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Liability for Toxic Workplace Cultures

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LIABILITY FOR TOXIC WORKPLACE CULTURES

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ABSTRACT

Title VII is meant to protect employees from discrimination and has historically been a crucial tool for creating social change in the workplace. But when considering modern-day workplace discrimination wrought by "toxic workplace cultures" defined herein, Title VII's frameworks for confronting systemic discrimination prove outdated and ineffective. This Note proposes the codification of a new theory of discrimination under Title VII targeting toxic workplace cultures, with substantive and procedural elements working in tandem to better enable plaintiffs to collectively bring actions to hold employers accountable for fostering discriminatory environments. Part I defines toxic workplace cultures and walks through case studies of such cultures in action. Part II explains the existing frameworks of Title VII and why they do not provide recourse for victims of toxic workplace cultures. Part III proposes a solution through codifying a new cause of action for toxic workplace cultures under the statute and offers a brief case study highlighting a potential outcome were this proposal to be implemented.

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INTRODUCTION

Imagine that you are one of the nearly 72 million American women over the age of sixteen in the workforce.[1] Unfortunately, like about 60% of those women, you experience "unwanted sexual attention . . . [or] sexist or crude/offensive behavior" at your workplace.[2] For you, sexist behavior or attitudes are of the utmost concern. Maybe you feel like you've entered a "boys' club" that excludes you from professional or social activities. Maybe you constantly hear your manager or coworkers make comments about your appearance or your skills that they never seem to make about your male coworkers. Maybe you are overlooked for

1. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 20, 2022), https://www.bls.gov/cps/cpsaat03.htm [https://perma.cc/DC7D-R8VX]. Not all individuals who experience female-directed harassment use she/her pronouns or identify as female, but for the sake of consistency and clarity she/her pronouns are used to identify individuals experiencing harssment of this nature throughout this piece.

2. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS 9–10 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [https://perma.cc/R3S7-U6RH].

promotions and your work goes unrecognized, despite fulfilling all the listed requirements. You notice that these kinds of experiences are part of your workplace's norms and are common experiences for other women as well,[3] although the exact behaviors to which each individual is subjected varies. All of these experiences compound to create an environment that is hostile to women, as evidenced by both your own experience and statistical gender disparities in positions of workplace authority.

Historically, Title VII of the Civil Rights Act of 1964 has been a powerful tool for combatting sex discrimination and harassment,[4] further, class action litigation has been critical in helping groups attack systemic injustices.[5] As such, Title VII class action litigation should be the ideal mechanism for combatting these types of discriminatory work environments, which this Note will refer to as "toxic workplace cultures."[6] Unfortunately, existing Title VII jurisprudence provides little protection to employees who are subject to this type of sex discrimination.[7] To fall under the current theories of discrimination under Title VII's umbrella, the harassment must be "because of sex". Such discrimination must be either (1) sufficiently "severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'"[8] or

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3. See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 Yale L.J. F. 22, 41–42 (2018) (describing how "broader patterns of sexism, exclusion, marginalization, and disrespect" are widely experienced by women in the workplace) [hereinafter Schultz, *Reconceptualizing Sexual Harassment*].

4. Harassment because of sex and harassment that is specifically sexual in nature are different concepts, although "sexual harassment" can be used to refer to both. Harassment because of sex, or "harassment" and "sex harassment" as used throughout this Note, is broad and reflects the occurrence of unwelcome conduct individuals face because of their gender identity (here, identifying as a woman). "Sexual harassment" as used within this Note refers specifically to unwelcome conduct of a sexual nature.

5. David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U.L. REV. 587, 639–40 (2013).

6. *See* discussion infra Part I.A ("A 'toxic workplace culture' as used throughout this Note can thus be defined as a set of social expectations for the workplace based in or motivated by entrenched ideas about the sexes which result in 'subtle' discrimination because of sex —i.e. behaviors that may 'side-line[], humiliate[], exclude[],' or demean women in that workplace.'" (internal citations omitted)).

7. While Title VII covers a range of workplace discrimination, this Note focuses exclusively on discrimination because of sex. Although toxic workplace cultures could theoretically disadvantage any protected class under the statute, sex is the pertinent characteristic in seminal examples defining toxic workplace cultures throughout this Note and is thus the focus of the proposed reform herein. Because of the examples from case law and news reports analyzed herein, this Note is also largely focused on one-way sex discrimination, i.e. discrimination against women because of their gender. However, the analysis in this Note applies to sex discrimination in any direction or context.

8. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alterations in original).

(2) "standard operating procedure" of an organization.[9] These standards set high bars to meet; in the absence of an explicit business policy endorsing such behaviors, acts of discrimination in the workplace are often regarded by courts as too isolated and too sporadic to constitute systemic sex discrimination.[10] To top it off, most employers have a so-called "golden ticket"—an explicit policy against discrimination.[11] These policies make employers less likely to face liability under Title VII, even when anecdotal evidence—objective statistical gender disparities in the workplace and sociological analysis of events in the workplace—strongly indicates that they have actively fostered a work environment that discriminates against women.[12]

This narrow conception of what constitutes sex discrimination creates enormous barriers to pursuing organizational accountability for modern discrimination, particularly when coupled with the difficulties of certifying 23(b)(2) classes post-*Wal-Mart v. Dukes*.[13] Most women in toxic workplace cultures like the one described above would find themselves unable to bring an action under Title VII, even though the discriminatory or harassing behaviors they are subject to should meet the definition of unlawful discrimination under Title VII.[14]

This Note argues that this result is at odds with the overarching goals of Title VII and that employers should face accountability for fostering toxic workplace cultures that breed discrimination. To remedy the present lack of accountability for discrimination in toxic workplace cultures, this Note advocates for the development of a new theory of discrimination under Title VII. Part I defines toxic workplace cultures and highlights how they manifest through real-world examples. Part II provides background on the current theories for pursuing class-based

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9. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

10. *See id*. at 336 n.16 ("(A) pattern or practice [of discrimination] would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if . . . a company repeatedly and regularly engaged in acts prohibited by the statute." (quoting 110 Cong. Rec. 14,270 (1964) (statement of Sen. Hubert Humphrey)).

11. *See* Claudia Flores, *Beyond the Bad Apple-Transforming the American Workplace for Women After #metoo*, 2019 U. CHI. LEGAL F. 85, 92 (2019).

12. *See id*. at 92–94.

13. Cindy A. Schipani & Terry Morehead Dworkin, *Class Action Litigation After Dukes: In Search of A Remedy for Gender Discrimination in Employment*, 46 U. MICH. J.L. REFORM 1249, 1258 (2013)

> ("The Dukes holding has made it significantly more difficult for victims of workplace gender discrimination to fight for their rights in court. With class certifications becoming more difficult to attain, potential plaintiffs with limited resources may be unable to afford to bring lawsuits, and, as a result, corporations with company-wide discrimination problems may not be held accountable for the damage they cause.").

14. *See* 42 U.S.C. § 2000e-2(a).

sex discrimination claims under Title VII and explains why it is difficult to hold employers accountable for toxic workplace cultures under the existing legal frameworks. Finally, Part III proposes a new theory of discrimination targeting toxic workplace cultures for codification within Title VII itself. This statutorily incorporated theory would substantively recognize how toxic workplace cultures foster systemic sex discrimination, and procedurally outline a cause of action for potential classes of plaintiffs. The proposed cause of action would enable groups harmed by such toxic workplace cultures to bring actions for class-wide injunctive relief. Part III also explains the importance of codifying the cause of action within the statute itself[15] and presents a case study that highlights the benefits of this proposal.

I. THE NATURE OF MODERN SYSTEMIC WORKPLACE HARASSMENT

As the "linchpin of federal employment discrimination law,"[16] Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[17] The Act also establishes the Equal Employment Opportunity Commission (EEOC) to facilitate the goals of the statute, including intervening in or initiating civil actions.[18]

Title VII was intended to improve equality of opportunity in the workplace.[19] By enacting anti-discrimination policies that were initially at odds with broadly accepted norms, the law pushed for a new, higher standard for society.[20] Soon after its enactment, women used Title VII to file complaints of sex discrimination.[21] For a period, the statute effectively combatted such discrimination. Foundational cases in the 1980s

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15. There are problems with the structure of Title VII claims themselves that this Note does not address; Title VII claims require complex and convoluted reporting procedures which effectively restrict claims from being brought. *See* Flores, *supra* note 11, at 92–94.

16. KATHERINE T. BARTLETT, DEBORAH L. RHODE, JOANNA L. GROSSMAN & DEBORAH L. BRAKE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 120 (8th 2020).

17. 42 U.S.C. § 2000e-2(a)(1).

18. 42 U.S.C. § 2000e-4(g); *see also* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 404 (2011) [hereinafter Green, *Future*] (explaining that Title VII was amended in 1972 to expand the EEOC's enforcement authority to bring "a civil action whenever there was 'reasonable cause' to believe that any person or group of persons is engaged in a 'pattern or practice' of discrimination [under section 707 of the statute] . . . [and] sue to enforce private rights and to vindicate the public interest under section 706.").

19. Flores, *supra* note 11, at 86–87 (alteration in original) (quoting 29 C.F.R. § 1608.1 (1979)).

20. *See id.*; Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1024–28 (2015) [hereinafter Schultz, *Taking Sex Discrimination Seriously*].

21. Schultz, *Taking Sex Discrimination Seriously*, *supra* note 20, at 1027.

and '90s led to critical advances in women's equality in the workplace[22] and to the apparent end of policies many now view as blatantly discriminatory.[23] Partially thanks to these visible successes of Title VII, scholars such as Deborah M. Weiss argue that, "[t]he overwhelming majority of Americans today believe that discrimination is wrong, and the overt discrimination targeted by Title VII in 1964 has become a relatively small problem."[24]

But discriminatory employment practices have not ceased.[25] As one might expect, workplaces today look different than workplaces did when Title VII was enacted in 1964 and when frameworks for evaluating workplace discrimination were established through litigation in the 1980s. Workplace discrimination is no exception to this evolution and has continued to develop alongside more visibly obvious changes in workplace technology and industry. Near universal use of computers, the recent embrace of remote work due to the COVID-19 pandemic, and the outsized consideration of work culture[26] are features of the modern workplace that were not present when foundational Title VII frame-

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22. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that hostile work environment sexual harassment is sex discrimination under Title VII); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (establishing the framework for evaluating hostile work environment harassment and holding that such harassment need not severely physically or psychologically injure the plaintiff to be actionable); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable sex discrimination under Title VII).

23. Green, *Future*, *supra* note 18, at 401. An example of previous blatantly discriminatory practices and one of the first issues women targeted in their complaints to the EEOC under Title VII were "discriminatory practices associated with sex segregation, such as exclusionary hiring systems, separate seniority lists, and protective labor laws." Schultz, *Taking Sex Discrimination Seriously*, *supra* note 20, at 1027.

24. Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119, 126 (2012); *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward A Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–96 (2003) [hereinafter Green, *Discrimination in Workplace Dynamics*]

> ("In the early days of Title VII, discrimination was often the result of blatant racism and conscious reliance on stereotypes. Dominant individuals and groups systematically and deliberately excluded minorities and women from certain jobs. But as it became less socially acceptable to harbor overtly racist beliefs, and as antidiscrimination laws targeted actions based upon those beliefs, incidents of blatantly discriminatory exclusion decreased significantly. It is well known, however, that although minorities and women have gained entry into much of the workforce, inequities in advancement and wages persist.").

25. For example, in 2020, the EEOC received 21,398 charges filed under Title VII alleging sex discrimination. *See Sex-Based Charges (Charges filed with EEOC) FY 1997 - FY 2020*, EQUAL EMPL. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/sex-based-charges-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/UWU5-59BD] (last visited Mar. 6, 2022).

26. *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 633 (2005) [hereinafter Green, *Work Culture*].

works were created. While employment discrimination today may look different than in the past, many employers continue to treat their employees differently because of sex,[27] and such treatment should still be discrimination under the statute's plain meaning.

A. *The Problem of "Toxic Workplace Cultures"*

This Note focuses on one particularly tricky form of workplace discrimination: toxic workplace cultures. Although legal literature has not yet discussed or defined toxic workplace cultures in-depth, Professor Tristin K. Green defines the broader concept of "work culture" as a set of socially constructed practices "that define the social, behavioral expectations of interaction that manifest in everything from informal interactional style and appearance signals to specific displays of competence."[28] In essence, work culture is a set of behavioral expectations for employees in the workplace; such expectations are often implicitly set rather than explicitly codified.[29] Work culture often prioritizes the dominant in-group in the workplace, which is typically white men.[30] Generally, an employer's work culture has a profound impact on all employees' experiences in the workplace.[31] While work culture is often touted as something that can be beneficial, its negative effects should not be underestimated.[32] As demonstrated by the examples discussed herein, toxic workplace cultures can have a significant negative impact on the employees that endure them.[33]

Toxic workplace cultures manifest through a variety of more "subtle" expressions of discrimination.[34] Expressions of a toxic workplace culture may include gender disparities in employment generally or in positions of power,[35] or more anecdotal evidence of an employer allow-

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27. Schultz, *Taking Sex Discrimination Seriously*, *supra* note 20, at 1102–04.

28. Green, *Work Culture*, *supra* note 26, at 627.

29. *See id*. at 630–33.

30. *Id*. at 646–47; *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 671 (2003) [hereinafter Green, *Targeting Workplace Context*].

31. Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 423 (2020).

32. *See* Green, *Work Culture*, *supra* note 26, at 643–44.

33. *See* discussion *infra* Part I.B.

34. *See* discussion *supra* Part I.A..

35. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 370 (2011) (Ginsburg, J., concurring in part and dissenting in part) ("Women fill 70 percent of the hourly jobs in the retailer's stores but make up only '33 percent of management employees.' . . . '[T]he higher one looks in the organization the lower the percentage of women.' . . . The plaintiffs' 'largely uncontested descriptive statistics' also show that women working in the company's stores 'are paid less than men in every re-

ing and normalizing a wide range of behaviors that target and undermine, alienate, or isolate female employees.[36] While more blatant harassment can also be present, it is not required for a toxic workplace culture to exist; "nonsexual forms of sexism and abuse, directed at women simply because they are women, are far more prevalent [in the modern workplace] than unwanted sexual advances and sexual coercion."[37] For example, in a 2015 survey of women, most of whom were working in Silicon Valley, 60% said they had been sexually harassed.[38] But perhaps more strikingly, "a whopping 90% reported witnessing sexist behavior, . . . 66% felt excluded from networking activities because of their sex, and 59% said they had not received the same opportunities as their male counterparts."[39] The survey results have been interpreted to suggest that in Silicon Valley tech companies, unwanted sexual advances are only one aspect of an exclusionary culture that marginalizes women and preserves the industry as a bastion of masculine authority, competence, and identity.[40]

As the examples below detail, toxic workplace cultures allow a wide spectrum of behavior that demeans, undervalues, and harms women. Workplace culture informs and shapes the experiences of all in the workplace.[41] As such, toxic workplace cultures rarely negatively impact just one woman; instead, a workplace is made toxic when women as a group fare negatively under the culture of their workplace although their individual experiences of discrimination may differ.[42] Individual instances of discriminatory behavior against women are thus expressions of the root problem of a toxic workplace culture. Although individuals may experience the effects of a work culture differently, those effects all grow out of one root culture that has enabled discrimination against a certain group, meaning that toxic workplace culture based

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gion' and 'that the salary gap widens over time even for men and women hired into the same jobs at the same time.'" (internal citations omitted)).

36. *See* discussion *supra* Parts I.B.1., 2., 3.

37. Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 3, at 37–38.

38. *Id*. at 41–42 (emphasis added).

39. *Id*. (emphasis added).

40. *Id*. at 42.

41. Goldberg, *supra* note 31.

42. *Cf.* David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. 1785, 1811 (2018) [hereinafter Marcus, *History, Part II*] (explaining why class action procedure is well-suited to Title VII claims as a whole: "[t]he named plaintiff 'just happen[s] to be the member of a group subjected to the [protected] classification.' She is better understood as 'merely the catalyst' for litigation, not its central figure. No good reason exists to limit a case to an individual's claim." (quoting Burke Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006, 1006 (1984))).

discrimination is at its core class-wide. This theory of discrimination is thus a cause of action created out of collective experience.

To sumarize, a "toxic workplace culture" as used throughout this Note can thus be defined as a set of social expectations for the workplace based in or motivated by entrenched ideas about the sexes that result in subtle discrimination because of sex[43]—i.e. behaviors that may "side-line[], humiliate[], exclude[]," or demean women in that workplace.[44] This discrimination goes unchecked—and continues to inform social expectations in the workplace in a sort of endless cycle—because it is not blatant enough to violate either (1) an organization's explicit anti-discrimination policies or (2) common cultural/legal conceptions of sex discrimination. The definition provided here is somewhat broad and flexible, which is necessary to encompass the myriad expressions of more subtle modern discrimination.[45] Thus any claim stemming from a toxic workplace culture should be brought on behalf of a group or class that shares the same protected characteristic—here, sex—which is precisely what subjects them to discrimination under such a culture, because although women's experiences of such a culture may differ, they are expressions of the same root problem.[46]

B. *Toxic Workplace Cultures in Action*

To illustrate how such cultures operate and the discriminatory outcomes they promote, this Part details three examples of workplaces with toxic cultures: Wal-Mart, Fox News, and Uber. Of the examples discussed herein, only Wal-Mart is an example from case law. The lack of alignment between the governing legal regime and the realities of modern workplace discrimination[47] means that few claims based on

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43. *See* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 41 (2009)

> ("[W]orkplace discrimination today is more subtle–often involving structural and organizational norms that are less easy to identify as discriminatory–than the explicit exclusions that characterized early civil rights litigation."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–69 (2001) (defining "first generation" discrimination as deliberate, overt exclusion and "second generation" discrimination as more subtle, organizational and cultural that is difficult to tie to intentional, discrete actions).

44. *See* Flores, *supra* note 11, at 89.
45. *See* Sturm, *supra* note 43, at 460.
46. *See* discussion *infra* Part II.B.
47. *See* discussion *infra* Part II.A.

toxic workplace cultures appear in the courts.[48] However, the absence of examples in case law does not mean the absence of a problem; toxic workplace cultures are widely discussed in the media and online[49] and have been identified at Fox News[50] and Uber,[51] among other employers.

To reiterate, a toxic workplace culture is a collection of expectations, socially-set and enforced, that result in an environment that disadvantages women at large in the workplace.[52] The toxic workplace culture of these three employers subjected women to harassment and other forms of discrimination on the basis of sex. While the discrimination manifested differently for the women at these respective workplaces, these egregious acts of discrimination were not isolated incidents. They were expressions of a root problem: a toxic workplace culture that pervaded each company.

1. Case Study 1: *Wal-Mart v. Dukes*

Wal-Mart Stores, Inc. v. Dukes[53] is a significant example of how a Title VII claim alleging facts resembling a toxic workplace culture is presently adjudicated by the Supreme Court. *Wal-Mart* is most widely discussed for its impact on class certification, but its impact on delegitimizing Title VII class actions should not be understated. Plaintiffs brought a class action against Wal-Mart alleging sex discrimination

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48. A Westlaw search for the term "toxic workplace culture" across all state and federal courts returns results for three cases, all from 2020 or 2021. *See* WESTLAW, *search for "toxic workplace culture,"* https://www.westlaw.com/SharedLink/e5dd2d870b044093ac964bb41009288d?VR=3.0&RS=cblt1.0 (last visited Mar. 31, 2022) (searching for cases across all state and federal courts). The broader search term "work culture" returned only ninety-two cases across all courts. *See* WESTLAW, *search for "work culture,"* https://www.westlaw.com/SharedLink/8750d9f6680a4427b58d63123f6dd32a?VR=3.0&RS=cblt1.0 (last visited Mar. 31, 2022) (searching for cases across all state and federal courts). And finally, a search for "toxic culture" resulted in thirty-five cases. *See* WESTLAW, *search for "toxic culture,"* https://www.westlaw.com/SharedLink/3b8641956164413588af059051756814?VR=3.0&RS=cblt1.0 (last visited Mar. 31, 2022) (searching for cases across all state and federal courts).

49. Analysis from Google Trends demonstrates that the term initially spiked in popularity in 2004 and has been consistently discussed since then. Google Trends, "toxic workplace culture," https://trends.google.com/trends/explore?date=all&geo=US&q=toxic%20workplace%20culture (last visited Jan. 9, 2022).

50. *See generally* Kate Webber Nuñez, *Toxic Cultures Require A Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463 (2018).

51. *See* Mike Isaac, *Inside Uber's Aggressive, Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html?smid=tw-share&_r=0; Maya Kosoff, *Uber Reels as Dozens of Employees Describe a Sexist, Hostile Workplace*, VANITY FAIR (Feb. 23, 2017), https://www.vanityfair.com/news/2017/02/uber-reels-as-dozens-of-employees-describe-a-sexist-hostile-workplace.

52. *See supra* Part I.A.

53. 564 U.S. 338, 343 (2011).

under Title VII.[54] This claim arose from Wal-Mart's practice of giving local supervisors complete discretion over pay and promotion decisions, which plaintiffs alleged led to those decisions being made "in a largely subjective manner."[55] Plaintiffs alleged that they were discriminated against on the basis of sex because "local managers' discretion over pay and promotions [was] exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees."[56] Plaintiffs supported this theory with statistical,[57] anecdotal,[58] and sociological evidence.[59]

The Court declined to certify the plaintiff-class, in part because plaintiffs alleged what the Court called a "kaleidoscope"[60] of discriminatory behaviors rather than more uniform occurrences or policies of discrimination that better aligned with what the Court's implicit preexisting notion of what sex discrimination should be. However, this kaleidoscope of discriminatory expressions all stemmed from Wal-Mart's deeply rooted toxic workplace culture. Wal-Mart's policy of delegated discretion and individual managers' differing exercises of that discretion—which led to the broad range of discriminatory behavior experienced by the plaintiffs—can be seen as expressions of a root problem: a toxic workplace culture. Despite the wide range of decisions managers had discretion to make, women overall suffered discriminatory outcomes at the company, as seen through the statistical and anecdotal evidence plaintiffs presented.

Although she did not use the term explicitly, Justice Ginsburg's concurrence in part implicitly identified Wal-Mart's culture and policy of delegation as amounting to a toxic workplace culture. She explained:

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54. *Id.* at 342.

55. *Id.* at 343.

56. *Id.* at 343–45.

57. *Id.* at 356 (a labor economist "compared work-force data from Wal–Mart and competitive retailers and concluded that Wal–Mart 'promotes a lower percentage of women than its competitors.'" (internal citations omitted)).

58. *Id.* at 358 (dismissing this evidence, the majority described it as such: "respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores.").

59. *Id.* at 353–55 (a sociologist testified for plaintiffs that "Wal–Mart has a 'strong corporate culture,' that makes it 'vulnerable' to 'gender bias.'").

60. *Id.* at 359 (quoting Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (Kozinski, C.J., dissenting)). The *Wal-Mart* majority adopted the use of the term "kaleidoscope" to characterize the plaintiffs' claims from then-Chief Judge Kozinski, who dissented from the Ninth Circuit's affirmation of the district court order certifying the plaintiff-class. It is a painful irony that then-Chief Judge Kozinski supported the denial of the plaintiffs' class certification, given that he himself had a history of harassing female clerks and acting inappropriately towards his clerks writ large. *See* Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 604–06 (2020).

> The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, *like all humankind, may be prey to biases* of which they are unaware. *The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes*.[61]

Justice Ginsburg also highlighted evidence that high-level supervisors at the head of the company made blatantly sexist remarks to and about female colleagues and employees, which demonstrates a sort of "trickle-down" aspect to the toxic workplace culture that took root at Wal-Mart.[62] Discriminatory behavior was modeled at the highest level of the organization, which demonstrates to those further down in the organization that such behavior is permitted and perhaps even preferred, leading lower level individuals to engage in discriminatory actions, further entrenching discrimination. Despite Wal-Mart's policy forbidding sex discrimination—the presence of which was a motivating factor in the majority's decision to deny class certification[63]—the evidence of statistical disparities in the employment of women,[64] sexist remarks made by those in management positions,[65] and expert analysis[66] led the District Court and Court of Appeals to conclude that there was at least a question of whether discrimination occurred *despite* the presence of such a policy, findings that should not have been overlooked.[67]

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61. *Wal-Mart*, 564 U.S. at 372–73 (Ginsburg, J., concurring in part and dissenting in part) (emphasis added).

62. *See id.* at 371–72 (Ginsburg, J., concurring in part and dissenting in part) ("[Wal-Mart's] senior management often refer to female associates as 'little Janie Qs.' One manager told an employee that '[m]en are here to make a career and women aren't.' A committee of female Wal–Mart executives concluded that '[s]tereotypes limit the opportunities offered to women.'" (internal citations omitted)).

63. *Id.* at 353 (majority opinion).

64. *Id.* at 370 (Ginsburg, J., concurring in part and dissenting in part) ("[T]he higher one looks in the organization the lower the percentage of women." (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 155 (N.D. Cal. 2004))).

65. *Id.* at 371–72.

66. *Id.* at 372 ("[P]laintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart 'can be explained only by gender discrimination and not by . . . neutral variables.'" (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 155 (N.D. Cal. 2004))).

67. *Id.* at 347–48 (majority opinion) (citing Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (district court certifying the plaintiff-class in *Wal-Mart*); Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc) (affirming the district court's grant of class certification)).

2. Case Study 2: Fox News

Fox News fostered a toxic workplace culture rife with both blatant sexual harassment and virulent non-sexual sexist behaviors.[68] A 2017 report revealed that Fox News heavyweights like Roger Ailes, the Chairman and CEO, and Bill O'Reilly, a celebrity anchor, had harassed women at the network for over a decade. The organization "[hid] the harassment problem behind confidential settlements and arbitration."[69]

These were not isolated expressions of sexism, but rather, were clearly linked to Fox's root "culture of harassment."[70] One former employee described the culture at Fox News as "a sex-fueled, Playboy Mansion-like cult, steeped in intimidation, indecency, and misogyny."[71] In addition to blatant sexual harassment, women at the network endured a variety of sexist and condescending behavior; "[o]ne commentator described the network as on 'the wrong side of patriarchy and male privilege,' and stated that the Ailes and O'Reilly accusations are just one 'part of [a] larger, male-centric cultural problem at Fox.'"[72] Former Fox News newscasters likewise described the company culture as "'toxic' and a 'minefield,' and even Sarah Palin [has] said that the network's culture of intimidating women needed to change."[73]

Though Fox News eventually fired Ailes and O'Reilly, the perpetrators of the reported sexual harassment, this occurred only after media reporting triggered a public outcry.[74] Fox leadership knew about this harassment long before this public outcry,[75] demonstrating a complacency and acceptance of such behavior at the company's highest levels. The organization settled multiple different legal complaints filed by former women employees against Ailes and O'Reilly for millions of dollars each, preventing the harassment from being exposed in court.[76] Culture takes root from the top in large organizations. In settling with the women who had been harassed and continuing to employ the harassers—whose harassing behavior was widely known—while not further acting to prevent discriminatory behavior, management effectively sent a message to its employees that perpetrators would not experience meaningful consequences for such behavior, thus making it culturally

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68. *See* Webber Nuñez, *supra* note 50, at 467–75.
69. *Id.* at 467, 473.
70. *Id.* at 473 (emphasis added).
71. *Id.* at 471.
72. *Id.* at 468, 501.
73. *Id.* at 501.
74. *Id.* at 475.
75. *See id.* at 467.
76. *Id.* at 470, 473.

acceptable and its repeated occurrence a norm within the organization.[77]

3. Case Study 3: Uber

The experiences of female employees at Uber demonstrate a different type of toxic workplace culture, yet one that harms women all the same. Susan Fowler, an engineer who left the company and wrote a viral blog post about her time there, "detailed a history of discrimination and sexual harassment by her managers."[78] Ms. Fowler's account of her experience at Uber included sexual harassment from colleagues, sexist treatment of women on male-dominated teams, and multiple reports to human resources that were ignored and denied.[79] When she left the organization, only 6% of employees in Mr. Fowler's department were female—a decrease from 25% women when she joined.[80]

The discriminatory behavior Ms. Fowler and others experienced was rooted in Uber's workplace culture, which company leadership fostered and which Uber's human resources department was unwilling to address.[81] As more employees then came forward, it became clear that "the company's aggressive, sometimes sexist workplace culture" was widely known, yet perpetrators of sexist or discriminatory actions were not held accountable.[82] Management set a cultural expectation that they accepted these subtle expressions of discrimination, which made discrimination against women the norm. Many tech companies have dealt with similar accusations, "suggesting that bias and discrimination are an industry-wide problem. . . . [and] a deeply-rooted, insidious issue"[83] in the workplace cultures of tech companies.

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77. *See id.* at 490–91

> ("As just one example, in response to revelations about Ailes, the Fox News leadership announced its commitment 'to maintaining a work environment based on trust and respect.' Shortly after that, however, Fox News confidentially settled two women's claims of sexual harassment against O'Reilly and then renewed O'Reilly's contract. Only months later, after significant press coverage led to advertiser and shareholder pressure, Fox News finally took action against O'Reilly." (internal citations omitted)).

78. Isaac, *supra* note 51.

79. *Reflecting On One Very, Very Strange Year At Uber*, SUSAN FOWLER (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber [https://perma.cc/6QPZ-435C].

80. *Id.*

81. *Id.*

82. Kosoff, *supra* note 51.

83. *Id.*; *see also* Christian Davenport & Rachel Lerman, *Inside Blue Origin: Employees Say Toxic, Dysfunctional 'Bro Culture' Led to Mistrust, Low morale and Delays at Jeff Bezos's Space Venture*,

In 2019, after investigating Uber, the EEOC "found reasonable cause to believe that Uber permitted a culture of sexual harassment and retaliation against individuals who complained about such harassment."[84] In response to these findings, Uber established a fund to compensate those who experienced harassment or retaliation at work and agreed to update several policies pertaining to reporting and monitoring harassment.[85] Although this is a positive outcome, it was notably achieved only after Uber *cooperated* with an EEOC investigation.[86] While the EEOC Commissioners are authorized to investigate possible discrimination on their own volition (termed a "Commissioner Charge"), which happened here, this is a relatively rare occurrence.[87] Women experiencing a toxic workplace culture cannot rely on these investigations or outcomes such as the one Uber agreed to in conciliation with the EEOC; if women wanted to file discrimination charges themselves under a theory of a toxic workplace culture, they would not be able to. The next Part discusses the misalignment between current legal frameworks and the realities of modern discrimination stemming from toxic workplace cultures that exacerbates this problem.

WASH. POST (October 11, 2021, 9:13 AM), https://www.washingtonpost.com/technology/2021/10/11/blue-origin-jeff-bezos-delays-toxic-workplace/ [https://perma.cc/GQK6-6UFH] ("The new management's 'authoritarian bro culture,' as one former employee put it, affected how decisions were made and permeated the institution, translating into condescending, sometimes humiliating, comments and harassment toward some women and a stagnant top-down hierarchy that frustrated many employees."); David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (Mar. 27, 2015), https://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html.

> ("Episodes of men behaving badly make the news frequently here, whether it is sexism or harassment in the workplace or just derogatory attitudes toward women. Critics are increasingly drawing a straight line between such behavior and the small percentage of women who are engineers and executives, and the even smaller percentage of women who are venture capitalists.").

84. Kate Conger, *Uber Settles Federal Investigation Into Workplace Culture*, N.Y. TIMES (Dec. 30, 2019), https://www.nytimes.com/2019/12/18/technology/uber-settles-eeoc-investigation-workplace-culture.html (quoting Press Release, Equal Emp. Opportunity Comm'n, Uber to Pay $4.4 Million to Resolve EEOC Sexual Harassment and Retaliation Charge (Dec. 18, 2019), https://www.eeoc.gov/newsroom/uber-pay-44-million-resolve-eeoc-sexual-harassment-and-retaliation-charge [https://perma.cc/LP3L-DNG3]).

85. Press Release, Equal Emp. Opportunity Comm'n, Uber to Pay $4.4 Million to Resolve EEOC Sexual Harassment and Retaliation Charge, *supra* note 84.

86. *Id*.

87. Commissioner Charges and Directed Investigations, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commissioner-charges-and-directed-investigations [https://perma.cc/77HW-3Y5X] (last visited Sept. 14, 2022) (noting that only 3 Commissioner charges were filed in FY20 and FY21 respectively); Press Release, Uber to Pay $4.4 Million to Resolve EEOC Sexual Harassment and Retaliation Charge, *supra* note 84.

II. THE NECESSITY OF CLASS-WIDE RELIEF AND OBSTACLES TO LIABILITY FOR TOXIC WORKPLACE CULTURES UNDER CURRENT FRAMEWORKS

> "For reasons both practical and doctrinal, [current systemic sex discrimination law], even properly constructed and applied, cannot fully address discrimination in the modern workplace."[88]

While the underlying nature of systemic discrimination has changed in the modern workplace, the legal theory of liability for such claims has remained stagnant.[89] While conceptualizations of sex discrimination and harassment as established in the1980s and '90s were watershed moments for broadening employer liability under Title VII, they are no longer sufficient to address the reality of modern workplace discrimination.[90]

As defined, toxic workplace culture does not solely result in sexual harassment, but instead in an entire spectrum of unequal opportunities and hostile treatment for women because they are women.[91] Class-wide injunctive relief that requires employers to address the cultural and social norms that foster toxic workplace cultures is necessary in order to ensure significant, systemic change.[92]

Under the current Title VII frameworks, however, any resulting relief for a plaintiff in a work environment like those described above would most likely not attack the root of the problem: the toxic workplace culture that fostered the discrimination the plaintiff experienced. Both the hostile work environment and pattern or practice discrimination frameworks[93] fail to address the root environment or organizational decisions that lead to discrimination, and instead target only the expression of specific harassing acts.[94] Thus, as it currently stands,

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88. Green, *Future*, *supra* note 18, at 433.

89. *See* Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 487 (2011) ("Importantly, while social conditions have surely changed, the theory underlying the pattern or practice cause of action has not[.]").

90. *See* Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152, 153 (2018), https://www.yalelawjournal.org/forum/was-sexual-harassment-law-mistake [https://perma.cc/MR8R-KG] [hereinafter Green, *Was Sexual Harassment Law a Mistake?*] ("Sexual harassment is a form of discrimination because more often than not it is tied to broader inequality in the workplace. But our law has not embraced this reality.").

91. *See* discussion *supra* Part I.A.

92. *See* discussion *infra* Part III.

93. *See* discussion *infra* Part II.A.1 and Part II.B.

94. See Green, *Work Culture*, *supra* note 26, at 657–58.

> [T]he existing law of harassment constrains permissible narratives on both sides. On the victim side, it rewards thinking of ourselves and our experiences of harassment in isolation, when we might instead see our experiences as members of groups embedded within broader environments. On the perpetrator side, it asks whether a specific, identified harasser engaged in acts of harassment, thereby ignoring others in the organization and the organizational structure itself as causes of ongoing hostile environments.[95]

This Part will discuss how the substantive barriers of established Title VII theories of discrimination, coupled with the procedural difficulties in class certification, can impede plaintiffs' ability to secure meaningful class-wide relief. By preventing plaintiff-classes from even considering bringing actions against their employers for fostering discriminatory work environments,[96] these frameworks hinder "the law's ability to serve its broader goal of reduced discrimination in the workplace."[97]

A. *Obstacles in Title VII*

Title VII's frameworks do not fully address the deep structural issues that enable the continuation of sex discrimination in the modern workplace, as they focus on individual acts of discrimination.[98] Two main problems work in tandem to exclude coverage of discrimination stemming from toxic workplace cultures from the statute: (1) the rigid theoretical frameworks for bringing suit under Title VII, and (2) the lack of understanding and acceptance of the modern manifestation of workplace discrimination.

There are a number of judicially created Title VII theories. The two most applicable to toxic workplace cultures are the "hostile work envi-

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95. *See* Green, *Was Sexual Harassment Law a Mistake?*, *supra* note 90, at 153. Not all sex discrimination claims are hostile work environment claims involving sexual harassment, but—as discussed in Part II.A.1—hostile work environment claims are the likeliest match for toxic workplace culture discrimination claims and are thus the established theory discussed herein.

96. *See* Weiss, *supra* note 24, at 121 ("[i]mposing liability for [features of the workplace that tend to produce discriminatory outcomes] does not fit comfortably into conventional Title VII doctrine.").

97. Green, *Was Sexual Harassment Law a Mistake?*, *supra* note 90, at 154.

98. *See* Green, *Targeting Workplace Context*, *supra* note 30, at 691 ("Conceptualizing the problem of modern workplace discrimination purely in terms of discrete decisions made by individual decision makers, these courts fail to recognize the broader structural influences potentially at play across the organization.").

ronment" and "pattern or practice" theories. Both should provide opportunities to address the systemic, class-wide discrimination toxic workplace cultures produce. The "hostile work environment" theory purports to focus on the work environment and its impact on a plaintiff, and "pattern or practice" theory specifically applies to allegations of systemic or class-wide discrimination because of sex. However, both fail to provide victims of toxic workplace cultures with meaningful relief. This Part will evaluate their shortcomings in turn.

1. The Rigid Theoretical Frameworks for Bringing Suit Under Title VII

Although it is now generally understood that Title VII protects against harassment because of sex, that was not covered under the statute until the late twentieth century. In 1980, the EEOC adopted a novel framework initially proposed by sex equality scholar Catherine MacKinnon that interpreted Title VII to prohibit two types of harassment: quid pro quo and hostile environment harassment.[99] Both types of harassment must be *intentional* on the part of the harasser.[100] Hostile environment harassment is "based on unwelcome conduct of a sexual nature that 'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.'"[101]

To be actionable as a hostile work environment, harassment (1) must be "unwelcome," (2) must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment,"[102] and (3) must create an environment that is objectively offensive to a reasonable person, as well as subjectively perceived by the victim to be abusive.[103] The hostile work environment must create or result in an "adverse employment action" on which to base a claim.[104] Because hostile work environment claims often involve

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99. BARTLETT ET AL., *supra* note 16, at 505–07 (citing 29 C.F.R. § 1604.11(a)(1)-(3)).

100. Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295, 1302–03 (2021); *see* Green, *Discrimination in Workplace Dynamics*, *supra* note 24, at 132; BARTLETT ET AL., *supra* note 16, at 120–21.

101. BARTLETT ET AL., *supra* note 16, at 505.

102. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68, 67 (1986) (internal quotations omitted).

103. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

104. Duarte v. St. Barnabas Hosp., 265 F. Supp. 3d 325, 347 (S.D.N.Y. 2017)

> ("In order to establish a prima facie case for discrimination premised on disparate treatment, Plaintiff must show, inter alia, that 'she was subject to an adverse employment action' on the basis of a protected characteristic. . . . 'To constitute an adverse em-

no clear tangible action that harms the plaintiff (such as a firing), the action at issue in these claims is typically some alteration of the workplace.[105] This creates a malleable and somewhat confusing standard; conduct that is "merely offensive" rather than "severe and pervasive" is not an actionable "alteration of the workplace," but conduct does not have to be severe enough to cause a "tangible psychological injury" to be actionable.[106]

Complainants of harassment are not technically required to bring a hostile work environment claim with an explicitly sexual component.[107] It should be sufficient for the harassment to have been motivated "because of sex." In practice, however, "courts have repeatedly rejected claims in which general hostility to women is evident but not made explicit in sexualized comments," effectively requiring an explicit sexual element in hostile work environment claims.[108] This directly bars claims focused on toxic workplace cultures, which definitionally result in environments which are generally hostile to women yet do not necessarily include a per se sexual element.[109]

Notably, the hostile work environment theory requires that a work environment is made hostile by harassing conduct that alters a plaintiff's work environment. This does not encompass the entire universe of discriminatory behavior a toxic workplace culture can create. Expressions common to a toxic workplace culture, such as "[a] poor evaluation, a change of job title, a failure to train, and an intra-department transfer, for example, have each been held legally insufficient to support a Title VII claim."[110] As a result, "[e]mployees who are judged more harshly in internal evaluations or excluded from key informal social networks because of protected characteristics must nonetheless await an event

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ployment action in the context of a discrimination claim, an action must cause 'a materially adverse change in the terms and conditions of employment.'").

105. Flores, *supra* note 11, at 88.

106. *Harris*, 510 U.S. 17 at 21.

107. Goldberg, *supra* note 31, at 429

("[S]exual harassment involves the exercise of power and is best understood in the context of broader inequities related to sex and gender in the workplace and surrounding society. This has been recognized in doctrine, which does not require misconduct to be 'motivated by sexual desire to support an inference of discrimination on the basis of sex.'").

108. Flores, *supra* note 11, at 89.

109. *See* discussion *supra* Part I.A.

110. Green, *Discrimination in Workplace Dynamics*, *supra* note 24, at 116–17.

that constitutes a 'materially adverse action' within a single institution before challenging the discriminatory denial of opportunity."[111]

Thus, hostile work environment theory becomes somewhat of a "theoretical straitjacket" for pursuing claims based in a toxic workplace culture.[112] The theory purports to address claims where the work environment is hostile, but for a work environment to be found hostile an adverse employment action must *actually be taken* against plaintiffs. Under this framework a toxic workplace culture would only be actionable when a prospective plaintiff failed to meet cultural requirements or expectations, and her work environment was subsequently negatively altered by an adverse employment action.[113] This seems impossible to measure. What does failing to meet cultural requirements or expectations—especially if those requirements are implicit—look like? And how would one link an adverse employment action, such as a firing or demotion, to such a failure? The hostile work environment theory also does not account for the class-wide impact toxic workplace cultures can create; it evaluates whether the work environment was hostile for each individual. There is no specific moment where a particular woman fails to live up to the requirements of her workplace's culture but instead a series of smaller moments—which encompass a broad spectrum of discriminatory behavior towards that woman and women at large—that when viewed in aggregate, demonstrate unequal treatment for women as a class.

The hostile work environment theory fundamentally misunderstands the harm of a toxic workplace culture. It is not a single alteration of the workplace, but the everyday work environment and its norms created by a toxic workplace culture that are the root cause of discrimination within a workplace. For example, Fox News' toxic workplace culture was evidenced by the fact that so many women experienced sexual harassment, that the organization knew about that harassment, and that the organization decided to silence those women while continuing to employ and applaud their serial harassers.[114] Legally, there was no sufficient adverse employment action taken by the organization—the women were not formally fired, demoted, or otherwise disciplined. There was, however, an adverse workplace environment, which condoned female employees' harassment and devalued them because of

111. *Id*. at 117.

112. Weiss, *supra* note 24, at 126 (quoting Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1366 (2009)).

113. Green, *Work Culture*, *supra* note 26, at 656.

114. *See* discussion *supra* Part I.B.2.

their sex. That is not presently actionable under Title VII. However, experiencing an adverse environment still tangibly harms victims as an adverse action would—psychologically, physically, occupationally and economically[115]—and these are harms for which courts have historically provided relief.

2. The Lack of Understanding of the Nature of Modern Discrimination

Legal decisionmakers' inflexible enforcement of the rigid theoretical frameworks outlined above are due in part to those decisionmakers' lack of understanding of modern harassment generally. As discussed in Part I, workplace discrimination has evolved since Title VII's initial enactment.[116] Over time, "[c]ognitive bias, structures of decisionmaking [sic], and patterns of interaction have replaced [the so-called 'smoking guns' of] deliberate racism and sexism as the frontier of much continued inequality."[117] Toxic workplace cultures result in expressions of this more subtle discrimination that includes side-lining, humiliating, excluding, or demeaning women in the workplace.[118] However, because a toxic work culture is a set of workplace expectations that are socially formed and enforced, it is often not explicitly codified (and may even run counter to the organization's explicit workplace policies).[119]

Title VII jurisprudence has not carved out a clear space or accountability framework for this type of discrimination.[120] No theory of discrimination fully addresses the issue of subtle discrimination or implic-

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115. *See* FELDBLUM & LIPNIC, *supra* note 2, at 20–23. This EEOC task force report discussed these harms with a focus on workplace harassment prevention efforts. *Id.* at ii. While this report focused on harassment—which I have above explained as not encompassing the full universe of discrimination from toxic workplace cultures—it took an expansive view of the term and did not "confine [itself] to the legal definition of workplace harassment, but rather included examination of conduct and behaviors which might not be 'legally actionable,' but left unchecked, may set the stage for unlawful harassment." *Id.* at iv. Because of this expansive focus, the analysis of "harassment" and its harmful effects contained within the report can be taken as relevant and applicable to the broader discussion of toxic workplace culture discrimination in this Note.

116. *See* discussion *supra* Part I.

117. Sturm, *supra* note 43, at 459–60. This is not to say that "smoking gun" overt discrimination no longer exists, simply that such discrimination is accounted for within Title VII's legal frameworks and more implicit or subtle forms of discrimination, such as discrimination stemming from toxic workplace cultures, is a current, major problem going unaddressed by Title VII litigation.

118. *See* discussion *supra* Part I.A.

119. *See* discussion *supra* Part I.A.

120. *See* Green, *Work Culture*, *supra* note 26, at 653 ("Despite its importance, work culture goes unrecognized as a source of discrimination in current legal discourse.").

it bias,[121] nor does EEOC guidance or the Code of Federal Regulations' "Guidelines on Discrimination Because of Sex."[122] The Code does not address any form of broad workplace impact or environmental discrimination beyond the hostile work environment theory of harassment.[123]

Courts also appear resistant to expand Title VII's coverage beyond the smoking gun discrimination of the past without such guidance. Take *Wal-Mart* as an example: despite a variety of evidence illustrating the toxic workplace culture that led to discriminatory effects for the class of female plaintiffs, the majority found this evidence insufficient to allow plaintiffs to move forward with their discrimination claim.[124] The discrimination presented in *Wal-Mart* did not align with any of the currently accepted theories of sex discrimination, such as hostile work environment harassment. Much of the conduct was interpreted as falling into the "merely offensive" category rather than being "severe or pervasive" enough to constitute harassment.[125] Crucially, the conduct lacked a clear "adverse action."[126] The majority instead asserted, without any evidentiary support, that "most managers in a corporation that forbids sex discrimination" would not discriminate, and so did not here.[127] This may be because "the Court views earlier cases recognizing widespread discrimination . . . as 'products of their era[]' . . . [and] may doubt that widespread discrimination exists in the modern corporation."[128] The *Wal-Mart* decision demonstrates that the nation's highest court considers work culture to be purely a "business prerogative rather than a matter of antidiscrimination concern. . . . [which] underestimates the significance of work culture as a source of discrimination in the modern workplace."[129]

There are additional considerations that may impact courts' narrow understanding of discrimination and Title VII claims more generally. Professor A. Benjamin Spencer posits that discrimination claims are disfavored because:

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121. *See* Weiss, *supra* note 24, at 127.

122. *See EEOC Guidance*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/enforcement-guidances-and-related-documents (last visited Feb. 6, 2022); Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604 et seq. (2021).

123. 29 C.F.R. § 1604.11.

124. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355–58 (2011).

125. *See id.* at 352–60 (describing how the evidence presented by plaintiffs did not demonstrate discrimination common to the class); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

126. *See supra* notes 104–06 and accompanying text.

127. *Wal-Mart*, 564 U.S. at 355.

128. Angela D. Morrison, *Duke-Ing Out Pattern or Practice After Wal-Mart: The EEOC As Fist*, 63 AM. U. L. REV. 87, 111 (2013).

129. Green, *Work Culture*, *supra* note 26, at 664.

> At bottom, it appears that jurists who disfavor these claims do so because they do not believe in them. They seem to espouse a deep suspicion of, or at least a doubt concerning, claims of mistreatment tied to a person's race or gender, believing that the vast majority of people do not discriminate and instead treat each other fairly. Explicit evidence of . . . animus is demanded before this presumption can be overcome.[130]

This potential explanation is especially troubling when there have been indications of sexual harassment and sex discrimination in some work environments within the judiciary.[131] For example, Judge Alex Kozinski—a former Ninth Circuit judge who dissented from that Court's certification of the plaintiff-class in *Wal-Mart*[132]—was accused of inappropriate sexual conduct and comments by former clerks and junior staffers.[133] But even before these allegations, it was widely known that Judge Kozinski "behaved in both inappropriate and sexualized ways."[134] A toxic workplace culture might have been present in Judge Kozinski's chambers.[135] This problem is not confined to one chambers or one employer. In March 2022, the House Committee on the Judiciary held a hearing on "Workplace Protections for Federal Judiciary Employers" where individuals who held a variety of positions within the judicial system testified about their experiences with sex harassment or discrimination at work.[136] These testimonies indicate that the problem of a

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130. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 481 (2013) (internal citations omitted).

131. *See* Litman & Shah, *supra* note 60.

132. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, C.J., dissenting), *rev'd*, 564 U.S. 338 (2011).

133. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [https://perma.cc/C8QJ-SFQY].

134. *See* Litman & Shah, *supra* note 60, at 604.

135. If Judge Kozinski fostered such a culture, it is unsurprising that a tolerance for such behavior would permeate his judicial opinions. *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting) (dissenting from the decision to certify the class of female Wal-Mart employees, writing "Some thrived while others did poorly. They have little in common but their sex and this lawsuit."), *rev'd*, 564 U.S. 338 (2011).

136. *See generally Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change Before the Subcomm. on Cts., Intell. Prop., and the Int. of the H. Comm. on the Judiciary*, 117th Cong. (2022), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4883 [https://perma.cc/MA9R-9LMW]; *H. Comm. on the Judiciary*; House Judiciary Dems(@House Judiciary), TWITTER (Mar. 17, 2022, 8:54 AM), https://twitter.com/HouseJudiciary/status/1504441081827676167?s=20&t=_qOKXMRnIvaYrdkE1nFZNQ [https://perma.cc/JS2Q-F2TM]. While beyond the scope of this Note, it is important to note that Title VII does not currently apply to the

lack of accountability for toxic workplace cultures may apply to work environments within the judiciary itself, further underscoring the immediate need for our legal system to fully recognize and facilitate claims arising from toxic workplace cultures.

B. *Obstacles in Class Certification*

Historically, class actions—particularly those under Federal Rule of Civil Procedure 23(b)(2), termed "civil rights" class actions[137]—have been important tools in civil rights litigation, including Title VII claims.[138] By banding together many wronged parties, class actions "trigger[] inquiry about institutional and organizational sources of harm and encourage[] development of solutions aimed at systemic reform."[139]

In practice today, Rule 23's certification requirements actually compound difficulties for plaintiffs seeking to bring claims of systemic sex discrimination.[140] This is especially true post-*Wal-Mart*. In addition to reinforcing Title VII's lack of understanding of and accountability for modern workplace discrimination, the *Wal-Mart* decision effectively heightened the "commonality" threshold for class certification under Rule 23(a)(2).[141] In requiring plaintiffs to demonstrate they suffered the "same injury" and not just "a violation of the same provision of law" the majority added a gloss to Rule's 23's simple requirement that classes have questions of law or fact in common.[142] This erects yet another barrier to plaintiffs seeking class-wide relief from toxic workplace cultures.

To allege systemic or class-wide discrimination because of sex under Title VII, plaintiffs typically bring "pattern or practice" claims.[143] Pattern or practice claims exist when "the denial of rights consists of something more than an isolated, sporadic incident, but is repeated,

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federal courts, a barrier that many former clerks have proposed reforming. *See, e.g.*, Litman & Shah, *supra* note 60, at 606–07, 637.

137. Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 857–60 (2016).

138. Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U.L. REV. 455, 489 (2014).

139. Green, *Targeting Workplace Context*, *supra* note 30, at 678–79.

140. Schipani & Dworkin, *supra* note 13.

141. For a class to be certified Rule 23(a) requires that plaintiffs meet the requirements of "numerosity, commonality, typicality, and adequate representation." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011); *see also* FED. R. CIV. P. 23(a)(1)-(4). The "commonality" requirement is that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).

142. *Wal-Mart*, 564 U.S. at 350; FED. R. CIV. P. 23(a)(2).

143. Green, *Discrimination in Workplace Dynamics*, *supra* note 24, at 119.

routine, or of a generalized nature"[144] and the discrimination against members of a protected class is "standard operating procedure."[145] Plaintiffs typically rely on statistical evidence, individual anecdotes, and sociological evidence[146] to prove these claims.[147] The plaintiffs in *Wal-Mart* alleged systemic discrimination under this theory.[148]

These claims are important because a grant of injunctive or declaratory relief is more expansive under pattern or practice claims than what a court would order for individual plaintiffs pursuing accountability regarding a more "unique" instance of discrimination.[149] Relief may include "an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII."[150] While individual monetary relief is also possible, additional proceedings after an initial liability determination are typically needed to determine the scope of such relief.[151]

Pattern or practice claims can be brought by the EEOC or by private parties; however, while the EEOC can pursue claims under the enforcement provisions of Title VII without meeting class certification requirements, private plaintiffs cannot.[152] Like hostile work environment theory in the previous section, pattern or practice claims may initially seem well-suited to addressing toxic workplace cultures. Individuals in the workplace make decisions informed—and perhaps even compelled by—the expectations set by their workplace's culture.[153] A toxic work-

144. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977) (quoting 110 CONG. REC. 14,270 (1964) (statement of Sen. Hubert Humphrey)).

145. BARTLETT ET AL., *supra* note 16, at 140; *see also Int'l Bhd. Of Teamsters*, 431 U.S. at 336 (defining this theory in a case focused on racial discrimination under Title VII). This baseline framework has been utilized in the context of sex discrimination or workplace harassment. *See, e.g.*, E.E.O.C. v. Mavis Disc. Tire, Inc., 129 F. Supp. 3d 90 (S.D.N.Y. 2015) (denying summary judgment for the EEOC but finding that there was a genuine issue of material fact as to whether employer engaged in pattern or practice discrimination against female applicants).

146. This evidence is typically called "social framework evidence," which "provides a social and psychological context in which the trier can understand and evaluate claims about the ultimate fact." Neil Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, 52 LAW & CONTEMP. PROBS. 133, 135 (1989); *see also* Hart & Secunda, *supra* note 43, at 42–44.

147. BARTLETT ET AL., *supra* note 16, at 140.

148. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011).

149. Morrison, *supra* note 128, at 107.

150. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977) (internal citation omitted).

151. *Id.*

152. BARTLETT ET AL., *supra* note 16, at 140; 42 U.S.C. § 2000e-5(a) ("The Commission is empowered . . . to prevent any person from engaging in any unlawful employment practice"); Green, *Future*, *supra* note 18, at 404–05.

153. Green, *Discrimination in Workplace Dynamics*, *supra* note 24, at 108.

place culture involves the establishment of implicit, socially-set discriminatory behavioral expectations that individuals systemically enforce as they operate and attempt to succeed within the workplace culture. This aligns with what pattern or practice claims purport to target: systematic discrimination.[154] In practice, however, the pattern or practice theory requirement that a discriminatory policy or practice be "standard operating procedure" is challenging to prove, even by a preponderance of the evidence, because the plaintiff must show that the discriminatory practice reflected "the defendant's 'regular' policy."[155] This is especially challenging for claims based on toxic workplace cultures, which are typically comprised of uncodified set socially expectations.[156]

Title VII includes no separate collective action provision for private plaintiffs that would circumvent certification requirements.[157] This was not always a pressing problem because pre-*Wal-Mart*, commonality was a low threshold to meet for class certification.[158] *Wal-Mart* departed from that practice, with the Court holding that to satisfy commonality, "all class members must 'have suffered the same injury,' that '[t]heir claims must depend upon a common contention' that is 'central to the validity of each one of the claims,' and that resolution of the common contention must resolve a central issue 'in one stroke.'"[159]

Post-*Wal-Mart*, class certification remains relatively easy where there is a uniform policy impacting a class in a specific way, but becomes more difficult when there is not. "If the record reveals discretion in decision making," plaintiffs risk losing certification unless they can identify "'plus factors' explaining why discretion is exercised consistently in one way."[160] Pre-*Wal-Mart*, it should have been simple for the plaintiffs in that case to meet the threshold of Rule 23(a)(2). A common question of law or fact that should have been sufficient could have asked

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154. Ramona L. Paetzold. & W. Steven Rholes, Wal-Mart v. Dukes*: Justice Scalia and Systemic Disparate Treatment Theory*, 21 EMP. RTS. & EMP. POL'Y J. 115, 144 (2017) ("Systemic disparate treatment is about entity-level, or organizational level, discrimination.").

155. *See* E.E.O.C. v. Mavis Disc. Tire, Inc., 129 F. Supp. 3d 90, 102–03 (S.D.N.Y. 2015).

156. *See* discussion *supra* Part I.A.

157. *See* Michael C. Harper, *Class-Based Adjudication of Title VII Claims in the Age of the Roberts Court*, 95 B.U. L. REV. 1099, 1102 (2015).

158. Spencer, *supra* note 130, at 443–44 ("[Until the Court's decision in *Wal-Mart* in 2011,] identifying a factual determination to be made or a legal issue to be resolved that was germane to the claims asserted by each class member had been sufficient to meet the commonality standard of Rule 23(a)(2).").

159. Carroll, *supra* note 137, at 886 (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011)) (alteration in original).

160. Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153, 168 (2015).

"whether the employer's organizational structures, culture, and/or institutionalized decision-making practices facilitate or permit discriminatory decisions by individual decision makers against members of the class."[161] Why was commonality denied here, and the requirement seemingly heightened? It is possible the Court's reasoning had much to do with the fact that *Wal-Mart* was a Title VII systemic sex discrimination action.[162] This is supported by the fact that now, twelve years after *Wal-Mart*, the heightened commonality standard has not been a so-called "death knell" for all class actions; instead, it seems to have most negatively impacted the certification of classes where defendants do not acknowledge or have in place any explicit policy or practice, a category that would seem to encompass potential claims based on toxic workplace cultures.[163]

Additionally, there appears to be a troubling perception of Title VII class actions as compilations of individual claims rather than as actions based on broader organizational problems.[164] This view is fostered directly within legal standards for proving discrimination established by courts,[165] which "focus[] on the bad actors/rotten apples that abuse their

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161. *See* Green, *Targeting Workplace Context*, *supra* note 30, at 692–93.

162. *See, e.g.*, Spencer, *supra* note 130, at 476 ("By endorsing a 'rigorous' probe into the proofs offered by the plaintiffs of their collective claims, the [*Wal-Mart*] majority demonstrated threshold skepticism, using its prejudgments about the merits as a guide to its resolution of the procedural question before it."); Morrison, *supra* note 128, at 111 ("Skepticism that intentional discrimination occurs to such a degree that it is spread throughout the company, rather than the result of a few bad apples, also seems to be motivating the [*Wal-Mart*] Court's holding."); Weiss, *supra* note 24, at 162 ("[T]he evaluation of evidence in discrimination cases [such as *Wal-Mart*] unavoidably turns on background assumptions about the societal pattern of discrimination.").

163. *Cf.* David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK L. REV. 395, 397–99 (2020). Although Marcus analyzes exclusively class actions against government defendants, terming these "public interest class actions," his core argument is that *Wal-Mart* has only had a negative impact for "cases challenging customs, practices, and patterns of conduct that add up to . . . systemic maladministration." *Id.* at 396, 399. This description would also accurately apply to a hypothetical toxic workplace culture class action, characterized for being constructed around social expectations and infrequently codified.

164. *See* Carroll, *supra* note 137, at 889 (arguing that the Court's denial of commonality as needed for class certification in *Wal-Mart* "makes sense only if one views the case narrowly (indeed, myopically) as a collection of individual damages claims, overlooking that the plaintiffs requested class-wide injunctive relief.").

165. *See* Green, *Was Sexual Harassment Law a Mistake?*, *supra* note 90, at 162.

> ("The second prong [of the Harris standard: that victims must subjectively perceive the work environment to be abusive], however, is also problematic. This prong poses a hurdle to those who experience a hostile work environment and want to pursue a collective claim, and thereby more easily present a collective story. Plaintiffs in any lawsuit must experience harm to have standing and to recover individualized compensatory damages, but Harris puts the subjective element of individual offense into the plaintiff's principal case of discrimination. This makes meeting class certification requirements more

authority or openly degrade their female coworkers" at the expense of larger, systemic issues and cultural norms that enable and encourage such behavior.[166] This troubling perspective adopted by the courts has negative implications for prospective Title VII class actions, including preventing courts from seeing the "commonality" that class certification requires.[167] In *Wal-Mart*, "[b]y denying the existence of discrimination or depicting it as an aberrant problem, the analysis assumed away the question of commonality the Court was supposed to consider."[168] In looking only at the individual claims that make up the class action, and not at the plaintiffs' evidence—sociological, statistical, and anecdotal—cumulatively, the *Wal-Mart* majority missed the bigger picture of the toxic company culture that was the root cause of the individual accounts of discrimination that prompted the litigation.[169]

Courts are cautious when considering Title VII pattern or practice claims and emphasize that "isolated or individual instances of discrimination, even if true, should not be construed to turn every Title VII case into 'a potential companywide class action.'"[170] However, such caution disregards that sex harassment is not an isolated event, but rather "a tactic that defines certain workplaces and is a critical component of them."[171] Instances of sex harassment or sex discrimination more broadly are not random, unfortunate incidents but can be considered targeted actions which, when considered in the context of the workplace and its culture, demonstrate the root issue of a toxic culture of discrimination.[172]

Although it can manifest in a variety of ways, "[s]exual harassment is not merely the experience of a few unlucky women but a practice that advances, entrenches, and preserves workplace inequalities, discouraging women from pursuing higher-level positions or even entering certain industries."[173] Because this Note argues that sex discrimination

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difficult because whether a hostile work environment existed becomes in part a question of individual perception.").

166. Flores, *supra* note 11, at 95.

167. FED. R. CIV. P. 23(a)(2); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) ("Rule[] [23's] four requirements—numerosity, commonality, typicality, and adequate representation—'effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" (quoting Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982))).

168. Schultz, *Taking Sex Discrimination Seriously*, *supra* note 20, at 1063–64.

169. Paetzold, & Rholes, *supra* note 154, at 145.

170. EEOC v. Mavis Disc. Tire, Inc., 129 F. Supp. 3d 90, 102–03 (S.D.N.Y. 2015) (internal citation omitted).

171. Flores, *supra* note 11, at 95.

172. *Id.*

173. *Id.*

should be conceived as intrinsically class-based (targeting women as a group precisely because of their identity),[174] the class action mechanism must continue to be a crucial tool for plaintiffs seeking relief from discrimination at their workplaces. Attacking individual instances of discrimination does not solve the ultimate problem. Such expressions of discrimination are merely heads of the hydra[175] that is toxic workplace culture; adjudicate one claim and two more will rise in its place, because the body of this beast has not been slain.

III. REFORMING TITLE VII TO ACCOMMODATE CLASS-WIDE RELIEF FOR TOXIC WORKPLACE CULTURES

> "[I]t is not Title VII suits, but sex discrimination itself that targets individuals who are otherwise different and reduces them to the common denominator of their sex."[176]

Current Title VII jurisprudence has resulted in immense difficulty for plaintiff-classes seeking to target toxic workplace cultures. To remedy these issues and impose liability on employers for creating such cultures, this Note proposes a new theory of employment discrimination targeting toxic workplace cultures. Rather than focus solely on isolated expressions of systemic discrimination, as current theories like hostile work environment do, this theory would focus on the systemic discrimination's root cause: the toxic workplace culture perpetuated by employers that creates opportunities for discriminatory conduct. This theory should be codified within Title VII to directly mitigate the substantive and procedural difficulties currently preventing classes of plaintiffs from holding employers accountable for toxic workplace cul-

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174. *See* discussion *supra* Part I.A; Marcus, *History, Part II*, *supra* note 42, at 1811 ("Class action procedure fit the group rights understanding of Title VII perfectly. As the Ninth Circuit reasoned in 1977, '[e]mployment discrimination based on race, sex, or national origin is by definition class discrimination[,]' and for this reason 'class actions are favored in Title VII actions.'" (internal citations omitted)).

175. *See* Lisa Foster, *Remarks*, 54 U. MICH. J.L. REFORM 835 (2021)

> ("In both Greek and Roman mythology, a Hydra guards the entrance to the underworld. For those who don't remember their mythology, a Hydra is a multi-headed serpent who exhales poisonous fumes. If you get close enough to the Hydra and are able to cut off one of its heads, two grow back in its place. Slaying the Hydra was number two on Hercules' famous list of Labors. He was successful, but not without a fierce struggle.").

176. Schultz, *Taking Sex Discrimination Seriously*, *supra* note 20, at 1065 (internal citations omitted).

tures. This statutory reform does not purport to solve every problem with current Title VII jurisprudence and merely seeks to address some of the preliminary barriers preventing plaintiffs from bringing claims based on toxic workplace cultures. Part A outlines the goals of this proposal and the relief it would offer. Part B addresses the substantive and procedural amended provisions to the statute that would accomplish these goals and provides a brief case study illustrating the reform's potential impact for victims of toxic workplace cultures.

A. *The Goal: Allowing Plaintiffs to Seek a New Form of Injunctive Relief*

Before detailing what this reform would include, it is important to understand the relief it can provide. Like a Rule 23(b)(2) civil rights class action,[177] this new theory would provide broad, class-wide, injunctive relief for toxic workplace culture claims. Injunctive relief would be farther-reaching in its long-term impact than immediate individual damages like backpay[178] because courts could mandate, via injunctions, employers to meaningfully modify their workplace culture and prevent fufuture instances of discrimination. Injunctive relief ordered for toxic workplace culture claims could include orders against the continuation of discriminatory practices, a requirement that employers file compliance reports with the EEOC, or a mandate to conduct a specific kind of anti-discrimination training.[179]

Under the present law, employers know they need only engage in "surface-level" compliance with Title VII's mission to escape legal liability.[180] For example, when a plaintiff presents a prima facie case of a hostile work environment harassment claim, employers have the opportunity to bring an affirmative defense: that the employer exercised "reasonable care" to prevent and correct harassing behavior, and that the employee did not utilize the employer's processes to address the behavior.[181] This is not a high bar to meet, as "[a]n employer is merely required to be responsive—having an available anti-harassment policy

177. *See* Carroll, *supra* note 137, at 857–60.

178. Monetary damages were also a large point of discussion in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011), but such discussion is not within the scope of this Note as this reform prioritizes injunctive relief.

179. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977) (describing potential awards of relief for successful pattern or practice claims).

180. *See* Webber Nuñez, *supra* note 50, at 487–89.

181. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 8 (2003) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998)).

with a complaint procedure which the employee unreasonably failed to use would defeat the claim."[182] There is no legally required evaluation of whether the anti-discrimination policy was enforced or whether claimants reasonably could have taken advantage of it. Resulting employer anti-discrimination policies, liability-focused trainings, and complaint systems cannot adequately address the problem at hand,[183] as *Wal-Mart* shows us,[184] because these measures do not need to be *effective*, they just need to *exist* to make out the affirmative defense. Codifying a new cause of action for toxic workplace cultures that requires *effective* injunctive relief would thus allow a class to receive recourse for the discrimination they suffered and provide a better work environment for the next generation.[185] One way to incentivize employers to make an effort to comply with ordered injunctive relief effective would be to involve the EEOC in the administration of injunctive relief and monitoring of employers' efforts to improve their workplace cultures.[186]

Although Congress would still need to develop the exact parameters of effective relief during the drafting process, plaintiffs experiencing a toxic workplace culture currently have no avenue for recourse. Therefore, beginning the conversation on what relief might look, as this Note does, is an important first step forward. This Note seeks not to minimize specific concerns about the drafting process and statutory language but rather intends to begin to broadly envision and shape a new major theory of sex discrimination targeting toxic workplace cultures. Additionally and to alleviate some concerns, while Congress is drafting reforms to Title VII it could and should involve the EEOC in that process. The EEOC is the agency dedicated to combating workplace discrimination and has tremendous expertise in this field.

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182. Flores, *supra* note 11, at 92.

183. *See* Green, *Was Sexual Harassment Law a Mistake? supra* note 90, at 166; Vicki J. Magley & Joanna L. Grossman, *Do Sexual Harassment Prevention Trainings Really Work?*, SCIENTIFIC AMERICAN: OBSERVATIONS (Nov. 10, 2017), https://blogs.scientificamerican.com/observations/do-sexual-harassment-prevention-trainings-really-work/ [https://perma.cc/E5WL-M6Z2].

184. *See* discussion *supra* Part I.B.1.

185. This is part of what Title VII is intended to do: improve equality of opportunity in the workplace and set a higher standard for society. *See* discussion *supra* notes 19–20 and accompanying text.

186. There are features of this proposal that would need to be worked out during the drafting process, such as: how EEOC monitoring and enforcement would be funded, the Commission's capacity to run such a program; whether the EEOC's statutory authority would need to be expanded to allow this oversight; and, in the absence of monetary damages and a weak statutory fee-shifting mandate, how attorneys could be incentivized to bring actions under this theory. For an example of how the EEOC could be involved in the administration of relief and monitoring of employers, see Green, *Work Culture*, *supra* note 26, at 681–83.

Some commentators have raised the concern that regulating work culture means policing all behavior in the workplace.[187] While Title VII protects employees from discrimination on the basis of sex, race, religion, and national origin, it does not seek to do so at the expense of employers' freedom to run their business the way they see fit.[188] This is undoubtedly a difficult balance to strike. However, as discussed above, the scale is currently weighted towards employers; plaintiffs suffering under toxic workplace cultures only have legal recourse if they can make out a claim that aligns with the limiting causes of action of pattern or practice or hostile work environment discrimination, neither of which quite aligns with the theory and problem of toxic workplace cultures as described herein. Title VII is not meant to be a "general civility code",[189] meaning that "the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[190] Toxic workplace cultures, however, are not innocuous. The injunctive relief outlined above would not seek to police every individual's actions, but rather would aim to modify the institutional workplace culture that sets expectations and allows or encourages discriminatory behaviors. Ideally this would result in positive alterations of individual behaviors and the reduction of expressions of discrimination. This goal is well within the purpose and bounds of Title VII:

> [s]ince the early 1980s—when first the Equal Employment Opportunity Commission and later the Supreme Court identified harassment as a form of discrimination actionable under Title VII—employers have been legally obligated to regulate social relations in their workplaces.[191]

There are some potential downsides to solely focusing on injunctive relief. First, "the threat of monetary damages may be more effective

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187. *See* Green, *Work Culture*, *supra* note 26, at 669–72.

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

189. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (explaining that Title VII is not a civility code because,

> The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the"# conditions" of the victim's employment. . . . We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory "conditions of employment.

190. *Id*.

191. Green, *Work Culture*, *supra* note 26, at 669.

than prospective injunctions in eliminating the continuation of future discrimination."[192] Second, lawyers may be less willing to take on complex cases of this nature without a financial incentive.[193] This concern is mitigated somewhat as Title VII already includes a fee-shifting provision that allows the prevailing party to have its fees covered.[194] However, without any prospect of monetary damages, this leaves statutory fees as the exclusive source of compensation for lawyers, which may provide only a marginal incentive for attorneys to take on these cases.[195] These concerns are valid, but this Note instead contends that reform must start somewhere in bolstering employer accountability so toxic workplace cultures are addressed and litigated. Injunctive relief is that starting point.

B. *The Method: Reforming Title VII to Include a New Theory Targeting Discrimination Caused by Toxic Workplace Cultures*

Title VII is a dynamic statute: as social norms regarding sex discrimination and harassment have evolved since its 1964 enactment, so has Title VII.[196] For example, Title VII was amended in 1978 to reject a Supreme Court decision holding that pregnancy discrimination is not sex discrimination. The Pregnancy Discrimination Act of 1978 added a provision to Title VII clarifying that discrimination due to pregnancy or related medical conditions is discrimination "because of sex"[197] and explicitly providing that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[198]

It follows that Title VII should be reformed once again to better address the current frontier of discrimination stemming from toxic workplace cultures. The suggestions that follow are not a complete model of prospective statutory additions, but rather a point from which Congress and the EEOC could begin to reform the statute.

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192. Harper, *supra* note 157, at 1117.

193. *See id*.

194. 42 U.S.C. § 2000e-5(k).

195. *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 10–11 (2006).

196. *See* William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 342 (2017).

197. 42 U.S.C. § 2000e(k); *see also* Eskridge, *supra* note 196, at 354–55.

198. 42 U.S.C. § 2000e(k); *see also* Eskridge, *supra* note 196, at 355.

Overall, there are two elements necessary for a statutory modification to Title VII to properly address the problems highlighted in this Note: (1) more expansive definitions of what constitutes discrimination "because of sex," and what kind of behavior from employers would be actionable under this theory, and (2) a collective action provision effectively bypassing the now-stringent requirements of Rule 23 class certification. The former is substantive and the latter procedural. They are discussed in turn.

1. Substantive Provision

The new section added to Title VII should begin by providing clarity on this new theory of discrimination. This can be done by expanding the definition of what discrimination "because of sex" includes, detailing the root-expression relationship between toxic workplace cultures and acts of discrimination. This section would also explicitly acknowledge that a workplace culture—not just discriminatory expressions of such a culture—is actionable; discrimination occurs when a workplace culture affects an individual's work *environment*, or an individual's perception of that environment—this can be termed "workplace impact."

It is not unusual for theories of discrimination or definitions to be clarified in Title VII itself. For example, the explicit acknowledgement that "because of sex" includes pregnancy discrimination and the burden of proof for claims under the disparate impact theory of discrimination have both been codified in the statute.[199] An expanded definition of discrimination "because of sex," modeled after the approach taken by the Pregnancy Discrimination Act,[200] would remedy the current problem of courts not recognizing more subtle expressions of discrimination resulting from toxic workplace cultures as discrimination. Such a definition should state that behaviors that side-line, humiliate, exclude, demean, or otherwise treat women unequally in the workplace are discriminatory.[201]

Beyond expanding the definition of what behaviors count as discrimination "because of sex," the statutory amendment should also specify what aspects of the plaintiff-employee's work environment must be adversely impacted to constitute a claim. The statute currently highlights that discrimination occurs when an individual's "compensation,

199. 42 U.S.C. §§ 2000e-2(k), 2000e(k).

200. *See* Eskridge, *supra* note 196, at 354–55.

201. Flores, *supra* note 11, at 89 (listing behaviors women are currently subjected to that are, as of now, not covered under Title VII).

terms, conditions, or privileges of employment"[202] are negatively impacted. Courts have interpreted these categories as tangible elements of employment that must be adversely affected to find a violation. Toxic workplace cultures are often less immediately obvious and more subtle in their expressions. Adding an explicit statement that discrimination can occur when behavior affects an individual's work *environment*, or an individual's perception of that environment (i.e., workplace impact), would expand the universe of impacts considered discriminatory and encompass the effect toxic workplace cultures have on women in the workplace. No longer would plaintiffs' claims be limited to specific "adverse employment actions,"[203] which are incompatible with the root problem theory of toxic workplace cultures, as the overall work environment would serve as the basis for a claim.

Although workplace impact is a broad and flexible concept, this statutory addition would not make changes to the work environment actionable for all individual plaintiffs. Toxic workplace culture discrimination is a class-based theory requiring a critical mass of plaintiffs to bring suit. Crucially, the theory of toxic workplace culture discrimination is focused on targeting the root cause of systemic discrimination; this, once again, is the toxic workplace culture that creates an environment where discrimination flourishes.[204] This root cause is the ultimate problem that would be actionable under the proposed reform. However, since work cultures are often implicit and ever-evolving, we only know that the root problem of a toxic workplace culture exists when expressions of discrimination occur.[205] This is why toxic workplace culture discrimination is an inherently class-based theory: the bigger problem can only be seen when looking at instances of discrimination in the aggregate. Individuals suffering discrimination in their work environ-

202. 42 U.S.C. § 2000e-2(a)(1).

203. *See* discussion *supra* Part II.A.1.

204. *See* discussion *supra* Part I.A.

205. This relationship between acts of discrimination and the root issue of toxic workplace cultures may raise preclusion considerations. While a full exploration of potential preclusive effects is beyond the scope of this Note, based on the theory as outlined preclusion for toxic workplace culture cases would likely be treated similarly to pattern or practice cases. A finding that an employer has a toxic workplace culture would not automatically preclude individual claims on acts of discrimination; while such a finding certainly may lend support to an individual claim it is also possible for individual claims to result from other sources. *See, e.g.*, Cooper v. Fed. Rsrv. Bank of Richmond, 467 U.S. 867, 877–78 (1984) ("[T]he rejection of a claim of class-wide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim. 'A . . . balanced work force cannot immunize an employer from liability for specific acts of discrimination.'" (internal citation omitted)); Brewton v. City of Harvey, 285 F. Supp. 2d 1121 (N.D. Ill. 2003) ("[A] judgment in a class action determining that an employer did not engage in a general pattern or practice of discrimination against a certified class of employees does not preclude a class member from maintaining a subsequent civil action alleging an individual claim of dis- crimination.").

ment currently have recourse through hostile work environment theory which, while imperfect, allows individual plaintiffs to bring suit more easily than a class of plaintiffs can bring suit and be certified under any of the contemporary Title VII theories.

The proposed statutory reform expanding the universe of recognized discrimination to more accurately reflect the forms of discrimination that stem from toxic workplace cultures would mitigate the problems caused by Title VII's current failure to address systemic discrimination inherent in toxic workplace cultures.[206] This provision is unlikely to be effective, however, without considering what evidence would be sufficient proof of a toxic workplace culture. In addition to anecdotal evidence of plaintiffs' experiences under toxic workplace cultures, sociological evidence (that certain cultural elements made discrimination because of sex more likely), and statistical evidence (that women are less likely to be promoted, are paid less, or are less frequently in positions of power in the workplace in question) could all be explicitly included in the statute as permissible forms of evidence to demonstrate toxic workplace cultures.

Other Title VII causes of action have employed these forms of evidence to varying degrees of success. In harassment cases, for example, "[sociological testimony by] experts can help the fact finder appreciate the relationship between a hostile work environment and adverse employment actions."[207] Sociological analysis can contextualize discrimination and explain the impact of implicit bias,[208] a factor highly relevant to the development of toxic workplace cultures.[209] In pattern or practice

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206. Flores, *supra* note 11, at 85 (explaining the "bad apple" theory of sexual harassment).

207. Hart & Secunda, *supra* note 43, at 46. Note, however, that sociological testimony or "social framework evidence" has been questioned by courts, particularly by the *Wal-Mart* Court. Although the sociologist in that case testified that Wal-Mart's culture made it "vulnerable" to gender bias, the Court honed in on the perceived non-specificity of that analysis, finding that,

> even if properly considered, [the sociologist's] testimony does nothing to advance [plaintiffs'] case. "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If [the sociologist] admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from "[s]ignificant proof' that Wal–Mart "operated under a general policy of discrimination."

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354–55 (2011). This fundamentally misunderstands the value of sociological analysis, which is outside of the scope of this Note but worth thinking about because this form of evidence would be extremely valuable to courts evaluating claims under the proposed cause of action.

208. Natalie Bucciarelli Pedersen, *The Hazards of* Dukes*: The Substantive Consequences of A Procedural Decision*, 44 U. TOL. L. REV. 123, 142–43 (2012).

209. *See* discussion *supra* Part II.B.2.

discrimination claims, plaintiffs rely on statistical disparities to raise an inference of discrimination.[210] Confirmation that statistical, sociological, and anecdotal evidence would be sufficient to find a toxic workplace culture could be codified within the statute as well; the provision outlining the proof structure for disparate impact theory cases can be used as an example for how to craft this provision.[211]

However, codifying acceptable forms of evidentiary support could prove unduly restrictive to future forms of evidentiary support being developed or considered. Approval of such evidence for these claims could instead be developed through case law, in order to provide for more flexibility. Regardless, the statutory provision must emphasize that toxic workplace cultures can be evidenced by some combination of anecdotal instances of discrimination "because of sex," statistical disparities in the workplace, or sociological evidence that an organization's culture may result in a work environment with unequal opportunities for members of one sex. This would enable plaintiffs to paint a full picture of evidence and experiences that *in the aggregate* demonstrate the cultural problem, which is where the collective action element below becomes crucial.

2. Procedural Provision

Substantive reform to Title VII's scope, while essential to allow plaintiffs suffering toxic workplace cultures to qualify for relief, will not succeed alone. Due to the Court's decision in *Wal-Mart* and the nature of toxic workplace cultures, plaintiffs experiencing harassment will continue to have difficulty certifying a class action and in particular meeting the Rule 23 commonality requirement.[212] Without class action litigation, "those affected may be unaware that their rights have been violated, or they may lack the resources to bring individual lawsuits in numbers sufficient to justify systemic relief."[213] Class actions are additionally important in this context because employees who file individual Title VII claims do not have very high success rates, despite suffering real and redressable harms.[214] Furthermore, a class action "may be the

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210. BARTLETT ET AL., *supra* note 16, at 140 (citing Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324 (1977)).

211. *See* 42 U.S.C. §2000e-2(k).

212. FED. R. CIV. P. 23(a)(2).

213. *See* Carroll, *supra* note 137, at 893–94.

214. Mark R. Bandsuch, S.J., *Ten Troubles with Title VII and Trait Discrimination Plus One Simple Solution (A Totality of the Circumstances Framework)*, 37 CAP. U. L. REV. 965 (2009); *see also* Morrison, *supra* note 128, at 101 ("Bringing an employment claim collectively rather than individually also re-

only way for many employees with smaller claims and limited resources to challenge systemic discrimination."[215] A workable solution is to codify the theory of toxic workplace culture discrimination as inherently class-based and have a collective action provision in the statutory section itself.

The Equal Employment Opportunity Restoration Act of 2012 provides a helpful model of how to codify the class-based element into the toxic workplace culture theory of discrimination.[216] The bill was proposed in 2012 by Senator Al Franken but never adopted.[217] It was a direct response to the outcome in *Wal-Mart* and sought to "restore employees' ability to challenge, as a group, discriminatory employment practices[.]"[218] The bill includes a "group action" mechanism by which representative members of a group may sue on behalf of all members much like a class action.[219] Importantly, the requirements for a plaintiff to bring such a group action are a lower bar to satisfy under the bill than the class certification requirements in Rule 23(a). These requirements are akin to the "similarly situated" standard for collective actions under the Fair Labor Standards Act ("FLSA"), an employer-regulating statute that includes a plaintiff-friendly collective-action provision.[220] "Similarly situated" may seem analogous to Rule 23(a)(2)'s commonality requirement of "questions of law or fact common to the class"[221] but in practice it is typically easier to satisfy than the commonality requirement.[222] The Second Circuit has even held that "analogies to Rule 23 . . .

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sults in better outcomes for the plaintiffs. Such cases 'are less likely to be dismissed and less likely to lose on motion for summary judgment' than individual lawsuits. Plaintiffs in a collective action also win at trial more often than individual plaintiffs."); Goldberg, *supra* note 31, at 437 n.45.

215. Morrison, *supra* note 128, at 101.

216. Equal Employment Opportunity Act of 2012, S. 3317, 112th Cong. § 4201 (a) (as introduced by Sen. Al Franken, June 20, 2012), https://www.congress.gov/bill/112th-congress/senate-bill/3317/text.

217. Ironically and disappointingly, Senator Franken resigned from the Senate in 2017 due to sexual harassment allegations. Sheryl Gay Stolberg, Yamiche Alcindor & Nicholas Fandos, *Al Franken to Resign From Senate Amid Harassment Allegations*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/us/politics/al-franken-senate-sexual-harassment.html?smid=url-share. However, this is not why the bill never passed—it appears to just have languished in committee—but it is relevant context due to the subject matter at hand.

218. S. 3317 §§ 2(a)(5), (b).

219. S. 3317 § 3(a).

220. 29 U.S.C. § 216(b); *see also* Schipani & Dworkin, *supra* note 13, at 1262. Relying on case law, Dworkin & Schipani explain that that "Plaintiffs are 'similarly situated' where 'claims [are] unified by common theories of defendants' statutory violations'". *Id*. This is directly contrary to the *Wal-Mart* majority's holding that commonality under Rule 23 requires *more* than "merely [a showing] that [plaintiffs] have all suffered a violation of the same provision of law," Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

221. FED. R. CIV. P. 23(a)(2).

222. Schipani & Dworkin, *supra* note 13, at 1263.

are inconsistent with the language of [the FLSA's collective-action provision] and that the question of whether plaintiffs may proceed as a collective under the FLSA is to be analyzed under the separate and independent requirements of [its collective-action provision]."[223]

However, collective action provisions such as those in the FLSA differ from Rule 23 class actions in that plaintiffs do not join the group unless they affirmatively consent or opt-in.[224] This is not an element that should be included in the collective action provision for toxic workplace culture discrimination, because class actions of this nature should offer relief to the entire class regardless of whether its members are aware of the action or not. Otherwise, the purpose of the reform would be defeated because relief for the civil rights violation would not be available for the entire class.[225]

C. Considering Alternatives to Statutory Reform

Statutory reform to include a theory of toxic workplace culture discrimination in Title VII would not be the first amendment to the statute, demonstrating that although such reform may be difficult it is not impossible.[226] Furthermore, statutory change is the best available option especially compared to the two potential alternatives of administrative or judicial reform, discussed below.

Administratively, the EEOC could release updated guidance on what constitutes sex discrimination in the modern workplace. Although the EEOC does not have the power to promulgate rules with the force of law,[227] previous Supreme Court decisions about sex discrimination have established a strong willingness to defer to guidance issued by the agency.[228] The fact that the EEOC in 2016 published a report studying workplace harassment, and within that report identified "risk factors" that increase the likelihood of harassment,[229] may indicate that the Commis-

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223. Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 518 (2d Cir. 2020), *cert. dismissed*, 142 S. Ct. 639 (2021).

224. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.").

225. *See* Carroll, *supra* note 137, at 853; discussion *supra* Part III.A.

226. Webber Nuñez, *supra* note 50, at 502–03.

227. *See* 42 U.S.C. § 2000e-4(g).

228. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) ("As an 'administrative interpretation of the Act by the enforcing agency,' these Guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (internal citations omitted)).

229. *See* FELDBLUM & LIPNIC, *supra* note 2, at 25–30.

sion is open to reconsidering guidance or is at least aware of current workplace discrimination issues and trends. However, it seems unlikely that the current Court, favoring textualism,[230] will take an expansive view of Title VII as incorporating accountability for toxic workplace cultures without modification of the statute itself.[231] Even in the recent landmark case *Bostock v. Clayton County*, where the Court held that discrimination on the basis of sexual orientation is discrimination "because of sex" and thus in violation of Title VII,[232] the Court relied on the plain language of the statute, taking a more textualist approach.[233]

Waiting for judicial reform to eventually occur through adjudication of a case and then be affirmed by the Supreme Court is anything but a guarantee. Although landmark expansions of Title VII have been made through the courts in the past,[234] plaintiffs need help combatting toxic workplace cultures now, not at some indeterminate point in the future. Thus, legislative reform of the statute itself would likely be more effective than hoping for the Court to act on its own volition.

D. *Case Study: Fox News Reimagined*

If the toxic workplace culture theory of discrimination were codified, classes of women subjected to toxic workplace cultures would be able to bring their cases to court, hold employers accountable for the discrimination they fostered, and better the workplace for future employees through injunctive relief. Recall the example of Fox News. Through tolerance of harassment of women and settlements to victims which effectively shirked accountability,[235] Fox News implicitly approved of discriminatory behavior and incorporated it into their culture. An employment environment where this type of gender-based inequality becomes routine can be properly described as a toxic workplace

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230. Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 265 (2020) ("[T]extualism has in recent decades gained considerable prominence within the federal judiciary."); *id.* at 265 n.1 ("Justice Kagan commented several years ago that 'w[e are] all textualists now.'" (internal citation omitted)).

231. For all the reasons previously discussed, *see* discussion *supra* Part II.A, the statute as written and interpreted over the past few decades does not naturally allow for coverage of toxic workplace cultures.

232. *See* Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1754 (2020).

233. *Id.* at 1749.

234. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (expanding discrimination "because of sex" to include sexual harassment); Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (clarifying the standard for hostile work environment theory).

235. Webber Nuñez, *supra* note 50, at 467 ("Fox News settled case after case, generally hiding the harassment problem behind confidential settlements and arbitration.").

environment.[236] Only after several high-profile female employees came forward with individual suits and shared their stories was there public pressure for accountability.[237]

In response to such pressure, Fox News made institutional changes to how it addresses discrimination: the company "replaced the head of its human resources department . . . and repeatedly enlisted the help of outside counsel to investigate potential discrimination."[238] These changes were meant to improve the organization's reporting and recourse avenues.[239] Yet when one female employee reported discriminatory conduct after these changes were made, she was immediately fired.[240] This implicates the problem of surface-level accountability compliance discussed in Part III.A. Furthermore, the lack of a class action brought on behalf of Fox News female employees means that many women who suffered under this culture, but did not have the resources to bring suit individually, will never be granted any form of relief.

If the theory of toxic workplace culture discrimination were incorporated into Title VII, the outcomes for women at Fox News would be different. A representative plaintiff could bring suit on behalf of herself and others similarly situated, thus encompassing all female employees at the company because all were touched by the organization's larger culture. Following the outlined model above, this plaintiff could use anecdotal evidence from herself and other plaintiffs detailing expressions of discrimination, including the now-codified subtle forms of modern discrimination[241] and if it exists, evidence of blatant discrimination already considered to be covered by Title VII. Coupled with statistical and sociological analysis, the plaintiff-class would present the root issue at Fox News: a toxic workplace culture for women. Because the existence of such an environment would itself be actionable under this theory, plaintiffs would no longer have to consider how to theorize what may or may not have been an adverse action meriting a case. From the brief recounting within this Note, it is not difficult to imagine that this hypothetical class of Fox News plaintiffs could fulfill these evidentiary requirements and qualify for relief.

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236. *See supra* notes 43–46, 72–73 and accompanying text.

237. *See* Webber Nuñez, *supra* note 50, at 517.

238. *Id.* at 501.

239. *Id.* at 502.

240. *Id.* at 501–02.

241. Such as "behavior that side-lines, humiliates, excludes, demeans, or otherwise treats women in a hostile manner in the workplace are not necessarily considered by courts to be 'because of sex.'" Flores, *supra* note 11, at 89.

Once plaintiffs proved their case under this theory, the presiding court would issue injunctive relief. In the case of Fox News, this relief could include mandating a new anti-discrimination policy and training that has been approved by the EEOC as effective, as well as issuing an order for the company to put new institutional structures in place that seek to prevent a toxic workplace culture from developing.[242] The key to elevating this relief from surface-level compliance to meaningful change would be mandating EEOC involvement. With a government watchdog, Fox News would need expert approval of proposed policies and trainings, and would report to a specific body of the agency for a court-ordered period of time to track effectiveness of these court-ordered corrections. External legal accountability focused on employer's actions going forward rather than just financial compensation for past wrongs could thus help motivate genuine change, unlike the policy implemented by Fox News on their own.

CONCLUSION

The rise of the #MeToo movement in the last several years has brought the issue of sexual harassment (and more broadly, sex discrimination) in the workplace back to the forefront of public consciousness and has raised awareness of "toxic workplace cultures" and the discrimination they can produce.[243] But "[r]educing harassment in the workplace . . . will take legal reforms in addition to changes in public perception. Those reforms must acknowledge that stories of harassment—and more broadly, discrimination—often go well beyond isolated individu-

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242. Workplace structure has a large impact on employees' experiences, and workplaces where "[i]ndividuals work[] in small groups where power differentials are significant, or in isolated or highly decentralized workplaces, or in workplaces where heavy alcohol consumption is the norm" are more vulnerable to harassment and discrimination. *See* Goldberg, *supra* note 31, at 485. The EEOC could provide guidance to help employers like Fox News modify their workplace structure to mitigate these so-called riskier environments. Involving employees more in the development of reporting policies and procedures is another area where institutional change could be particularly impactful. *See, e.g.*, *id.* at 484, 487

> ("Requirements that employers not only conduct regular trainings but also evaluate their effectiveness, assess employees' experience with complaint processes, and report publicly, in the aggregate, on their handling of harassment complaints all put a focus on how employees understand and experience the employer's efforts. Engaging the workforce in these ways may help convey that sexual harassment prevention and response is more than just a compliance obligation for the organization's human resources or legal department.").

243. *See* Green, *Was Sexual Harassment Law a Mistake? supra* note 90, at 167.

als to include others in the workplace and the environments of work shaped by organizational leaders."[244]

The largest problem for victims of toxic workplace cultures is that, because of the legal limits and requirements of Title VII claims and class action certification, there is no claim to pursue. Not only does that mean that victims receive no recourse for the harm they suffered, but employers are not held accountable for the discrimination they foster. Organizations will not change unless the law incentivizes them to,[245] and thus Title VII should be modified to create accountability and incentivize employers to change their cultures. As we have seen from history, legislators have periodically updated the statute to reflect its broad intent to prevent discrimination and the evolution of discriminatory behavior in the public consciousness.[246] It is now time for another update to address the current frontier of discrimination from toxic workplace cultures and combat their harmful effects. Reforming Title VII to include a new theory creating a new cause of action for this harm may not be easy, but it will be worthwhile.

244. *Id*.
245. *See* Goldberg, *supra* note 31, at 494.
246. *See generally* Eskridge, *supra* note 196, at 342.