quit, transfer, or lose jobs because of sexual harassment more often than men).

47. Title VII § 703, 42 U.S.C. § 2000e-2(a) (1988) states the following:

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

This section, by its very terms, sets out two sorts of prohibited behavior: behavior that is overtly discriminatory, § 2000e-2(a)(1), and behavior that has a discriminatory effect, § 2000e-2(a)(2). The disparate treatment and disparate impact models are well known and discussed in employment discrimination law case books. *See generally*, BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13-22, 80-205 (2d ed. 1983); 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION 47-301 (2d ed. 1988). For a case description of disparate impact, see, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 427-30 (1971) (discussing discriminatory testing procedures).

48. 42 U.S.C. § 2000e-2(a).

ment. It may be necessary to reconsider the models of discrimination if Title VII is to be used to eliminate the more subtle practices that appear to influence the advancement of minorities and women.

One cogent explanation for Title VII's lack of ability to eliminate discrimination at more advanced levels within organizations is that the disparate treatment and disparate impact models of discrimination were developed to deal with discriminatory practices in the ELM. Title VII may fail to aid in upward mobility for minorities and women because its models of discrimination are not effective for handling upward mobility issues at more advanced levels within the ILM.[49] As currently applied, the models suffer from at least four particular flaws that have a major impact in ILM employment situations. First, the existing standards for proof under the models are problematic for ILM employees. Second, the models are not sufficiently sensitive to stereotyping to eliminate it from ILM employer decision making. Third, statistical evidence is often required, but problematic for ILM employees to obtain. Fourth, even though the new hostile environment model has been created to help eliminate racial and sexual harassment, it is inadequate to combat the ILM incentives for the existence of hostile work environments. In this Part we discuss all of these problem areas and their particular importance for ILM employees. Although some of these problems have been examined individually in different contexts,[50] the aggregate effect of all four

---

49. Refer to Part III *infra*. Women and minorities are attempting to use discrimination laws to combat problems with advancement. In fiscal year 1990, nearly 61% of the bias charges filed with the EEOC involved advancement and discharge, while only about 8% involved hiring. Joann S. Lublin, *Rights Law to Spur Shifts in Promotions*, WALL ST. J., Dec. 30, 1991, at B1. Lublin's article predicted that ILMs would be scrutinized to the same extent as ELMs. *Id.*

50. Gender stereotyping and problems with women obtaining higher level positions in organizations have been discussed by many authors. *See, e.g.*, MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 12-18 (1992) (discussing the gender discrimination charges brought by the EEOC against Sears in 1973); RHODE, *supra* note 13, at 169-72 (discussing the unconscious biases and stereotypes that affect opportunities for women); Radford, *supra* note 6, at 490 (describing how the masculine characterization of effective management styles favors men for higher ranking positions); Maxine N. Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1398-1404 (1988) (targeting male bias in the description and characterization of employment positions as the cause of sexual inequalities in the work force). General problems with obtaining statistical significance in small samples have been discussed. *See, e.g.*, RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION: USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES 4-29 to 4-36 (1994) (discussing the problems of significance and statistical power in small samples). A considerable amount of literature has recently criticized the hostile environment harassment model. *See, e.g.*, Naomi R. Cahn, *The Looseness of Legal Language: The Rea-*

problems on nontraditional workers in the ILM context has not previously been considered.

A. *Proof Framework and Standards*

The standards of proof in Title VII cases pose particular problems for ILM situations and are problematic within both the disparate treatment and disparate impact models of Title VII discrimination.

1. Disparate treatment. The disparate treatment model, which prohibits intentional discrimination based on race[51] or gender, recognizes that race or gender should not be used as a proxy or surrogate for other characteristics in which the employer has legitimate interest.[52] For an individual plaintiff to establish that a violation of Title VII has occurred under this model, the plaintiff must show that the employer acted for discriminatory reasons when making some employment decision.[53] Proof of discrimination is obviously easiest when the

---

sonable Woman Standard in Theory and in Practice, 77 CORNELL L. REV. 1398, 1415-17 (1992) (criticizing the reasonable woman standard as stereotypical, unaccommodating of all women's experiences, and victim-focused); Ramona L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When is Enough, Enough?*, 31 AM. BUS. L.J. 365, 371-74 (1993) (arguing that requiring plaintiffs to show severity or pervasiveness of harassment creates confusion over what standard to use and what evidence is relevant, and also forces plaintiffs to endure more harassment in order to benefit legally); Paetzold & O'Leary-Kelly, *supra* note 46, at 51 (noting how the victim's behavior often draws the focus away from the harassing party's conduct); Ellen F. Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 350-51 (1990) (asserting that sexual harassment claims are inconsistent with Title VII's goal of addressing gender discrimination in employment because sexual harassment generally targets an individual rather than an entire class); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 863 (1993) (noting that criticism of the hostile environment model's reasonableness standard centers around what behavior is unreasonable and whose perspective is determinative).

51. We use the term "race" to include race, color, and ethnicity.

52. The disparate treatment model, for example, does not allow the use of gender as a proxy for longevity when actuarial tables are used to determine pension contributions or premiums. *See* Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1084 (1983) ("The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class . . . ."); City of Los Angeles v. Manhart, 435 U.S. 702, 711 (1978) (holding an employer's gender-based requirement that female employees make contributions to a pension fund exceeding those of their male counterparts violative of Title VII). It seems clear that race would also be an illegitimate proxy for longevity.

53. *E.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 333, 335 (1977) (detailing the plaintiff's prima facie case).

employer has made a patently discriminatory remark in conjunction with the employment decision, or has somehow explicitly revealed the discriminatory intent present in the decision.[54] Not surprisingly, relatively early disparate treatment cases sometimes involved such explicit comments. For example, in *Slack v. Havens*,[55] a supervisor ordered black women employees who were not a part of the maintenance or custodial crew to do general cleanup because "[c]olored people . . . clean better."[56] When they refused, they were fired and were told by their supervisor that "[c]olored people should stay in their places."[57] This direct evidence of discriminatory intent made clear that the termination was an unlawful employment practice under Title VII.[58]

Most disparate treatment cases have not involved explicit expressions of intent, but instead have provided situations involving an inference of intentional discrimination. Recognizing the need for inference regarding an employer's intent, courts fashioned the *McDonnell Douglas-Burdine*[59] framework as a "sensible, orderly way to evaluate the evidence"[60] in an individual disparate treatment case. This framework, which has remained intact for over twenty years, requires that the plaintiff demonstrate four elements to establish a prima facie case.[61] The plaintiff must show that she is a member of a Title VII protected class, that she applied for and was qualified to perform the available job, that she was denied the job, and that the employer continued to seek applicants for the position.[62] Proof of these elements eliminates the most common nondiscriminatory reasons for not hiring the plaintiff,[63] and

---

54. *See, e.g.*, Miles v. M.N.C. Corp., 750 F.2d 867, 875 (11th Cir. 1985) ("Where a case of discrimination is proved by direct evidence, the defendant bears a heavier burden. If the evidence consisted of direct testimony that the defendant acted with a discriminatory motive, and it is accepted by the trier of fact, the ultimate issue of discrimination has been proved.") (footnote omitted).

55. 522 F.2d 1091 (9th Cir. 1975).

56. *Id.* at 1093.

57. *Id.* at 1092-93.

58. *Id.* at 1095.

59. The *McDonnell Douglas-Burdine* framework comes from two Supreme Court cases. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (listing the elements a plaintiff must show); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (elaborating on the *McDonnell Douglas* standard).

60. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2756 (1993) (Souter, J., dissenting).

61. *McDonnell Douglas*, 411 U.S. at 802.

62. *Id.* These elements are presented in the context of a charge of discrimination in hiring and must be altered to fit other contexts.

63. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (explaining that "the *McDonnell Douglas* formula . . . does demand that the

until recently, was determined to imply discrimination unless the employer could articulate a legitimate, nonpretextual and nondiscriminatory reason for the employment decision.[64]

In the five to four *St. Mary's Honor Center v. Hicks*[65] decision, however, the Supreme Court articulated a new rule making it harder for plaintiffs to win individual disparate treatment cases. A showing of pretext no longer entitles the plaintiff to judgment because the plaintiff must still show that her protected status was the "determining factor" in the employer's adverse employment decision.[66] The prima facie case establishes only a presumption of discrimination that is rebutted when the employer articulates a legitimate, nondiscriminatory reason for its actions, whether or not that reason is true.[67] Thus, an employer who offers a patently false reason for its employment decision can still win the discrimination case and may be in a better position than the employer who remains silent and offers no reasons for its conduct.[68]

The *Hicks* ruling is particularly problematic for plaintiffs in ILM situations for three reasons. First, even more than in ELM situations, the ILM plaintiff's prima facie case may eliminate the best nondiscriminatory reasons for the employer's actions, thereby providing the inference that the employer's actions were likely based on impermissible criteria. Employers have greater uncertainty in ELM hiring situations because they have less information about applicants and many possible legitimate reasons exist for not hiring a particular individual from the ELM.[69] In ILMs, however, employers have more information about individuals being considered for advancement.[70] Unless the employer can produce a nondiscriminatory

---

alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: . . . lack of qualifications or the absence of a vacancy in the job sought").

64. *See McDonnell Douglas*, 411 U.S. at 802 (stating that after the plaintiff meets the requisite burden of proof, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for not hiring the plaintiff).

65. 113 S. Ct. 2742 (1993).

66. *Id.* at 2748.

67. According to *Hicks*, "the burden-of-production determination necessarily *precedes* the credibility-assessment stage." *Id.*

68. *See id.* at 2764 (Souter, J., dissenting) (criticizing the majority's opinion as leading to the perverse result that employers who fail to discover nondiscriminatory reasons for terminating employees must lie to defend themselves against accusations of disparate treatment).

69. Employers use the ELM and the ILM to fill different needs in the company. *See, e.g.*, Wachter & Cohen, *supra* note 18, at 1356-57 (finding that firms hire from the ELM to expand production or to replace lost workers, but promote from the ILM when "ongoing contractual relationships" are already established).

70. *See* Peter Cappelli & Wayne F. Cascio, *Why Some Jobs Command Wage*

reason that survives pretext analysis, the plaintiff should be considered to have proven discrimination. Second, it is the employer—and particularly the ILM employer, who need rely only on internal work force data for its promotion decisions—who is in the better position to uncover the reason for its employment decision. As Justice Souter noted in dissent, the *Hicks* rule will tend to disfavor plaintiffs who lack direct evidence of discriminatory intent.[71] Third, the ILM employer has compelling economic incentives to behave opportunistically toward employees seeking advancement and thus may have greater incentives to lie.[72] If a plaintiff must prove the employer's articulated reasons are false and must also uncover and disprove other possible nondiscriminatory reasons why the employer acted in a certain way to create a sufficient inference of intent, the ILM employee will not be able recoup her investment. Instead, the employer's strategic behavior will be rewarded.

2. Disparate impact. The disparate impact model permits challenges to "neutral" employment criteria[73] and does not require any inference of intent to find a discriminatory practice illegal.[74] This model was first articulated in *Griggs v. Duke Power Co.*[75] as a means of eliminating employment practices that systematically disadvantage blacks, but has since been extended to other groups.[76] The model has been responsible for the elimination of many selection mechanisms, such as

---

Premiums: A Test of Career Tournament and Internal Labor Market Hypotheses, 34 ACAD. MGMT. J. 848, 853 (1991) (finding that internal promotion methods such as career ladders assist employers in monitoring employee behavior and in selecting appropriate employees for promotion).

71. *Hicks*, 113 S. Ct. at 2762 (Souter, J., dissenting) (criticizing the majority's opinion for saddling a victim of discrimination with the burden of having to disprove all possible nondiscriminatory reasons suggested in the record).

72. *See* Wachter & Cohen, *supra* note 18, at 1358 (stating that ILMs reduce costs associated with the ELM). *But see id.* (noting that the costs of training and monitoring ILMs are high).

73. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-46 (1989) (stating that evidence of an employer's intent to discriminate is not necessary to find that a facially neutral employment practice violates Title VII); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (stating that a plaintiff has only to show that the facially neutral standards result in a discriminatory hiring pattern to make a prima facie case); Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (stating that Title VII does not allow retention of facially neutral practices if they effectively freeze the status quo of prior discrimination).

74. *See Griggs*, 401 U.S. at 431 (prohibiting facially neutral intelligence tests because they maintained the status quo of prior discriminatory practices).

75. 401 U.S. 424 (1971).

76. *See, e.g., Dothard*, 433 U.S. at 330-31 (applying the disparate impact model articulated in *Griggs* to gender-based discriminatory hiring criteria).

education, height, and weight, that may tend to disadvantage a particular race or sex under Title VII.[77]

The disparate impact model requires the plaintiff to challenge a specific employment practice as having an adverse impact on one of Title VII's protected groups.[78] This adverse impact is typically shown through some quantitative demonstration of the disadvantage on a particular subgroup within the protected category.[79] If this showing reflects sufficient disadvantage to the subgroup, the burden then shifts to the employer to prove that the challenged practice was justified by "business necessity."[80] If the employer can show the practice was necessary for the employment decision in question, the burden then shifts back to the plaintiff, who will lose unless she can demonstrate that other criteria or selection methods would simultaneously achieve the employer's purposes and have lesser adverse impact on the protected group.[81]

---

77. *Griggs* argued that requiring a high school degree and a passing score on a standardized general intelligence test caused a disparate impact on blacks. *Griggs*, 401 U.S. at 425-26. *Dothard* challenged height and weight requirements applied to women seeking correctional counselor positions. *Dothard*, 433 U.S. at 323-24.

78. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1994). Note that there is an exception for plaintiffs who can demonstrate that the elements of an employer's decision making process are "not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. V 1994). These plaintiffs may treat the entire decision making process as one employment practice. *Id.*

79. For example, in a challenge of height and weight requirements for police officers, the showing would involve a comparison between the proportion of women and proportion of men who meet these requirements and who are otherwise qualified to become police officers. In general, plaintiffs must make some form of statistical showing to indicate the existence of the appropriate disparities. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (stating that substantial statistical disparities are needed to raise an inference of causation, and that the specific practices causing the statistical disparities must be identified). Courts vary as to how stringent that showing must be. Some courts rely more heavily on the four-fifths rule, which has been articulated by the EEOC to mean that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact . . . ." 29 C.F.R. §1607.4(D) (1993). Other courts require a showing of statistical significance, using accepted hypothesis testing procedures. For a discussion of the necessary quantitative showing, see, e.g., Waisome v. Port Auth., 948 F.2d 1370, 1375-78 (2d Cir. 1991) (conducting a statistical analysis of black and white candidates promoted to the rank of sergeant).

80. The Court in *Wards Cove* placed the entire burden of persuasion on the plaintiff. *Wards Cove*, 409 U.S. at 659-60. However, this particular burden was reinstated to a burden of persuasion for the defendant under the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

81. Title VII requires the plaintiff to demonstrate the efficacy of an alternative employment practice "in accordance with the law as it existed on June 4, 1989." 42 U.S.C. § 2000e-2(k)(1)(C) (Supp. V 1994). This reinstates the required showing to what it would have been at the time of the *Wards Cove* case. Because the Court in *Wards Cove* arguably reached its interpretation of that issue by using all of the precedents existing on June 4, 1989, it would appear that this showing is the same

The disparate impact model standards are problematic for ILM plaintiffs in at least two ways. First, neutral selection criteria may be difficult to specify, or may be so informal that they are difficult to associate with the employer per se. For example, consider an employer that expressly or impliedly encourages, but does not solicit or require, in-house referrals.[82] Does this constitute a selection mechanism instituted by the employer?[83] Alternatively, suppose that within an organization there are highly informal channels that provide access to information regarding promotions, selection for executive training, selection for foreign assignments, or other opportunities generally correlated with career advancement. Although theoretically available to all employees, certain groups of employees may have greater access than others. The disparate impact model does not appear to allow challenges to these criteria because they are not the employer's selection mechanisms. Instead, they are informal information networks.[84] The mere existence of such networks—often to the exclusion of more formalized networks providing similar information—could be viewed as an endorsement by the employer, but courts may not ascribe these informal channels to the employer.[85] To the extent that such informal networks become even more important in ILMs than in ELMs (because firm-specific investment may provide incentives for the existence of such "grooming" networks), the disparate impact model does not satisfactorily meet the needs of ILM employees.[86]

---

as that expected in *Wards Cove* and other cases. *See Wards Cove*, 490 U.S. at 656 (articulating the showing required of the plaintiff). For an explication of that showing, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *see also* C. Ray Gullett, *The Civil Rights Act of 1991: Did It Really Overturn* Wards Cove?, 43 LAB. L.J. 462, 465 (1992) (stating that Title VII has not reversed *Wards Cove* and concluding that the plaintiff's burden of proof "appears no less difficult than before").

82. For instance, in EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991), the employer acted upon word-of-mouth referrals that were "undertaken solely by employees." 947 F.2d at 305.

83. In *Chicago Miniature Lamp Works*, the court of appeals stated that the lower court had "erred in considering passive reliance on employee word-of-mouth recruiting as a particular employment practice for the purposes of disparate impact." *Id.*

84. *See id.* (holding that no disparate impact liability exists against an employer who passively waits for applicants who learn of opportunities from current employees).

85. Refer to note 82 *supra* and accompanying text.

86. *See, e.g.*, Levin v. Delta Air Lines, Inc., 730 F.2d 994, 997-98 (5th Cir. 1984) (holding the airline not liable for disparate impact in removing pregnant flight attendants because removal was justified by business necessity); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984) (holding that the university's tenure selection criteria, which excluded four female professors, did not violate Title VII because the criteria were justified as job-related).

Second, the definition of business necessity has become somewhat loose and broad, thereby allowing greater deference to the employer. Far from meaning a practice that is necessary to the operation of the business, as the plain language suggests, business necessity has often been interpreted as any legitimate business reason,[87] bringing the standard much closer to the employer's burden of production in a disparate treatment case. This loosened burden on the employer provides considerable deference to employer decision making, particularly regarding internal promotions. Courts may view promotions to fairly high level business positions as "marriages" within the organization, requiring a close fit in outlook, personality, and other subjective factors.[88] For example, in *Johnson v. Uncle Ben's, Inc.*,[89] while commenting in dicta that Uncle Ben's produced evidence that blacks and Mexican-Americans were not promoted because of "plausible, legitimate employment goals," the court indicated that it would "not decide how Uncle Ben should determine which applicants have the required qualifications for particular jobs and which applicants do not."[90] The reluctance of courts to substitute their own judgments for those of the business organization in cases involving internal promotion and advancement decisions has the effect of reducing the protection provided by Title VII to those workers in ILM situations.

B. Stereotyping

Title VII's failure to assist women and minorities adequately in advancement and promotion is due in part persistent stereotypes. Subtle stereotypes may infiltrate the

---

87. *See* Aguilera v. Cook County Police & Corrections Merit Bd., 760 F.2d 844, 847 (7th Cir.) (interpreting business necessity as "'efficient,' which is pretty much the same thing as 'reasonable'"), *cert. denied*, 474 U.S. 907 (1985); Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982) (stating that after a plaintiff meets its burden, the employer has the burden of proving the hiring procedure is "justified by a legitimate business reason"); Johnson v. Uncle Ben's, Inc., No. 74-H-435, 1991 U.S. Dist. LEXIS 19733, at *6 (S.D. Tex. Apr. 30, 1991) (upholding the defendant's practices as serving plausible, legitimate goals), *aff'd*, 965 F.2d 1363 (5th Cir. 1992).

88. *See, e.g.*, Vuyanich v. Republic Nat'l Bank, 505 F. Supp. 224, 370-71 (N.D. Tex. 1980) (describing the hiring of upper level employees as requiring consideration of subjective, immeasurable traits such as loyalty, ability, and reliability), *vacated on other grounds*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *see also* Bartholet, *supra* note 10, at 973 (noting the role of subjective assessment in upper level jobs).

89. No. 74-H-435, 1991 U.S. Dist. LEXIS 19733.

90. *Id.* at *6-*7.

employer's decision making process. Courts may then fail to identify these stereotypes and, as a result, reinforce the employer's stereotypical thinking.[91] Stereotyping is problematic for both the disparate treatment and disparate impact models.[92]

1. Disparate treatment. The disparate treatment model sends conflicting signals regarding an employer's use of stereotypes in decision making. On the one hand, in cases such as *City of Los Angeles v. Manhart*,[93] the Supreme Court indicated that even true statistical categorizations can result in harmful, stereotyped decision making when applied to individuals.[94] On the other hand, Title VII itself permits the stereotyping of certain individuals.

The sanctioning of gender-based stereotypes under Title VII is most vividly illustrated by the notion of the "bona fide occupational qualification" (BFOQ) defense to disparate treatment. Under the BFOQ defense, employers may explicitly use gender differences as the basis for various employment decisions.[95] This defense may allow an employer in limited situations to hire only men for particular jobs.[96] In *United Auto Workers v. Johnson Controls, Inc.*[97] the Supreme Court

---

91. *See, e.g.*, Nadine Taub, *Keeping Women In Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 348 n.16 (1980) (noting courts that have accepted stereotypical pay inequality as not violative of Title VII).

92. Stereotyping is also problematic for the hostile environment model of sexual harassment, but we treat that model separately. Refer to Part III(D) and note 177 *infra* and accompanying text.

Stereotypes can range in nature from those that are "real" or "substantially true" (i.e., elaborately reasoned and statistically indicated distinctions between men and women, and among blacks, Hispanics, and other racial groups), to those beliefs that cannot be empirically substantiated (i.e., unanalyzed and unsubstantiated personally held views). *See* Taub, *supra* note 91, at 349-61 (detailing numerous categories and methods of stereotyping); Ramona L. Paetzold et al., The Empirical Person: The Problematic Role of Statistics and Difference in Diversity Research in Social Science 8-12 (Nov. 1994) (unpublished manuscript, on file with the *Houston Law Review*) (listing forms of stereotyping and arguing for a new methodology focusing on individual experiences).

93. 435 U.S. 702 (1978).

94. *Id.* at 707-08 (noting that all members of a class do not always share the stereotypical characteristics).

95. 42 U.S.C. § 2000e-2(e) (1988).

96. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 337-38 (1977) (holding a policy to hire only male counselors at an all-male prison within the BFOQ exception); Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1532 (7th Cir. 1988) (stating that a policy to hire only women for a female rehabilitation program should be evaluated in light of the totality of the circumstances and the need for an innovative approach), *cert. denied*, 489 U.S. 1017 (1989).

97. 499 U.S. 187 (1991).

reiterated that the BFOQ defense is acceptable only in exceptional cases.[98] The *Johnson Controls* holding on the scope of the BFOQ defense was not unanimous. Four justices believed the cost to the employer could control in some cases, thus allowing the BFOQ to apply to a broader spectrum of cases.[99] In any event, the BFOQ defense permits some use of social stereotyping to exclude women from jobs. It promotes the idea that there are essential differences between men and women that employers may take into account in the employment relationship.

These essential differences tend to be socially constructed.[100] Further, employers do not need empirical evidence to support their claim that these essential differences exist. Although proof of a BFOQ requires that the employer have reasonable cause to believe that "all or substantially all" women cannot perform the job,[101] employers may rely on a common sense understanding of the nature of the job environment and men's and women's relationship to that environment.[102] This judicial deference allows employers to use stereotypes in employment decision making and renders Title VII less potent in eradicating social stereotypes that hinder women's advancement. The mere presence of the BFOQ defense, coupled with the common sense standard of proof for part of it, weakens the disparate treatment model of discrimination.

Similarly, despite *Manhart*'s sweeping language regarding the dangers of employer stereotyping, more subtle, judgmental forms of stereotyping have not been as readily recognized by the courts. Perhaps the best example is the well-known case of

---

98. The Court in this case held that women at Johnson Controls could be excluded from a position solely based on gender only if their gender or pregnant condition would actually interfere with their ability to perform the job. *Id.* at 206.

99. *Id.* at 217 (White, J., concurring).

100. *See, e.g., Dothard*, 433 U.S. at 336-37 (holding that women can be excluded from the position of security guard in an all-male maximum security prison because they are likely to be victimized by men, further placing the safety of all guards at risk).

101. Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985). The complete BFOQ test has two parts, requiring (1) that the particular protected class status be "*reasonably necessary* to the essence of [the] business," and (2) that all or substantially all persons outside the protected class status be unable to perform the job, or that it would be impossible to deal with persons outside the protected class status on an individual basis. *Id.* at 413-14.

102. Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1532-33 (7th Cir. 1988) (holding that, given the special nature of employment considerations in an all female prison, requiring the employer to adopt a completely objective hiring policy constituted reversible error), *cert. denied*, 489 U.S. 1017 (1989).

Price Waterhouse v. Hopkins.[103] Price Waterhouse denied Ann Hopkins a partnership because she was considered to be "macho"; she "overcompensated for being a woman," "us[ed] foul language," and needed to take "a course at charm school."[104] She had also generated more business than any other associate considered for partnership that year.[105] Instead of offering her the partnership, Price Waterhouse advised her to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[106] Although Hopkins ultimately won the case, the Supreme Court's endorsement of this case as a "mixed motive" disparate treatment case supports gender-based stereotyping in the workplace.

The Court recognized that blatant stereotypical comments about Hopkins had been mixed with other legitimate, supposedly nonstereotypical, comments regarding Hopkins' personality and ability to get along with others.[107] The Court did not recognize that these concerns may have been salient only because she was a woman. Both the fact and manner of Price Waterhouse's concern with Hopkins' personality suggest the presence of gender tainting. In addition, a strong opinion dissenting from the plurality argued that employers could not be held liable for their failure to "make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes."[108] Despite credible expert testimony to the contrary, the dissent appeared to view descriptions such as "overbearing and abrasive" as gender neutral.[109]

Stereotyping can also be a problem in disparate treatment situations because of the use of subjective standards for promotion and advancement decisions. Decisions about who is qualified under such criteria can become particularly problematic. For example, in *EEOC v. Sears, Roebuck & Co.*[110] it was alleged that Sears had disproportionately failed to hire and

103. 490 U.S. 228 (1989).
104. *Id.* at 235.
105. *Id.* at 234.
106. *Id.* at 235.
107. *Id.* at 236-37 (acknowledging the district court's finding that the employer legitimately considered the plaintiff's interpersonal skills in its promotion procedure, but holding that the employer nevertheless violated Title VII by giving weight to other employees' gender-based comments about the plaintiff).
108. *Id.* at 294 (quoting the district court's opinion) (Kennedy, J., dissenting).
109. *Id.* at 293 n.5 (Kennedy, J., dissenting).
110. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

promote women into commission sales positions.[111] Sears justified the low number of women in these positions by describing both the positions and the characteristics of individuals who would be able to fill them satisfactorily—characterizations that strongly suggest Sears viewed these positions inherently as "men's" positions. Sears noted that commission sales work tended to be risky in providing compensation, tended to require more independence than other sales work, and sometimes required technical knowledge.[112] Additionally, Sears argued that to be a good commission sales worker, an individual must be aggressive, highly motivated, knowledgeable, and a "special breed of cat."[113] Expert testimony was unable to help the court recognize the masculine descriptions of the personality traits governing Sears' selection process.[114]

2. Disparate impact. The disparate impact model was developed for use with so-called objective selection criteria, such as educational,[115] height, and weight requirements.[116] Although the Supreme Court recently indicated that disparate impact theory also applies to subjective employer decision making criteria,[117] courts may be loath to displace employer judgments about such criteria, believing that the organization has superior expertise to establish the standards by which candidates for promotion should be judged.[118] Thus, for example, a nebulous criterion such as "possessing leadership qualities" could be difficult to challenge under disparate impact theory.[119] Even though the criterion allows for the possibility of considerable stereotyping in its interpretation and instrumentation, courts may defer to organizations' needs to identify prospective leaders, particularly under the looser interpretation of business necessity.[120] Consequently, the resulting stereo-

111. *Id.* at 1278.
112. *Id.* at 1289-90.
113. *Id.* at 1290.
114. FRUG, *supra* note 50, at 14-15.
115. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (applying the disparate impact model to a facially neutral diploma requirement).
116. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).
117. Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 991 (1988).
118. *See id.* at 999 (noting that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it" (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978)) (alteration in original).
119. *See id.* (noting that certain qualities attach to managerial responsibilities that are not amenable to objective criteria, thus making the plaintiff's case inherently difficult to prove under disparate impact theory).
120. *See id.* at 997 (noting that business necessity provides the defendant with a

typical beliefs held by many employers about leadership qualities may exclude women from higher level managerial positions.[121]

The inability of Title VII to eradicate stereotyping from the workplace carries a bigger toll on ILM workers because the economics of the ILM render them vulnerable to opportunistic behavior by the employer.[122] Sanctioned stereotyping provides the employer with yet another mechanism for carrying out its opportunistic desire to eliminate ILM workers who are trying to recoup their initial investments by advancing in the organization.[123] Because race- and gender-based stereotyping are particularly prevalent in our society, ILM employers may engage in these opportunistic behaviors at a great cost to nontraditional workers.

C. *Statistical Proof of Discrimination*

The disparate impact model and disparate treatment model, via systemic disparate treatment,[124] both rely on

---

defense against a claim of discrimination upon a showing of disparate impact by the plaintiff).

121. *See, e.g.*, Joan Acker, *Gendering Organizational Theory*, *in* GENDERING ORGANIZATIONAL ANALYSIS 248, 255 (Albert J. Mills & Peta Tancred eds., 1992) (noting that women are perceived to be unable to adhere to organizational rules because of their obligations to family and reproduction); Marta B. Calás & Linda Smircich, *Using the F Word: Feminist Theories and the Social Consequences of Organizational Research*, 49 ACAD. MGMT. BEST PAPERS PROC. 355, 355 (1989) (noting that women must fit into preestablished organizational structures); Marta B. Calás & Linda Smircich, *Voicing Seduction to Silence Leadership*, 12 ORGANIZATION STUD. 567, 568, 571-72 (1991) (noting that leadership is stereotyped as a "seductive game," traditionally defined using masculine characteristics); Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 18 (1992) (concluding that women tend to be devalued in leadership or management capacities when those duties are carried out in stereotypical masculine fashion).

Similarly, minorities also face assignment difficulties because of stereotypes. *See* Jeffrey H. Greenhaus et al., *Effects of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes*, 33 ACAD. MGMT. J. 64, 65-66 (1990) (discussing the factors that give rise to racial stereotypes in the workplace and their impact on the promotability of African-Americans). Minorities may stereotypically be viewed as lazy or slow, uninterested in career development, unsuitable for foreign assignments, and lacking in leadership styles or abilities. *See id.* at 67-69 (noting that these perceptions are perpetuated by minorities' inability to receive work enhancing opportunities and to form supportive relationships within an organization). African-Americans are often given lower job performance evaluations than whites, particularly when whites are doing the ratings. *Id.* at 66. Minorities are overlooked for experiential or educational opportunities that would help them have greater access to high level positions within the organization. *Id.* at 80.

122. Refer to notes 31-36 *supra* and accompanying text.

123. *Id.*

124. *See* PAETZOLD & WILLBORN, *supra* note 50, at 1-17 to 1-20 (describing the systemic, or class wide, disparate treatment model). A claimant seeking relief under

statistical evidence as proof of discrimination.[125] In systemic disparate treatment discrimination, a pattern or practice of discrimination is typically established by statistical evidence,[126] giving rise to an inference of intent.[127] In disparate impact discrimination, the plaintiff's initial burden to demonstrate an adverse impact on her protected class is typically shown through quantitative evidence.[128] The need for statistical evidence to establish these two types of cases can pose problems in ILM settings.

First, the population of people affected by employer policies in ILMs may be relatively small.[129] This is particularly true as employees move up through the ILM into high level positions. Even though there may be a relatively large number of employees at entry level positions, there will be a relatively small pool of potential candidates at mid-level and high level positions to promote into senior management.

To show an intentional practice that excludes Hispanics, for example, the Hispanic plaintiff might compare the percentage of Hispanics promoted with the percentage of Hispanics available for promotion.[130] The percentages will be based on

---

a systemic disparate treatment model will try to establish a policy of intentional discrimination. *Id.* at 1-17. By comparison, in the individual claimant disparate treatment model, the aggrieved claimant will try to show that he was disadvantaged because of his group status. *Id.* at 1-5. This cause of action requires a stronger showing of direct injury to the claimant. *Id.* at 1-5 to 1-7.

The principles of the systemic disparate treatment model have been used in case law to find discrimination under Title VII. *See, e.g.*, Bazemore v. Friday, 478 U.S. 385, 387 (1986) (holding that the lower courts erred in disregarding petitioners' statistical analysis of pre-Title VII wage discrimination against black workers); City of Los Angeles v. Manhart, 435 U.S. 702, 717 (1978) (holding defendant's policy requiring female employees to contribute more to a pension fund than male employees discriminatory under Title VII).

125. *See generally* PAETZOLD & WILLBORN, *supra* note 50, at 1-17 to 1-22, & chs. 4, 5 (describing the systemic disparate treatment and disparate impact models of discrimination).

126. *See id.* at 1-17 to 1-20 (describing a prima facie case of systemic disparate treatment). The claimant's prima facie case is established in part by statistical evidence showing differential treatment of the protected class. *Id.* at 29.

127. *See id.* at 2-11 to 2-16 (noting that while statistics cannot conclusively prove discrimination, they can give rise to a rebuttable inference of discrimination).

128. *See id.* at 1-21 to 1-22 (identifying evidentiary requirements in disparate impact analysis).

129. *See* Wachter & Cohen, *supra* note 18, at 1357 (noting that compared to ELMs, ILMs involve relatively few participants).

130. *See, e.g.*, PAETZOLD & WILLBORN, *supra* note 50, at 4-23 to 4-24 (discussing the use of selection rates in disparate treatment analysis); Ramona L. Paetzold, *Problems with Statistical Significance in Employment Discrimination Litigation*, 26 NEW ENG. L. REV. 395, 397-99 (1991) (providing a hypothetical involving a qualified female job applicant trying to prove intentional discrimination by comparing the number of women in the relevant labor force with the number of women hired by the allegedly discriminatory employer).

small absolute numbers of Hispanics; thus, a statistical comparison will likely reflect no statistical difference between the two percentages.[131] Similarly, if a Hispanic plaintiff wants to show that a particular selection criterion, such as a test, disproportionately affects Hispanics, the pass rate for Hispanics would be compared with the pass rate for others.[132] Small numbers of individuals taking the test, coupled with even smaller numbers of Hispanics taking the test, could make it difficult to find any statistically significant differences in the two pass rates. In short, comparisons based on small numbers of individuals make it difficult to find the statistical significance typically required for establishment of a plaintiff's prima facie case.[133]

Second, even though it is difficult to obtain statistically significant differences for small sample sizes, these differences do occasionally occur. When they do, courts may discount them because they are based on a small sample.[134] For example, in

131. *See* PAETZOLD & WILLBORN, *supra* note 50, at 4-36 (noting that small samples have low statistical power to detect such differences).

132. *See id.* at 5-8 to 5-12 (discussing comparison of pass or selection rates in disparate impact analysis).

133. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 311 (1977) (noting that a mere 2% disparity between the percentage of black teachers hired in a given region and the percentage of qualified black teachers present in the region may weaken proof of discrimination on remand); Hatcher-Capers v. Haley, 786 F. Supp. 1054, 1064 (D.D.C. 1992) (noting that the plaintiff, as her organization's only black female, failed to show sufficiently meaningful statistics to find discrimination in the defendant's promotion practices under a disparate impact theory). Courts have increasingly required sophisticated tests to demonstrate systemic disparate treatment and impact. *See, e.g.*, Palmer v. Schultz, 815 F.2d 84, 113 (D.C. Cir. 1987) (holding that the plaintiff's showing of underselection of women measuring 3.1 standard deviations, without any showing of explanation by the defendant for the discrepancy, was sufficient as a matter of law to sustain a finding of disparate treatment); Arnold v. Postmaster Gen., 667 F. Supp. 6, 22-23 (D.D.C. 1987) (using statistical methods of correlation and chi-square analysis to find a disparate impact based on age discrimination), *rev'd on other grounds*, 863 F.2d 994 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989). For small sample sizes, there may be inadequate information to statistically detect differences or disparities. *See, e.g.*, *Hatcher-Capers*, 786 F. Supp. at 1064 (noting that decreasing sample sizes increase the possibility that noted discrepancies in treatment are due to chance rather than discrimination); JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 7 (2d ed. 1988) (discussing the mathematics of sample reliability and noting that some kinds of statistical precision increase with increasing sample sizes); Jacob Cohen, *A Power Primer*, 112 PSYCHOL. BULL. 155, 155-56 (1992) (discussing the merits of using statistical power analysis in the behavioral sciences and its applicability in determining the proper sample sizes needed to obtain statistically significant results); Richard Goldstein, *Two Types of Statistical Errors in Employment Discrimination Cases*, 26 JURIMETRICS J. 32, 38-39 (1985) (noting that one solution to inherent statistical weaknesses in small samples in discrimination cases is to increase the sample by aggregating affected groups).

134. *See, e.g.*, Waisome v. Port Auth., 948 F.2d 1370, 1379 (2d Cir. 1991)

Waisome v. Port Authority,[135] the Second Circuit held that a statistically significant disparity in pass rates between black and white police officers taking a written exam for promotion to sergeant was of limited use because of small sample size.[136] The court noted that if only two additional black candidates had passed the written examination, the disparity would no longer have been statistically significant.[137] Use of hypothetical alterations to demonstrate that small shifts in the numbers can alter statistical significance has become increasingly common.[138] Unfortunately, this reasoning ignores the fact that the statistical procedure adjusts for sample size, and that given the difficulty of obtaining significant results in small samples, the presence of such results should be taken seriously. Courts that discount such evidence unfairly penalize plaintiffs for being part of a small group.

(noting that statistics based on small samples are not reliable indicators of disparate impact); Frazier v. Consolidated Rail Corp., 851 F.2d 1447, 1451-52 (D.C. Cir. 1988) (noting that small sample sizes undermined the plaintiff's disparate impact analysis); Washington v. Electrical Joint Apprenticeship & Training Comm'n, 845 F.2d 710, 713 (7th Cir.) (holding that it was not reversible error for the district court to refuse to infer discrimination against a black committee applicant when only 20 positions were available), *cert. denied*, 488 U.S. 944 (1988); Bryant v. Wainwright, 686 F.2d 1373, 1379 (11th Cir. 1982) (denying the female plaintiff's claim of gender discrimination in the selection of grand jury forepersons based on a sample of only 10 grand juries over a 3 1/2 year span), *cert. denied*, 461 U.S. 932 (1983); Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341, 1350 (8th Cir. 1980) (noting that the promotion of only 4 cement finishers to foremen constitutes a sample too small for a meaningful statistical analysis to sustain the black plaintiff's claim of discrimination); Murray v. District of Columbia, 34 Fair Empl. Prac. Cas. (BNA) 644, 646 (D.D.C. 1983) (finding that the selection of 4 whites and 7 blacks for interviews from applicant pools of 74 whites and 36 blacks did not discriminate against a white applicant because the sample size of 11 positions was less than adequate to make a relevant statistical determination); *cf.* Hartman v. Wick, 600 F. Supp. 361, 371 (D.D.C. 1984) (noting that statistics based on small sample sizes are discouraged, but suggesting that even small samples can give rise to a finding of discrimination if disparities are "egregious").

135. 948 F.2d 1370 (2d Cir. 1991).

136. *Id.* at 1375-77 (noting the examination pass rate of black applicants was 87.2% of white applicants and that passage by just two more blacks would have negated the disparity's statistical importance).

137. *Id.* at 1376.

138. *See, e.g.*, Guinyard v. City of New York, 800 F. Supp. 1083, 1089 (E.D.N.Y. 1992) (describing the use of the "80% Plus 1 Rule," whereby if one extra minority is hypothetically assumed to have achieved the desired status, resulting in a minority pass rate greater than 80% of the nonminority pass rate, then no inference of discrimination is shown); *Murray*, 34 Fair Empl. Prac. Cas. (BNA) at 646 (noting that if one extra white applicant had been chosen for one of eleven interview positions, no statistically relevant discrepancy against whites would be found); *cf.* 29 C.F.R. § 1607.4 (1988) (discussing the appropriateness of offering evidence concerning the use and results of a particular selection procedure in circumstances similar to those in which a discriminatory practice is suspected but which involves an unreliably small sample size).

Thus, in ILMs there will be a point at which nontraditional employees will find it difficult to avail themselves of the systemic disparate treatment and disparate impact models. The models are ill-suited to small populations because statistical significance is relatively difficult to obtain in such situations. Even when it does occur, courts may discount its importance.

D. The ILM Work Environment

Hostile environment harassment is a relatively new form of discrimination actionable under Title VII,[139] and it is one that almost exclusively targets nontraditional workers. Although most often associated with sexual harassment, there are recent reported cases involving racial- or ethnicity-based harassment.[140] Hostile environments may occur in any type of organization, but they are primarily associated with employment situations in which women and minorities appear in relatively small numbers and are viewed as nontraditional workers.[141] Additionally, harassment may occur at all levels

---

139. *See* Paetzold & O'Leary-Kelly, *supra* note 50, at 367 (noting that the federal circuit courts began recognizing hostile work environment as sexual discrimination in the early 1980s); *see, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 901, 903-05 (11th Cir. 1982) (holding that sexually hostile or offensive work environments present actionable discrimination under Title VII, and setting forth the elements for the claimant's cause of action); Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (determining that Title VII covers sexual discrimination predicated on a substantially discriminatory work environment). The United States Supreme Court first recognized this claim in 1986. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (holding that a claimant may establish a violation of Title VII by proving discrimination based on a sexually hostile or abusive working environment). Commentators have argued that the claim should be considered sui generis under Title VII. *See* Paetzold & O'Leary-Kelly, *supra* note 50, at 366-67, 377-78 (advancing several reasons for this conclusion, most relating to problems posed by the statute of limitations to hostile work environment claims under Title VII).

140. *See, e.g.*, Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573, 1576-78 (11th Cir. 1993) (denying the plaintiff's claim of posthiring racial harassment under 42 U.S.C. § 1981 because the Civil Rights Act of 1991, which amended this section to cover the plaintiff's alleged situation, could not be retroactively applied); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (noting that a Title VII action for racial harassment was appropriate but should not have been brought against the plaintiff's employers in their individual capacities); Snell v. Suffolk County, 782 F.2d 1094, 1102-03 (2d Cir. 1986) (affirming the lower court's ruling of racial discrimination based on a racially hostile work environment under Title VII).

141. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1204 (1989) (noting that "[w]omen are comparative newcomers to many kinds of work"). *See generally* Edward Lafontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433, 441-42 (1986) (concluding that sexual harassment erects a formidable barrier to equal treatment for females in traditionally male-dominated work fields).

within an organization, so that women and minorities in managerial level positions may become targets of harassment by superiors and subordinates alike.[142]

The legal model for a hostile work environment requires the plaintiff to prove that she was subjected to unwelcome harassment that occurred because of her protected class status, and that such harassment was sufficiently severe or pervasive to alter the terms, conditions, or privileges of her employment.[143] Unlike other forms of discrimination under Title VII, the employer is generally not automatically liable for a hostile work environment. Agency theory principles govern employer liability.[144] Thus, although the employer may be strictly liable for a hostile environment created by a supervisor,[145] it would not be strictly liable for a hostile environment created by a victim's co-worker. In the latter case, the employer may be liable if it knew or should have known of the harassment and failed to take prompt remedial action.[146]

Many commentators have noted problems in the implementation of this legal framework and the difficulties that it poses for harassment victims.[147] The lack of automatic liability imposes an additional burden on women and minorities, who are harassed more often than white males.[148] The recent Supreme Court endorsement of the reasonable person standard for determining the effect of the alleged harassment on the victim may make it difficult for women and minorities to

---

142. *See, e.g.*, Kathleen McKinney, *Sexual Harassment of University Faculty by Colleagues and Students*, 23 SEX ROLES 421, 431-32 (1990) (describing sexual harassment of university professors by students as "contrapower harassment").

143. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993).

144. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (suggesting that the use of agency theory in Title VII cases to fix employer liability may be appropriate in light of the fact that the Title's definition of "employer" includes any "agent" of the employer). The courts of appeal have further developed relevant agency principles. Refer to notes 145-46 *infra* and accompanying text.

145. *E.g.*, Huddleston v. Roger Dean Chevrolet, Inc., 845 F.2d 900, 904 (11th Cir. 1988); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1559-60 (11th Cir. 1987) (holding that because a discriminating supervisor has the apparent authority to alter the plaintiff's employment status, respondeat superior applies and establishes employer liability directly, even absent a showing of actual notice of the discriminatory conduct by the supervisor).

146. Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3d Cir. 1990). Employers may, however, absolve themselves of liability by taking steps that are proportional to the seriousness of the harassment and that are reasonably calculated to end the harassment in the workplace. Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1991).

147. Refer to note 50 *supra* and accompanying text.

148. *See, e.g.*, Riger, *supra* note 46, at 497 (noting a 1981 survey concluding that 40% of the women polled reported having experienced sexual harassment, compared to 15% of the men polled in the same survey).

convince fact finders of their discomfort in the workplace.[149] Although courts have been relatively sympathetic to minority plaintiffs who complain of racially offensive language, women have not always fared as well.[150] Courts have more difficulty determining the scope of language that gives rise to actionable sexual harassment. Gendered or "sexist" comments are more difficult to see as sexual harassment than are explicitly "sexual" comments.[151] Further, courts may more often recognize hostile environment harassment when victims behave in stereotypical ways[152] than when victims appear to be stronger and suffer fewer psychological or physical symptoms.[153]

---

149. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (noting that a reasonable person standard should be used to judge whether a work environment is sufficiently abusive to warrant protection under Title VII). Many commentators have debated the appropriateness of a "reasonable victim" standard, particularly in the context of gender discrimination. *See, e.g.*, Cahn, *supra* note 50, at 1402-03 (criticizing the application of a "reasonable woman" standard to sexual harassment cases because this classification operates to disempower women and furthers female stereotypes); Childers, *supra* note 50, at 856-57 (arguing that a reasonable woman standard, while producing the short term benefits of heightened sensitivity to women's issues in the workplace, ultimately works against the goal of defining a standard of conduct mutually acceptable to both sexes); Ramona L. Paetzold & Bill Shaw, *A Postmodern Feminist View of "Reasonableness" in Hostile Environment Sexual Harassment*, 13 J. BUS. ETHICS 681, 681 (1994) (noting how the reasonableness standard is often used to enforce social norms of conformity and to preserve male privilege); *cf.* Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825, 1829 (1992) (asserting that the use of a reasonable woman standard is proper for determining workplace hostility in Title VII actions).

150. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (concluding that the plaintiff failed to sustain her burden of proving sexual harassment), *cert. denied*, 481 U.S. 1041 (1987). Results for women alleging sex-based harassment vary considerably. In *Rabidue*, female employees were subjected to posters that portrayed women in states of undress and comments by one supervisor describing women as "whores," "cunt," and "pussy." *Id.* at 623-24 (Keith, J., dissenting). The court did not find a hostile environment, however, noting that the "sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features . . . open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." *Id.* at 622; *cf. Ellison*, 924 F.2d at 880 (holding that the plaintiff showed sufficient evidence of a hostile environment in the workplace when she explained receiving numerous bizarre, and sometimes passionate, notes from a co-worker). In contrast to *Rabidue*, the *Ellison* court was sympathetic to the particular perspectives of women in American society because of women's common concerns about sexual assault. *Id.* at 879. As such, the court adopted a reasonable woman standard for judging the hostility of a plaintiff's work environment. *Id.* The court argued that "a sex-blind reasonable person standard tends to be male biased and tends to systematically ignore the experiences of women." *Id.*

151. Paetzold & O'Leary-Kelly, *supra* note 46, at 52.

152. This may occur, for example, when victims appear vulnerable and emotional and react with severe psychological distress.

153. *See* Lucy V. Katz, Sexual Harassment and Feminist Theory: Tracing the

Hostile environments may be expected to occur more often in ILM situations because there are economic incentives supporting their existence.[154] In the ILM, co-workers are direct competitors for promotions and other advancement opportunities, making harassment one weapon to eliminate competition.[155] Further, in the absence of effective Title VII enforcement, the ILM employer may have little incentive to eradicate harassment in the ILM, and may in fact have incentives to promote it, because workplace harassment may be consonant with the employer's opportunistic desires to eliminate workers before they can recoup their investments.[156] Because racial and sexual harassment affect primarily nontraditional workers, these workers may be disproportionately forced to leave the ILM without receiving the return on their investment gained through advancement.

IV. CONCERNS AND IMPLICATIONS REGARDING TITLE VII AND ILMS

In the previous Parts of this Article we have argued that although Title VII has allowed women and minorities to move into entry level positions, it has not been equally successful at facilitating their advancement to higher levels of employment. As a result, two major negative outcomes are likely for nontraditional workers. These two possibilities directly relate to the problems of standards of proof, stereotyping, statistical evidence, and hostile environment harassment.

First, fewer women and minorities will be permitted to enter positions requiring employee investment in the form of firm-specific skills learning.[157] Women and minorities may be disproportionately assigned to dead end staff positions because the presence of stereotyping by employers means that employers may not recognize most members of these groups as suitable for ILM advancement.[158] Similarly, employers will likely assign fewer women and minorities to line positions that are

---

Lineage 20-21 (1993) (unpublished manuscript, on file with the *Houston Law Review*) (describing "tough" female plaintiffs who have been denied relief).

154. Refer to notes 31-36 *supra* and accompanying text.

155. *See* Glidden, *supra* note 149, at 1836 (describing power as a catalyst for sexual harassment). Men may abuse this power implicitly to convey an image that women are inferior and cannot adequately stand up to job pressures. *Id.* at 1837.

156. Refer to notes 31-36 *supra* and accompanying text.

157. *See, e.g.*, U.S. DEP'T OF LABOR, *supra* note 5, at 16-17 (noting that employers use stereotypes to exclude women from positions that lead to advancement, but also providing evidence showing that these stereotypes are false).

158. *Id.* at 16.

part of the ILM feeder system for higher ranking positions of authority.[159] In other words, employers will be less likely to incur investment costs for nontraditional workers.

Consequently, there will be large numbers of women and minorities assigned to dead end positions who will consider leaving because of frustration at the lack of opportunity for advancement.[160] These nontraditional employees will be unable to recoup specific investments they have made in the organization, and their ability to shift to other job opportunities will depend in part on the transferability of those investments.[161] To the extent that their investments are highly firm-specific and transfer is difficult, these frustrated workers may continue in the ILM arrangement with little or no opportunity for advancement. This result then reinforces the stereotype that women and minorities are not motivated to, or do not aspire to, the same career paths as traditional white male employees. Those employees who are able to transfer some of their investments to other organizations may leave the organization. This type of turnover behavior then tends to further strengthen employers' stereotypes about the lack of long-term commitment of women and minority employees.[162]

Additionally, workers who bear the responsibility of caring for children or other family members may determine that the *specific* tradeoff between holding a dead end job and caring for a family member favors the latter. They make this choice even though they may have preferred career advancement had it been available to them.[163] Employers are likely to translate these workers' actions into reinforcement of existing stereotypes concerning nontraditional workers' primary concerns and responsibilities for family caregiving.[164] The interaction

---

159. *Id.*

160. *See* Martin et al., *supra* note 33, at 26-27 (alleging that high turnover rates for women are due to limited advancement opportunities in the dead end jobs that are traditionally available to women).

161. Refer to note 26 *supra* and accompanying text.

162. *See* Martin et al., *supra* note 33, at 26-27 (noting that high turnover rates for women give the impression of low job commitment).

163. Some firms utilize family friendly policies to assist female career advancement. Rochelle Sharpe, *Family Friendly Firms Don't Always Promote Females*, WALL ST. J., Mar. 29, 1994, at B1. However, many of these companies tend to have poor track records in promoting women. *Id.* Women are afraid to use these policies because they believe they will not be seriously considered for top jobs. *Id.*

164. Martin et al., *supra* note 33, at 26-27. Women are often believed to be less dedicated than men to their jobs and careers. *Id.* at 21. Managerial level employees may view single women as likely to leave or get married, and married women as likely to have children. *See id.* at 27 (noting that women must sacrifice marriage, children, or both to overcome stereotypes that inhibit their promotability). Title VII has not been effective in eradicating these notions from the workplace. *See generally*

between ILMs and Title VII can therefore lead to a situation in which women and minorities appear to choose opportunities that do not permit them to obtain long-term career advancement, thwarting the national goals of increased diversity and equal opportunity in all organizations.

In addition to creating a situation in which fewer nontraditional workers will, in the long run, be willing to enter ILM-type employment arrangements, a second negative outcome for women and minorities is also likely to occur. Women and minorities who hold line positions—positions that feed into higher ranking positions of authority—will tend to be subjected to opportunistic behavior by the employer.[165] Specifically, the employer will recoup its investment without providing opportunities for advancement because of the conscious or unconscious perception that nontraditional workers are unsuitable for long-term advancement within the organization.[166] The employer may also discharge these employees once its investment has been recouped. Small numbers of women and minorities in feeder positions means that employers will have created a situation in which few women and minorities are deemed qualified for ILM advancement. Instead, most candidates will be white males, ensuring that an inordinate percentage of white males are selected for advancement.

This view of the organization suggests that employers play a major role in maintaining existing stereotypes concerning qualifications and availability for mid-level and upper level management positions for women and minorities, and that Title VII allows this situation to occur. The disparate treatment, disparate impact, and hostile environment models of discrimination are unlikely to provide sufficient relief for

---

Abrams, *supra* note 141, at 1187 (noting that while Title VII helps women gain entry into once closed occupations, it is not effective in eradicating many damaging female stereotypes that prohibit career advancement); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, *in* FEMINIST JURISPRUDENCE 65, 77 (Patricia Smith ed. 1993) (noting that while Title VII has helped a small group of women achieve equality in the workplace, it has failed to change sexually segregated employment practices). Women may be perceived as more costly to employ, and thus will tend to be overlooked for higher ranking positions that require long-term development and commitment. *See id.* at 1222 (noting that employers may discriminate against women with children by denying the employee interesting work or refusing to award earned promotions). Firms might not choose female candidates for executive development courses, important or powerful positions that lead to general management, international assignments, or promotions. *See, e.g.*, U.S. DEP'T OF LABOR, *supra* note 5, at 5 (noting that developmental experiences and career enhancing assignments that act as precursors to advancement are often not available to women and minorities).

165. Refer to note 31 *supra* and accompanying text.

166. Refer to notes 163-64 *supra* and accompanying text.

workers trapped in the ILM because, as previously discussed, courts have been relatively insensitive to the particular problems that ILM employees face under Title VII.

V. RECOMMENDATIONS FOR IMPROVED APPLICATION OF TITLE VII TO ILMS

The economic incentives created by ILMs make a strong argument favoring a revision in the interpretation of Title VII. Failures in the ILM, as in the external market, warrant improved regulation to achieve increased workplace diversity.[167]

A. Standards of Proof

Although arguably adequate to monitor employment decisions that take place in the ELM, Title VII's standards of proof regarding both prima facie cases and defenses fail to protect minority and women employees in the ILM situation.[168] Compared to the protection afforded to workers at entry level decisions, neither the disparate treatment nor the disparate impact model provides much assistance to those workers who have entered the firm, have made firm-specific investments, and have then been denied opportunities for advancement.[169]

The *Hicks* requirement that the plaintiff in a disparate treatment case bear an additional burden beyond showing pretext is particularly problematic for the ILM employee.[170] Employment decisions within the ILM are made under a much more controlled environment than those in the ELM because the employer's uncertainty is correspondingly reduced.[171] Thus, the *Hicks* Court's concern that employers may make employment decisions for not readily apparent, nondiscriminatory reasons should be reduced. In the ILM situation, the plaintiff should win if she can demonstrate that the reason(s) advanced by the employer are mere pretext for discrimination. To allow this, *Hicks* should be overturned to avoid the problems it currently creates for ILM employees.

---

167. *See* HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 95 (1987) (noting that white males born in the United States will account for only 15% of the net additions to the American work force between 1985 and 2000).

168. Refer to notes 129-38 *supra* and accompanying text.

169. Refer to note 31 *supra* and accompanying text.

170. Refer to notes 65-72 *supra* and accompanying text.

171. Refer to note 23 *supra* and accompanying text (discussing the implicit agreement between the employer and employee in the ILM context).

In disparate impact cases, the business necessity requirement should be more stringently interpreted so that legitimate reasons for using a facially neutral selection mechanism are insufficient to justify a mechanism that has an adverse impact on ILM women and minorities. Further, courts must be willing to monitor the practices of employers who operate ILMs and to question the suitability of criteria for advancement that ILM employers either use or impose. The use of informal criteria, in particular, should be scrutinized. If the plaintiff plausibly demonstrates that a particular informal criterion has been used in the past, or that the formal criteria used by the employer provide no basis for screening her, then the employer presumably is using some informal criteria despite the employer's failure to officially recognize these criteria.[172]

Courts have been reluctant to inquire into a firm's high level employment decisions.[173] This is perhaps due to a failure to recognize that ILM employers will follow their best strategic economic interests and will therefore tend to dismiss employees or deny access to further advancement once the employers have recovered their investment. As argued above, the likelihood of opportunistic behavior by employers is accentuated in the case of nontraditional workers.[174] The forces behind the operation of ILMs require courts to devise rules that motivate employers to fulfill the implicit agreement entered with

---

172. *See, e.g.*, Churchill v. IBM, 759 F. Supp. 1089, 1091 (D.N.J. 1991) (denying the defendant's motion for summary judgment concerning the plaintiff's claim of discrimination in the defendant's salary and promotional practices). In *Churchill*, the plaintiff was able to demonstrate that three of the men promoted to the executive level did not appear on the resource listing of candidates for executive positions. *Id.* at 1104. Under our proposed scheme, this would give rise to a presumption that informal criteria were used by the employer. In *Churchill*, this evidence was used by the plaintiff to show that the rationales offered by the defendant for salary and promotional discrepancies between men and women were mere pretext for discrimination. *Id.*

A recent survey indicates that although employers may not officially recognize certain criteria for promotion, those criteria nonetheless play an important role. Daily Lab. Rep., *supra* note 42, at D10. Informal criteria include factors such as office politics, personality, integrity, and familiarity with the candidate. *Id.* In fact, 54% of those responding said that informal criteria were the most important criteria in determining who was promoted, even though they do not appear on any official evaluations of the candidates. *Id.*

Organizational research also suggests that women and minorities are often excluded from promotion networking channels due to informal criteria. *See, e.g.*, Herminia Ibarra, *Personal Networks of Women and Minorities in Management: A Conceptual Framework*, 18 ACAD. MGMT. REV. 56, 56-58 (1993) (noting that informal networking in organizations produces unique constraints on women and minorities that negatively impact job effectiveness and career development).

173. Refer to notes 88-90 *supra* and accompanying text.

174. Refer to notes 37-46 *supra* and accompanying text.

nontraditional workers.

In particular, we propose that employment decisions concerning promotion and advancement be understood by the courts as implicit contracts capable of legal enforcement. For example, in common situations in which extensive firm-specific training is required, courts should scrutinize the employer's decisions to a larger extent. If it appears that the employee has substantially performed by making the firm-specific investments, the employer's breach of the implicit contract would require the employer pay damages or specifically perform her obligations, perhaps by awarding the employee reinstatement and back pay.

B. Stereotyping

Stereotypes may be used by the ILM employer as either conscious or unconscious subterfuge in limiting of advancement opportunities for women and minorities.[175] This behavior by the employer can occur after the employee has made investments, so that it represents opportunistic, strategic behavior by the employer.[176] Because many of the stereotypes are widespread and socially held, there may not be serious social repercussions for an employer who engages in this kind of behavior.[177] Lack of serious reputational injury to the employer means there are inadequate incentives for the employer to eradicate this barrier to advancement.[178] The courts must realize that employment-related decisions in the ILM are affected at least as much by stereotyping as those in the ELM, due to the ILM incentives for the employer to prevent employee recoupment of investment. Courts should realize that stereotyping can be inadvertent and unconscious but nevertheless intentionally discriminatory in the sense that the stereotypes on their face treat women or minorities differently from

---

175. *See, e.g.*, Ann M. Morrison & Mary Ann Von Glinow, *Women and Minorities in Management*, 45 AM. PSYCHOLOGIST 200, 202 (1990) (noting that upper level managers, acting consciously or unconsciously under the influence of stereotypes, contribute to the differential treatment of women and minorities in management).

176. Refer to note 31 *supra* and accompanying text.

177. Refer to notes 118, 175 *supra* and accompanying text. Social stereotyping can also lead to problems in sexual or racial harassment. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502-03 (M.D. Fla. 1991) (discussing plaintiff's expert witness testimony concerning the impact of stereotyping and how it inadvertently leads to sex discrimination).

178. *See* Morrison & Von Glinow, *supra* note 175, at 202 (suggesting that a manager may choose to discriminate if such action will be viewed positively by others in a position to reward that manager).

others.[179]

For the courts to deal specifically with the stereotyping problem, we argue that it cannot be enough that the courts, are willing to evaluate the selection and evaluation decisions after a worker's entry to the firm to the same degree that the original hiring decisions are scrutinized. Instead, we propose that employment decisions within the ILM be subjected to a higher level of scrutiny. In addition, we propose the BFOQ defense[180] be disallowed in decisions that occur within the ILM context. As previously indicated, no employer may use a BFOQ for race.[181] Thus, we are arguing for the abolishment of BFOQs for gender. If an individual woman truly cannot perform the job, the employer can articulate this as the legitimate, nondiscriminatory reason for not advancing her. As a class, however, women should not be eliminated from advancement because of BFOQ stereotyping.

C. *Statistical Proof of Discrimination*

In the absence of an explicit policy, both the systemic disparate treatment and the disparate impact models require a sufficient statistical showing giving rise to an inference of a pattern or practice of discrimination.[182] This proof by the plaintiff requires comparing the number of women and minorities actually selected by the firm and the relevant pool from which selections could be made.[183] At higher levels of the organization, the economics of ILMs suggest that this reference pool, and the number of women or minorities within it, could be rather small.[184] Additionally, over time the available pool at lower levels will become smaller as nontraditional workers become increasingly aware of the small expectation for advancement.[185] For those workers who enter such positions and make investments in firm-specific training but are left

---

179. *See* Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621, 626 (1993) (noting that stereotyping is viewed by cognitive psychologists as intentional in the sense that humans have the capacity to think of others as "members of a category or as unique individuals").

180. Refer to notes 95-102 *supra* and accompanying text.

181. 42 U.S.C. § 2000e-2(e).

182. Refer to notes 124-28 *supra* and accompanying text.

183. Refer to notes 124-38 *supra* and accompanying text.

184. Refer to note 129 *supra* and accompanying text.

185. *See, e.g.*, Greenhaus et al., *supra* note 121, at 68 (noting that blacks who have internalized negative assessments of themselves may not see the point in pursuing career development); Martin et al., *supra* note 33, at 28 (noting that women, in response to claims that they lack necessary management skills, may consequently become less career oriented and less ambitious than men).

with no possibility of advancement, small sample size would make it difficult to prove discrimination on the basis of any systematic pattern or practice.[186] This limitation on the application of the systemic disparate treatment and disparate impact models should be specifically acknowledged by the courts. The need for statistical evidence should be reduced in these circumstances so that comparative and anecdotal evidence is given greater weight. Additionally, courts must not discount statistical significance when it occurs for small samples or small numbers of minority and women employees.

D. The ILM Work Environment

Courts should also recognize that as nontraditional workers enter previously unattainable positions, the possibility of racial and sexual harassment is enhanced.[187] A hostile work environment would aggravate the problems presented in the ILM framework by making it more difficult for women and minorities to remain with the organization long enough to recover their investments or to perform well enough in the organization to advance. The effects of the hostile work environment in this context could, therefore, be twofold. First, more women and minorities could opt out of any labor market that would require them to make firm-specific investments. Because firm-specific training is normally associated with higher paying jobs,[188] such a situation would direct nontraditional workers into lower paying jobs and would create the corresponding societal problems evidenced in the literature concerning primary and secondary markets. Second, a hostile work environment would also facilitate strategic employer behavior by making it more difficult for those employees that have made investments to stay with the firm long enough to reach the investment recoupment stage in their careers. The special problems that hostile work environments can create in ILMs suggest that courts must scrutinize alleged harassment of this type more closely in ILM environments.

Because ILM employers have strong economic incentives to maintain hostile work environments for women or minorities, courts must use Title VII to provide appropriate disincentives. Courts could require ILM employers to remedy the hostile

186. Refer to notes 130-38 *supra* and accompanying text.

187. Refer to text accompanying notes 154-56 *supra*.

188. *See* Cappelli & Cascio, *supra* note 70, at 862 (suggesting a mathematical correlation between higher wages and firm-specific knowledge).

environment to avoid liability, or they could hold ILM employers strictly liable for hostile environment harassment created by co-workers. Additionally, courts could eliminate the reasonableness requirement of the hostile environment case, thereby allowing ILM plaintiffs to prove harassment by demonstrating that they personally considered the behavior unwelcome and that it altered their conditions of employment.[189]

VI. CONCLUSION

Despite thirty years of antidiscrimination regulation under Title VII, women and minorities continue to experience a glass ceiling that prohibits them from advancing to high level positions of authority in organizations. We argue that Title VII has actually played a role in this lack of advancement. Because Title VII was interpreted to focus on entry level positions for women and minorities, it is arguably not suitable, as currently interpreted, for ILM situations. Without either judicial or legislative recognition of the special problems nontraditional workers face in the ILM, and without concomitant adaptation of Title VII to address these problems, women and minorities will continue to face a glass ceiling that will frustrate societal efforts to improve diversity at all levels of the workplace.

189. *See, e.g.*, Paetzold & Shaw, *supra* note 149, at 684 (recommending that courts drop the existing focus on reasonableness and instead concentrate on fostering equal opportunities for all employees by eliminating behavior detrimental to individual women).