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Article

## When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?

Dallan F. Flake<sup>†</sup>

### INTRODUCTION

Following a checkup at the local medical clinic, Mark stops by the reception desk to fill out an anonymous survey about his visit in exchange for ten dollars off his bill. Mark skims the questionnaire, rates his doctor, Melanie Flowers, mostly threes (out of five), and is on his way. When the clinic is forced to lay off one of its doctors two months later, it decides to terminate Dr. Flowers because she has the lowest patient-satisfaction scores. Dr. Flowers subsequently files a sex discrimination lawsuit against the clinic based on her suspicion Mark and other patients rated her lower because she is a woman. If Dr. Flowers is right, should the clinic be liable?

The answer to this question is more complicated than it might seem. If the feedback for Dr. Flowers was explicitly sexist, and the medical clinic knew it—suppose Mark had written “Women belong in the home, not the doctor’s office!” across the bottom of his survey—it seems reasonable to hold the clinic liable, because it knew the feedback was sexist and still factored it into the termination decision. But what if neither Mark nor any other patient had written anything sexist on the survey, yet nonetheless rated Dr. Flowers lower because they viewed female doctors as less competent than male doctors? Would it still make sense to hold the clinic liable if it had no reason to suspect Dr. Flowers’s ratings, which were just slightly lower than the other doctors’ ratings, were tainted by bias? Taking it a step further, what if Mark and the other respondents genuinely thought they

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were being objective in their ratings, but their unconscious biases nonetheless skewed their perceptions of Dr. Flowers, causing them to give her lower ratings? Could the clinic be liable for using customer feedback that *nobody*—including the raters themselves—suspected was sexist?

This hypothetical raises important and novel questions that current employment discrimination laws seem ill equipped to answer. Indeed, it is not merely coincidental that by the end of 2017 there still were no published court opinions directly addressing whether, or to what extent, employers should be liable for using discriminatory customer feedback to make employment decisions (what I refer to as “customer feedback discrimination”). The most instructive guidance in this regard derives from customer preference cases, in which courts routinely hold that employers cannot discriminate against employees based on customers’ discriminatory preferences.<sup>1</sup> But those cases universally involve customer preferences that are blatantly discriminatory; so while they are useful in thinking about how courts would analyze the first scenario (where Mark left an explicitly sexist comment at the bottom of his survey), they are not particularly helpful in the latter two situations, where the bias is not obvious to the employer either because the respondents disguise their biases as objective ratings or because the respondents are unaware their implicit biases tainted their ratings.

While courts and scholars alike have heavily scrutinized employers’ reliance on biased employee evaluations from supervisors in making employment decisions,<sup>2</sup> employers’ use of biased

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1. See, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (“It is now widely accepted that a company’s desire to cater to the perceived . . . preferences of its customers is not a defense under Title VII for treating employees differently . . .”); *Pleener v. N.Y.C. Bd. of Educ.*, 311 F. App’x 479, 482 (2d Cir. 2009) (“We agree that federal law does not permit an employer to discriminate based on race to accommodate the actual or perceived invidious biases of its clientele.”); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) (“The existence of . . . third party preferences for discrimination does not, of course, justify discriminatory hiring practices.”); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971) (“[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.”); *Williams v. G4S Secure Sols. (USA), Inc.*, No. ELH-10-3476, 2012 WL 1698282, at \*22 (D. Md. May 11, 2012) (“Courts have repeatedly held employers responsible for discrimination against their employees, even when the employer itself claimed to be free of bias.”).

2. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (alleging sexist performance evaluations the plaintiff received earlier in her tenure with the employer had resulted in lower pay than her male colleagues

customer feedback to make employment decisions has gone largely unchecked. Only recently have commentators raised concerns that this practice could open the door to discrimination claims. Noah Zatz contends that employers should not be able to “launder” out discriminatory intent from an employment decision merely because such intent is folded into a customer’s feedback.<sup>3</sup> More recently, Lu-in Wang has argued that the law should not allow discrimination in employment to masquerade as customer service and should “hold employers accountable for the ways in which they facilitate, and benefit from, customers’ discrimination against service workers.”<sup>4</sup> Zatz proposes, and Wang endorses,<sup>5</sup> an accommodation-based model of liability, whereby an employer could be held liable for basing an employment decision on discriminatory customer feedback if: “(1) The employee suffered employment-related harm . . . [;] (2) [t]he employee suffered that harm because of her membership in a protected class . . . [;] and (3) [t]here is a basis for holding the employer responsible.”<sup>6</sup> Although this theory sheds new and important light on how existing frameworks can be refashioned to address customer feedback discrimination, it appears the model would only reach cases involving explicitly discriminatory customer feedback.<sup>7</sup> Thus we are still left to wonder how the law should respond when employers base employment decisions on customer feedback in which the taint of bias is less obvious.

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through the end of her career); *McGowan v. Bd. of Trs. of Metro. State Univ.*, 645 F. App’x 667, 670 (10th Cir. 2016) (alleging race discrimination and retaliation based on poor performance reviews); *Kayky v. Boeing Co.*, No. C15-0488RSL, 2016 WL 6525808, at \*5 (W.D. Wash. Nov. 3, 2016) (alleging negative performance evaluations were pretext for national origin discrimination); R. Lawrence Ashe, Jr. & Ginger S. McRae, *Performance Evaluations Go to Court in the 1980’s* [sic], 36 MERCER L. REV. 887, 892–97 (1985) (discussing how subjective performance evaluation systems are susceptible to legal challenges); Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005) (arguing that implicit bias affects performance evaluations).

3. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1416–17 (2009).

4. Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL’Y & L. 249, 250 (2016).

5. *See id.* at 286–91.

6. Zatz, *supra* note 3, at 1413.

7. *See id.* at 1416–22 (identifying examples where the accommodation-based model limits liability to cases involving explicitly discriminatory customer feedback).

I argue in this Article that the dearth of attention given to customer feedback discrimination from courts and scholars alike is not because the problem is nonexistent or inconsequential. To the contrary, a growing chorus of researchers has found that both explicit and implicit bias often taint customer feedback,<sup>8</sup> and firms regularly rely on such feedback to make employment decisions.<sup>9</sup> The problem lies in the fact that customer feedback discrimination does not fit neatly under either the disparate treatment or the disparate impact model of discrimination—the only two judicially endorsed pathways to proving discrimination under antidiscrimination statutes—making it virtually impossible for a victim of such discrimination to prevail in court. Drawing upon my previous work on employer liability for nonemployee discrimination more generally,<sup>10</sup> I contend that courts can and should remedy this injustice by assessing employer liability for customer feedback discrimination under a negligence standard. In essence, a court (or jury) need only ask two questions to determine liability in such cases: (1) did the employer know, or should it reasonably have known, that the customer feedback was biased; if so, (2) did the employer act reasonably in response by taking appropriate preventive or corrective measures? A negligence standard undoubtedly would make it easier for customer feedback discrimination plaintiffs to prevail. Yet the standard would not be so stringent that an employer would be strictly liable whenever biased feedback taints an employment decision. Indeed, a negligence standard is advantageous because it would encourage employers to take reasonable measures to prevent such discrimination without substantially impairing their business operations. This standard is also advantageous insofar as it can be applied with relative ease in both the easy cases, where bias is clear and explicit, and the harder cases, where bias is more difficult to detect. Returning to the introductory hypothetical, the medical clinic's liability under a negligence standard would depend on both its knowledge of and response to the biased feedback.

Now is an especially critical time to consider the parameters of employer liability for customer feedback discrimination. This is not a problem likely to go away anytime soon; in fact, there are strong indicators it may become even worse. As I explain in

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8. See *infra* Part II.B.

9. See *infra* Part I.

10. See generally Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169 (2017).

Part I, we live in a customer-service-obsessed society in which consumers are constantly bombarded with requests for feedback. Employers use this feedback to make an array of employment decisions and this seems unlikely to change anytime soon, with technological advances making customer feedback even easier and less expensive to obtain

Given the ubiquity of customer feedback and the high value employers place on it, one might logically assume the feedback is highly reliable in its depiction of consumers' attitudes toward goods and services. In Part II, I analyze several key studies that not only cast serious doubt on this assumption, but also show that customer feedback is often tainted by explicit and, perhaps more commonly, implicit biases that adversely impact how consumers rate service exchanges.

In Part III, I address how customer feedback discrimination claims fit into the extant legal frameworks. I argue that neither the disparate treatment nor the disparate impact analytical framework is fully equipped to handle customer feedback discrimination claims and, in fact, have made such claims virtually unwinnable.

In light of these deficiencies, I propose in Part IV that employers be held to a negligence standard in customer feedback discrimination cases. I explain how applying a negligence standard is consistent with how courts analyze certain other types of employment discrimination claims. I argue that a reasonable knowledge standard would provide a viable path to recovery for victims of customer feedback discrimination because they would only have to prove the employer should have known the feedback was biased and failed to reasonably respond. I likewise contend that a negligence standard would strike an appropriate balance between incentivizing firms to make reasonable efforts to prevent and correct customer feedback biases without detrimentally impacting their business operations.

## I. CUSTOMER FEEDBACK IN THE MODERN ECONOMY

It would be difficult to overstate the importance of customer satisfaction in the modern economy. Today's customer-centric business environment is a result of several factors, including the

rise of the service economy,<sup>11</sup> increased competition among businesses,<sup>12</sup> the global quality revolution,<sup>13</sup> and the ease with which firms can now gather customer metrics.<sup>14</sup> Catchphrases such as “the customer is always right,” “customer satisfaction is our highest priority,” and “the customer is king” are common in the business world,<sup>15</sup> as firms strive to differentiate their goods and services from those of their competitors. President Clinton famously acknowledged the importance of customer service in 1993 when he introduced the National Partnership for Reinventing Government—an initiative that sought to reform the way the federal government worked, in part by reimagining ordinary citizens as customers and by requiring agencies to set and meet specific customer-service standards.<sup>16</sup> The importance of keeping customers satisfied is further illustrated by a recent survey of over five hundred U.S. business executives, ninety-four percent of whom agreed that listening to customer feedback is increasingly critical to their organization’s bottom line, and ninety

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11. See ANDERS GUSTAFSSON & MICHAEL D. JOHNSON, *COMPETING IN A SERVICE ECONOMY: HOW TO CREATE A COMPETITIVE ADVANTAGE THROUGH SERVICE DEVELOPMENT AND INNOVATION* xiv (2003) (describing how customers in the service economy are “an essential source of information, innovation, and creativity”).

12. See Michael J. Mazzeo, *Competition and Service Quality in the U.S. Airline Industry*, 22 *REV. INDUS. ORG.* 275 (2003) (explaining that when customers are presented with more choices, firms have an incentive to improve customer satisfaction by offering higher-quality goods, better service, and lower prices to maintain their market share).

13. See DEREK R. ALLEN, *CUSTOMER SATISFACTION RESEARCH MANAGEMENT* 1 (2004) (“Customer satisfaction has its roots in the global quality revolution.”).

14. See Jenny van Doorn et al., *Customer Engagement Behavior: Theoretical Foundations and Research Directions*, 13 *J. SERV. RES.* 253, 253–54 (2010) (describing the rise of customer-based metrics as a means for measuring performance).

15. See, e.g., BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 111 (2013) (describing Amazon CEO Jeff Bezos as obsessed about delivering a “flawless” customer experience); *Customer Is King*, ALLEYNE’S GENTLEMEN’S GROOMING CTR., <http://alleynesgrooming.com/customer-is-king> (last visited Apr. 22, 2018) (“Visit us at Alleyne’s, where we believe our Customer is King and we aim to serve every man like one.”); EDDIE SMIT’S AUTO. SOLS., <http://www.autorepairwhitehousetn.com> (last visited Apr. 22, 2018) (“Your Satisfaction is Our Highest Priority!”); *Contact Us*, MOELLER MFG. & SUPPLY, INC., <http://www.moellermfg.com/contact> (last visited Apr. 22, 2018) (“Your satisfaction is our top priority and we’ll endeavor to maintain our status of 100% customer satisfaction.”).

16. See John Kamensky, *A Brief History*, NAT’L P’SHIP FOR REINVENTING GOV’T (Jan. 1999), <http://govinfo.library.unt.edu/npr/whoweare/history2.html>.

percent of whom reported that having customer feedback on employees helps identify “rising stars.”<sup>17</sup>

Given the almost fanatical value placed on customer satisfaction, it is hardly surprising that firms go to remarkable lengths to solicit customers’ opinions on everything from employees to ambiance. Although soliciting customer feedback is hardly a new phenomenon,<sup>18</sup> the methodological and technological advances in how firms gather feedback are extraordinary. For most of the twentieth century, customer feedback tended to be measured informally, such as by front line staff asking people if they were happy or annual paper surveys of customers.<sup>19</sup> However, by the 1980s, businesses began moving away from their almost singular focus on making the best product and became increasingly concerned with boosting customer satisfaction.<sup>20</sup> Firms employed a variety of mechanisms to collect customer feedback, including paper surveys, comments cards, focus groups, mystery shoppers, polling, in-person interviews, usability testing, suggestion boxes, and some inbound and outbound phone calls.<sup>21</sup> In the early 1990s, Computer-Assisted Telephone Interviewing became widespread, as did comparatively short-lived experiments with faxed and disk-by-mail surveys.<sup>22</sup>

The advent of the Internet has significantly expanded feedback possibilities. Mobile device ratings, in-app ratings, web-based pop-up surveys, email and text surveys, live chats over the internet, dedicated feedback space on websites, community groups and discussion boards, review sites, and social media sites like Facebook, Instagram, LinkedIn, and Twitter,<sup>23</sup> allow firms to reach more customers more quickly and inexpensively

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17. See *Listening to Customer and Employee Outcomes Key to Business Performance*, HUNDREDX, INC. (Sept. 14, 2016), <https://hundredxinc.com/news/87>.

18. See *A Brief History of Survey Research*, PRAIRIE RESEARCH ASSOCS., [http://www.pra.ca/resources/pages/files/technotes/history\\_e.pdf](http://www.pra.ca/resources/pages/files/technotes/history_e.pdf) (last visited Apr. 22, 2018) (tracing the history of surveys from the Roman Empire, the Middle Ages, and early nineteenth century Great Britain).

19. See Ray Poynter, *The Rise of Customer Satisfaction Research*, VISION CRITICAL (Nov. 6, 2013), <https://www.visioncritical.com/rise-customer-satisfaction-research>.

20. *Id.*

21. See DEREK R. ALLEN, CUSTOMER SATISFACTION RESEARCH MANAGEMENT 1–14 (2004).

22. See Poynter, *supra* note 19.

23. See Ginny Marvin, *Twitter Launches New Customer Service Feedback and Engagement Tools for Businesses*, MARKETING LAND (Feb. 18, 2016), <http://www.marketingland.com/164993-164993> (discussing Twitter’s recent rollout of two new tools for companies to provide support and get feedback from customers).



than ever before.<sup>24</sup> Indeed, it is now common for firms to receive customer feedback without even soliciting it, as Yelp, Amazon, Google, and other web-based services create independent spaces for customers to share their judgments on a host of different goods and services. In turn, companies such as the Audience<sup>25</sup> and Sprout Social<sup>26</sup> offer products that allow businesses to monitor, measure, and even respond to customer-initiated feedback.

The explosion in feedback mechanisms means customers are bombarded with feedback requests seemingly at every turn. SurveyMonkey, one of the largest online survey developers and distributors, reports that it alone receives three million survey responses *per day*.<sup>27</sup> In the course of writing this Article, I received customer satisfaction questionnaires in the mail from my realtor, health insurance company, and mechanic. During telephone calls to my bank and credit-card company, I was invited to stay on the line to rate my experience with the customer service representatives. Several apps on my phone requested I rate them. A postal worker showed me on my receipt where I could go online to give feedback about my experience at the Post Office. After a recent trip, I received follow-up emails from an airline, hotel, and car-rental agency requesting my feedback on my experience with their services. Uber asked me to rate my driver. I spotted a How's my driving? sticker (complete with a telephone number to call) on the bumper of a semitruck. I lost track of how many survey requests popped up on websites I visited. A casebook publisher invited me to participate in a focus group. Various restaurants, hotels, a doctor's office, and yes, even the DMV, made customer comment cards available to me. A customs officer at an Asian airport asked me to tap either a smiley face or a frowny face on an electronic tablet to indicate my satisfaction with her service. My credit-card company solicited my feedback during an online chat. And upon returning to my vehicle after dining out, my vehicle's navigation system asked me to rate the restaurant.

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24. See generally Robert A. Opoku, *Gathering Customer Feedback Online and Swedish SMEs*, 29 MGMT. RES. NEWS 106 (2006) (exploring and describing tools used by small- and medium-sized enterprises to collect customer feedback using internet-based tools); Scott E. Sampson, *Gathering Customer Feedback Via the Internet: Instruments and Prospects*, 98 INDUS. MGMT. & DATA SYS. 71 (1998) (discussing various ways in which the internet has expanded firms' abilities to collect customer feedback).

25. AUDIENCE, <http://www.theaudience.com> (last visited Apr. 22, 2018).

26. SPROUT SOCIAL, <http://sproutsocial.com> (last visited Apr. 22, 2018).

27. *How SurveyMonkey Gets Its Data*, SURVEYMONKEY, <https://www.surveymonkey.com/mp/survey-methodology> (last visited Apr. 22, 2018).

The proliferation of customer feedback requests is troubling on a number of fronts, particularly its tendency to cause rater fatigue. Research shows that survey response rates peaked between 1960 and 1990 and have been falling precipitously ever since.<sup>28</sup> Indeed, one study found that telephone survey cooperation rates plunged from forty-three percent in 1997 to a mere fourteen percent in 2012.<sup>29</sup> And online-survey response rates are even lower, with some studies showing participation rates averaging a paltry two percent.<sup>30</sup> Customers seem to be particularly weary of online surveys; nearly three-quarters report that surveys interfered with the experience of a website, eighty percent admitted to abandoning a survey halfway through, and nearly two-thirds expressed a preference for giving feedback by actively reaching out.<sup>31</sup> Even Fred Reichheld, inventor of a popular short consumer survey to test brand loyalty, thinks the customer feedback craze has gone too far, recently quipping: “The instant we have a technology to minimize surveys, I’m the first one on that bandwagon.”<sup>32</sup> Rater fatigue has been shown to suppress response rates, which in turn can affect the accuracy of the data.<sup>33</sup>

Employers factor customer feedback into a vast array of business decisions, including employment-related decisions such as who to hire, promote, discipline, and fire; employees’ pay rates, bonuses, tips, and other remuneration; and work schedules, job duties, and other assignments. One study found that about half of large U.S. companies include customer feedback in their incentive compensation.<sup>34</sup> Moreover, in their influential qualitative study of how fifteen firms used customer feedback to

28. David Wheeler, *The Rising Revolt Against Customer Surveys*, WEEK (Sept. 30, 2015), <http://theweek.com/articles/577882/rising-revolt-against-customer-surveys>.

29. *Id.*

30. *Id.*

31. See Lydia Dishman, *Retailers: Your Surveys Are Making Customers Suffer*, FORBES (Mar. 7, 2014), <http://www.forbes.com/sites/lydiadishman/2014/03/07/retailers-your-surveys-are-making-customers-suffer/#7a885956581a>.

32. Jennifer Kaplan, *The Inventor of Customer Satisfaction Surveys Is Sick of Them, Too*, BLOOMBERG TECH. (May 4, 2016), <https://www.bloomberg.com/news/articles/2016-05-04/tasty-taco-helpful-hygienist-are-all-those-surveys-of-any-use>.

33. See, e.g., Stephen R. Porter et al., *Multiple Surveys of Students and Survey Fatigue*, 2004 NEW DIRECTIONS FOR INSTITUTIONAL RES. 63 (finding that administering multiple surveys to students in one academic year significantly reduced response rates in later surveys).

34. See Jeff Marr, *Tying Employee Compensation to Customer Feedback: It Really Works!*, CUSTOMER THINK (Apr. 23, 2006), [http://customerthink.com/tying\\_employee\\_compensation\\_to\\_customer\\_feedback](http://customerthink.com/tying_employee_compensation_to_customer_feedback).

manage their employees, Linda Fuller and Vicki Smith found that on average, each firm utilized five different customer feedback mechanisms.<sup>35</sup> They further discovered that every business they interviewed used feedback mechanisms that allowed customers to identify specific employees,<sup>36</sup> and that customers “re-layed detailed information about individual employee’s [sic] behavior and attitudes” in response to questions such as: “Were your nurses *concerned?*,” “How was your salesperson’s *appearance?*,” and “Was our employee *quick* and *efficient* at the cash register?”<sup>37</sup> The researchers observed that “such detailed feedback about specific employees derived from customers was funneled into employees’ personnel files and often used in bureaucratic systems of evaluation and discipline.”<sup>38</sup> For instance, an insurance agency routed customer feedback into personnel files, “on the basis of which periodic quantitative performance reviews used to determine raises, promotions and the like were prepared.”<sup>39</sup> A supermarket chain inputted information about individual employees from comment cards and customer-initiated letters into electronic employee files that supervisors subsequently factored into annual employee performance reviews.<sup>40</sup> Interestingly, a car-dealership manager threw away comment cards containing positive feedback; he saved the negative ones “for later” and also used summary statistics from monthly customer surveys to pinpoint employees whose numbers deviated substantially from the norm.<sup>41</sup> And, finally, a union official representing grocery workers reported that managers used customer feedback both to initiate the first stages of disciplinary action, such as verbal and written warnings, and for “temporary suspensions and on-the-spot terminations.”<sup>42</sup>

The fact that employers rely on customer feedback to make employment decisions is significant because such decisions constitute “employment actions” under Title VII and other antidiscrimination laws.<sup>43</sup> This means an employer can be held liable if

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35. Linda Fuller & Vicki Smith, *Consumers’ Reports: Management by Customers in a Changing Economy*, 5 WORK, EMP. & SOC. 1, 5 (1991).

36. *Id.* at 6–7.

37. *Id.* at 7.

38. *Id.*

39. *Id.* at 7–8.

40. *Id.* at 8.

41. *Id.*

42. *Id.*

43. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2533 (2015) (“[Title VII] makes it unlawful for an employer to

a protected characteristic motivates the decision and the employee suffers an adverse impact as a result.<sup>44</sup> One may question the fairness of holding employers exclusively liable in such instances, given it is the customer rather than the employer who bears the discriminatory animus.<sup>45</sup> But even within this framework of exclusive employer liability there exists the potential to make employer liability for customer feedback discrimination more commensurate with an employer's level of culpability.

## II. THE PERILS OF CUSTOMER FEEDBACK

Given the prevalence of customer feedback and the high value companies place on it, one might assume most customer feedback accurately and objectively reflects a customer's experience. When gathered correctly, customer satisfaction data certainly can be used to enhance a firm's performance.<sup>46</sup> However, too often customer feedback is unreliable—either because of

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take a variety of adverse employment actions (such as failing or refusing to hire a job applicant or discharging an employee) 'because of' religion [or other protected characteristics]."); *Davis v. Time Warner Cable of Se. Wis., L.P.*, 651 F.3d 664, 677 (7th Cir. 2011) ("[A] reduction in compensation is a materially adverse employment action."); *Kercado-Clymer v. City of Amsterdam*, 370 F. App'x 238, 243 (2d Cir. 2010) (explaining that the assignment of less desirable duties may be considered an adverse employment action); *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." (citation omitted)).

44. See 42 U.S.C. § 2000e-2(m) (2012); see also *Tibbs v. Calvary United Methodist Church*, 505 F. App'x 508, 515 (6th Cir. 2012) ("Title VII prohibits adverse employment actions if the employee's race [or other protected characteristic] was a motivating factor, even if other legitimate factors also motivated the employer's decision."); *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005) ("Title VII expressly prohibits adverse employment actions that are motivated in part by discrimination on the basis of sex, race, color, religion, or national origin.").

45. Compare Einat Albin, *A Worker-Employer-Customer Triangle: The Case of Tips*, 40 *INDUS. L.J.* 181, 182, 186–89 (2011) (asserting that customers have, in effect, become second employers in many cases because of employers' increased reliance on customer feedback to make employment decisions; as such, perhaps they should share responsibility for discrimination), with Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 *IOWA L. REV.* 223, 228–39 (2016) (suggesting the law does not hold customers accountable for their discrimination against employees because it is more effective to hold employers liable for such discrimination and out of concern for customers' personal autonomy and privacy).

46. See generally JANELLE BARLOW & CLAUS MØLLER, *A COMPLAINT IS A GIFT* (1996); Sunil Gupta & Valarie Zeithaml, *Customer Metrics and Their Impact on Financial Performance*, 25 *MARKETING SCI.* 718 (2006); Neil A. Morgan & Lopo Leotte Rego, *The Value of Different Customer Satisfaction and Loyalty Metrics in Predicting Business Performance*, 25 *MARKETING SCI.* 426 (2006).

flaws in the methodologies by which firms collect the data or because respondents consciously or unconsciously permit biases to skew their responses. Whatever the reason, employers would be wise to exercise extreme caution before factoring customer feedback into employment decisions.

#### A. METHODOLOGICAL CHALLENGES

When customer feedback started becoming an important business tool in the mid-twentieth century, few employers stopped to question its reliability; instead, they seemed to adopt the mantra that any feedback was good feedback.<sup>47</sup> However, in recent years numerous studies have revealed widespread and severe methodological flaws associated with customer feedback. For example, Jonathan Barsky and Stephen Huxley argue that many customer satisfaction surveys are of “dubious value” because they typically are conducted without regard for who takes part or the motivation for participating, and thus are susceptible to nonresponse bias, meaning the respondents differ in meaningful ways from nonrespondents.<sup>48</sup> Feedback instruments also are often poorly designed, which can lead to content-validity problems because the instruments “are inadequate for measuring what they are supposed to measure.”<sup>49</sup> For instance, a 2016 analysis of customer feedback tools used by the fifty-one largest U.S. retailers found the majority to be “critically flawed” and “riddled with information biases.”<sup>50</sup> Based on an objective evaluation of fifteen elements, the average survey scored just forty-three out of one hundred points.<sup>51</sup> The study also found that most of the surveys were excessively long, nearly one-third of the questions led customers to give answers the retailer wanted to hear, and

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47. See Rob Brogle, *How to Avoid the Evils Within Customer Satisfaction Surveys*, ISIXSIGMA, <https://www.isixsigma.com/methodology/voc-customer-focus/how-to-avoid-the-evils-within-customer-satisfaction-surveys> (last visited Apr. 22, 2018) (“[As] [c]ompanies jumped on the survey bandwagon . . . there was no limit to the misunderstanding, abuse, wrong interpretations, wasted resources, poor management and employee dissatisfaction that would result from these surveys. Although some companies were savvy enough to understand and properly interpret their survey results, the majority of companies did not.”).

48. Jonathan D. Barsky & Stephen J. Huxley, *A Customer-Survey Tool: Using the “Quality Sample,”* 33 CORNELL HOSPITALITY & RESTAURANT ADMIN. Q. 18, 18–19 (1992).

49. *Id.* at 19.

50. INTERACTION METRICS, 2016 FINDINGS REPORT: THE STATE OF POP RETAIL SURVEYS, (Nov. 27, 2017), <http://interactionmetrics.com/Point-of-Purchase-Survey-Study/Report.pdf>.

51. *Id.*

sixty-three percent of surveys had at least one scale that either lacked a numerical midpoint or used labels that favored toward the positive.<sup>52</sup>

While a full rendering of the methodological inadequacies of customer feedback is beyond the scope of this Article, three studies highlight some of the more common pitfalls. Moses Altsech's analysis of sixty-three medical patient satisfaction surveys found "serious and fundamental flaws in the questions and measurement scales embedded in a considerable number of survey instruments."<sup>53</sup> For instance, seventy-one percent of the surveys contained double-barreled questions, which ask about multiple constructs in the same question but only provide a single measurement scale to assess the multiple constructs.<sup>54</sup> When respondents are confronted with double-barreled questions, they sometimes report an average of the multiple ratings, or report their rating on the construct they consider most important, or do not respond at all.<sup>55</sup> The study likewise found that fifty-seven percent of patient satisfaction surveys used Likert scales with nonneutral midpoints.<sup>56</sup> Likert scales typically have five to seven points, one of which is a midpoint denoting neutral or average judgment, surrounded by equal numbers of negative and positive points.<sup>57</sup> According to Altsech, a Likert scale with a nonneutral midpoint can skew feedback by forcing a respondent who intends to give an "average" rating to give an artificially high or low rating instead.<sup>58</sup>

Kenneth Bartkus and colleagues discovered a number of methodological defects in their analysis of guest comment cards from sixty-three major U.S. lodging chains.<sup>59</sup> Over half of the comment cards lacked a satisfactory secure-return mechanism, such as a locked drop box or postage-paid mail.<sup>60</sup> By far, the most common return method (31.7%) was simply to leave the card at

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52. *Id.*

53. Moses Altsech, *Back to Square One: How Patient Satisfaction Survey Flaws Bias Assessments of Health Care Quality*, ATHENS INST. FOR EDUC. & RES. 1, 9 (2012), <https://www.atiner.gr/papers/BUS2012-0032.pdf>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See Kenneth R. Bartkus et al., *The Quality of Guest Comment Cards*, 48 J. TRAVEL RES. 162 (2009).

60. *Id.* at 169.

the front desk where it was susceptible to tampering from employees.<sup>61</sup> Other common flaws in the comment cards included biased introductory statements, not asking for the respondent's email address, overuse of closed-ended questions, lack of writing space for open comments, imprecise question wording, and unbalanced response options.<sup>62</sup>

Sampling bias is another common problem with customer feedback, not only because participation by the customer is voluntary (thus opening the door to nonresponse bias) but also because of the ways customers are selected to provide feedback. Yaniv Poria's study of hotel employees in the United Kingdom and Israel found a number of factors influenced employees' deviation from unbiased sampling procedures in how they distributed guest satisfaction questionnaires, including their accessibility to guests, their perceptions of management reaction and its magnitude if employees' names were mentioned in the guest's comments, their perception of the importance of the data gathered, and whether the employees perceived the questionnaire as a tool to pacify an agitated guest.<sup>63</sup>

#### B. COGNITIVE BIASES

Customer feedback is also problematic inasmuch as it ultimately consists of subjective judgments that are vulnerable to a wide range of biases. Such biases may include "the 'bandwagon effect,' confirmation of preexisting beliefs, education or cognitive ability, and stereotypes based on the race or gender of the person being rated."<sup>64</sup> Customer feedback is likewise susceptible to the halo effect, a cognitive bias in which a respondent's overall impression of a person influences the respondent's thoughts and feelings about the person's character.<sup>65</sup> Halo-contaminated data "can undermine the interpretability of attribute-specific satisfaction data, obscure the identification of the strengths and weak-

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61. *Id.*

62. *Id.* at 169–72.

63. Yaniv Poria, *Employees' Interference with the Distribution of Guest Satisfaction Questionnaires*, 16 INT'L J. CONTEMP. HOSPITALITY MGMT. 321, 322–23 (2004).

64. David R. Hekman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 238–39 (2010).

65. Edward L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCHOL. 25, 25 (1920).

nesses, and make attribute-specific comparisons across competing brands and products unreliable.”<sup>66</sup> The danger of such biases skewing customers’ judgments is compounded by the fact that many raters are naïve, inexperienced, and are not held accountable for the accuracy of their ratings.<sup>67</sup> Moreover, customer feedback is often anonymous, which not only decreases accountability but also suppresses “the desire to engage in the effortful cognitive processing required to conceal or overcome any biases.”<sup>68</sup>

While any cognitive bias may compromise the validity of customer feedback, only those based on race, sex, or some other protected trait have the potential to expose employers to liability for discrimination. Sometimes such impermissible biases are easy to spot because they are overt, intentional, and explicit. For instance, in an Urbanspoon review of the Atomic Grill in Morgantown, West Virginia, a patron requested that the servers show “more skin.”<sup>69</sup> In Harrisonburg, Virginia, a couple dining at a luncheonette refused to leave a tip for their Latina waitress and instead wrote across the bottom of the receipt, “We only tip

66. Jochen Wirtz, *Halo in Customer Satisfaction Measures*, 14 INT’L J. SERV. INDUSTRY MGMT. 96, 96 (2003).

67. Hekman et al., *supra* note 64, at 239. *See generally* Elaine D. Pulakos et al., *Examination of Race and Sex Effects on Performance Ratings*, 74 J. APPLIED PSYCHOL. 770 (1989) (examining the effects of race and sex on performance evaluation ratings for first-term Army soldiers); Tim J. Wilkinson & Sylvie Fontaine, *Patients’ Global Ratings of Student Competence: Unreliable Contamination or Gold Standard*, 36 MED. EDUC. 1117 (2002) (determining that global ratings by medical patients are a valid and reliable assessment of medical students’ clinical skills, but that this is achieved by controlling the context and questions of surveys); David J. Woehr & Sylvia G. Roch, *Context Effects in Performance Evaluation: The Impact of Ratee Gender and Performance Level on Performance Ratings and Behavioral Recall*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 31 (1996) (finding significant differences in overall performance ratings as a result of ratee sex and context factors).

68. Hekman et al., *supra* note 64, at 240; *see also* Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255 (1999) (reviewing the impact of accountability on social judgments and choices); Wendy L. Richman et al., *A Meta-Analytic Study of Social Desirability Distortion in Computer-Administered Questionnaires, Traditional Questionnaires, and Interviews*, 84 J. APPLIED PSYCHOL. 754 (1999) (offering an analysis of social desirability distortions between computer, traditional paper-and-pencil questionnaires, and face-to-face interviews).

69. Anna Breslaw, *One Restaurant’s Unbelievable Response to a Sexist Customer Comment*, COSMOPOLITAN (May 21, 2014), <http://www.cosmopolitan.com/food-cocktails/news/a25556/restaurant-more-skin-comment>. In response to the sexist feedback, the restaurant offered a seven-dollar potato skin special and donated all proceeds to the West Virginia Foundation for Rape Information Services. *Id.*



citizens.”<sup>70</sup> And in Cleveland, Ohio, a university dining hall worker found a comment card that read, “There are a lot of black people working here. I hope it’s just for Black History Month. Signed, the KKK.”<sup>71</sup> While overtly discriminatory customer feedback typically is anonymous, that’s not always the case. For example, a father in Michigan told a hospital supervisor that he did not want any black nurses caring for his baby;<sup>72</sup> a medical center in Baltimore, Maryland, demanded that a security staffing company provide only male security guards;<sup>73</sup> and even the federal government, by way of the National Security Agency, insisted that an IT contractor reassign an employee to another client for taking what it considered excessive leave to care for his sick wife.<sup>74</sup> Although instances of overt discrimination seem to be less common in recent years, various commentators have expressed concern that blatant racism, sexism, and xenophobia may become more commonplace under the Trump Administration.<sup>75</sup>

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70. Cleve R. Wootson Jr., *This Couple Didn’t Tip Their Latina Server. They Left a Hateful Message Instead*, WASH. POST (Aug. 21, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/08/21/this-couple-didnt-tip-their-latina-server-they-left-a-hateful-message-instead>.

71. Gabrielle Buffington, *Graffiti and Prejudiced Remarks Found in Fribley Commons Before Spring Break; Perpetrators Still Not Caught*, OBSERVER (Mar. 26, 2015), <http://observer.case.edu/graffiti-and-prejudiced-remarks-found-in-fribley-commons-before-spring-break-perpetrators-still-not-caught>.

72. Gary Ridley, *Hurley Settles Race Discrimination Complaint That Claimed Black Nurses Were Banned from Treating White Baby in Flint*, MLIVE.COM (Sept. 27, 2013), [http://www.mlive.com/news/flint/index.ssf/2013/09/hurley\\_settles\\_race\\_discrimina.html](http://www.mlive.com/news/flint/index.ssf/2013/09/hurley_settles_race_discrimina.html).

73. *Williams v. G4S Secure Sols. (USA), Inc.*, No.ELH-10-3476, 2012 WL 1698282, at \*2 (D. Md. May 11, 2012).

74. *Sparenberg v. Eagle All.*, No. JFM-14-1667, 2015 WL 6122809, at \*2 (D. Md. Oct. 15, 2015).

75. See, e.g., Laura Bates, Opinion, *Trump’s Insults Embolden America’s Secret Sexists*, CNN (Oct. 14, 2016), <http://www.cnn.com/2016/10/14/opinions/trumps-insults-embolden-americas-secret-sexists-opinion-bates> (“[Mr. Trump] is emboldening all those who secretly hold these [sexist] views at every turn. If he were elected, it would be a hugely powerful validation of these opinions and would risk securing them in societal acceptability for generations to come.”); Arun Gupta, *How a Trump Presidency Would Unleash a Torrent of Racist Violence—and Devastate the Left*, IN THESE TIMES (Sept. 26, 2016), [http://www.inthesetimes.com/features/trump\\_presidency\\_would\\_devastate\\_the\\_left.html](http://www.inthesetimes.com/features/trump_presidency_would_devastate_the_left.html) (warning that “a Trump victory would embolden white nationalists, giving them access to vast state power and resources and a White House that would downplay or ignore their violent excesses”); *What It’s Like to Be an American Muslim After Trump’s Election*, NPR (Nov. 12, 2016), <http://www.npr.org/2016/11/12/501853599/what-its-like-to-be-an-american-muslim-after-trumps-election> (quoting human rights lawyer Arsalan Iftikhar as he explains that he is “quite worried for the next four years when it comes to women and Hispanics and

Although we have made “considerable progress in reducing overt expressions of prejudice since the Civil Rights Movement of the 1960s,”<sup>76</sup> this does not necessarily mean Americans are becoming less discriminatory; more likely, discrimination is becoming harder to detect. Indeed, “there is abundant social-psychological evidence that biases against women and minorities persist in a more covert and non-conscious form”<sup>77</sup>—what researchers often term “modern discrimination,”<sup>78</sup> “aversive discrimination,”<sup>79</sup> “covert discrimination,”<sup>80</sup> or “implicit bias.”<sup>81</sup>

Samuel Gaertner and John Dovidio posit that as antidiscrimination ideals become more firmly entrenched in American society, “many Whites who consciously, explicitly, and sincerely support egalitarian principles and believe themselves to be non-prejudiced also harbor negative feelings and beliefs about Blacks and other historically disadvantaged groups.”<sup>82</sup> They further explain that “The existence of both the conscious endorsement of egalitarian values and unconscious negative feelings toward Blacks makes aversive racists’ attitudes complex and produces a distinct pattern of discriminatory behavior.”<sup>83</sup> Moreover,

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LGBT folks and people with disabilities, African-Americans and, of course, American Muslims, in terms of how this is going to affect their lives over the next four years under a Trump presidency” because Mr. Trump “has emboldened an entire subset of the American populace who now think it’s OK to bring Nazi flags to presidential rallies”).

76. Hekman et al., *supra* note 64, at 240.

77. *Id.*

78. See, e.g., V. Paul Poteat & Lisa B. Spanierman, *Modern Racism Attitudes Among White Students: The Role of Dominance and Authoritarianism and the Mediating Effects of Racial Color-Blindness*, 152 J. SOC. PSYCHOL. 758 (2012).

79. See, e.g., Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common In-group Identity Model*, 61 J. SOC. ISSUES 615, 618 (2005).

80. See, e.g., Christopher L. Aberson et al., *Covert Discrimination Against Gay Men by U.S. College Students*, 139 J. SOC. PSYCHOL. 323 (1999).

81. See, e.g., Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON U. C.R.L.J. 1 (2015).

82. Gaertner & Dovidio, *supra* note 79; see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 903 (1993) (“[Survey data shows] virtually all whites in American society now profess a commitment to nondiscrimination in employment.” However, the data also reveals a “consistently high level of general racial prejudice,” signifying that “overt racism has lost favor socially, but racist attitudes lie close beneath the surface of our society.”).

83. Gaertner & Dovidio, *supra* note 79, at 619; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“Traditional notions of intent do not reflect

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“Whereas old-fashioned racists exhibit a direct and overt pattern of discrimination, aversive racists’ actions may appear more variable and inconsistent.”<sup>84</sup> Significantly, because aversive racists consciously endorse egalitarian principles, “they will *not* discriminate in situations with strong social norms when discrimination would be obvious to others and to themselves.”<sup>85</sup> Instead, these unconscious feelings are expressed in “subtle, indirect, and rationalizable ways”—particularly “in situations in which normative structure is weak, when the guidelines for appropriate behavior are vague, or when the basis for social judgment is ambiguous.”<sup>86</sup>

Aversive discrimination often occurs when aversive racists “can justify or rationalize a negative response on the basis of some factor other than race,” such that they are able to engage in behaviors that harm a minority, “but in ways that allow them to maintain their self-image as nonprejudiced.”<sup>87</sup> Customer feedback may be especially susceptible to this type of bias for the very reasons Gaertner and Dovidio articulate: the normative structure for feedback exchanges typically is weak or nonexistent, because feedback tends to be anonymous and raters face no repercussions for their answers; the guidelines for appropriate rater behavior are often vague; the basis for social judgment is entirely ambiguous; and survey questions and other feedback mechanisms provide ample opportunity for a respondent to give an employee a poor rating ostensibly on the basis of some factor other than the employee’s protected characteristic.

A growing body of research indicates customers both consciously and unconsciously allow racist and sexual biases to adversely affect their perceptions of service exchanges. David Hekman and colleagues conducted the most robust study on this question, demonstrating how rater bias impacted customer satisfaction scores in three studies using different samples and methods.<sup>88</sup> The first study analyzed over twelve thousand patient satisfaction ratings and found that even after controlling

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the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision-maker’s beliefs, desires, and wishes.”).

84. Gaertner & Dovidio, *supra* note 79, at 619.

85. *Id.* at 620.

86. *Id.*

87. *Id.*

88. See Hekman et al., *supra* note 64.

for objective measures of physician performance (productivity, accessibility, and quality), female and nonwhite physicians received lower patient satisfaction scores than their male and white counterparts.<sup>89</sup> In the second study, student raters observed videos of an employee-customer interaction in a university bookstore and were asked to evaluate the employee's behavior and to provide satisfaction judgments of the store environment.<sup>90</sup> Different videos of the same scripted interaction were shown, with the only variance being in the employee's race or sex.<sup>91</sup> Importantly, each respondent also took two implicit association tests (IATs), so the researchers could examine how implicit biases impacted student rater evaluations.<sup>92</sup> The study found that respondents rated employees and the organizational context as worse when observing the performance of female and nonwhite employees, especially if the respondent held implicit biases about the low-status group.<sup>93</sup> The third study, which examined member satisfaction at sixty-six country clubs, found that objectively measured behaviors that benefitted members, such as the quality of the facilities, were positively related to satisfaction, but only for facilities with low percentages of nonwhite and female employees.<sup>94</sup> The findings from these three studies led Hekman and colleagues to conclude:

If these results are replicated and generalizable, they have significant implications for organizational practice. If managers are serious about the fair treatment of their employees and the promotion of diversity, they need to treat customer ratings differently. More specifically, the rating process can be changed by increasing information, responsibility, or training for raters and by changing how customer ratings are used. In the latter context, organizations can perhaps measure and discount such biases or statistically adjust the ratings to remove the bias. Without such actions, given the increasing dependence on customer ratings, society is not only likely to maintain existing levels of inequitable compensation and advancement for women and minorities, but also likely to increase these inequities. This outcome is unacceptable in a society that is committed legally, morally, and socially to fair treatment for all in the workplace.<sup>95</sup>

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89. *Id.* at 243–49.

90. *Id.* at 249.

91. *Id.*

92. *Id.* at 250.

93. *Id.* at 250–53.

94. *Id.* at 253–56.

95. *Id.* at 259.

Other researchers have found similar patterns of bias across a variety of settings. For instance, Dan Moshavi found that customers rated their telephonic exchanges with customer-service representatives significantly higher if the representative was the opposite sex of the respondent.<sup>96</sup> An analysis of customer satisfaction scores from three hundred clients of an online-marketing firm found that all of the male client-service representatives had higher scores than all of the female client-service representatives, even though the female marketers on average had higher producing accounts.<sup>97</sup> In fact, all of the men on staff had above-average scores, while all women had below-average scores, and the lowest scoring male representative had higher ratings than the top scoring female representative.<sup>98</sup> Lillian MacNell and colleagues detected a similar pattern of discrimination in students' ratings of their professors on teaching evaluations.<sup>99</sup> In that study, assistant instructors in an online class each operated under two different gender identities.<sup>100</sup> Students rated the male identity significantly higher than the female identity, regardless of the instructor's actual gender.<sup>101</sup> Tombs and Hill's study of customer reactions to different employee accents revealed that while hearing a foreign accent was not enough on its own to influence customer ratings, when the employee was incompetent or the customer was in a negative affective state, a foreign accent seemed to exacerbate the situation.<sup>102</sup>

Customer bias likewise manifests itself in the judicial world. A 1993 study of over ten thousand Colorado attorneys' ratings of the judges before whom they had appeared in the prior eighteen months found that female judges were rated significantly lower than male judges on a number of different attributes.<sup>103</sup> One-

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96. Dan Moshavi, *He Said, She Said: Gender Bias and Customer Satisfaction with Phone-Based Service Encounters*, 34 J. APPLIED SOC. PSYCHOL. 162, 171 (2004).

97. See Bryce Covert, *Female Client Service Reps Get Lower Scores Despite Better Performance and Experience*, THINKPROGRESS (May 22, 2014), <https://www.thinkprogress.org/female-client-service-reps-get-lower-scores-despite-better-performance-and-experience-dfa457062f5c#.36ijmroyv>.

98. *Id.*

99. See Lillian MacNell et al., *What's in a Name: Exposing Gender Bias in Student Ratings of Teachings*, 40 INNOVATIVE HIGHER EDUC. 291, 301 (2015).

100. *Id.* at 296–97.

101. *Id.* at 301.

102. Alastair Tombs & Sally Rao Hill, *The Effect of Service Employees' Accent on Customer Reactions*, 48 EUR. J. MARKETING 2051, 2062–65 (2014).

103. Joyce S. Sterling, *The Impact of Gender Bias on Judging: Survey of Attitudes Toward Women Judges*, 22 COLO. LAW. 257, 257 (1993).

fourth of the attorneys recommended the female judges not be retained, whereas just thirteen percent recommended the male judges not be retained.<sup>104</sup> Male attorneys ranked female judges lower than male judges on every attribute measured.<sup>105</sup> Interestingly, female attorneys ranked female judges as high as male judges on some attributes but significantly lower than male judges on several others, including compassion, courtesy, satisfactory performance as a motions judge, satisfactory performance as a settlement judge, and overall rating.<sup>106</sup> More than two decades later, female judges still appear to be evaluated more harshly because of their sex. Gill's 2014 study of judicial performance evaluations from Clark County, Nevada, found that female and nonwhite judges were rated significantly lower by attorneys, even after controlling for job performance.<sup>107</sup>

Lastly, a number of studies have shown customers discriminate against black service employees in how much they tip them—a different, perhaps more honest, form of feedback. Ian Ayres and colleagues' analysis of more than one thousand tips to taxicab drivers in New Haven, Connecticut, found that black drivers on average were tipped nearly one-third less than their white counterparts and were also eighty percent more likely than white drivers to receive no tip at all.<sup>108</sup> Michael Lynn and colleagues' examination of 140 tips given to restaurant workers in a southern region of the United States showed that both white and black diners tipped black servers less than white servers, even after controlling for the diners' rating of service.<sup>109</sup> Brewster and Lynn's subsequent study of over five hundred restaurant diners in a northern U.S. city detected this same pattern of discrimination against black servers.<sup>110</sup>

In short, there can be no doubt customer feedback plays a vital role in today's service economy. But its utility is often undermined both by serious methodological shortcomings in how

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104. *Id.*

105. *Id.*

106. *Id.*

107. Rebecca D. Gill, *Implicit Bias in Judicial Performance Evaluations: We Must Do Better Than This*, 35 JUST. SYS. J. 271, 289–91 (2014).

108. Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1616 (2005).

109. Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, 38 J. APPLIED SOC. PSYCHOL. 1045, 1054–55 (2008).

110. Zachary W. Brewster & Michael Lynn, *Black-White Earnings Gap Among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping*, 84 SOC. INQUIRY 545, 557–61 (2014).

the data is collected and generated, as well as by conscious and unconscious cognitive biases that skew customer ratings. Although the former is troubling in its own right, the latter is of more serious concern, inasmuch as biased feedback can subject employees to discrimination based on protected traits while also exposing employers to costly litigation.

### III. CUSTOMER FEEDBACK DISCRIMINATION WITHIN EXISTING LEGAL FRAMEWORKS

As other commentators have noted, the courts have not directly addressed employers' use of discriminatory customer feedback.<sup>111</sup> That is not to say customer feedback discrimination is not a serious problem. We know firms are soliciting feedback from customers at unprecedented rates, that much of that feedback is either intentionally or unintentionally biased, and that such feedback regularly factors into employment decisions.<sup>112</sup> So then, why the dearth of lawsuits? I argue in this Part that the answer lies, at least partially, in the difficulty of litigating customer feedback discrimination claims within existing legal frameworks. Returning to our introductory hypothetical, Dr. Flowers has two options for proving the medical clinic terminated her employment because of her sex.<sup>113</sup> She either must prove disparate treatment (i.e., that the clinic's discrimination was intentional; its use of patient satisfaction ratings was pretext for discrimination) or disparate impact (i.e., that even if the clinic's decision was facially neutral, it had a discriminatory impact on women). In this Part, I explain why the disparate treatment and disparate impact frameworks are unappealing and may, in fact, deter victims of discrimination from pursuing their claims. I further contend that these frameworks do not properly incentivize employers to guard against customer feedback discrimination.

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111. See Wang, *supra* note 4, at 285 ("While the use of customer feedback to manage employees appears to be both widespread and problematic, it is not one that employment discrimination law has yet addressed."); Zatz, *supra* note 3, at 1417 ("No published decision is precisely on point . . .").

112. See *supra* Parts I, II.B.

113. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (explaining that disparate treatment and disparate impact "are the only causes of action under Title VII"); *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1041 (2d Cir. 1993) ("Under Title VII, discrimination can be demonstrated through evidence of either 'disparate treatment' or 'disparate impact.'").

## A. DISPARATE TREATMENT

Discrimination that is intentional is analyzed under a disparate treatment theory of discrimination.<sup>114</sup> To prevail on a disparate treatment claim, a plaintiff must prove her employer discriminated against her “because of” a protected trait.<sup>115</sup> The protected trait need not be the sole reason for the termination; alternatively, a plaintiff can prevail by showing the protected trait “was a motivating factor” in the employment decision.<sup>116</sup> How a plaintiff goes about proving disparate treatment depends on the type of evidence she possesses to support her claim. A plaintiff can prove disparate treatment through direct or circumstantial evidence.<sup>117</sup> “Direct evidence of discrimination is ‘evidence which, if believed, would prove the existence of a fact [in issue] without inference or presumption.’”<sup>118</sup> Direct evidence requires a statement of discriminatory intent by a person involved in the adverse action, such as “a woman was not competent enough to do this job” or “we can’t have women in management.”<sup>119</sup>

Because direct evidence of discrimination is rare,<sup>120</sup> plaintiffs ordinarily attempt to prove their claims through circumstantial evidence, using a three-part burden shifting analysis known as the *McDonnell Douglas* test.<sup>121</sup> This analytical model,

114. See *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (explaining that intentional discrimination is known as disparate treatment).

115. 42 U.S.C. § 2000e-2(a) (2012).

116. *Id.* § 2000e-2(m).

117. See *Presley v. Ohio Dep’t of Rehab. & Corr.*, 675 F. App’x 507, 512 (6th Cir. 2017) (“To establish a discrimination claim under Title VII, plaintiffs must present either direct or circumstantial evidence of discrimination . . .”).

118. *Horne v. Turner Constr. Co.*, 136 F. App’x 289, 292 (11th Cir. 2005) (quoting *Earley v. Champion Int’l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990)); see also *McNulty v. Citadel Broad. Co.*, 58 F. App’x 556, 562 (3d Cir. 2003) (“Direct evidence means ‘evidence sufficient to allow the jury to find that the “decision makers placed substantial negative reliance on [the plaintiff’s age] in reaching their decision to fire him.’” (quoting *Fakete v. Aetna, Inc.*, 308 F.3d 335, 337–38 (3d Cir. 2002))).

119. *Horne*, 136 F. App’x at 292.

120. See *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016) (“Direct evidence—an overt admission of discriminatory intent—is rare . . .”); *Sardina v. United Parcel Serv., Inc.*, 254 F. App’x 108, 109 (2d Cir. 2007) (“[D]irect evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence . . .”).

121. See *Sullivan v. Worley Catastrophe Servs., L.L.C.*, 591 F. App’x 243, 245–46 (5th Cir. 2014) (“Since ‘direct evidence of discrimination is rare, the Supreme Court has devised an evidentiary procedure that allocates the burden of production and establishes an orderly presentation of proof in discrimination cases.’” (quoting *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir.



announced by the Supreme Court in 1973,<sup>122</sup> involves three distinct steps: (1) the plaintiff must first establish a prima facie case of discrimination; (2) the defendant employer must then offer a legitimate nondiscriminatory reason for the adverse employment action; whereafter (3) the plaintiff must show the employer's proffered reason was pretext for discrimination.<sup>123</sup> In mixed-motive cases, there is often a fourth step: "If a plaintiff demonstrates that [the protected trait] was a motivating factor in the employment decision, it then falls to the defendant to prove 'that the same adverse employment decision would have been made regardless of discriminatory animus.'"<sup>124</sup> Whereas the second and third steps of the *McDonnell Douglas* test are fairly straightforward, "[t]he proof necessary to establish a prima facie case . . . is flexible and varies with the specific facts of each case."<sup>125</sup> In a discriminatory discharge case such as *Dr. Flowers's*, a plaintiff can establish a prima facie case generally by showing that (1) she belongs to a protected class; (2) she was performing her duties satisfactorily; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination.<sup>126</sup>

Although the courts have made clear that disparate treatment must be intentional on the employer's part,<sup>127</sup> neither the

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1996)); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) ("The *McDonnell Douglas* analytical framework using circumstantial evidence has developed because direct evidence of discrimination is rare.").

122. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–04 (1973).

123. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49–50 n.3 (2003) ("Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." (internal citation omitted)).

124. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (quoting *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

125. *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 679 (8th Cir. 2001); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (stating that *McDonnell Douglas* created a flexible standard for plaintiffs to establish a prima facie case of discrimination that may be modified to fit the facts of a case).

126. See *Grant v. City of Blytheville*, 841 F.3d 767, 773–74 (8th Cir. 2016); *Kirkland v. Cablevision Sys.*, 760 F.3d 223, 225 (2d Cir. 2014); *Barlow v. C.R. Eng., Inc.*, 703 F.3d 497, 505 (10th Cir. 2012).

127. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1024 (11th Cir. 2016) ("To prevail on a disparate treatment claim, a Title VII plaintiff must demonstrate that an employer intentionally discriminated against her on the basis of

language of Title VII nor the *McDonnell Douglas* test explicitly requires a showing of intentionality. Whether and how a plaintiff must show an employer intentionally discriminated is crucial in the context of customer feedback discrimination. If an employer could only be liable for disparate treatment if it consciously factors biased feedback into an employment decision, the employer would have to actually know the feedback was biased and decide to use it anyway. Thus the employer could avoid liability, and freely use feedback that is just as prejudicial to an employee, so long as the bias is implicit or otherwise unknown to the employer. Deborah Brake rightly asserts that uncertainty about whether disparate treatment must be conscious to be intentional stems from ambiguity in the statutory text itself, which simply prohibits discrimination “because of”<sup>128</sup> or motivated by<sup>129</sup> a protected trait:

The statute could plausibly be read [as permitting disparate treatment claims based on unconscious discrimination]. Nowhere does the text limit the statute’s reach to intentionally biased decision making in codifying the unlawful employment practices. Rather, the statutory language simply bars employers from discriminating “because of such individual’s” race or sex. If “because of” denotes causation-in-fact, an employment decision that is made based in whole or in part on the employee’s sex or race would violate the statute regardless of whether the actor deliberately relied on the discriminatory reason, as long as that is in fact what occurred.

And yet, this is not the only plausible reading of the statutory text. An alternative reading is that the term “discriminate” . . . implicitly incorporates a requirement that the decision maker acted intentionally, so that discrimination is understood to involve the actor’s conscious awareness of the reason for the decision.<sup>130</sup>

While scholars are somewhat divided over whether disparate treatment reaches implicit bias,<sup>131</sup> I agree with Brake that

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a protected characteristic.”); *Ray v. Ropes & Gray LLP*, 799 F.3d 99, 112 (1st Cir. 2015) (“To successfully establish a Title VII disparate treatment claim, [the plaintiff] must show that he suffered intentional discrimination.”); *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 612 (6th Cir. 2012) (“To prevail on a disparate treatment claim, a plaintiff must show proof of intentional discrimination.”); *Mullin v. Raytheon Co.*, 164 F.3d 696, 699–700 (1st Cir. 1999) (“The linchpin of a disparate treatment claim is proof of the employer’s discriminatory motive. Not so a claim of disparate impact . . .” (internal citation omitted)).

128. 42 U.S.C. § 2000e-2(a) (2012).

129. *Id.* § 2000e-2(m).

130. Deborah Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 571 (2017).

131. Compare Christopher Cerullo, *Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 155–61 (2013), Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L.

the courts appear to be “increasingly wedded to a conception of the disparate treatment claim as predicated on the decision maker’s conscious reliance on a discriminatory reason.”<sup>132</sup> This is evident from courts’ repeated assertion that disparate treatment claims involve intentional discrimination, whereas disparate impact involves unintentional discrimination.<sup>133</sup> Additionally, the Supreme Court itself insinuated, in *Price Waterhouse v. Hopkins*, that an employer intentionally discriminates only if it acts with a conscious discriminatory intent or motive:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.<sup>134</sup>

The Court’s reasoning suggests that whether an employer intentionally discriminates depends on if the employer knows at the time of the employment decision that a protected trait motivated the action. Thus, if the employment decision had been unconsciously motivated by the protected trait, the employer could not have intentionally discriminated. More recently, as Brake points out, the Court in *Ledbetter v. Goodyear Tire & Rubber Co.*

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REV. 741, 757, 771 (2005), Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1237 (1999), and Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 100–01 (2010), with Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1146–49 (1999) (arguing that the current doctrine is formally at odds with liability for unconscious forms of disparate treatment).

132. Brake, *supra* note 130, at 572; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1172 (1995) (arguing that, in disparate treatment cases, “liability is premised on the presence of conscious discriminatory animus”).

133. See, e.g., *EEOC v. Joe’s Stone Crabs, Inc.*, 296 F.3d 1265, 1270 (11th Cir. 2002) (referring to intentional discrimination as disparate treatment and unintentional discrimination as disparate impact); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1405 (10th Cir. 1997) (“[C]ourts have found it useful to distinguish between intentional discrimination, often labeled as ‘disparate treatment,’ and unintentional or incidental discrimination, labeled as ‘disparate impact.’”); *Brown v. Ameriprise Fin. Servs., Inc.*, 707 F. Supp. 2d 971, 976 (D. Minn. 2010) (“[D]isparate treatment involves *intentional* discrimination against an individual (or group of individuals), while disparate impact involves *unintentional* discrimination.”); *Save Mart Supermarkets v. Underwriters at Lloyd’s London*, 843 F. Supp. 597, 606 (N.D. Cal. 1994) (“The issue before this Court is whether claims of disparate impact (unintentional), as well as disparate treatment (intentional), discrimination are barred from coverage . . .”).

134. 490 U.S. 228, 250 (1989) (emphasis added).

“equated pay discrimination with the employer’s deliberate decision to pay a woman less because of her sex,” and in *Wal-mart Stores, Inc. v. Dukes* the Court expressed “skepticism of the plaintiffs’ assertion [that] a common policy of discrimination was fueled by an implicit understanding of discrimination as a conscious, and thereby rare, phenomenon.”<sup>135</sup> Brake further contends that even though the Court did not make intentionality an explicit element of the *McDonnell Douglas* test, the test itself “is predicated on a working assumption that the employer knew regardless of whether it relied on a discriminatory reason.”<sup>136</sup> This assumption is evidenced by the fact that “proof of the falsity of the employer’s legitimate, nondiscriminatory reason supports an inference of discrimination because it supports an inference that the employer knowingly lied to cover up its real (and by implication, deliberate) discriminatory reason.”<sup>137</sup>

Either interpretation of the statutory text seems anathema to properly allocating liability for employment decisions based on biased customer feedback. On the one hand, if Title VII only prohibits intentional discrimination that is conscious, this would seem to foreclose the possibility of an employer being liable for using anything other than the most explicitly and obviously discriminatory customer feedback. This seems contrary to Title VII’s plain intent.<sup>138</sup> What incentive would an employer have to carefully scrutinize feedback for bias if ignorance is bliss? Indeed, what would keep an employer from relying exclusively on quantitative customer feedback, from which bias cannot be easily ascertained, as a way to insulate itself from liability? On the other hand, a broad reading of Title VII that would subject employers to liability for the slightest trace of implicit bias in a single customer satisfaction survey seems heavy handed, unrealistic, and overly punitive. Can it really be said that an employer intentionally discriminates when it factors into an employment

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135. Brake, *supra* note 130, at 571–72.

136. *Id.* at 572–73.

137. *Id.*

138. See H.R. REP. NO. 88-914, at 26 (1963), as reprinted in 1964 U.S.C.A.N. 2391, 2401 (“The purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.”); 110 CONG. REC. 13,079–80 (1964) (statement of Sen. Clark) (similar); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (“The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of minority citizens.”).

decision facially neutral feedback that is tainted by hidden bias that only a skilled social scientist could detect?

To understand how courts might analyze customer feedback discrimination claims under a disparate treatment framework, it is helpful to divide such claims into three categories: (1) claims in which the bias is intentional and known to the employer; (2) claims in which bias is intentional but unknown to the employer; and (3) claims in which bias is unintentional and unknown to the employer.

### 1. Intentional and Known Bias

The case law is most helpful in predicting how a court would analyze a customer feedback discrimination claim where the feedback is intentionally biased and the employer is aware of the bias but uses the feedback anyway. It seems clear that in such cases the employer could—and should—be liable. Customer preference cases are instructive, if not perfectly analogous, in this regard. These cases typically involve customer requests or demands that would require an employer to discriminate against its workforce; in turn, the employer acquiesces to keep the customer happy.<sup>139</sup> What makes these cases intellectually interesting is that, as with customer feedback discrimination, it is the customer, not the employer, who possesses the discriminatory animus. Even so, the courts have been clear that this does not exculpate the employer from liability in most instances. For example, in *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit held that Pan Am's policy of hiring only women as flight attendants because its passengers "overwhelmingly preferred to be served by female stewardesses" constituted impermissible discrimination under Title VII.<sup>140</sup> The court explained that although its decision "may cause some initial difficulty" for the airline, "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome."<sup>141</sup>

The *Diaz* court was not alone in holding an employer liable for catering to customers' discriminatory preferences. In *Chaney*

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139. See, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7th Cir. 2010); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Williams v. G4S Secure Solutions (USA), Inc.*, No. ELH-10-3476, 2012 WL 1698282 (D. Md. May 11, 2012).

140. 442 F.2d at 387–89.

141. *Id.* at 389.

*v. Plainfield Healthcare Center*, the Seventh Circuit reversed summary judgment for a nursing home that assigned a black employee different job duties because certain residents refused to be treated by black nurses.<sup>142</sup> In so doing, the court declared, “It is now widely accepted that a company’s desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race.”<sup>143</sup> In *Silver v. North Shore University Hospital*, the district court denied summary judgment to a hospital that terminated a fifty-nine-year-old scientist based on its perception that outside sources would not give funding to older employees.<sup>144</sup> In *Olsen v. Marriott International, Inc.*, the district court denied Marriott summary judgment on a claim that it unlawfully refused to hire a male massage therapist based on its clientele’s preference for females.<sup>145</sup> And in *Hylind v. Xerox Corp.*, the district court denied summary judgment to an employer accused of assigning a female employee to a less desirable sales account because it believed the client was attracted to her.<sup>146</sup>

The courts have stopped short of declaring that discriminatory customer preferences can never legally factor into employment decisions. Employers have found modest success in cases where customers’ discriminatory preferences were rooted in privacy<sup>147</sup> or safety<sup>148</sup> concerns. For instance, in *Wade v. Napolitano*, the district court granted summary judgment to the Transportation Security Administration on a claim that it engaged in

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142. 612 F.3d at 912–15.

143. *Id.* at 913.

144. 490 F. Supp. 2d 354, 365 (S.D.N.Y. 2007).

145. 75 F. Supp. 2d 1052, 1063–68 (D. Ariz. 1999).

146. 380 F. Supp. 2d 705, 716–18 (D. Md. 2005), *aff’d*, 481 F. App’x 819 (4th Cir. 2012).

147. *See, e.g.*, *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (childcare specialists); *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (catheterization and other intimate services provided to male patients by nurse’s aides); *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) (washroom attendants); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982) (janitors cleaning bathhouses and restrooms); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vacated on other grounds*, 671 F.2d 1100 (8th Cir. 1982) (nurses in obstetrics unit of hospital where intimate procedures performed and female body and genitalia routinely exposed).

148. *See, e.g.*, *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984) (upholding a policy prohibiting pregnant flight attendants from working on flights because of the safety concerns created for passengers if pregnant flight attendants could not properly perform their roles in emergency situations); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) (same).

sex discrimination by requiring that one-third of its screeners be female.<sup>149</sup> The court found sex to constitute a bona fide occupational qualification (BFOQ), and therefore a complete defense to the discrimination claim, after customer satisfaction surveys

revealed that the same-gender screening procedures met the public's expectations . . . [while] further[ing] TSA's ultimate objective of providing security as the TSA found that if passengers are more comfortable with how searches are conducted, then they are less likely to object and more likely to comply with pat-down requests.<sup>150</sup>

Similarly, in *Dothard v. Rawlinson*, the Supreme Court upheld Alabama's creation of gender-specific positions in its prison system because maintaining prison security is the essence of a correction officer's job and prisoners—a different type of customer—were entitled to feel safe.<sup>151</sup> Outside the privacy and safety contexts, there may also be room within the law for employers to discriminate based on customers' preference for genuineness, such as a woman playing Cinderella in a play.<sup>152</sup>

Customer preference cases provide a useful model for how courts should analyze customer feedback discrimination claims involving feedback the customer intended, and the employer

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149. *Wade v. Napolitano*, No. 3-07-0892, 2009 WL 9071049, at \*1–2 (M.D. Tenn. Mar. 24, 2009).

150. *Id.* at \*9.

151. 433 U.S. 321, 332–37 (1977).

152. See 29 C.F.R. § 1604.2 (2016) (recognizing sex as a BFOQ where authenticity or genuineness is at issue). The courts tend to agree that in limited circumstances an employer is permitted to discriminate where gender-based authenticity is at issue. See, e.g., *St. Cross v. Playboy Club, Inc.*, Appeal No. 773, Case No. CSF 22618-70 (N.Y. Human Rights App. Bd. 1971) (finding being female a BFOQ for the position of a Playboy Bunny because female sexuality is reasonably necessary to perform the dominant purpose of the job, which is to titillate and entice male customers). They likewise have acknowledged the possibility of race- and national-origin-based authenticity discrimination. See, e.g., *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 653–54 (5th Cir. 1980) (questioning whether race might in fact constitute a BFOQ in certain situations, such as a black actor portraying George Wallace or a white actor portraying Martin Luther King Jr.); *Util. Workers v. S. Cal. Edison Co.*, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970) (suggesting, without holding, that the authenticity exception would give rise to a BFOQ for Chinese nationality where necessary to maintain the authentic atmosphere of an ethnic Chinese restaurant); see also Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 525 (2001) (“Although courts are willing to recognize an authenticity justification for BFOQs, the fact that Congress intentionally elected not to enact a BFOQ for race or color prevents courts from judicially creating one even to protect the authenticity of theatrical productions.”). But see *EEOC v. Joe's Stone Crab, Inc.*, 136 F. Supp. 2d 1311, 1312–13 (S.D. Fla. 2001) (rejecting argument that hiring only male servers was necessary to create an “Old World” ambience modeled after the highest-quality restaurants in Europe).

knew, to be biased. In general, an employer would be prohibited from using tainted feedback for the same reason the courts prohibit employers from acquiescing to customers' discriminatory demands: it runs counter to Title VII's goal of eradicating discrimination from the workplace.<sup>153</sup> As with customer preference cases, there may be some room to allow employers to discriminate where biased customer feedback is tied to privacy, safety, or authenticity concerns. For instance, a playhouse might be entitled to recast the role of Ray Charles as a black man if patrons left comment cards expressing outrage that a white man was given the part, or a women's gym could hire only female trainers if members complained that having male trainers violated their privacy.

## 2. Intentional but Unknown Bias

It is more difficult to predict how a court would address a situation in which customers intend for their feedback to be biased, but the bias is unknown to the employer who then uses it to make employment decisions. The customer preference cases are unhelpful in answering this question because, at least so far, they involve only blatantly prejudicial customer requests that the employers knew were discriminatory. If an employer is unaware that feedback is biased, does this foreclose the possibility of the discrimination being intentional? Or might a court impose some sort of duty on the employer to make itself aware (and therefore conscious) that the feedback was biased? If so, how far would that duty extend? Suppose Dr. Flowers's patient feedback included both quantitative and qualitative components. The quantitative component consisted strictly of numerical scores, but the qualitative component included sexist comments about Dr. Flowers from several patients. If the clinic only looked at the quantitative data, which showed no obvious signs of bias, but forgot to review the qualitative data (which surely would have tipped the clinic off that several respondents were sexist), would the clinic's discrimination still be unintentional? What if the clinic purposely chose not to examine the patients' comments because it was afraid of what it might find? Because unconscious

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153. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254–55 (1994) (“Title VII’s ‘central statutory purposes [are] eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination’ . . . .” (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975))).



discrimination claims are almost always brought under a disparate impact theory,<sup>154</sup> the case law offers virtually no guidance as to whether an employer has a duty to make itself conscious of discriminatory customer feedback in the disparate treatment context. The negligence framework I propose in Part IV seeks to remedy this deficiency.

Setting aside the question of whether an employer has a duty to make itself conscious of discriminatory feedback, there may be an alternative ground for a court to determine whether the employer intentionally discriminated despite its lack of knowledge that the feedback was biased. Under the cat's paw theory of liability, "an employer may be liable for employment discrimination if the source of illegal animus was not the final employment decision-maker but rather another employee whose animus proximately caused the adverse employment action."<sup>155</sup> Although not perfectly analogous, cat's paw discrimination is factually similar to a situation in which an employer unintentionally discriminates based on intentionally biased customer feedback. Both scenarios involve unsuspecting ultimate decision-makers who bear no animus themselves, yet nonetheless permit others' intentionally discriminatory feedback to affect the employment decision.

The Supreme Court's analysis of cat's paw discrimination in *Staub v. Proctor Hospital* is helpful in thinking about how courts might approach a claim involving customer feedback in which the bias is intentional but unknown to the employer.<sup>156</sup> Vincent Staub claimed his termination was motivated by his employer's

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154. See, e.g., *Gordon v. City of New York*, No. 14 Civ. 6115, 2016 WL 4618969, at \*1–7 (S.D.N.Y. Sept. 2, 2016) (explaining that certain facially neutral employment practices "can cause a disparate impact through favoritism or unconscious racism or any number of other behaviors that are not intentionally discriminatory"); *Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1362 (D.N.J. 1996) (holding that the plaintiffs' claim that subjective decision-making procedures resulted "in both conscious and unconscious discrimination is a disparate impact claim and not a pattern-or-practice claim").

155. *Mason v. Se. Pa. Transp. Auth.*, 134 F. Supp. 3d 868, 874 (E.D. Pa. 2015); see also *McKenna v. City of Phila.*, 649 F.3d 171, 178 (3d Cir. 2011). Judge Posner was the first to refer to subordinate bias liability as the cat's paw doctrine. See *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). The term derives from Jean LaFontaine's fable, *The Monkey and the Cat*, "in which a monkey convinces a gullible cat to pull chestnuts from a hot fire. The cat snatches them from the fire, each time burning its paw, only to find that the monkey has eaten all of the chestnuts." Sara Atherton Mason, *Cat's Paw Cases: The Standard for Assessing Subordinate Bias Liability*, 38 FLA. ST. U. L. REV. 435, 436 (2011).

156. 562 U.S. 411 (2011).

hostility to his obligations as a member of the U.S. Army Reserve, which required him to devote a certain number of days each year to training.<sup>157</sup> He alleged that although the vice president of human resources, who lacked such hostility, made the decision to terminate him, her decision was influenced by his supervisors, who were perturbed by his military obligations.<sup>158</sup> The Court began by noting that disparate treatment is an intentional tort, which “generally require[s] that the actor intend ‘the consequences[] of an act,’ not simply ‘the act itself.’”<sup>159</sup> It then questioned whether the discriminatory motive of a subordinate employee can be aggregated with the act of a decision-maker, ultimately concluding that because the law requires only that the protected trait be a motivating factor in the employment decision, “[s]o long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under [antidiscrimination laws].”<sup>160</sup> The Court further reasoned that “it is axiomatic under tort law that the exercise of judgment by the decision-maker does not prevent the earlier agent’s action (and hence the earlier agent’s discriminatory animus) from being the proximate cause of the harm.”<sup>161</sup> Nor could the decision-maker’s judgment be deemed a superseding cause of the harm, the Court noted, because a cause is superseding “only if it is a ‘cause of independent origin that was not foreseeable.’”<sup>162</sup>

In rejecting the employer’s position that an employer can only be liable if the de facto decision-maker possesses discriminatory animus, the Court explained:

[T]he approach urged upon us by Proctor gives an unlikely meaning to a provision designed to prevent employer discrimination. An employer’s authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors. Proctor’s view would have the improbable consequence that if an employer isolates a personnel official from an employee’s supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee’s personnel file before taking the adverse action, then the employer will be effectively shielded from dis-

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157. *Id.* at 413–14.

158. *Id.* at 415.

159. *Id.* at 417 (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998)).

160. *Id.* at 417–19.

161. *Id.* at 419.

162. *Id.* at 420 (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)).

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criminary acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.<sup>163</sup>

Two important principles emerge from *Staub*. First, because disparate treatment is a kind of intentional tort (or at least equivalent thereto), an unsuspecting employer can only be liable if the subordinate actor intends, for discriminatory reasons, to cause the adverse action. Thus, even if customer bias is not obvious to the employer, it could still be liable if the customer gives feedback intended to get an employee demoted or fired for discriminatory reasons. One problem with this, of course, is that it would be exceedingly difficult for a plaintiff to prove a customer's discriminatory motive, particularly if the feedback was solely quantitative or given anonymously. But the more pressing concern is that some, if not most, discriminatory feedback results from *implicit* bias; as such, a plaintiff would be hard pressed to argue that an implicitly biased customer gave feedback that was "designed and intended" for discriminatory reasons to produce the adverse action. It seems, then, that the cat's paw principle might be of some use in expanding liability to scenarios in which employers are unaware of the bias, yet a plaintiff is able to prove the customer consciously gave prejudicial feedback with the intent of causing an adverse action.

The other relevant principle from *Staub* is that cat's paw liability is premised on an agency relationship between the employer and the subordinate actor. The reason cat's paw liability works is because the subordinate actor whose animus motivates the employment decision is an employee, and thus an agent, of the employer. For some commentators, the requirement of an agency relationship renders the cat's paw theory untenable in cases where the discriminator is a nonemployee.<sup>164</sup> But this position overlooks the reality that when an employer factors customer feedback into an employment decision, it has made the customer a pseudoagent. Einat Albin persuasively argues the law should rethink discrimination liability in light of the fact that, as employers become more reliant on feedback from customers, they grant those customers more sway over employing functions that were once reserved exclusively to management,

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163. *Id.* at 420.

164. *See, e.g.*, Wang, *supra* note 4, at 259 ("But *Staub's* seeming expansion of the employer's liability beyond the discrimination of the ultimate decision maker is limited by its terms to discrimination by those who occupy the narrow category of supervisor within the employer-employee dyad . . .").

such as hiring, firing, and compensation.<sup>165</sup> Lu-in Wang similarly reasons that “[t]his participation makes the customer simultaneously and paradoxically both a ‘partial employee’ of the firm and . . . a second ‘boss’ to the worker.”<sup>166</sup> When an employer relies on a customer’s feedback to make an employment decision, the employer has effectively outsourced some of its decision-making authority to the customer. The customer becomes an agent of the employer in the sense that the employer has empowered the customer to influence, if not altogether make, employment decisions. But even if courts are reticent to deem the employer-customer relationship one of agency, perhaps the cat’s paw doctrine could be extended by arguing there is no appreciable difference between a decision-maker relying on a subordinate employee’s tainted disciplinary action, as was the case in *Staub*, and reliance on a customer’s tainted feedback, since both the subordinate employee’s disciplinary action and the customer’s feedback were intended, for discriminatory reasons, to cause the adverse action.

### 3. Unintentional and Unknown Bias

Under current interpretations of disparate treatment law, a victim of customer feedback discrimination would be least likely to prevail in situations where the customers did not intend to discriminate and the employer did not know their feedback was biased. The case law offers precious little guidance on this category of claims, which is unfortunate because unintentional and unknown bias is a very common type of customer feedback discrimination. Evidentiary challenges aside, the biggest problem with feedback in which bias is unintentional and unknown is the complete absence of intentionality by either the customer or the employer. If neither the customer nor the employer knows the feedback is biased, then under the *Price Waterhouse* test the employer truthfully would deny that at the moment of the decision the protected trait motivated the employment decision.<sup>167</sup>

Still, the fact that customer bias may be unintentional and unknown does not make it any less true that the employee was discriminated against based on a protected trait. In reality, whether Dr. Flowers’s patients realized they rated her lower because of their implicit biases, and whether the clinic knew the ratings were biased, are irrelevant in the sense that neither fact

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165. See Albin, *supra* note 45, at 186–90.

166. Wang, *supra* note 4, at 264–65 (internal citations omitted).

167. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

has any bearing on whether Dr. Flowers was terminated because of her sex (or, alternatively, that her sex motivated the employment decision). Although the growing consensus among the courts seems to be that a claim of unknowing discrimination such as this must be brought under the disparate impact framework,<sup>168</sup> there may yet be room within the disparate treatment framework to plausibly argue that the clinic intentionally discriminated even though the bias was unintentional on the patients' part and unknown to the clinic.

In *Thomas v. Eastman Kodak Co.*, the First Circuit provided a roadmap for how a plaintiff may prove an employer intentionally discriminated even when the intermediary actor, as well as the employer itself, were unaware of the discrimination.<sup>169</sup> Myrtle Thomas claimed she was terminated based on a series of racially biased performance appraisals from her supervisor.<sup>170</sup> Thomas lost her job under circumstances similar to Dr. Flowers: Kodak decided to reduce its workforce by terminating employees with the lowest performance review scores over the past three years.<sup>171</sup> The district court granted Kodak summary judgment, in part because Thomas failed to link her low scores to her race.<sup>172</sup> Significantly, in reversing the lower court, the First Circuit noted that "Title VII's prohibition against 'disparate treatment because of race' extends to both employer acts based on conscious racial animus *and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias.*"<sup>173</sup> The court pointed out that Thomas's claim was different "than the type often used to exemplify the operation of the *McDonnell Douglas* . . . framework" insofar as it alleged "a more subtle type of disparate treatment" by challenging the neutrality of the performance review system—an argument that is typically reserved for disparate impact cases—as opposed to claiming her employer had articulated a false reason for her layoff.<sup>174</sup> The court rejected the notion that Thomas had to prove the ratings were consciously biased, reasoning that "[t]he ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously

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168. See cases cited *supra* note 133.

169. 183 F.3d 38 (1st Cir. 1999).

170. *Id.* at 42.

171. *Id.* at 46.

172. *Id.* at 57.

173. *Id.* at 42 (emphasis added).

174. *Id.* at 58.

intended to base the evaluations on race, or simply did so because of *unthinking* stereotypes or bias.”<sup>175</sup> The court supported this proposition by citing a portion of the D.C. Circuit’s reasoning in *Price Waterhouse*—which the Supreme Court left undisturbed—wherein the appellate court declared:

unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination . . . . [T]he fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it.<sup>176</sup>

In the First Circuit’s view, Thomas’s inability to prove her supervisor’s ratings were consciously biased did not preclude the possibility of disparate treatment. Instead, less conscious—but equally pernicious—bias could be inferred from other facts, including that Thomas’s scores sharply declined after she was given a new supervisor and that the new supervisor had rated Thomas lower than the white employees whom she evaluated.<sup>177</sup>

It did not matter to the *Thomas* court whether either the employer or the author of the performance reviews was consciously aware that the data was biased. Thomas survived summary judgment by presenting enough evidence to create a fact issue as to whether the ratings were *in fact* biased. In Dr. Flowers’s case, if the court accepted the proposition that a plaintiff can establish disparate treatment without showing the employer consciously discriminated, she could at least theoretically prevail by proving the ratings themselves were discriminatory, regardless of whether the patients intended to discriminate or whether the clinic knew the feedback was biased. The problem, of course, is that proving the ratings were actually biased would be extremely difficult, if not altogether impossible. Unlike Thomas, who created an inference of implicit bias based on evidence that she had received higher ratings from a previous supervisor and that her current supervisor rated her lower than the white employees whom she supervised, Dr. Flowers would have to rely on far less concrete evidence. Patients who gave Dr. Flowers low ratings could not testify that their implicit biases influenced their ratings; by definition, an implicit bias is unknown to the actor.<sup>178</sup> Nor would a comparison of Dr. Flowers’s

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175. *Id.* (emphasis added).

176. *Id.* at 60 (quoting *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (D.C. Cir. 1987)).

177. *Id.* at 62–63.

178. Cerullo, *supra* note 131, at 139.

ratings to other doctors' scores be fruitful, since different patients rated each doctor. Perhaps Dr. Flowers's best option would be to have a social scientist run sophisticated statistical models to attempt to detect implicit bias. However, because such an analysis would be extremely sensitive to confounding variables, the clinic's patient-satisfaction questionnaire would have to be sufficiently refined to allow a statistician to isolate implicit bias—a longshot by almost any measure.

In sum, there is tremendous uncertainty surrounding the use of a disparate treatment framework to prove customer feedback discrimination. The framework likely would work in cases where bias is explicit and known to the employer, similar to customer preference cases. But in cases where the bias is unknown to the employer, the framework would be much less likely to support a customer feedback discrimination claim unless a court were willing to extend cat's paw principles to cases of intentional but unknown bias, or, in cases of unintentional and unknown bias, a plaintiff could somehow prove the ratings were actually biased. These possibilities notwithstanding, victims of customer feedback discrimination face tremendously long odds in prevailing under the disparate treatment framework.

#### B. DISPARATE IMPACT

Nearly all cases of unintentional discrimination are analyzed under the disparate impact framework.<sup>179</sup> Although the Civil Rights Act of 1964 did not expressly prohibit employment policies or practices that produce a disparate impact, the Supreme Court recognized such a prohibition in the landmark case of *Griggs v. Duke Power Co.*, wherein it interpreted the Act to prohibit certain facially neutral employment practices that, in fact, were “discriminatory in operation.”<sup>180</sup> Two decades later, Congress codified the disparate impact doctrine as part of the Civil Rights Act of 1991.<sup>181</sup> Under the statute, a plaintiff establishes a prima facie violation by showing an employer uses “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”<sup>182</sup> An

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179. See cases cited *supra* note 133.

180. 401 U.S. 424, 431 (1971). *Griggs* “has been universally hailed as the most important development in employment discrimination law.” Michael Selmi, *Was Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 703 (2006) [hereinafter Selmi, *Disparate Impact*].

181. 42 U.S.C. § 2000e-2(k)(1) (2012).

182. *Id.* § 2000e-2(k)(1)(A)(i).

employer may defend against liability by demonstrating the practice is “job related for the position in question and consistent with business necessity.”<sup>183</sup> If the employer meets this burden, a plaintiff may still succeed by showing the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer’s legitimate needs.<sup>184</sup> At least in theory, claims of unintentional discrimination are well suited for the disparate impact framework because a court’s sole focus is on the effect of an employment practice—not the employer’s intent.<sup>185</sup>

Although there were no published decisions by the end of 2017 involving allegations that customer feedback resulted in disparate impact, plaintiffs have used this framework in claiming other types of subjective evaluations (typically supervisor-generated performance reviews) disproportionately impacted a protected group. For instance, Microsoft is currently embroiled in a massive class action discrimination lawsuit in which the plaintiffs claim Microsoft’s procedure for evaluating performance “systematically undervalues female technical employees relative to their male peers.”<sup>186</sup> Pittsburgh Glass Works likewise has been involved in litigation for more than seven years over claims its subjective evaluation process led to a disproportionate number of older workers being laid off.<sup>187</sup> In challenging these policies, the plaintiffs need only prove the discriminatory effect of such policies rather than a discriminatory motive.<sup>188</sup>

At first blush, disparate impact may seem like the ideal framework in which to prove customer feedback discrimination, particularly in cases where discriminatory animus on the employer’s part is lacking. However, a closer examination of the theory reveals multiple drawbacks that render this framework much less enticing, if not altogether infeasible. For instance, un-

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183. *Id.*

184. *Id.* § 2000e-2(k)(1)(A)(ii).

185. *See* *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015) (“In evaluating a disparate-impact claim, courts focus on the *effects* of an employment practice, determining whether they are unlawful irrespective of motivation or intent.”).

186. Class Action Complaint at ¶ 24, *Moussouris v. Microsoft Corp.*, No. 2:15-cv-01483 (W.D. Wash. filed Sept. 16, 2015), 2015 WL 5460411.

187. *See* *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 66 (3d Cir. 2017).

188. *See* *Hill v. Miss. State Emp’t Serv.*, 918 F.2d 1233, 1238 (5th Cir. 1990) (explaining that disparate treatment focuses on discriminatory motive, whereas disparate impact concentrates on discriminatory effect).



like with disparate treatment claims, Title VII forbids compensatory and punitive damages for disparate impact claims,<sup>189</sup> automatically making such claims less attractive for many plaintiffs and their attorneys.<sup>190</sup> Although the Age Discrimination in Employment Act (ADEA) does not differentiate between the types of damages available to victims of disparate treatment and disparate impact age discrimination, liquidated damages are available only upon proof of willfulness, which of course tends to be extremely difficult to prove in disparate impact cases.<sup>191</sup>

Not only are damages in disparate impact cases more limited, but the cases themselves are harder to win.<sup>192</sup> Michael Selmi's analysis of three decades worth of disparate impact cases revealed that plaintiffs prevailed at the appellate level in only 19.2% of cases (the majority of which were remands rather than outright victories) and at the district court level in 25.1% of cases (many of which involved simply surviving summary judgment).<sup>193</sup> By contrast, the win rate for plaintiffs in employment discrimination cases more generally stands around 35%.<sup>194</sup> Selmi attributes the lack of success by disparate impact plaintiffs not to any inherent difficulty in establishing that a practice or policy disparately impacts a particular group, but rather in courts' hesitance to seriously question an employer's defense

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189. See 42 U.S.C. § 1981a(a)(1); see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (“[Title VII] limits compensatory and punitive damages awards, however, to cases of ‘intentional discrimination’—that is, cases that do not rely on the ‘disparate impact’ theory of discrimination.”).

190. See Selmi, *Disparate Impact*, *supra* note 180, at 735 (“Undoubtedly, the addition of damages for intentional discrimination claims . . . while withholding them from disparate impact claims, has substantially altered the incentives for defining claims as intentional discrimination.”); Sandra F. Sperino, *Disparate Impact or Negative Impact?: The Future of Non-Intentional Discrimination Claims Brought by the Elderly*, 13 *ELDER L.J.* 339, 363 (2005) [hereinafter Sperino, *Disparate Impact*] (explaining that the prohibition on compensatory and punitive damages in disparate impact cases “provides little incentive for private attorneys to pursue disparate impact claims, compared to the types of damages available under a disparate treatment cause of action”).

191. See Sperino, *Disparate Impact*, *supra* note 190, at 363.

192. See Selmi, *Disparate Impact*, *supra* note 180, at 706 (“[T]he reality has been that disparate impact claims are more difficult—not easier—to prove than claims of intentional discrimination.”).

193. *Id.* at 738–39.

194. *Id.* at 739.

that the practice or policy is job-related and consistent with business necessity.<sup>195</sup> He explains that “courts routinely defer to employer practices in making those judgments . . . because courts typically are reluctant to identify ambiguous behavior as discriminatory.”<sup>196</sup>

Selmi’s analysis exposes another troubling truth about disparate impact claims. The disparate impact framework initially was constructed to combat discrimination in seniority systems and written tests, and “[a]lthough courts have never restricted the theory to those particular contexts, the reality has been that the theory has proved an ill fit for any challenge other than to written examinations.”<sup>197</sup> Selmi found this to be especially true of cases involving subjective employment practices, which certainly would include customer feedback-based employment decisions, noting that “these claims have been almost uniformly unsuccessful” and that “the reality is that subjective employment practices are almost always more successful as intentional discrimination claims.”<sup>198</sup> Selmi suggests this is because a court that would not see intentional discrimination amidst circumstantial evidence “would have an equally hard time identifying discrimination based on adverse effects that were, by definition, unintentional. Even if statistical disparate impact could be shown, the court would likely accept the employer’s practices as justified, just as it found the employer’s practice nondiscriminatory.”<sup>199</sup> Based on Selmi’s analysis, not only would a customer-feedback-based disparate impact claim be harder to prove than other disparate impact claims, but it would also be more difficult to prove than if the claim were brought under the disparate treatment framework.

Selmi’s point about judicial deference to employers has the potential to be especially true of customer feedback discrimination. One can easily envision a scenario in which an employer defends itself from a disparate impact customer feedback discrimination claim by arguing that reliance on customer feedback to make employment decisions constitutes a business necessity,

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195. *Id.* at 749 (“The expectation that these claims would be easier to establish than intentional discrimination claims rests entirely on the first part of the theory regarding the prima facie case of discrimination, but ignores the business necessity prong, which has always proved the greater hurdle.”).

196. *Id.* at 769.

197. *Id.* at 705.

198. *Id.* at 744.

199. *Id.* at 769.

insofar as customer satisfaction is crucial to an employer's livelihood and is socially beneficial. A similar argument prevailed in *EEOC v. Sephora USA, LLC*, where the EEOC alleged Sephora's rule requiring employees to speak English whenever clients were present adversely impacted Hispanic employees.<sup>200</sup> Sephora responded, and the district court agreed, that the policy constituted a business necessity as a matter of law because the policy was not merely intended to satisfy customer preference but was in fact indispensable to promoting politeness to customers.<sup>201</sup> In the customer feedback realm, an employer could similarly argue that its ability to consider customer feedback in making employment decisions is equally necessary to ensure customer satisfaction.

A final problem with the disparate impact framework is that establishing a statistically significant adverse impact almost always requires that a sufficiently large and diverse population be affected by the challenged practice.<sup>202</sup> Indeed, courts have routinely held that an adverse effect on a single or a few employees does not create a prima facie case of disparate impact as a matter of law.<sup>203</sup> This not only precludes a plaintiff from asserting a disparate impact claim unless she is one of several employees af-

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200. 419 F. Supp. 2d 408, 409–11 (S.D.N.Y. 2005).

201. *Id.* at 417.

202. *See Selmi, Disparate Impact, supra* note 180, at 769; *see also Connecticut v. Teal*, 457 U.S. 440, 462 (1982) (Powell, J., dissenting) (stating that disparate impact claims “cannot be based on how an individual is treated in isolation from the treatment of other members of the group” because “[s]uch claims necessarily are based on whether the group fares less well than other groups under a policy, practice, or test”).

203. *See, e.g., Bramble v. Am. Postal Workers Union, AFL-CIO Providence Local*, 135 F.3d 21, 26 (1st Cir. 1998) (“Where an employer targets a single employee and implements a policy which has, to date, affected only that one employee, there is simply no basis for a disparate impact claim.”); *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 (6th Cir. 1987) (concluding that statistics based on the departure of seventeen people lacked probative value in part because of the small sample size); *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986) (holding that an adverse effect on a single or a few employees does not create a prima facie case of disparate impact under the ADEA); *Pace v. S. Ry. Sys.*, 701 F.2d 1383, 1389 (11th Cir. 1983) (affirming summary judgment in ADEA case where the plaintiff's statistics were deficient because the sample size of twelve was too small to be significant); *Kolesnikow v. Hudson Valley Hosp. Ctr.*, 622 F. Supp. 2d 98, 116 (S.D.N.Y. 2009) (citing cases noting that smaller sample sizes allow for less persuasive inferences of discrimination to be drawn); *Jackson v. Univ. of New Haven*, 228 F. Supp. 2d 156, 164–65 (D. Conn. 2002) (noting, in a disparate impact case involving sample size of fourteen people, that “exceedingly small sample sizes often result in statistically unreliable evidence”).

ected by the employer's policy or practice, but also virtually ensures no employee who works for a smaller business—one-half of today's workforce<sup>204</sup>—could realistically bring a disparate impact claim because of the difficulty of proving statistical significance. For instance, if Dr. Flowers asserts a disparate impact claim against the clinic, she stands almost no chance of surviving summary judgment because she was the only employee terminated under the facially neutral employment practice. Moreover, even if Dr. Flowers had been one of several female doctors to lose her job, proving statistical significance would be almost impossible unless the clinic employed hundreds of doctors, such that Dr. Flowers could prove the clinic's practice adversely impacted an entire class.

In sum, although disparate impact may seem like a more promising framework than disparate treatment for asserting customer feedback discrimination claims, the theory is fraught with limitations that diminish its attractiveness and utility. Given the statutory restrictions on damages, the tendency of courts to side with employers on the business necessity defense, and the requirement of class-wide rather than individual discrimination, it is no wonder disparate impact claims rarely have been asserted in employment discrimination cases.<sup>205</sup> For most victims of customer feedback discrimination, these limitations would likely render disparate impact not only unappealing but outright untenable.

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204. See ANTHONY CARUSO, U.S. CENSUS BUREAU, G12-SUSB, STATISTICS OF U.S. BUSINESSES EMPLOYMENT AND PAYROLL SUMMARY: 2012, at 1 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf>.

205. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991) (finding disparate impact claims were asserted in less than two percent of employment discrimination cases in a 1987 study); see also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499 (2003) ("As a practical matter, disparate impact litigation now plays a much smaller role than it once did in increasing employment opportunities for large numbers of nonwhite workers."); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004) (stating that disparate impact claims are "a relatively less vital tool, compared with theories of intentional discrimination.").

## IV. A NEW APPROACH

To adequately protect employees from customer feedback discrimination, a new approach is needed that gives victims realistic options for pursuing their claims beyond the traditional disparate treatment/disparate impact binary. The current system is unacceptable because it effectively shuts out victims of customer feedback discrimination from the legal system in most scenarios. If Dr. Flowers asserts a disparate treatment claim, she probably would win if she can prove the clinic knew the feedback was sexist. That is the good news. But under any other scenario her chances of success drop precipitously because of the difficulty of proving the clinic's discrimination was intentional. Asserting a disparate impact claim would relieve Dr. Flowers from proving intentional discrimination—her biggest barrier to prevailing under the disparate treatment framework—yet it, too, comes with its own set of problems that make it unlikely she would prevail on such a claim.

That Dr. Flowers has almost no realistic path to recovery is an indictment of the current state of employment discrimination law. Title VII seeks to eradicate workplace discrimination by imposing on employers a duty to protect their employees from discrimination.<sup>206</sup> This is true whether the discrimination is intentional or unintentional, conscious or unconscious.<sup>207</sup> Dr. Flowers's inability to prove discrimination unless there is evidence the clinic knew the feedback was tainted conveys the message to employers and employees alike that subtle or inadvertent discrimination is not as serious as more intentional discrimination. While on some level an employer may be less culpable for unknowingly using customer feedback that does not appear on

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206. See *Lidwell v. Univ. Park Nursing Care Ctr.*, 116 F. Supp. 2d 571, 580 (M.D. Pa. 2000) (“[I]t may be said that an employer has a duty to protect employees from violations of Title VII.”); Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 402 (1998) (“Title VII liability saddles employers with a duty to protect its workers from the harmful acts of third parties, namely other workers.”).

207. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (“Title VII prohibits both intentional discrimination . . . as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities . . . .”); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999) (“Title VII’s prohibition against ‘disparate treatment because of race’ extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias.”).

its face to be biased, this does not change the fact that “the victims of unconscious discrimination have suffered the same economic damages, and often the same emotional damages, as the victims of knowing bigotry.”<sup>208</sup> In fact, many scholars argue subtle discrimination is just as harmful as intentional discrimination, if not more so.<sup>209</sup>

The current legal framework is also untenable because it does little to incentivize employers to carefully scrutinize customer feedback for bias. As the Supreme Court has noted, Congress enacted Title VII to motivate employers “to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”<sup>210</sup> As previously discussed, the threat of disparate impact liability is minimal, and employers have even less incentive to self-examine and self-evaluate in the disparate treatment context, since the law does not appear to impose on employers any duty to make themselves aware of biases in customer feedback. If unawareness constitutes an absolute defense to intentional discrimination, what motivation would an employer have to review customer feedback for signs of bias, much less engage expensive statisticians to sift through the data in search of implicit bias?

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208. Oppenheimer, *supra* note 82, at 916.

209. See, e.g., Peter A. Clark, *Prejudice and the Medical Profession: A Five-Year Update*, 37 J.L. MED. & ETHICS 118, 118 (2009) (“It is clear that a subtle, perhaps unconscious form of racism is just as harmful as expressed hatred and bigotry . . .”); Casey A. Kovacic, *The Real BCS: Black Coach Syndrome and the Pursuit to Become a College Head Football Coach*, 36 S.U. L. REV. 89, 104 (2008) (“Unconscious racism is not less harmful than intentional discrimination. In fact, it may likely be more harmful because it is frequently unrecognizable by the victim as well as the perpetrator.”); Samuel Noh et al., *Overt and Subtle Racial Discrimination and Mental Health: Preliminary Findings for Korean Immigrants*, 97 AM. J. PUB. HEALTH 1269, 1269–72 (2007) (finding that subtle racism can be more psychologically damaging than overt racism because recipients can more easily shrug off overt discrimination, whereas subtle racism is more likely to be committed by colleagues, neighbors, or friends, which causes recipients to feel that people do not like or accept them, thereby lowering self-esteem and leading to depression); Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271, 272–84 (2007) (concluding that invisibility and deniability of racial microaggressions make them especially problematic for recipients, who must try to decide whether the discrimination was deliberate or unintentional); Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 461 (2012) (“Unintended and unintentional as implicit discrimination may be, it has real and harmful consequences that must be addressed by legal means.”).

210. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975).

Given the proliferation of customer feedback—and of both explicit and implicit bias within that feedback—we cannot afford to let customer feedback discrimination claims slip through the cracks simply because they do not fit neatly under either a disparate treatment or disparate impact model of discrimination.<sup>211</sup> This is not a conundrum incapable of being solved. In truth, the solution is quite simple: employers should be held to a negligence standard in customer feedback discrimination cases, whereby they would be liable if they knew, or had reason to know, the feedback was biased and failed to act reasonably in response. As I explain below, this standard would remedy many of the shortcomings of the extant frameworks in a manner that could appeal to employers and employees alike. In Section A, I make the argument that applying a negligence standard to customer discrimination cases is hardly a radical proposition because negligence principles abound in other areas of employment discrimination law. In Section B, I examine how a negligence standard would be preferable to the disparate treatment/disparate impact dichotomy in determining which employers are truly bad actors who warrant liability. In Section C, I consider how a negligence standard could incentivize employers to be more mindful and proactive in protecting employees from customer feedback discrimination.

#### A. A FOUNDATION OF NEGLIGENCE

At first blush, applying a negligence standard to customer feedback discrimination claims may seem a drastic departure from Title VII jurisprudence. After all, the Supreme Court has consistently interpreted “Title VII as providing tort-like actions under theories of intentional tort [in disparate treatment cases] and strict liability [in disparate impact cases].”<sup>212</sup> In her concurring opinion in *Price Waterhouse*, Justice O’Connor first referred

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211. See Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 126 (2012) (“Remedies, proof patterns and available defenses all turn on whether liability is based on disparate treatment or disparate impact, yet many troublesome situations cannot comfortably be analyzed in the treatment/impact framework.”); Zatz, *supra* note 3, at 1366 (criticizing the disparate treatment-disparate impact dichotomy as a “theoretical straitjacket with two arms”).

212. Oppenheimer, *supra* note 82, at 918–19; see also Sandra F. Sperino, *Let’s Pretend Discrimination Is a Tort*, 75 OHIO ST. L.J. 1107, 1109–14 (2014) [hereinafter Sperino, *Let’s Pretend*] (tracing how the Supreme Court has increasingly embraced tort law as a substantive framework for discrimination law); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1053 (2014) (“[T]he Supreme Court repeatedly applies negligence concepts to discrimination

to Title VII as a “statutory employment ‘tort.’”<sup>213</sup> Thereafter, in *Staub v. Proctor Hospital*, a disparate treatment case, the Court observed that “[i]ntentional torts such as this, ‘as distinguished from negligent or reckless torts[,] . . . generally require that the actor intend “the consequences[] of an act,” not simply “the act itself.””<sup>214</sup> Yet for all the emphasis courts place on intentionality, there are several areas of discrimination law where negligence principles figure prominently into employer liability,<sup>215</sup> including the areas of harassment, accommodation, and disparate impact.

The negligence standard is most readily apparent in how courts assess employer liability for coworker harassment. Indeed, the Supreme Court has made clear in cases where “the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions.”<sup>216</sup> Under this standard, harassment decisions do not focus on intent to do wrong but rather on the employer’s failure to do right.<sup>217</sup> David Oppenheimer explains that “[t]he employer is liable not because it wanted the harm to occur, or helped bring about its occurrence, but because the law imposed on it a duty of care to protect its employees from co-employee harassment, and it failed to take the necessary steps to protect them.”<sup>218</sup> It is significant that courts analyze harassment claims under the disparate treatment framework,<sup>219</sup> yet within that framework allow a

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claims, even though it also claims that disparate treatment claims require proof of intent.”).

213. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring in the judgment).

214. 562 U.S. 411, 417 (2011) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998)).

215. See Oppenheimer, *supra* note 82, at 899 (“[T]he existing law of employment discrimination, while eschewing the term negligence, frequently incorporates the doctrine.”); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 99 (2011) (“[I]deas of negligence abound within the accepted discrimination frameworks.”); Weiss, *supra* note 211, at 124 (“Although negligence theories are not well-recognized under Title VII, they have some basis in existing law.”).

216. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

217. Oppenheimer, *supra* note 82, at 950.

218. *Id.* at 966.

219. See *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 n.4 (11th Cir. 2010) (analyzing hostile work environment claim under disparate treatment framework); *Raniola v. Bratton*, 243 F.3d 610, 617 (2d Cir. 2001) (“Under Title VII, a hostile work environment is one form of disparate treatment . . . .”); *Roberts v. Archbold Med. Ctr.*, 220 F. Supp. 3d 1333, 1334 (M.D.



plaintiff to prove intentional discrimination by showing mere negligence on the employer's part.

Though less explicit, negligence principles are also present in accommodation law. In certain instances, it is not enough that an employer simply refrains from discriminating against an employee; the employer has an affirmative duty to provide a reasonable accommodation to the employee. This is true where an employee's religion,<sup>220</sup> disability,<sup>221</sup> or, in some instances, pregnancy<sup>222</sup> conflicts with job requirements. Oppenheimer explains that "an employer may be subjected to liability not because of any affirmative or intentionally discriminatory steps it has taken" but because it failed "to act affirmatively to protect employees or applicants from harm when it had a duty to do so. Liability cannot be explained under a theory of intentional wrong, nor of strict liability. The analogous common law tort is negligence."<sup>223</sup>

A final area of discrimination law where negligence principles are apparent is in the less-discriminatory-alternative test available in disparate impact cases. Under this test, a plaintiff may still succeed on a disparate impact claim even if the employer proves the challenged practice is job related and consistent with business necessity "by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs."<sup>224</sup> This test "encourages the consideration of a negligence theory of employment discrimination," insofar as employer liability is premised on a breach of the employer's duty to avoid disparate impact by "failing to adopt a less discriminatory alternative where such an alternative was available."<sup>225</sup>

The pervasiveness of negligence principles in Title VII jurisprudence has prompted several commentators to call for the extension of the negligence standard to other areas of discrimination law. For example, Deborah Weiss argues employers should be held to a negligence standard for intentional discrimination

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Ga. 2016) ("[A] sexual harassment claim is not a unique type of disparate treatment."); *Jackson v. Deen*, 959 F. Supp. 2d 1346, 1352 (S.D. Ga. 2013) ("[A] claim for a hostile work environment is a form of disparate treatment.").

220. 42 U.S.C. § 2000e(j) (2012).

221. *Id.* § 12112(b)(5)(A)–(B).

222. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

223. Oppenheimer, *supra* note 82, at 944.

224. *Ricci v. DeStefano*, 557 U.S. 557, 557 (2009); 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

225. Oppenheimer, *supra* note 82, at 932–34.

by supervisors in structural pattern-or-practice cases.<sup>226</sup> Jessie Allen urges the application of negligence to cases of “unthinking” discrimination.<sup>227</sup> Elizabeth Cramer claims courts should apply a negligence standard to coworker retaliation cases.<sup>228</sup> And Oppenheimer advocates for the application of negligence to employment discrimination claims more generally.<sup>229</sup>

The relative ease with which negligence principles have been incorporated into discrimination law both in theory and in practice shows the feasibility of their application to customer feedback discrimination. But even though the application of a negligence standard does not appear to present any serious challenges doctrinally, its desirability hinges on whether the standard would have the power to produce actual results that are consistent with Title VII’s goal of eradicating discrimination from the workplace. I argue in Sections B and C that in fact, this is precisely what a negligence standard would accomplish.

#### B. ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF DISCRIMINATORY FEEDBACK

Far and away, the most formidable barrier to proving customer feedback discrimination under the disparate treatment framework is showing the employer intended to discriminate. While explicitly discriminatory feedback certainly is not unheard of,<sup>230</sup> the reality is that customers often express their biases in discrete, subtle, and even unconscious ways that cannot easily be detected<sup>231</sup>—especially for employers lacking the sophisticated statistical training or elaborate feedback instruments and methodologies required to spot such bias. But that should not excuse employers from at least making reasonable efforts to identify tainted feedback, given the reality that a victim

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226. Weiss, *supra* note 211, at 136–46.

227. See generally Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299 (1995).

228. Elizabeth A. Cramer, *Taking Matters into Their Own Hands: Retaliatory Actions by Coworkers and the Fifth Circuit’s Narrow Standard for Employer Liability*, 82 U. CIN. L. REV. 591, 601–04 (2013).

229. Oppenheimer, *supra* note 82, at 969 (“From these well recognized instances of negligence liability under Title VII, it is but a small step to a general application of the principle. Whenever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur, it should be held negligent.”).

230. See *supra* Part II.B.

231. See *supra* Part II.B.

of customer feedback discrimination suffers as much harm regardless of whether bias is explicit or implicit.<sup>232</sup> At present, the law actually dissuades employers from making such efforts; if an employer does not know the feedback is biased, how can it be said that the employer intended to discriminate? Of course a plaintiff could always assert a disparate impact claim, but the dismal success rate of such claims outside the testing and seniority contexts<sup>233</sup> makes it unlikely an employer would take the threat of disparate impact liability seriously enough to alter its behavior.

At the same time, strict liability seems neither a realistic nor appropriate answer. If an employer were liable any time a plaintiff could show that even one answer to a single survey was implicitly biased, thus causing a protected trait to motivate the employment decision, the employer may cease soliciting feedback from customers altogether. Although this would probably be welcome news to some weary consumers who are fed up with unending feedback requests, extinguishing customers' voices and, consequently, their power seems too drastic of a measure. Customer satisfaction is an important driver of firms' practices in the modern economy,<sup>234</sup> and the law should not discourage it from remaining so to the extent it does not run afoul of antidiscrimination measures.

A negligence standard would strike an appropriate balance by imposing on employers a reasonable but not overly burdensome duty to detect bias in customer feedback. Under this standard, an employer could no longer plead ignorance. If Dr. Flowers's feedback contained sexist comments from survey respondents, the clinic could not avoid liability simply because it declined to read such comments. Even though the clinic did not know the feedback was biased, it could have—and should have—known so because evidence of the bias was readily apparent and could easily have been detected. Subjecting the clinic to a negli-

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232. See sources cited *supra* note 209.

233. See generally Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (discussing the general difficulty of winning employment discrimination and disparate impact claims along with possible reasons for those difficulties).

234. J.A.F. Nicholls et al., *Parsimonious Measurement of Customer Satisfaction with Personal Service and the Service Setting*, 15 J. CONSUMER MARKETING 239, 239 (1998) ("Customers are the lifeblood of any organization, be it private sector business or public-sector government, because consumer satisfaction is the key to continued organizational survival.").

gence standard should motivate the clinic to examine the feedback for signs of bias before relying on it. And yet the standard is not so onerous that the clinic would have to subject the feedback to round after round of expensive and time-consuming bias testing, which could potentially disincentivize an employer from seeking customer feedback altogether. In short, a negligence standard would advantage plaintiffs by allowing them to prove intent through constructive rather than actual knowledge, while at the same time only requiring employers to take reasonable measures to gain such knowledge.

The biggest question left open by the imposition of a reasonable-knowledge standard is what the standard would actually require from employers in customer feedback discrimination cases. The beauty—and the curse—of this standard is its highly fact-intensive nature. What constitutes reasonable knowledge would be decided case by case, based on factors such as the employer’s sophistication level, the characteristics of the workforce, and the type of feedback solicited. Still, as with any reasonableness standard, over time the case law could help define the general parameters of when an employer should have known feedback was biased. Employee harassment cases could be helpful in this regard since they, too, hold employers to a negligence standard.<sup>235</sup> But perhaps even more instructive is the more factually analogous line of cases involving joint-employer staffing agencies. Such cases typically involve a staffing agency that did not independently engage in discrimination but was nevertheless subject to liability for the discriminatory conduct of a joint-employer client if the agency knew or should have known of the client’s discrimination but failed to take corrective measures within its control.<sup>236</sup> For example, in *Nicholson v. Securitas Security Services, USA, Inc.*, Helen Nicholson brought an age discrimination action against Securitas, the staffing agency that employed her, after the agency removed her from a receptionist

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235. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 768 (1988).

236. See *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 228–29 (5th Cir. 2015); *Whitaker v. Milwaukee Cty.*, 772 F.3d 802, 812 (7th Cir. 2014); EEOC, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), <https://www.eeoc.gov/policy/docs/conting.html> (“The firm is liable if it participates in the client’s discrimination. For example, if the firm honors its client’s request to remove a worker from a job assignment for a discriminatory reason and replace him or her with an individual outside the worker’s protected class, the firm is liable for the discriminatory discharge. The firm also is liable if it knew or should have known about the client’s discrimination and failed to undertake prompt corrective measures within its control.”).

position at the request of the agency's client.<sup>237</sup> The Fifth Circuit reversed summary judgment for the agency upon determining that a fact issue persisted as to whether the agency should have known the client's reason for requesting Nicholson's reassignment was discriminatory because the agency deviated from its standard operating procedures by failing to investigate the circumstances of the client's reassignment request and by not asking Nicholson for an explanation before removing her from the client site.<sup>238</sup> Because the client's reassignment request is a form of customer feedback, *Nicholson* could be helpful in the customer feedback discrimination context if, for instance, an employer ordinarily scanned feedback for certain discriminatory code words but failed to do so in a particular instance.

Perhaps the most significant advantage of a reasonable-knowledge standard is its flexibility in adapting to social and technological changes.<sup>239</sup> Whether an employer reasonably should know customer feedback is biased has changed, and will continue to change, over time—both as definitions of discrimination evolve and as the methods for detecting discrimination become more refined. When Congress enacted the Civil Rights Act of 1964 over five decades ago, our conceptualization of discrimination was markedly different than it is today.<sup>240</sup> Discrimination was only actionable if it was based on race, color, sex, religion or national origin.<sup>241</sup> Other characteristics, such as pregnancy,<sup>242</sup>

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237. 830 F.3d 186, 187–88 (5th Cir. 2016).

238. *Id.* at 190–91.

239. See Sperino, *Let's Pretend*, *supra* note 212, at 1125–26 (“If discrimination law is truly a tort, it should retain the flexibility to adapt to changed circumstances over time, including new understandings of how discrimination occurs.”).

240. See Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 942–53 (tracing the history of how employment discrimination doctrine has changed in response to changing social conceptions); see also John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 474–81 (2002) (arguing that the Civil Rights Act was “clear[ly]” intended as an antidifferentiation principle); Virginia W. Wei, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 B.C. L. REV. 771, 772 (1996) (“Over time, Title VII generally has been able to accommodate changing concepts of discrimination.”).

241. See EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3213 (1968).

242. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012).

military status,<sup>243</sup> disability,<sup>244</sup> age,<sup>245</sup> and genetics,<sup>246</sup> did not receive protection until decades later. Even within the protected classes that did exist early on, discrimination was thought of very differently than it is today. For instance, it took several years for the Supreme Court to recognize the possibility of reverse race discrimination<sup>247</sup> or same-sex harassment.<sup>248</sup> Had a reasonable-knowledge standard applied since Title VII's inception, the types of customer biases that an employer should have known about would have been different than what they would be today. Likewise, as antidiscrimination statutes extend their protections to other characteristics in the future—perhaps to sexual orientation,<sup>249</sup> criminal background,<sup>250</sup> and physical appearance<sup>251</sup>—the reasonable knowledge standard would expand to require employers to look for these types of biases as well.

An employer's duty to realize customer feedback is biased would also increase as scientific advances make it easier to understand and detect new forms of discrimination. When overt discrimination was more socially acceptable decades ago, a court applying a negligence standard may have found it perfectly reasonable for an employer to scan customer feedback only for explicit signs of bias because that is how customers likely would have expressed their biases. Today, a court may rightfully find these same efforts unreasonable in light of our understanding that changing norms have resulted in less overt expressions of discrimination. In fact, given the prevalence of bias in customer feedback today, a plausible argument could be made that an employer should *always* have reason to know its feedback is likely

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243. Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 (2012).

244. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101.

245. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2012).

246. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff.

247. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

248. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

249. See Equality Act, H.R. 3185, 114th Cong. (2015) (proposing to amend Title VII to extend protection against sexual orientation and gender identity discrimination).

250. See generally Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination Against Ex-Offenders*, 93 WASH. U. L. REV. 45 (2015) (arguing Title VII should be amended to include criminal background as a protected trait in some instances).

251. See, e.g., Sarah E. Friedrichs, Note, *Sexy Sex Discrimination: Why Appearance-Based Discrimination Is Sex Discrimination*, 40 J. CORP. L. 503, 516–19 (2015) (arguing that Title VII should prohibit appearance-based discrimination as a type of sex discrimination).

biased, particularly if it employs women, older workers, or racial minorities.

As social-science research on implicit bias is still in its infancy,<sup>252</sup> there remains much to learn about how such bias manifests itself—particularly in the customer feedback arena, where research on how biases skew customers' perceptions is finally gaining traction after years of neglect.<sup>253</sup> At present, implicit bias is difficult to detect unless a survey instrument is sufficiently sophisticated to capture the type of advanced data that lends itself to the complicated statistical analyses necessary to uncover implicit bias.<sup>254</sup> Even then, the validity of the results can be controversial.<sup>255</sup> Given the current difficulties of proving implicit bias, it seems unlikely a court would require an employer to go to the expensive and time-consuming lengths required to detect implicit bias with statistical precision. While such testing may become more reasonable in the future, as analytical models become more streamlined, for the time being perhaps less onerous measures that have been shown to reduce bias could be required for an employer to demonstrate it had no reason to suspect the feedback was biased. Such measures might include, for example, “increasing information, responsibility, or training for raters” or statistically adjusting customer ratings to

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252. See Allison Fisher, Note, *Using California State Anti-Discrimination Law to Combat the Overuse of School Suspensions*, 88 S. CAL. L. REV. 1197, 1207 (2015) (noting that social science research on implicit bias is still in its infancy); John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 43 (2009) (detailing the evolution of implicit bias research and explaining “[b]y the early-1980s, the scientific consensus regarding the importance and ubiquity of nonconscious, highly efficient, and automatized cognition was firmly established”).

253. See Hekman et al., *supra* note 64, at 239 (noting that although other researchers had studied biases in supervisory ratings, this 2010 study was the first to examine “bias in customer judgments of organizational context or overall work unit”).

254. See Bertram Gawronski & Galen V. Bodenhausen, *What Do We Know About Implicit Attitude Measures and What Do We Have to Learn?*, in IMPLICIT MEASURES OF ATTITUDES 265, 280 (Bernd Wittenbrink & Norbert Schwarz eds., 2007) (detailing the difficulty of measuring implicit bias); Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 820–22 (2017) (explaining the various “sophisticated techniques” psychologists have developed to measure implicit bias).

255. See Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, CHRON. HIGHER EDUC. (Jan. 5, 2017), <https://www.chronicle.com/article/Can-We-Really-Measure-Implicit/238807> (detailing new research showing the link between implicit bias and biased behaviors may be overstated).

remove or minimize bias.<sup>256</sup> Although such measures could not guarantee bias-free feedback, they could be enough—at least for now—for an employer to legitimately argue that it neither knew, nor had reason to know, the feedback was biased.

### C. REASONABLE RESPONSE TO DISCRIMINATORY FEEDBACK

Under the proposed negligence standard, an employer who knows, or reasonably should know, customer feedback is biased would have a duty to take reasonable measures to remedy the discrimination. Like in harassment cases, where employers with actual or constructive knowledge of harassment have a remedial duty, liability would not necessarily hinge on an employer's ability to eliminate the discrimination altogether but rather its reasonable efforts to do so.<sup>257</sup> What constitutes reasonable efforts largely depends on the employer's level of knowledge; the more an employer knows its customer feedback is biased, the greater the employer's duty would be to take steps to remedy that bias.<sup>258</sup> In cases where an employer is unaware but should have known the feedback was biased, it would make little sense to focus on the employer's corrective practices, since the employer was unaware of the bias in the first place. Instead, a court might examine whether the employer took reasonable preventive measures to guard against relying on biased feedback in making employment decisions. By contrast, in cases where an employer strongly suspects or actually knows feedback is biased, assessing

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256. Hekman et al., *supra* note 64, at 259.

257. See *Vance v. Ball State Univ.*, 646 F.3d 461, 473 (7th Cir. 2011), *aff'd*, 133 S. Ct. 2434 (2013) ("Of course, the ideal result of an employee's complaint would be that the harassment ceases. But Title VII does not require an employer's response to 'successfully prevent[] subsequent harassment,' though it should be reasonably calculated to do so." (quoting *Cerros v. Steel Techs. Inc.*, 398 F.3d 944, 954 (7th Cir. 2005))); *Neely v. McDonald's Corp.*, 340 F. App'x 83, 86 (3d Cir. 2009) (noting that remedial action is adequate so long as it is reasonably calculated to prevent further harassment, regardless of whether it actually succeeds in doing so); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir. 2004) ("An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made. We are not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed." (quoting *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001))).

258. See *McDaniel v. Elgin*, No. 2:09 cv 119, 2011 WL 5006313, at \*8 (N.D. Ind. Oct. 19, 2011) ("The reasonableness of the employer's response depends on the severity of the harassment and how much the employer knows about the alleged harassment.").



the employer's preventive practices would be pointless since the employer knows or is at least fairly certain its preventive measures failed. A court might instead scrutinize what efforts the employer took after becoming aware of the bias to reasonably prevent the tainted feedback from affecting its employment decisions.

The notion that an employer can fulfill its reasonable response duty through either preventive or corrective practices constitutes a small but necessary departure from the employer's remedial duty in harassment cases, where most courts seem to require an employer to engage in both preventive *and* corrective practices.<sup>259</sup> Unlike harassment cases, which typically involve a series of harassing events, some occurring before the employer becomes aware of the harassment and some occurring after the fact,<sup>260</sup> customer feedback discrimination claims are likely to involve a single employment decision. It would be unfair to require both preventive and corrective measures in this scenario because the employer either is unaware the feedback is biased, in which case it could not engage in any corrective action, or the employer is aware of the bias, in which case the employer's corrective actions would be more important than its preventive practices.

Where an employer has constructive rather than actual knowledge that its feedback is biased, what preventive measures could the employer reasonably be expected to take to avoid liability? Again, the standard would likely change over time as we learn more about how implicit biases operate in the customer feedback context. For now, reasonable preventive measures might include efforts such as requiring customers to provide their names and contact information on feedback forms, which has been proven to reduce bias; soliciting in-person feedback

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259. See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (noting that an employer may escape liability for harassment if it "exercised reasonable care to prevent and correct any harassing behavior"); *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 653 (10th Cir. 2013) (holding that an employer's defense to a harassment claim "actually imposes two distinct requirements on an employer: (1) the employer must have exercised reasonable care to prevent sexual harassment and (2) the employer must have exercised reasonable care to correct promptly any sexual harassment that occurred." (quoting *Helm v. Kansas*, 656 F.3d 1277, 1288 (10th Cir. 2011))). *But see* *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1292 (11th Cir. 2007) (noting that an employer's duty is to "prevent or correct" harassment); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 958 (9th Cir. 2004) (same).

260. See, e.g., *Gentile v. Des Properties, Inc.*, No. 3:08CV2330, 2010 WL 597433, at \*5 (M.D. Pa. Feb. 16, 2010) (claiming the employer was aware that the plaintiff had been harassed but allowed the harassment to continue).

through interviews and focus groups rather than by phone, internet, or mail; asking for both quantitative and qualitative feedback; only using customer feedback after a sufficiently large and diverse dataset is obtained; using computer programs or other tools to identify word patterns that reflect bias in written comments; having a statistician analyze customer feedback for signs of bias; requiring raters to provide their sex and race on feedback forms to facilitate the comparison of an employee's ratings across race and sex; educating customers about the dangers of implicit bias; and providing training or other specific guidelines to customers on how to accurately rate employees. Even if these measures do not completely eradicate bias from customer feedback, a court may find they were reasonably calculated to do so, which is all a negligence standard can and should require of employers.

If an employer actually knows or strongly suspects its feedback is biased, it could avoid liability only by showing it engaged in corrective practices reasonably designed to prevent the tainted feedback from infiltrating its employment decisions. Of course, the best way to assure this is by discarding the feedback altogether, in which case there would be no need for a lawsuit. Other reasonable corrective measures might include only considering feedback from customers of the employee's same race and sex,<sup>261</sup> attempting to neutralize bias by statistically adjusting customer ratings,<sup>262</sup> revising how customer feedback factors into employment decisions, gathering alternative feedback using the aforementioned preventive measures, and removing outlier responses from feedback datasets. Again, none of these corrective practices is foolproof, but under a negligence standard, they need not be so. An employer could avoid liability by making reasonable efforts to remedy the discrimination.

Returning to the introductory hypothetical, if Dr. Flowers could prove the clinic should have known her patient feedback

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261. This response may not be entirely foolproof, given the social science evidence that blacks sometimes discriminate against other blacks and women sometimes discriminate against other women in rating their employment performance. See Lynn et al., *supra* note 109, at 1054–55 (finding that white and black restaurant customers tipped black servers less on average than white servers); see also Brewster & Lynn, *supra* note 110 (same); Sterling, *supra* note 103 (finding that male and female attorneys rated female judges lower than male judges on a variety of personal attributes).

262. See Hekman et al., *supra* note 64, at 259 (suggesting that “organizations can perhaps measure and discount such biases or statistically adjust the ratings to remove the bias”).

was sexist (perhaps if early on, the clinic noticed a major discrepancy between her peer evaluations and her patient ratings), the clinic's liability would hinge on the reasonableness of its preventive measures, such as requiring patient raters to provide their contact information, warning patients of the dangers of implicit bias, and training patients on how to accurately rate their doctors. On the other hand, if the clinic knew the feedback was biased (perhaps if some of the patients wrote sexist comments at the bottom of their surveys), it could only avoid liability if it took reasonable measures to correct the bias, such as resurveying Dr. Flowers's patients using methods less susceptible to bias, excluding male respondents' feedback from Dr. Flowers's overall ratings or otherwise statistically adjusting the ratings to neutralize the effects of the bias.

### CONCLUSION

Customer feedback discrimination is a pressing problem that will likely become even worse unless the law provides a more effective framework for litigating such claims. In today's hypercompetitive business environment, customer feedback is invaluable because of the insights it can offer firms about how to attract, satisfy, and retain customers.<sup>263</sup> The high value firms place on customer feedback is evident in the ubiquity of their feedback solicitations, as consumers are bombarded with feedback requests seemingly every time they speak with a customer service representative, open a webpage, or eat out. This is not a trend that is likely to subside any time soon; in fact, technological advances are making it cheaper and easier to reach more customers faster and more intimately than ever before.

Customer feedback can be unreliable due to serious flaws in how the data is collected and analyzed, and because customers' perceptions often are skewed by explicit and implicit biases that impede their ability to fairly and accurately rate their experiences. Both problems are serious in their own right, but the latter is particularly disconcerting because employers often factor

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263. See, e.g., Jay Baer, *7 Ways to Mine the Hidden Gold in Your Customer Data*, CONVINC & CONVERT (Apr. 19, 2014), <http://www.convinceandconvert.com/digital-marketing/7-ways-to-mine-the-hidden-gold-in-your-customer-data>; Aneesh Reddy, *Customer Feedback Is a Pot of Gold*, DMN (May 2, 2014), <http://www.dmnews.com/customer-experience/customer-feedback-is-a-pot-of-gold/article/344837>; James White, *Customer Feedback: Worth Its Weight in Gold*, INTOUCH (Oct. 2, 2012), <http://www.intouchcrm.com/customer-feedback-worth-its-weight-in-gold>.

customer feedback into major employment decisions. If the feedback is biased, the employer has allowed its customers' discriminatory preferences to color its employment decisions—an unequivocal violation of federal antidiscrimination laws.<sup>264</sup>

Although this is a serious and potentially widespread problem, it has not received the attention it deserves because the law does not provide victims of customer feedback discrimination with a viable path to recovery in most instances due to the courts' rigid adherence to the disparate treatment and disparate impact frameworks. Remedying this problem does not require a complete overhaul of the law but instead simply necessitates the application of a negligence standard, as has been done in other areas of employment discrimination law.<sup>265</sup> A negligence standard offers a sensible solution that would provide victims of customer feedback discrimination a realistic pathway to recovery without overly burdening employers. The reasonable-knowledge component would allow a plaintiff to prevail by showing the employer knew or should have known the feedback was biased. It would also incentivize employers to make appropriate efforts to detect customer bias rather than looking the other way so it cannot be said that they intentionally discriminated. At the same time, the reasonable-knowledge requirement is not so stringent that it would deter employers from soliciting customer feedback altogether or otherwise unduly burden business operations. Moreover, the reasonable response component of the negligence standard is likewise preferable to the current scheme because it would properly motivate employers to take appropriate precautionary and remedial measures against customer bias.

If we are ever to achieve Title VII's goal of eradicating discrimination from the workplace, we must provide victims of all types of employment discrimination with a viable path to recovery. At present, the law is failing victims of customer feedback discrimination simply because this form of discrimination does not fit neatly under either the disparate treatment or disparate impact framework. Rather than allowing these claims to fall through the cracks, the courts should apply a negligence standard to customer feedback discrimination claims by imposing liability on an employer if the employer knew, or should have known, the feedback was biased and failed to take reasonable preventive or corrective measures in response. As customer feed-

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264. See 42 U.S.C. § 2000e-2(m) (2012); see also cases cited *supra* note 44.

265. See *supra* Part IV.A.

back is likely to play an even more prominent role in employment decisions in the future, this standard will help protect employees from the “evils of employment discrimination”<sup>266</sup>—just as the Civil Rights Act and other antidiscrimination statutes intended.

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266. See *Armbruster v. Quinn*, 711 F.2d 1332, 1336 (6th Cir. 1983) (“The primary purpose of the Civil Rights Act, and Title VII in particular, is remedial. Its aim is to eliminate employment discrimination by creating a federal cause of action to promote and effectuate its goals. To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction.” (internal citations omitted)).