

# Defensive Glass Ceilings

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## ABSTRACT

*The #MeToo movement is a grassroots effort mobilized by survivors of sexual assault and harassment to end sexual violence and sex-based discrimination against women. Though in its infancy, the movement has catalyzed significant legal and cultural reform by revealing credible accusations of sexual misconduct and tarnishing the careers of prominent men. Men have reacted by doubling down on decades-old sex-based workplace inequities and practices to avoid female coworkers and hedge against allegations or the appearance of impropriety. If recent anecdotal evidence of men increasingly dodging women is indicative of a wider, long-term trend, the American workplace will become more sex-segregated.*

*At the same time, women are punished on the job for being too friendly or perceived as too attractive. Such mistreatment stems from men's fears that they are unable to exercise self-control, that women are "overly sensitive," or that women might make baseless accusations against them. Too often, courts have declined to recognize these invidious employment practices as unlawful sex discrimination because judges fail to see these behaviors as manifestations of systemic gender policing. Judges instead attribute these practices to isolated incidences of misbehavior. The hue and cry of this paradigm-shifting moment is ripe to reconsider the law's prior understanding of sexual harassment and sex discrimination in the workplace.*

*This Article advances two primary arguments. First, employment practices that create different rules of workplace engagement, which are motivated by ambivalent sexism and exist primarily for the benefit of men, form defensive glass ceilings—a term first introduced by this Article. Second, because defensive glass ceilings are a structural barrier to women's employment opportunities, the employer practices that create them are prohibited under existing employment antidiscrimination laws. In advancing this position, this Article offers the most detailed and extensive discussion published to date of using an often-overlooked provision of Title VII, § 703(a)(2), to make disparate treatment claims.*

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## INTRODUCTION

Women should not pay for the sins of men on the job. This simple proposition should easily garner universal support. Despite years of progress through social movements and legal regimes like Title VII of the Civil Rights Act of 1964<sup>1</sup> and analogous state employment stat-

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<sup>1</sup> Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to e-17 (2018)). Title VII of the 1964 Civil Rights Act is the primary federal law prohibiting discrimination in employment, including sex discrimination.

utes,<sup>2</sup> however, women are still taxed in the workplace for the unwillingness of men to behave.<sup>3</sup>

One grassroots movement that holds real promise to improve workplace equality is #MeToo. #MeToo, which is derived from a phrase created by activist Tarana Burke and was later popularized as a social media hashtag by actress Alyssa Milano in 2017,<sup>4</sup> encouraged women to come forward and share their experiences of sexual harassment and sexual assault.<sup>5</sup> Untold numbers of women shared how workplace sexual harassment affected their careers and personal lives.<sup>6</sup> Consequently, women (and men) proffered credible allegations of abuse, assault, and harassment—some but not all occurring in the workplace—against many powerful individuals.<sup>7</sup>

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<sup>2</sup> E.g., ALA. CODE § 25-1-22(2) (LexisNexis 2016); ARIZ. REV. STAT. ANN. § 41-1463(B)(2) (2018); DEL. CODE ANN. tit. 19, § 724(c)(2) (2019); D.C. CODE ANN. § 2-1402.11(a)(1) (West 2019); FLA. STAT. ANN. § 760.10(1)(b) (West 2019); KAN. STAT. ANN. § 44-1113(a) (2018); LA. STAT. ANN. § 23:332(A)(2) (2018); MD. CODE ANN., STATE GOV'T § 20-606(a)(2) (LexisNexis 2019); MICH. COMP. LAWS ANN. § 37.1202(1)(c) (2019); MO. ANN. STAT. § 213.055.1(1)(b) (West 2019); NEB. REV. STAT. § 48-1004(2) (2019); NEV. REV. STAT. ANN. § 613.330(1)(b) (LexisNexis 2019); OKLA. STAT. ANN. tit. 25, § 1302(A)(2) (West 2008); S.C. CODE ANN. § 1-13-80(A)(2) (2018); TENN. CODE ANN. § 4-21-401(a)(2) (2019); TEX. LABOR CODE ANN. § 21.402(d) (2018).

<sup>3</sup> A Pew Research poll reported that 42% of women believe that they have experienced some form of sex-based discrimination at work. Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RES. CTR. (Dec. 14, 2017), [www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/](http://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/) [http://perma.cc/SZA5-2N5L]. An NPR/PBS NewsHour/Marist Poll from late 2017 revealed that 22% of Americans, including 35% of women, have experienced sexual harassment in the workplace. *More Than One in Three Women Report Sexual Harassment in the Workplace*, MARIST (Nov. 22, 2017), [www.maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.3O1pFhQn.dpbs](http://www.maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.3O1pFhQn.dpbs) [https://perma.cc/A5NM-FTTL]. Similar numbers were registered by a Washington Post poll, which reported that one-third of women claimed to have received unwanted “sexual advances from a male coworker or a man who had influence over their job.” Caitlin Gibson & Emily Guskin, *A Majority of Americans now Say that Sexual Harassment Is a ‘Serious Problem’*, WASH. POST (Oct. 17, 2017), [https://www.washingtonpost.com/lifestyle/style/a-majority-of-americans-now-say-that-sexual-harassment-is-a-serious-problem/2017/10/16/707e6b74-b290-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.a6dc4fa366e7](https://www.washingtonpost.com/lifestyle/style/a-majority-of-americans-now-say-that-sexual-harassment-is-a-serious-problem/2017/10/16/707e6b74-b290-11e7-9e58-e6288544af98_story.html?utm_term=.a6dc4fa366e7) [https://perma.cc/F637-BZ4J].

<sup>4</sup> Aisha Harris, *She Founded Me Too. Now She Wants to Move Past the Trauma.*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html> [https://perma.cc/PBC8-52MX].

<sup>5</sup> Karen Kaplan, *After Alyssa Milano's #MeToo Tweet, Google Searches About Sexual Assault Hit Record High*, L.A. TIMES (Dec. 21, 2018, 11:50 AM), <https://www.latimes.com/science/sciencenow/la-sci-sn-metoo-google-searches-20181221-story.html> [https://perma.cc/HQ9K-ZNDT].

<sup>6</sup> See Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [https://perma.cc/5T4L-N353].

<sup>7</sup> See *id.*

The movement's impact on every profession is extraordinary given its infancy. The careers of journalists, elected officials, film producers, sports figures, academics, clergy, doctors, consultants, judges, and lawyers—men and women—have been rocked by sexual misconduct allegations.<sup>8</sup> While much of the movement's impact has been exogenous to law precisely because it is a reaction to the law's shortcomings,<sup>9</sup> some movement-inspired legal reform has occurred.<sup>10</sup> These reforms include adopted or proposed state legislation to mandate sexual harassment training,<sup>11</sup> prevent forced arbitration of sexual harassment claims,<sup>12</sup> and ease the standards of what constitutes sexual harassment.<sup>13</sup> At the federal level, Senate Democrats led by Senator Patty Murray authored a study calling for more federal action to combat workplace harassment.<sup>14</sup>

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<sup>8</sup> 263 *Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> [<https://perma.cc/X93F-85RZ>]; Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES, <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/QE7T-B8HN>].

<sup>9</sup> See Catherine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/E6NN-JBBS>].

<sup>10</sup> See, e.g., Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW (July 31, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws> [<https://perma.cc/EPX7-D4XX>] (describing the influence of the #MeToo movement on legislators' efforts to combat harassment and sexual assault); Alexia Fernández Campbell, *California Approves a Law That Helps Sexual Harassment Survivors Sue Employers*, VOX (Aug. 28, 2019, 8:30 AM), <https://www.vox.com/2018/8/28/17777128/california-me-too-bill-mandatory-arbitration> [<https://perma.cc/4M4L-EXWM>] (describing California's effort to reform sexual harassment law as “#MeToo-inspired”).

<sup>11</sup> Jon Griffin, *#MeToo Movement Has Lawmakers Looking for Ways to Halt Harassment in the Statehouse*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 17, 2018), <https://www.ncsl.org/research/about-state-legislatures/legislatures-move-quickly-to-address-sexual-harassment.aspx> [<https://perma.cc/4M4L-EXWM>].

<sup>12</sup> Disclosing Sexual Harassment in the Workplace Act of 2018, ch. 739, 2018 Md. Laws (invalidating any “provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment”); Act of March 23, 2018, ch. 117, 2018 Wash. Sess. Laws 688 (prohibiting an employment contract from “requir[ing] an employee . . . to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace”).

<sup>13</sup> Dave Orrick, *That Major Bipartisan Sexual Harassment Bill? It's Stumbling in the Minnesota Senate*, TWIN CITIES PIONEER PRESS (May 21, 2018, 5:54 PM), <https://www.twincities.com/2018/05/03/severe-or-pervasive-sexual-harassment-bill-stumbles-in-mn-senate/> [<https://perma.cc/K3BJ-WYKU>].

<sup>14</sup> STAFF OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSION, 115TH CONGRESS, MI-

The responses to #MeToo from some corners have been disappointing. Rather than taking proactive measures to ensure better work environments, some employers and supervisors have overcorrected.<sup>15</sup> Fearing the possibility of unsubstantiated sexual harassment claims, spousal jealousy, the inability to exercise self-control, or pressure from outside forces like insurers,<sup>16</sup> men have limited women's employment opportunities or subjected women to second-class rules of workplace engagement.<sup>17</sup> In January 2019, *The New York Times* reported that "companies seeking to minimize the risk of sexual har-

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NORITY REPORT, "... SO I TOLERATED IT": HOW WORKPLACES ARE RESPONDING TO HARASSMENT AND THE CLEAR NEED FOR FEDERAL ACTION (2018).

<sup>15</sup> See Bess Levin, *Wall Street Goes Full Mike Pence to Avoid #MeToo Accusations*, VANITY FAIR (Dec. 3, 2018), <https://www.vanityfair.com/news/2018/12/wall-street-goes-full-mike-pence-to-avoid-metoo-accusations> [<https://perma.cc/8WT6-CXLC>] (describing the trend in some workplaces for men in positions of power to avoid interacting with women under particular conditions); Claire Cain Miller, *Unintended Consequences of Sexual Harassment Scandals*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html> [<https://perma.cc/HN6B-USLR>] ("[M]en describe a heightened caution because of recent sexual harassment cases, and they worry that one accusation, or misunderstood comment, could end their careers. But their actions affect women's careers, too—potentially depriving them of the kind of relationships that lead to promotions or investments."); Jorge L. Ortiz, *Will #MeToo Turn into #NotHer? Movement May Come with Unintended Workplace Consequences*, USA TODAY (Oct. 5, 2018, 2:26 PM), <https://www.usatoday.com/story/news/2018/10/04/metoo-movement-unintended-career-consequences-women/1503516002/> [<https://perma.cc/4F25-ZDTZ>] ("Experts report increasing reluctance from men in positions of authority to hire or work closely with women, in some cases declining to hold one-on-one meetings with female employees."); Kyle Smith, *A Male Backlash Against #MeToo Is Brewing*, N.Y. POST (Feb. 3, 2018, 2:43 PM), <https://nypost.com/2018/02/03/a-male-backlash-against-metoo-is-brewing/> [<https://perma.cc/N3K5-XMVJ>] (opining that in the wake of #MeToo "men are taking to message boards like Reddit to express interest in sex segregation [at work]—sometimes labeled 'Men Going Their Own Way,' or the 'Man-o-Sphere'"). Some have argued, however, that male avoidance of women is not new but is more apparent because of #MeToo. See Tami Forman, *How To Find Mentors in the #MeToo Era*, FORBES (Jan. 29, 2019, 6:42 PM), <https://www.forbes.com/sites/tamiforman/2019/01/29/how-to-find-mentors-in-the-metoo-era/#1f9dad014495> [<https://perma.cc/27JM-V9A2>] (suggesting these networking patterns are not new "because the idea of a relationship being misconstrued or a man being falsely accused of harassment has been around since the Anita Hill hearings back in the early 90s. But, more importantly, . . . some men have avoided mentoring women for all the same old reasons—bias, a desire to reduce the competition, comfort with mentees who they feel they can relate to.").

<sup>16</sup> See Susan Antilla, *Entire Industries Are Being Blacklisted by Insurers over #MeToo Liability*, INTERCEPT (Feb. 2, 2019, 10:30 AM), <https://theintercept.com/2019/02/02/workplace-harassment-insurance-metoo/> [<https://perma.cc/X3XL-S3WL>] (detailing the resistance from employment practices liability insurance providers to offer coverage for some industries because of pervasive sexual harassment); Levin, *supra* note 15.

<sup>17</sup> See, e.g., Jena McGregor, *Nearly Three-Quarters of Executives Pick Protégés who Look Just Like them*, WASH. POST (Jan. 9, 2019, 10:36 AM), [https://www.washingtonpost.com/business/2019/01/09/nearly-three-quarters-executives-pick-protoges-who-look-just-like-them/?utm\\_term=.0d39c21cd0e8](https://www.washingtonpost.com/business/2019/01/09/nearly-three-quarters-executives-pick-protoges-who-look-just-like-them/?utm_term=.0d39c21cd0e8) [<https://perma.cc/2MUC-2T48>] (describing how some men hesitate to work closely with women in response to #MeToo).

assment or misconduct appear to be simply minimizing contact between female employees and senior male executives, effectively depriving the women of valuable mentorship and exposure.”<sup>18</sup> Some women, in turn, have gravitated to women-only workspaces for networking opportunities.<sup>19</sup> For women in the workforce, liability-avoidance tactics like this create defensive glass ceilings; these practices isolate women and stunt their career trajectories while perpetuating sex stereotypes.<sup>20</sup>

While these practices are under greater scrutiny given heightened sensitivity to sex equality issues on the job and the explanations offered in their defense may have the veneer of novelty,<sup>21</sup> they are *not* new—rather, they are another generation of the same workplace discrimination problems women fought against decades ago.<sup>22</sup> Some of them have been litigated thoroughly in state and federal courts.<sup>23</sup> The law, however, has typically dished out little more than cold comfort to women mistreated by nervous men.<sup>24</sup> While recognizing that defensive employment decisions have unjustly harmed women, courts have not

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18 Katrin Bennhold, *Another Side of #MeToo: Male Managers Fearful of Mentoring Women*, N.Y. TIMES (Jan. 27, 2019), <http://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html?action=click&module=Top%20Stories&pgtype=Homepage> [https://perma.cc/X298-9V84]; see also Pachi Gupta, *Men at Davos Discover New, Creative Excuse to Justify Excluding Women in the Workplace*, JEZEBEL (Jan. 28, 2019, 10:40 AM), <https://jezebel.com/men-at-davos-discover-new-creative-excuse-to-justify-e-1832119886> [https://perma.cc/C8DY-VT7J] (commenting that “[t]he lesson these men have apparently taken from MeToo is not that sexual harassment is a pervasive institutional issue, but that women are a threat, so best to just leave them behind”).

19 Michelle R. Smith, *‘My Happy Place.’ Workspaces for Women Rise in #MeToo Era*, ASSOCIATED PRESS (Jan. 29, 2019), <https://www.apnews.com/8d729d1d51094cb09f55464d09d82a9e> [https://perma.cc/Z53P-W9HN].

20 Jia Tolentino wrote incisively that sex-segregation tactics are problematic in their own right but also expose the “incredible level of inequity in the workplace; no successful woman could ever abide by the same rule[s]” some men are adopting. Jia Tolentino, *Mike Pence’s Marriage and the Beliefs that Keep Women from Power*, NEW YORKER (Mar. 31, 2017), <https://www.newyorker.com/culture/jia-tolentino/mike-pences-marriage-and-the-beliefs-that-keep-women-from-power> [https://perma.cc/9QXQ-F447].

21 See, e.g., Scott Flaherty, *In the MeToo Era, Lateral Candidates Are Going Under the Microscope*, AM. LAW. (Feb. 1, 2019), <https://www.law.com/americanlawyer/2019/02/01/in-the-metoo-era-lateral-candidates-are-going-under-the-microscope/> [https://perma.cc/QV68-NPET] (documenting the effect of #MeToo in law firm vetting).

22 See, e.g., Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 698 (1997) (observing that some employers may overcorrect to preempt sexual harassment “by broadly banning and punishing any offensive speech and conduct that might merely contribute to a hostile environment finding, even if it does not itself constitute illegal harassment”).

23 See *infra* Section III.A; *infra* Part IV.

24 See *infra* Section III.A; *infra* Part IV.

always read employment antidiscrimination laws to offer women a legal remedy.<sup>25</sup> The current moment should provoke reconsideration of these earlier decisions.

Using existing analytical frameworks from employment discrimination doctrine, this Article shows that employment practices that build defensive glass ceilings are unlawful under Title VII § 703(a)(1) and an infrequently used provision in Title VII: § 703(a)(2). This Article introduces the term “defensive glass ceilings” because it captures what the law too often fails to grasp—that sexual harassment is not about sexual desire or individual men behaving badly, but is fundamentally about systemic policing of gender norms that produces horizontal and vertical workplace sex segregation.<sup>26</sup>

The Article examines four types of hyper-defensive employer policies: (1) sex-based quarantine rules, (2) employer-employee platonic relationships, (3) appearance-based decision-making, and (4) paramour relationships.<sup>27</sup> Employment decisions grounded in conjecture, stereotypes, or unsubstantiated fears about mixed-sex workplace dynamics that restrict avenues of advancement for women do not square with the command for equal employment opportunities in Title VII and state employment statutes.<sup>28</sup> Thus, employer policies and company cultures that limit opportunities for women to interact with colleagues, discriminate against individuals because they are perceived as too attractive, or adversely harm employees based on their platonic relationships with colleagues are actionable under Title VII and state antidiscrimination statutes because they represent the structural nature of gender policing that strains women on the job.

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<sup>25</sup> See *infra* Section III.A; *infra* Part IV.

<sup>26</sup> Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) (arguing for the “need to conceptualize discrimination in terms of *workplace dynamics* rather than solely in existing terms of an identifiable actor’s isolated state of mind, a victim’s perception of his or her work environment, or the job-relatedness of a neutral employment practice with adverse consequences”); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 19 (2018) (emphasizing that “harassment is more about upholding gendered status and identity than it is about expressing sexual desire or sexuality”).

<sup>27</sup> See *infra* Parts II–IV.

<sup>28</sup> While this Article generally describes and addresses the problems that women experience in the labor market because of male-dominated work hierarchies, heterosexual relationships, or a culture of compulsory heterosexuality in the workplace, the sex of the parties involved in a defensive employment practice need not be different to make it unlawful. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (holding that “same-sex sexual harassment is actionable” under the sex discrimination provision of Title VII).

The Article proceeds in four parts. Part I delineates the basic outline of discriminatory employment practices, the structural harm those practices impose, and the ideology that animates workplace environments where employees build defensive glass ceilings. Parts II, III, and IV then examine the doctrinal limitations of and support for the proposition that defensive sex-segregation practices that manifest as sex quarantines, associational discrimination, and unequal physical attractiveness standards, respectively are unlawful. The Article concludes with recommendations for employers and policymakers combating defensive sex segregation in the workplace.

## I. UNDERSTANDING DEFENSIVE GLASS CEILINGS

### A. *Identifying Discriminatory Employment Practices*

The discriminatory workplace practices examined in this Article share essentially the same basic outline: a female employee engages in activities or seeks out opportunities that would place her on equal footing in the workplace—if she were a man, no person would think twice about her place at the jobsite. Because she is a woman, however, her otherwise non-objectionable presence invites opposition with negative, material employment consequences. These employment practices create a barrier to entry for applicants and foment vertical and horizontal segregation because individuals perceive sex equality as a threat to dominant power structures. Notwithstanding that they manifest in different ways, the discriminatory practices surveyed here generally have three additional properties in common: (1) they are the consequence of an employer reacting defensively, (2) they reinforce structural barriers that harm women's careers, and (3) they are products of ambivalent sexism.

### B. *Structural Harms and Defensive Employment Practices*

In the mid-1970s, modern feminist literature advanced a structural theory of workplace discrimination that critiqued the organizational hierarchies and culture of the workplace as a root cause of sex discrimination.<sup>29</sup> The structuralists' focus on the internal dynamics of an organization comes out of an understanding that the workplace is "a highly politicized site where informal encounters often have more importance than formal meetings—where success on the job is mea-

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<sup>29</sup> See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).



sured more by peer acceptance than by competence in performing the tasks found in the formal job description.”<sup>30</sup>

In this environment, the demographics of the decision-makers and employees telegraph which group exercises control. The less representation that the nondominant group holds, the more likely that class-based stereotypes will influence worker assessments.<sup>31</sup> When the outgroup is horizontally and vertically segregated, outgroup employees are particularly susceptible to abusive workplaces and stereotyping.<sup>32</sup> Thus, when members of the organization subject outgroup members to policies that segregate the outgroup, preventing such members from completing formal job-related tasks and from participating in informal workplace functions, the organization stifles the outgroup’s potential for long-term advancement and increases the likelihood of stereotypes infecting the workplace.<sup>33</sup>

The glass ceiling is a structural obstacle for women and sexual minorities in the workplace—it is “the unseen, yet unbreachable barrier that keeps minorities and women from rising to the upper rungs of the corporate ladder, regardless of their qualifications or achievements.”<sup>34</sup> Defensive glass ceilings destabilize the upward career trajectories of women who defy or want to defy sexist traditions of workplace interpersonal conduct that keep men and women separate.<sup>35</sup>

There are two grounds for challenging practices that build defensive class ceilings under Title VII: § 703(a)(1) applies when an employer’s actions rise to the level of an adverse employment action, such as termination or non-hiring, due to the employer’s defensive decision-making, *or* § 703(a)(2) applies when the employer’s defensive actions “limit, segregate, or classify” women on the basis of sex and reinforce glass ceilings.<sup>36</sup> In both cases, the key elements are that

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<sup>30</sup> Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2379 (1994).

<sup>31</sup> *Id.* at 2380.

<sup>32</sup> *See id.* at 2379–80, 2382–83.

<sup>33</sup> *Id.*

<sup>34</sup> FED. GLASS CEILING COMM’N, SOLID INVESTMENTS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL 4 (1995).

<sup>35</sup> This Section delineates the acts, ensuing harm, and ideology that animate workplace environments in which members build defensive glass ceilings. A discriminatory act is a harmful action made because of an individual’s sex, which restrains outgroup opportunities by furthering structural inequalities. The ideological underpinnings of practices that lead to defensive glass ceilings are rooted in ambivalent sexism.

<sup>36</sup> Pub. L. No. 88-352, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. §§ 2000e-2(a)(1)–(2) (2018)).

(1) women are treated differently than they would be if they were men (in other words, “because of sex”),<sup>37</sup> and (2) they either suffered an adverse employment action (§ 703(a)(1)), or defensive employment practices “limit, segregate, or classify” them in a way that “deprive[s] or tend[s] to deprive” them of “opportunities or otherwise adversely affect[s] [their] status” (§ 703(a)(2)).<sup>38</sup>

### C. *The Ideological Underpinnings of Defensive Glass Ceilings*

While some progressives argue for an antidiscrimination regime that cares *more* about racism or sexism, the question in disparate treatment cases is not whether an employment decision was motivated by racism or sexism but instead whether an individual was treated differently *because of a protected trait*.<sup>39</sup> Defensive employer practices’ ideological underpinnings reveals how different kinds of disparate treatment are interrelated.

The manifestation of workplace practices that defensively reinforce glass ceilings is rooted deeply in sexist ideology—it grows out of fears stemming from sex stereotypes about the types of relationships that are acceptable in the workplace, the combustible nature of interactions between ambitious women and men of weak constitutions, and the perception of women as “temptresses” who use their femininity to control men.<sup>40</sup> These sexist tactics are calibrated to cement the control of those who wield power in the workplace under the pretext of liability avoidance or to protect a purported familial or general reputational or dignitary interest.<sup>41</sup>

Sexism can be viewed as falling into two categories: hostile sexism and benevolent sexism.<sup>42</sup> Hostile sexism is rooted in patriarchal norms that seek to preserve male economic, political, and social domina-

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<sup>37</sup> Two doctrines that are later relied on in this Article, sex-plus discrimination and associational discrimination, are straightforward applications of these principles and should not be understood as stand-alone arguments unmoored from Title VII’s requirement that employers not discriminate “because of [an] individual’s . . . sex.” See *id.*

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) (“[Title VII’s] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. *Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.*” (emphasis added)).

<sup>40</sup> See Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491, 494 (1996).

<sup>41</sup> See *id.* at 492; Antilla, *supra* note 16; Levin, *supra* note 15.

<sup>42</sup> Glick & Fiske, *supra* note 40, at 491.

tion.<sup>43</sup> Hostile sexism is grounded in the idea that women are inferior to men because they are overly sensitive and incompetent, and that women can only achieve gender parity by controlling men with sexual manipulation or feminism.<sup>44</sup>

Unlike hostile sexism, which is characterized by misogynistic attitudes, benevolent sexism is characterized by patronizing attitudes.<sup>45</sup> Benevolent sexism is equally corrosive and rests on stereotypes that the discriminator subjectively views as positive.<sup>46</sup> Benevolent sexism “characterize[s] women as pure creatures who ought to be protected, supported, and adored and whose love is necessary to make a man complete.”<sup>47</sup> Benevolent sexism is an ideology that sees women as imbued with qualities of virtuous purity that men must preserve by committing acts of self-sacrifice.<sup>48</sup> Although they appear to be dichotomous ideologies on the surface, benevolent sexism and hostile sexism are actually self-reinforcing.<sup>49</sup>

Ambivalent sexism is a theory of sexism that recognizes the internal inconsistency that hostile and benevolent attitudes create in individuals who typically hold both views.<sup>50</sup> Ambivalent sexism is a byproduct of the unique predicament in which men find themselves—while men work to preserve the superiority of masculinity, heterosexual men are nevertheless dependent on women with whom they desire to curry favor.<sup>51</sup> Ambivalent sexism explains how men can simultaneously treat women with outright scorn *and* belittling affection.<sup>52</sup> These dual forms of gender policing are complementary because they act as a carrot and a stick, punishing women who defy gender roles and rewarding women who hew closely to tradition.<sup>53</sup>

Defensive work environments are the epitome of ambivalent sexism. On the one hand, they constitute a form of hostile sexism because the impetus behind them is anxiety that women’s thirst for control and

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<sup>43</sup> *Id.* at 492.

<sup>44</sup> *Id.* at 494, 507.

<sup>45</sup> *See id.* at 491–92.

<sup>46</sup> *Id.* at 491.

<sup>47</sup> Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 *AM. PSYCHOLOGIST* 109, 109 (2001).

<sup>48</sup> *Id.* at 111; Glick & Fiske, *supra* note 40, at 491–93 (explaining that benevolent sexism includes the notion that men must be “protector[s] and provider[s]” and affords a “positive image for men that subtly reinforces notions of dominance over women”).

<sup>49</sup> Glick & Fiske, *supra* note 40, at 491, 494.

<sup>50</sup> *Id.* at 494.

<sup>51</sup> *Id.* at 493–94.

<sup>52</sup> *See id.* at 494.

<sup>53</sup> *See id.*

their power of sexual seduction could imperil men who may find themselves accused falsely of misconduct or who are helpless to exercise self-control. On the other hand, defensive work environments are a form of benevolent sexism because they are shrouded under the auspice of chivalry and sometimes justified by rationales that promote traditional gender roles.

Sexism is fundamentally about inequitable *power* dynamics between men and women.<sup>54</sup> The law can run astray, however, from its proper mission to combat the entire spectrum of sexism when *sex discrimination* is confused for *sexual discrimination* or when discriminatory attitudes that are not overtly hostile are minimized. The law's ability to combat defensive employment practices will turn necessarily on judges' capacity to identify these practices as a form of workplace bias that happen "because of sex."<sup>55</sup>

The practices that defensively reinforce glass ceilings grow out of fears stemming from sex stereotypes. Whether it is sex quarantines, platonic associational discrimination, or attraction-based decision-making, defensive glass ceilings are forms of ambivalent sexism that double down on power iniquities and suppress gender equality in the workplace.<sup>56</sup>

## II. DEFENSIVE WORKPLACE SEX QUARANTINES

On one occasion between 1949 and 1950, the influential evangelist Billy Graham returned to his hotel room after finishing one of his

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<sup>54</sup> See, e.g., *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994) (highlighting the importance of the "asymmetry of positions" in sex-based discrimination claims). This, of course, is not to suggest that sex discrimination cannot be perpetrated against an employee by someone of the same sex or that sex discrimination should be narrowly understood to not include other sex-based forms of discrimination, such as sexual orientation discrimination. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (arguing that sexual harassment is not about sexual desire or sexuality but a manifestation of sexism in the workplace); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) (same).

<sup>55</sup> 42 U.S.C. § 2000e-2(a)(1) (2018) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .").

<sup>56</sup> One commentator, digital media consultant Heidi Moore, suggested insightfully that these dynamics reinforce preexisting structures that discriminate against women: "It's important to understand that a lot of rich, prominent men rarely or never interact [with] women they're not in financial control of: [w]ives, or employees, or mistresses. They literally have no frame of reference for a professional woman with independent ambitions." Luke Darby, *Rich Executive Men Are Worried They Can't "Mentor" Women Colleagues Because of #MeToo*, GQ MAG. (Jan. 28, 2019), <https://www.gq.com/story/rich-men-dont-think-they-can-work-with-women> [<https://perma.cc/B8Q2-5FQW>].

famous Crusade meetings.<sup>57</sup> To Reverend Graham's surprise, or so the story goes, a naked woman was lying in wait for him in his bed.<sup>58</sup> Ever the dutiful husband, Graham reported that he immediately left the room and thereafter swore to never interact with a woman—including traveling, dining, or meeting—alone.<sup>59</sup> Clergymen and businessmen followed Graham's model, adopting his rule for their own personal interactions.<sup>60</sup>

In 2002, then-Congressman Mike Pence told *The Hill* that he embraced a similar philosophy as Reverend Graham.<sup>61</sup> Pence explained that he never eats alone with a woman except for his wife and does not attend events where alcohol is served without her.<sup>62</sup> The rule also extended to his staffing policies. Pence only permitted male congressional aides to work late nights.<sup>63</sup> Pence's office was not the only one on Capitol Hill to take sex-based considerations into account in operations management.<sup>64</sup> Women reported that female aides in multiple offices were restricted from attending evening events, traveling alone, and holding one-on-one meetings with their male bosses.<sup>65</sup> In the wake of his elevation to the vice presidency and national conversations about sexual harassment, Pence's sex-based socialization rules received renewed attention.<sup>66</sup>

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<sup>57</sup> Laura Turner, *The Religious Reasons Mike Pence Won't Eat Alone with Women Don't Add up*, WASH. POST (Mar. 30, 2017, 5:12 PM), [https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/30/the-religious-reasons-mike-pence-wont-eat-alone-with-women-dont-add-up/?utm\\_term=.bf405a392ed9](https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/30/the-religious-reasons-mike-pence-wont-eat-alone-with-women-dont-add-up/?utm_term=.bf405a392ed9) [https://perma.cc/5BTF-ZWF2].

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Aaron Blake, *Mike Pence Doesn't Dine Alone with Other Women. And We're All Shocked.*, WASH. POST (Mar. 30, 2017, 12:15 PM), [https://www.washingtonpost.com/news/the-fix/wp/2017/03/30/mike-pence-doesnt-dine-alone-with-other-women-and-were-all-shocked/?utm\\_term=.477335b88da2](https://www.washingtonpost.com/news/the-fix/wp/2017/03/30/mike-pence-doesnt-dine-alone-with-other-women-and-were-all-shocked/?utm_term=.477335b88da2) [https://perma.cc/E5HP-N6LX].

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Sarah Mimms, *Why Some Male Members of Congress Won't Be Alone with Female Staffers*, ATLANTIC (May 14, 2015), <https://www.theatlantic.com/politics/archive/2015/05/why-some-male-members-of-congress-wont-be-alone-with-female-staffers/449367/> [https://perma.cc/LWC4-RK66].

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., Lauren Collins, *Virtue and Vice: Mike Pence's Dining Policy*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/10/virtue-and-vice-mike-pences-dining-policy> [https://perma.cc/Y4ZT-DZZF]; Ashley Parker, *Karen Pence Is the Vice President's 'Prayer Warrior,' Gut Check and Shield*, WASH. POST (Mar. 28, 2017), [https://www.washingtonpost.com/politics/karen-pence-is-the-vice-presidents-prayer-warrior-gut-check-and-shield/2017/03/28/3d7a26ce-0a01-11e7-8884-96e6a6713f4b\\_story.html?noredirect=on&utm\\_term=.4c298d5dc98e](https://www.washingtonpost.com/politics/karen-pence-is-the-vice-presidents-prayer-warrior-gut-check-and-shield/2017/03/28/3d7a26ce-0a01-11e7-8884-96e6a6713f4b_story.html?noredirect=on&utm_term=.4c298d5dc98e) [https://perma.cc/549P-BFU5].

Some nationally prominent commentators championed the Graham-Pence Rule after the proliferation of allegations of workplace wrongdoing in 2017 and 2018. Writing for the *National Review*, David French offered a three-part justification for the Graham-Pence Rule: (1) sexual attraction is more likely to blossom in casual social environments outside the workplace, (2) the potential for reputational harm is minimized by avoiding the appearance of impropriety, and (3) women are protected from truly predatory colleagues.<sup>67</sup> Some have also argued that the Graham-Pence Rule is a better vehicle for male self-regulation.<sup>68</sup> Echoing this sentiment, Charles C.W. Cooke not only praised Pence as a model of “decency” and “humility” but also advocated the policy’s widespread adoption to protect marital relationships.<sup>69</sup> “Caution is no vice when the end is so undesirable,” Cooke opined.<sup>70</sup>

Prominent conservatives endorsed Pence’s policy as the #MeToo movement picked up steam. Brit Hume wrote, “Mike Pence’s policy of avoiding being alone with women other than his wife looking better every day, though widely mocked when it first became known.”<sup>71</sup> Collin Garbarino contended that “[i]f people believe the woman in the absence of evidence, then men of integrity need evidence that they possess integrity. And the best way to do this? Follow Mike Pence’s example and adopt the Billy Graham rule. And fast.”<sup>72</sup> Similarly, Er-

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<sup>67</sup> David French, *In the Age of Sexual Misconduct, How Is Mike Pence a Problem?*, NAT’L REV. (Nov. 17, 2017, 8:27 PM), <https://www.nationalreview.com/2017/11/mike-pence-marriage-rules-make-workplace-professional/> [<https://perma.cc/7PN6-2YT2>]. Crucially, rationales for policies that harm women’s employment opportunities in the name of protecting women do not square with Title VII. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”).

<sup>68</sup> The Graham-Pence Rule is also favored by those who view #MeToo as an inherent threat to male domination in the labor market. As one Christian workplace ethicist has suggested, “[t]he best way to defeat the ‘#MeToo fad’ that’s going on” is for workers to follow the Graham-Pence model. Michael Gryboski, *Christians in a Secular Workplace: How to Navigate Anti-faith Harassment, LGBT Co-workers, #MeToo*, CHRISTIAN POST (Jan. 16, 2019), <https://www.christianpost.com/books/christians-in-a-secular-workplace-how-to-navigate-anti-faith-harassment-lgbt-co-workers-metoo.html> [<https://perma.cc/7D6D-5676>].

<sup>69</sup> Charles C.W. Cooke, *Good for Mike Pence*, NAT’L REV. (Mar. 30, 2017, 4:27 PM), <https://www.nationalreview.com/corner/mike-pence-wants-protect-his-marriage-good-him/> [<https://perma.cc/D8XD-PPML>].

<sup>70</sup> *Id.*

<sup>71</sup> @brithume, TWITTER (Nov. 16, 2017, 11:36 PM), <https://twitter.com/brithume/status/931380580750675969?s=20> [<https://perma.cc/3R3J-56P8>].

<sup>72</sup> Collin Garbarino, *If Men Don’t Want to Get Kavanaughed, They Should Follow the*

ick Erickson suggested that the #MeToo movement presented a valuable opportunity to better understand the wisdom of the Graham-Pence Rule.<sup>73</sup> Some women also defended the Pence-modeled protocols or recommended burdensome proactive measures for women to take to counteract anxious men.<sup>74</sup> Columnist Kathleen Parker argued that the sex quarantine trend was not “primarily a function of paranoia but of reality,” because in the #MeToo climate, “even casual interactions can seem unnecessarily risky.”<sup>75</sup>

Corporate managers, too, saw wisdom in the Graham-Pence approach.<sup>76</sup> The Society for Human Resource Management’s president explained that in the #MeToo era, executives of “several major companies . . . are now limiting travel between the genders.”<sup>77</sup> One Big Law trend watcher predicted that “Mike Pence will be the new role

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*Pence Rule*, *FEDERALIST* (Oct. 3, 2018), [thefederalist.com/2018/10/03/men-dont-want-get-kavanaughed-start-following-pence-rule/](https://thefederalist.com/2018/10/03/men-dont-want-get-kavanaughed-start-following-pence-rule/).

<sup>73</sup> Joe Tamborello, *After Weinstein, Mike Pence’s ‘Billy Graham Rule’ Gains Traction—and Criticism*, *INDIANAPOLIS STAR* (Nov. 17, 2017, 1:55 PM), <https://www.indystar.com/story/news/politics/2017/11/17/after-weinstein-mike-pences-billy-graham-rule-gains-traction-and-criticism/874460001/> [<https://perma.cc/J73S-MLG4>].

<sup>74</sup> See, e.g., Kimberly Ross, *Never Forget: Liberals Tsk-Tsking Joe Biden Mocked Mike Pence’s Marital Rules*, *WASH. EXAMINER* (Apr. 2, 2019, 4:25 PM), <https://www.washingtonexaminer.com/opinion/never-forget-liberals-tsk-tsking-joe-biden-mocked-mike-pences-marital-rules> [<https://perma.cc/54RW-C573>] (“The vice president has very strict, personal standards concerning how he interacts with those of the opposite sex. Without a doubt, they leave no room for misconduct. By doing so, he respects women in general and most importantly, his wife, Karen.”); Maura Schreier-Fleming, *Advice for Professional Women Who Want to Get Ahead in the #MeToo Era*, *ALL BUSINESS*, <https://www.allbusiness.com/advice-professional-women-me-too-era-119649-1.html> [<https://perma.cc/RL34-KRUV>] (suggesting women avoid initiating social meetings, take particular caution about fashion choices, and steer away from personally meaningful friendships at work).

<sup>75</sup> Kathleen Parker, *The Inevitable Unintended Consequences of #MeToo*, *WASH. POST* (Dec. 4, 2018, 6:44 PM), [https://www.washingtonpost.com/opinions/the-inevitable-unintended-consequences-of-metoo/2018/12/04/9c7e0418-f80e-11e8-8d64-4e79db33382f\\_story.html?utm\\_term=.85eb7f10c74d](https://www.washingtonpost.com/opinions/the-inevitable-unintended-consequences-of-metoo/2018/12/04/9c7e0418-f80e-11e8-8d64-4e79db33382f_story.html?utm_term=.85eb7f10c74d) [<https://perma.cc/9RAG-LTPV>].

<sup>76</sup> See Gillian Tan & Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, *BLOOMBERG* (Dec. 3, 2018, 9:59 AM), <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost> [<https://perma.cc/28JH-LFXA>]. While this Article focuses on the Graham-Pence Rule in the American workplace, South Korean journalists report that sex-segregated rules of engagement have gained traction after a national #MeToo movement there. See Kim Jae-heun, *More Men Wary of Interacting with Women*, *KOREA TIMES* (Mar. 8, 2018, 2:16 PM), [https://www.koreatimes.co.kr/www/nation/2018/03/356\\_245275.html](https://www.koreatimes.co.kr/www/nation/2018/03/356_245275.html) [<https://perma.cc/E8QE-C9HP>] (“An increasing number of men showing extra vigilance around women at work have created a ‘Mike Pence Rule’ situation in Korea.”).

<sup>77</sup> Steve Hendrix et al., *Lunches, Hugs, and Break-Room Banter: Where Are the New Boundaries at Work?*, *WASH. POST* (Jan. 28, 2018), [https://www.washingtonpost.com/local/lunches-hugs-and-break-room-banter-where-are-the-new-boundaries-at-work/2018/01/28/1911b700-013d-11e8-bb03-722769454f82\\_story.html?utm\\_term=.3cfb496324d5](https://www.washingtonpost.com/local/lunches-hugs-and-break-room-banter-where-are-the-new-boundaries-at-work/2018/01/28/1911b700-013d-11e8-bb03-722769454f82_story.html?utm_term=.3cfb496324d5) [<https://perma.cc/QQ2Q-RBXS>].

model for” men in law firms: “As men get increasingly unnerved by the #MeToo movement, expect the Mike Pence rule to prevail. Yes, that means more men in power will dodge one-on-one meetings or business travel with female colleagues. Expect a more uptight workplace and increased gender segregation on matters.”<sup>78</sup>

Survey data compiled by McKinsey and Company and Lean In revealed that there are considerable numbers of men worried about placing themselves in jeopardy at work. Over half of surveyed male managers felt “uncomfortable participating in a common work activity with a woman, such as mentoring, working alone, or socializing together.”<sup>79</sup> Approximately one-third of men said that they were uneasy socializing or working closely with women, and senior-level men are “12 [times] more likely to hesitate to have [individual] meetings” with women than in prior surveys.<sup>80</sup>

The research results also indicated that significant mentoring barriers exist for junior women.<sup>81</sup> One in six male managers telegraph concerns about mentoring women.<sup>82</sup> Men in senior-level positions were three-and-a-half times less willing to dine with junior women alone and five times less willing to travel with junior women than they were with junior men.<sup>83</sup> The McKinsey report concluded that it is “critical that companies focus on closing gender disparities early in the pipeline” and that while “diversity starts with real numbers,” employers must also “take steps to reduce sexual harassment and microaggressions” to retain and advance female talent.<sup>84</sup>

Journalists reported widely the impact of these trends. In a December 2018 exposé on Wall Street employment practices, *Bloomberg* uncovered that some men avoided meals, traveling in close quarters,

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<sup>78</sup> Vivia Chen, *What's in Store for Big Law this Year? Lavish Perks, Thought Leadership and More*, LAW.COM (Jan. 9, 2019), <https://www.law.com/americanlawyer/2019/01/09/whats-in-store-for-big-law-this-year-lavish-perks-thought-leadership-and-more/?slreturn=20190009125815> [<https://perma.cc/HN9Y-S2SY>].

<sup>79</sup> *Key Findings*, LEAN IN, <https://leanin.org/sexual-harassment-backlash-survey-results#key-finding-1> [<https://perma.cc/FMP3-63NU>].

<sup>80</sup> *Id.*

<sup>81</sup> *See Men, Commit to Mentor Women*, LEAN IN, <https://leanin.org/mentor-her> [<https://perma.cc/NM62-7KAQ>].

<sup>82</sup> *See* Katrin Bennhold, *Another Side of #MeToo: Male Managers Fearful of Mentoring Women*, N.Y. TIMES (Jan. 27, 2019), <https://www.nytimes.com/2019/01/27/world/europe/metoo-backlash-gender-equality-davos-men.html> [<https://perma.cc/C8DY-VT7J>].

<sup>83</sup> *See Men, Commit to Mentor Women*, *supra* note 81.

<sup>84</sup> MCKINSEY & COMPANY ET AL., *WOMEN IN THE WORKPLACE* 2018, at 55 (2019).



and private meetings with female colleagues to preempt the appearance of impropriety and hedge against allegations of harassment.<sup>85</sup>

According to the *Bloomberg* piece, the Pence-inspired sex quarantines at Wall Street firms allegedly run the gamut from petty to consequential:

A manager in infrastructure investing said he won't meet with female employees in rooms without windows anymore; he also keeps his distance in elevators. A late-40-something in private equity said he has a new rule, established on the advice of his wife, an attorney: no business dinner with a woman 35 or younger.

These changes can be subtle but insidious, with a woman, say, excluded from casual after-work drinks, leaving male colleagues to bond, or having what should be a private meeting with a boss with the door left wide open.<sup>86</sup>

To some extent, the *purported* overcorrection on Wall Street,<sup>87</sup> which was condemned loudly by New York City officials,<sup>88</sup> may be a consequence of men recognizing that there are gender and cultural divides over what constitutes sexual harassment.<sup>89</sup> A recent survey shows that a majority of men believe that “looking at another colleague’s private parts or asking for sexual favors” is not necessarily harassment as opposed to two-thirds of women who say it is harassment.<sup>90</sup> Similarly, one-third of women believe that “sexual jokes” are

<sup>85</sup> Tan & Porzecanski, *supra* note 76.

<sup>86</sup> *Id.*

<sup>87</sup> I emphasize “purported” because the truth may be that this “overcorrection” is a pretextual cover to justify practices that long predate the #MeToo movement. Some aggrieved individuals may feel greater space to “say the quiet part out loud” in wake of #MeToo.

<sup>88</sup> Katia Porzecanski & Gillian Tan, *NYC Officials Blast Wall Street's Ice-Out of Women in Wake of #MeToo*, BLOOMBERG (Dec. 5, 2018, 3:38 PM), <https://www.bloomberg.com/news/articles/2018-12-05/nyc-mayor-s-ex-goldmanites-blast-ice-out-of-wall-street-women> [<https://perma.cc/DP7N-P6VY>].

<sup>89</sup> Jorge L. Ortiz, *Will #MeToo Turn into #NotHer? Movement May Come with Unintended Workplace Consequences*, USA TODAY (Oct. 5, 2018, 2:26 PM), <https://www.usatoday.com/story/news/2018/10/04/metoo-movement-unintended-career-consequences-women/1503516002/> [<https://perma.cc/P2QD-M7Q7>] (“Human resources professionals say #MeToo has increased awareness of harassment” but has caused “confusion about workplace etiquette . . . . The confusion stems from cultural differences in a country as vast and diverse as the United States. What may be regarded as an inoffensive hug or compliment in one setting could be interpreted as a come-on in another.”); Alexandre Tanzi & Katia Dmitrieva, *Men and Women See Sexual Harassment in the Workplace Differently*, BLOOMBERG (Dec. 3, 2018, 7:30 AM), <https://www.bloomberg.com/news/articles/2018-12-03/sexual-harassment-in-workplace-is-seen-differently-by-men-women> [<https://perma.cc/J57B-LYJ2>] (reporting on research indicating that “younger people and men were less likely than older Americans and women to view something as harassment”).

<sup>90</sup> Tanzi & Dmitrieva, *supra* note 89.

harassment compared to 17% of men.<sup>91</sup> Whatever the reasons behind men adopting the various iterations of the Graham-Pence Rule—irrational fears of false allegations,<sup>92</sup> avoiding “reputational harm,”<sup>93</sup> failure to identify harassing behaviors,<sup>94</sup> worries about male supremacy in the labor market,<sup>95</sup> or concerns about their capacity to exercise self-control<sup>96</sup>—these men impose costs on their female subordinates and colleagues while fostering workplace cultures that treat women as outsiders.<sup>97</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> The idea that women make false allegations in large numbers, thus requiring sex segregation, is a particularly odious claim, but it does appear to be part of some men’s interpretation of workplace gender dynamics. See Rachele Hampton, *Memo to Managers: The Solution to Workplace Sexual Harassment Is Not Gender Segregation*, *Slate* (Jan. 29, 2019, 1:31 PM), <https://slate.com/human-interest/2019/01/metoo-workplace-harassment-men-avoiding-women.html> [<https://perma.cc/Y5A9-8BMV>] (“Broadcasting a reluctance to be alone with female co-workers indicates that you either find women to be fundamentally untrustworthy or unreliable narrators of their own lives.”). Andrew Sullivan articulated a similar position: “Any presumption of innocence [is] regarded as a misogynist dodge, and an anonymous online list of accusations against named men in the media was created and circulated with nary an attempt by its instigators to substantiate a single one. Within a few weeks, the righteous exposure of hideous abuse of power had morphed into a more generalized revolution against the patriarchy.” Andrew Sullivan, *It’s Time to Resist the Excesses of #MeToo*, *N.Y. Mag.* (Jan. 12, 2018), <https://nymag.com/intelligencer/2018/01/andrew-sullivan-time-to-resist-excesses-of-metoo.html> [<https://perma.cc/3P32-6H5Y>].

<sup>93</sup> Joanna L. Grossman, *Vice President Pence’s “Never Dine Alone with a Woman” Rule Isn’t Honorable. It’s Probably Illegal*, *Vox* (Dec. 4, 2017, 10:32 AM), <https://www.vox.com/the-big-idea/2017/3/31/15132730/pence-women-alone-rule-graham-discrimination> [<https://perma.cc/8GMX-2SZB>].

<sup>94</sup> See Tanzi & Dmitrieva, *supra* note 89.

<sup>95</sup> Writing for a libertarian publication, one commentator suggested that the response is natural for the type of men who work in these environments:

Wall Street law firms and investment banking companies recruit the brightest, most ambitious and, yes, most ruthless. The stakes are in the millions and billions of dollars. In this #Metoo era a sexual harassment complaint will bring a crashing end to a career that earned a seven digit bonus the year before. Wall Street is full of alpha males, and these alpha males are naturally going to react to this threat.

Jennifer Fisher, *Why the Pence Rule is Conquering Wall Street*, *LIBERTARIAN REPUBLIC* (Dec. 9, 2018), <https://thelibertarianrepublic.com/why-the-pence-rule-is-conquering-wall-street/> [<https://perma.cc/JKU2-FVPG>].

<sup>96</sup> See Levin, *supra* note 15.

<sup>97</sup> See Fisher, *supra* note 95. Even men who might otherwise reject the idea of sex quarantines may feel compelled to at least superficially endorse them to avoid personal career consequences. See Tristin K. Green, *Work Culture and Discrimination*, 93 *CAL. L. REV.* 623, 641 (2005) (“As social relations take center stage, increased pressure to conform to work culture follows. In a relationally dependent work environment, recommendations for promotion are made on an informal, ad hoc basis; performance reviews are conducted by coworkers, group leaders, and even subordinates; and determinations of skill competence are ongoing. All of these judgments depend in part on others’ perception of an individual’s ability or willingness to fit in

### A. *Sex Quarantines as an Adverse Employment Action*

To bring a federal employment discrimination claim under § 703(a)(1) of Title VII,<sup>98</sup> aggrieved employees must demonstrate that they have suffered an adverse employment action.<sup>99</sup> An adverse employment action affects the terms, conditions, or privileges of employment.<sup>100</sup> Individuals who have been terminated, refused a position, denied proper compensation, or denied a promotion easily meet this requirement.<sup>101</sup>

Employment antidiscrimination statutes, however, are not civility codes that subject employers to liability for “innocuous differ-

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with prevailing social expectations. And fitting in, of course, is largely a matter of conforming to work culture.”).

<sup>98</sup> 42 U.S.C. § 2000e-2(a)(1) (2018).

<sup>99</sup> The term “adverse employment action” is not found in Title VII’s text. As first used, “adverse employment action” was shorthand for the types of practices barred by Title VII. *See, e.g.,* *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1032, 1034 (5th Cir. 1980); *Womack v. Munson*, 619 F.2d 1292, 1296, 1297 n.7 (8th Cir. 1980). The term has, however, taken on a life of its own to the benefit of employers. The Fifth Circuit has adopted the most restrictive view of adverse actions, holding that Title VII only reaches “ultimate employment decisions” like “hiring, firing, demoting, promoting, granting leave, and compensating.” *Thompson v. City of Waco*, 764 F.3d 500, 503 (5th Cir. 2014) (citing *McCoy v. City of Shreveport*, 492 F.3d 551, 560 (5th Cir. 2007)).

Judge Frank Easterbrook described the relationship between the term “adverse employment action” and Title VII’s statutory text:

Although hundreds if not thousands of decisions say that an “adverse employment action” is essential to the plaintiff’s *prima facie* case, that term does not appear in any employment-discrimination statute . . . and the Supreme Court has never adopted it as a legal requirement. The statutory term is “discrimination,” and a proxy such as “adverse employment action” often may help to express the idea—which the Supreme Court *has* embraced—that it is essential to distinguish between material differences and the many day-to-day travails and disappointments that, although frustrating, are not so central to the employment relation that they amount to discriminatory terms or conditions.

*Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006).

For an example of the term “adverse employment discrimination” as used under a state antidiscrimination law, see *Yee v. Massachusetts State Police*, 121 N.E.3d 155, 160–61 (Mass. 2019) (“The phrase ‘adverse employment action’ does not appear in [the Massachusetts statute], but we use the phrase to determine when an act of discrimination against an employee ‘in compensation or in terms, conditions or privileges of employment’ may be remedied . . . . Where an employer discriminates against an employee but the discriminatory act falls short of being an ‘adverse employment action,’ [the statute] affords the employee no remedy for the discrimination.”).

<sup>100</sup> *Thompson*, 764 F.3d at 503.

<sup>101</sup> *See, e.g.,* *Clegg v. Ark. Dep’t of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007) (“An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage. This might include termination, cuts in pay or benefits, and changes that affect an employee’s future career prospects.” (internal quotations and citations omitted)).

ences.”<sup>102</sup> “Petty slights,” the imposition of “minor annoyances,” and impoliteness are not actionable forms of discrimination under Title VII because the law “is not intended to reach every bigoted act or gesture that a worker might encounter in the workplace.”<sup>103</sup> Of course, hostile work environments and class-based harassment are actionable even in the absence of a tangible loss.<sup>104</sup> If a worker is the target of behavior that is objectively and subjectively offensive to the worker, and that behavior is either severe or pervasive, those actions constitute a change in the terms and conditions of the worker’s employment.<sup>105</sup> The more that a plaintiff’s allegation of discrimination

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<sup>102</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (“[T]he 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.”); *see also* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1125–26, 1159 (1998) (analyzing courts’ treatment of material adversity and nonactionable workplace grievances).

<sup>103</sup> *Sutherland v. Mo. Dep’t of Corr.*, 580 F.3d 748, 752 (8th Cir. 2009); *Hunt v. City of Markham*, 219 F.3d 649, 653 (7th Cir. 2000); *see also, e.g., Terry v. Ashcroft*, 336 F.3d 128, 138 (2d Cir. 2003) (“An ‘adverse employment action’ is one which is ‘more disruptive than a mere inconvenience . . . .’”) (quoting *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)); *Russell v. Principi*, 257 F.3d 815, 818 (D.C. Cir. 2001) (“[W]hile adverse employment actions extend beyond readily quantifiable losses, not everything that makes an employee unhappy is an actionable adverse action.” (quoting *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996))); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (“Obviously, a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either.” (quoting *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456–57 (7th Cir.1994))); *Crady v. Liberty Nat’l Bank & Trust Co. of Ind.*, 993 F.2d 132, 135–36 (7th Cir. 1993) (holding a change in title alone was not an adverse employment action); *Spring v. Sheboygan Area Sch. Dist.*, 865 F.2d 883, 886 (7th Cir. 1989) (holding a transfer increasing commuting time was not an adverse employment action); *Rodas v. Town of Farmington*, 918 F. Supp. 2d 183, 191 (W.D.N.Y. 2013) (“Generally speaking, ostracism, ‘shunning,’ or the exclusion of an employee from non-essential office functions, cannot rise to the level of ‘material adversity’ required [for state a retaliation claim].”); *Pagan v. Holder*, 741 F. Supp. 2d 687, 696 (D.N.J. 2010) (finding no adverse employment action where the employer, in part, allegedly denied requested time off, failed to repair a broken air conditioner for three weeks, and caused employee to work in isolation); *Davis v. Verizon Wireless*, 389 F. Supp. 2d 458, 478 (W.D.N.Y. 2005) (“Menacing looks, name calling, or being shunned by coworkers does not constitute an adverse employment action. Nor does exclusion from meetings.” (citations omitted)).

<sup>104</sup> *See Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir. 1987) (“[A]dverse job action is not limited solely to loss or reduction of pay or monetary benefits. It can encompass other forms of adversity as well.”).

<sup>105</sup> *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998) (explaining that “the ordinary tribulations of the workplace, such as the sporadic use of abusive language” are not sufficient to bring a Title VII action) (citation omitted); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (holding that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive”); *Brennan v. Metro. Opera Ass’n, Inc.*, 192 F.3d 310, 318 (2d Cir. 1999) (“Isolated, minor acts or occasional episodes do not warrant relief.”).

focuses on ego bruising than obvious, deeper economic or dignitary harms, however, the less likely that courts will find a plaintiff has stated sufficiently a claim of a change in the terms and conditions of employment.<sup>106</sup>

A 2019 decision from the Fifth Circuit highlights this problem in the extreme. In *Peterson v. Linear Controls, Inc.*,<sup>107</sup> the court affirmed summary judgment for an employer notwithstanding evidence of workforce racial segregation because the alleged segregation fell short of an adverse employment action.<sup>108</sup> In *Peterson*, the employer divided a team of ten offshore oil platform workers into two groups: one of five black men and one of five white men.<sup>109</sup> For the duration of the offshore assignment, white supervisors tasked the five black team members with outside work in hot weather conditions without access to water, while the supervisors gave white team members indoor work with access to air conditioning.<sup>110</sup> The plaintiff claimed additionally that the black employees requested their supervisors to rotate the indoor and outdoor assignments, but those calls were ignored.<sup>111</sup>

The panel concluded that “[t]aking this as true, the magistrate judge did not err in holding that these working conditions are not adverse employment actions because they do not concern ultimate employment decisions.”<sup>112</sup> Under this construction of Title VII, an employer can escape liability for maintaining a racially segregated workforce as long as there is no ultimate employment decision that implicates an employee’s pay, benefits, or employment status.<sup>113</sup> Though the panel acknowledged rightfully that the working conditions were “disturbing,”<sup>114</sup> the outcome in *Peterson* is irreconcilable with Title VII’s text and the fundamental constitutional principle against racial segregation at the core of *Brown v. Board of Education*.<sup>115</sup> Thus,

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<sup>106</sup> See *infra* note 120 and accompanying text.

<sup>107</sup> 757 F. App’x 370 (5th Cir. 2019).

<sup>108</sup> *Id.* at 372–74.

<sup>109</sup> *Id.* at 372.

<sup>110</sup> *Peterson v. Linear Controls Inc.*, Civil Action, No. 16-00725, 2017 WL 3907299, at \*6 (W.D. La. Sept. 5, 2017), *aff’d*, 757 F. App’x 370 (5th Cir. 2019).

<sup>111</sup> *Id.*

<sup>112</sup> 757 F. App’x at 373.

<sup>113</sup> See *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007).

<sup>114</sup> 757 F. App’x at 375.

<sup>115</sup> 347 U.S. 483, 495 (1954). While nonstate actors’ employment decisions are not constrained by the Fourteenth Amendment, the Civil Rights Act of 1964 imported constitutional principles into the private sector. See *NBC v. Commc’ns Workers of Am.*, 860 F.2d 1022, 1024 (11th Cir. 1988); George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988). The failure to

*Peterson* serves as a warning for plaintiffs seeking to challenge forms of sex segregation—that courts’ understanding of adverse employment actions can tip the scale in employers’ favor.

The challenge for women trapped in workplaces where the Graham-Pence model is the norm lies in showing an adverse employment action. Even if a woman can proffer direct evidence that rules of engagement, like the Graham-Pence Rule, have been adopted, she nevertheless may not have suffered any identifiable material harm. A woman could be subject to such a policy and still benefit from pay raises and promotions. That, however, is not necessarily—and should not be—a barrier to a claim under § 703(a)(1).

For example, with respect to separate workspaces, the Ninth Circuit recognized in *Chuang v. University of California Davis, Board of Trustees*<sup>116</sup> that “substantial interference with work facilities important to the performance of the job constitutes a material change in the terms and conditions of a person’s employment.”<sup>117</sup> Yet, women who can produce evidence that they have been subjected to different standards for meeting settings, travel itineraries, and social gatherings could potentially fall short of showing an adverse employment action unless the plaintiff can link unmistakably that exclusion to some negative employment consequences.<sup>118</sup> While the Supreme Court has never

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identify racial segregation as injurious per se ignores the core lesson of *Brown* that racial classifications and racial segregation are inherently detrimental. 347 U.S. at 495.

<sup>116</sup> 225 F.3d 1115 (9th Cir. 2000).

<sup>117</sup> *Id.* at 1126; *see also* Postell v. Rochester City Sch. Dist., 136 F. Supp. 3d 492, 498–99 (W.D.N.Y. 2015) (finding an adverse employment decision where high school counselor was assigned a less prestigious student caseload and was “repeatedly and unnecessarily placed . . . in office spaces that were inadequately outfitted or physically uncomfortable to the point of being harmful to her health, in locations which were inconvenient and isolated from other staff members and the students to whom plaintiff was assigned, meanwhile providing similarly-situated Caucasian employees with better treatment and better resources”); *King v. City of Boston*, 883 N.E.2d 316, 324 (Mass. App. Ct. 2008) (reversing summary judgment for the defendant where plaintiffs complained about the lack of superior officer locker rooms for women because the denial of superior office space “is a material condition or privilege of employment in these circumstances, and consequently the factual dispute regarding its importance must be resolved by a fact finder”).

<sup>118</sup> *See* Dillon v. Morano, 497 F.3d 247, 255 (2d Cir. 2007) (rejecting a retaliation claim arising from staff meeting exclusions and noting that there was “nothing in the record to indicate that [the plaintiff] was disadvantaged”); *Drew v. Ill., Dep’t of Human Servs.*, 101 F. App’x 637, 638–39 (7th Cir. 2004) (affirming summary judgment for employer where plaintiff alleged discrimination because of the “isolated location of his cubicle and his exclusion from office social events . . . because neither circumstance constituted an adverse employment action”); *Sanders v. New York City Human Res. Admin.*, 361 F.3d 749, 756 (2d Cir. 2004) (suggesting that although “exclusion from critical meetings over a three or four month period might well be materially adverse,” a jury weighing the facts could reasonably determine otherwise); *Gonzales v. Marriott Int’l, Inc.*, 142 F. Supp. 3d 961, 984 (C.D. Cal. 2015) (finding that plaintiff’s allegations that she

embraced the adverse action doctrine so narrowly,<sup>119</sup> the defendant-friendly application of the “severe or pervasive” standard—utilized to determine whether workplace conditions have sufficiently altered the terms and conditions of employment to be actionable—suggests that courts could dismiss claims that *are* bona fide discrimination actions for want of an injury sufficient to satisfy judges.<sup>120</sup>

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was excluded from “lunches and social events [we]re not sufficient to plead adverse employment action as a matter of law”); *Blount v. Morgan Stanley Smith Barney LLC*, 982 F. Supp. 2d 1077, 1083 (N.D. Cal. 2013), *aff’d*, 624 F. App’x 965 (9th Cir. 2015) (“Simple exclusion from lunch with a supervisor is normally trivial, a nonactionable petty slight.”) (internal quotations omitted); *Mabry v. Neighborhood Def. Serv.*, 769 F. Supp. 2d 381, 399 (S.D.N.Y. 2011) (rejecting claim that employer retaliated against plaintiff by failing to invite him to meetings because plaintiff failed to “allege[] any facts to suggest that plaintiff’s exclusion from management meetings prohibits plaintiff from receiving critical training in his field necessary for his advancement”); *Bick-erstaff v. Vassar Coll.*, 354 F. Supp. 2d 276, 281 (S.D.N.Y. 2004), *aff’d on other grounds*, 160 F. App’x. 61 (2d Cir. 2005) (“Exclusions from meetings or social functions do not constitute adverse [employment] actions.”); *Quarless v. Bronx-Lebanon Hosp. Ctr.*, 228 F. Supp. 2d 377, 385 (S.D.N.Y. 2002), *aff’d*, 75 F. App’x 846 (2d Cir. 2003) (granting summary judgment for employer where plaintiff alleged that employer “exclude[d] him from meetings which he had attended in the past” because employee “fail[ed] to identify any specific actions by [his employer] which materially changed the terms or conditions of his employment”).

<sup>119</sup> See *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978) (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“Title VII is not limited to ‘economic’ or ‘tangible’ discrimination.”). In a decision concerning retaliation claims, however, the Court suggested that a violation of Title VII’s substantive discrimination provision might be more limited than retaliation because Title VII’s “antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006).

<sup>120</sup> See generally SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* (2017) (describing the trend of defendant friendly applications of Title VII doctrine to reject legitimate claims of discrimination); see also DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 235 (1989) (critiquing judges’ reception of sex discrimination claims because “[w]hat constitutes ‘malicious’ [treatment] ultimately depends on the perceptions of the judge rather than the victim, and the vestiges of long-standing prejudices do not seem entirely absent from judicial as well as workplace forums”); Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1321 (2012) (arguing that individuals’ prior conceptions about the nature of discrimination limits the capacity of judges and lay persons to view “nonsexual (but sex-based) harassment” as discriminatory); Yuki Noguchi, *Sexual Harassment Cases Often Rejected By Courts*, NPR (Nov. 28, 2017), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts> [<https://perma.cc/N97R-GUSZ>] (describing the difficulty plaintiffs sometimes face in showing a work environment was sufficiently hostile for a discrimination claim to lie).

*B. The Pence Effect and Title VII's Employment Opportunities Provision*

Section 703(a)(2) has two key components that make it stand apart from the more often used provision in Title VII, § 703(a)(1). Section 703(a)(2) bars employment practices that “limit, segregate, or classify” employees because of a protected characteristic “which would deprive or tend to deprive any individual of employment opportunities.”<sup>121</sup> Multiple state employment statutes contain parallel language, as well.<sup>122</sup>

Because of § 703(a)(2)'s limitation and segregation language, plaintiffs' claims can pinpoint plainly Graham-Pence workplace cultures for what they are—forms of sex segregation that are not new in the wake of #MeToo but are variations on the problem of workplace sex inequality that permeated the workforce in the 1960s and 1970s.<sup>123</sup> This second part of § 703 is also a useful vehicle for successfully challenging sex-based rules of workplace engagement because it avoids the need to demonstrate an adverse employment action or identify a particular practice and causation for a disparate impact claim.<sup>124</sup> The different threshold for successfully challenging sex segregation supplied by § 703(a)(2) is particularly helpful, because although Graham-Pence rules are not facially neutral, attempts to challenge them under disparate impact litigation may fall short.

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<sup>121</sup> 42 U.S.C. § 2000e-2(a)(2) (2018) (emphasis added).

<sup>122</sup> See, e.g., ALA. CODE § 25-1-22(2) (LexisNexis 2016); ARIZ. REV. STAT. ANN. § 41-1463(B)(2) (2018); DEL. CODE ANN. tit. 19, § 724(c)(2) (2019); D.C. CODE ANN. § 2-1402.11(a)(1) (West 2019); FLA. STAT. ANN. § 760.10(1)(b) (West 2019); KAN. STAT. ANN. § 44-1113(a) (2018); LA. STAT. ANN. § 23:332(A)(2) (2018); MD. CODE ANN., STATE GOV'T § 20-606(a)(2) (LexisNexis 2019); MICH. COMP. LAWS ANN. § 37.1202(1)(c) (2019); MO. ANN. STAT. § 213.055.1(1)(b) (West 2019); NEB. REV. STAT. § 48-1004(2) (2019); NEV. REV. STAT. ANN. § 613.330(1)(b) (LexisNexis 2019); OKLA. STAT. ANN. tit. 25, § 1302(A)(2) (West 2008); S.C. CODE ANN. § 1-13-80(A)(2) (2018); TENN. CODE ANN. § 4-21-401(a)(2) (2019); TEX. LABOR CODE ANN. § 21.402(d) (2018).

<sup>123</sup> See Alice S. Rossi, *Job Discrimination and What Women Can Do About It*, ATLANTIC (March 1970), <https://www.theatlantic.com/magazine/archive/1970/03/job-discrimination-and-what-women-can-do-about-it/304922/> [https://perma.cc/PVS8-LEGZ] (“The devices used to keep [female employees] down are various forms of ridicule, social rejection, bypassing them to promote less competent men, or subtle forms of lowering their expectations.”).

<sup>124</sup> See *Aliotta v. Bair*, 614 F.3d 556, 566 (D.C. Cir. 2010) (requiring plaintiffs to show an adverse employment action under both disparate treatment and disparate impact theories); *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 192 (3d Cir. 1980) (holding that “no violation of Title VII can be grounded in the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer’s work-force”).



The Eleventh Circuit Court of Appeals' decision in *EEOC v. Joe's Stone Crab, Inc.*<sup>125</sup> illustrates this problem. In *Joe's Stone Crab*, a Miami Beach seafood restaurant hired 108 servers between 1986 and 1990, all of whom were male.<sup>126</sup> After the Equal Employment Opportunity Commission ("EEOC") brought a charge against Joe's, the restaurant hired 19 women between 1991 and 1995.<sup>127</sup> Each year, Joe's hired servers through a call for workers that required applicants to fill out an application and complete an interview.<sup>128</sup> There was no formal hiring policy.<sup>129</sup> Rather, the maître d' charged with hiring selected new servers based on their "appearance, articulation, attitude, and experience."<sup>130</sup> The restaurant's management was not involved in the hiring process.<sup>131</sup>

The sex disparities in Joe's employees were the result of only two or three women typically applying for waitstaff positions per year.<sup>132</sup> Joe's reputation, however, likely impacted the applicant pool.<sup>133</sup> A number of women testified that they were told by Joe's employees and other acquaintances in the restaurant community not to apply for server positions because the restaurant "did not hire women."<sup>134</sup> Joe's business model recreated "Old World" European "fine dining" and "sought to emulate Old World traditions by creating an ambience in which tuxedo-clad men served its distinctive menu."<sup>135</sup> One crucial decision-maker, a former maître d', testified that Joe's environment necessitated "a male server type of job."<sup>136</sup>

The Eleventh Circuit held that the EEOC failed to identify a facially neutral policy that caused Joe's underrepresentation of women.<sup>137</sup> Consequently, the EEOC could not move forward with its disparate impact claim.<sup>138</sup> The court determined, however, that sufficient evidence indicated that the EEOC could proceed with a disparate treatment claim because Joe's "gave silent approbation" to the widely

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<sup>125</sup> 220 F.3d 1263 (11th Cir. 2000).

<sup>126</sup> *Id.* at 1267.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1269.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1271.

<sup>133</sup> *Id.*

<sup>134</sup> *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1270 (11th Cir. 2002).

<sup>135</sup> 220 F.3d at 1270 (citation omitted).

<sup>136</sup> *Id.* at 1281 (citation omitted).

<sup>137</sup> *Id.* at 1274, 1278.

<sup>138</sup> *Id.* at 1278.

understood belief in the service industry that men were preferred for employment because Joe's sought to "emulate Old World traditions" by using male servers.<sup>139</sup> Accordingly, the case was remanded to the district court for a determination of whether Joe's practices intentionally "excluded women from food server positions based on a sexual stereotype which simply associated 'fine-dining ambience' with all-male food service."<sup>140</sup>

Despite Joe's argument that the EEOC brought a pattern-or-practice claim under the guise of disparate treatment,<sup>141</sup> the EEOC successfully litigated a disparate treatment claim for two female nonapplicants, but only because evidence showed that they had "real and present interests" in working for Joe's and that they would have applied for a server position but for Joe's discriminatory practices.<sup>142</sup> The *Joe's Stone Crab* decision is symptomatic of the challenges courts face when dealing with facts that do not fit neatly in various silos of discrimination theories,<sup>143</sup> like when "allegedly neutral practices . . . create active exclusion."<sup>144</sup>

### 1. Sex-Based Rules of Engagement and Sex Segregation

The issue with litigating against Graham-Pence Rule-like sex quarantines is that they are not neutral policies and affected parties may be unable to show an adverse employment action. What *Joe's Stone Crab* indicates, however, is that courts are capable of divining intentionality by taking what might otherwise be seen as piecemeal practices and viewing them as a comprehensive pattern of purposeful

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<sup>139</sup> *Id.* at 1281 (quotation omitted).

<sup>140</sup> *Id.* at 1284.

<sup>141</sup> Brief. of Appellant at 8, *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265 (11th Cir. 2002) (Case No. 01-12917-I) ("On remand, without any amendment of the pleadings or any new evidence, and without additional briefing or argument, the district court re-entered verbatim the previous findings from its disparate-impact ruling, as the primary basis for its new ruling that Joe's had disparately treated four individuals. It also entered supplemental findings concerning Joe's general practice (which would only be relevant to a pattern-or-practice claim)—not its treatment of any individual claimant.").

<sup>142</sup> *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1275 (11th Cir. 2002).

<sup>143</sup> See Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 800 (2010) ("Even when pattern or practice evidence is used in an individual disparate treatment case, it is not clear that it is being used to establish employer liability rather than to bolster evidence that a particular individual acted with discriminatory intent."); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1358, 1363 (2017) (arguing for a theory of "status causation" that "bridges th[e] gap between an evidentiary showing of group disparities and a conceptual foundation in individual status causation").

<sup>144</sup> Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1062 (2015).

discrimination. This end can be better achieved under the infrequently used § 703(a)(2). Although it grew out of judicial interpretations of § 703(a)(2), disparate impact theory was codified in Title VII *after* Congress enacted the Civil Rights Act of 1991.<sup>145</sup> Because § 703(a)(2) refers specifically to employer practices that “limit” or “segregate” employees in ways that “deprive or tend to deprive” individuals of employment opportunities because of protected characteristics,<sup>146</sup> the text of § 703(a)(2) is significantly broader in scope than § 703(a)(1) and meaningfully different from disparate impact doctrine.<sup>147</sup>

Under § 703(a)(2), disparate treatment claims have been brought against employer policies that channel women into job classifications that stunt female employees’ earning potential and inhibit their ability to perform their job. Take, for example, *Armstrong v. Index Journal Co.*,<sup>148</sup> in which a newspaper hired two categories of advertising salespersons, special and regular.<sup>149</sup> Special salespersons were only women and regular salespersons were only men despite each type of employee having the same responsibilities.<sup>150</sup> In addition to the difference in titles, special salespersons had a lower base salary ceiling than regular salespersons.<sup>151</sup> The Fourth Circuit held that the plaintiff stated a disparate treatment case by showing that the newspaper’s “segregation of jobs by sex adversely affected her status as an employee and deprived her of the opportunity to reach the maximum salary payable to salesmen.”<sup>152</sup>

Similarly, the Eighth Circuit in *Wedow v. City of Kansas City*<sup>153</sup> upheld a jury verdict for a disparate treatment claim under § 703(a)(2) in which female firefighters complained of ill-fitting gear and alleged that “restrooms were located in the male locker rooms with the male

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<sup>145</sup> Civil Rights Act of 1991, Pub. L. No. 102–166, § 3, 105 Stat 1071.

<sup>146</sup> 42 U.S.C. § 2000e-2(a)(2) (2012).

<sup>147</sup> See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 n.9 (1989) (noting in dicta that “segregated dormitories and eating facilities in the workplace [could] be challenged under 42 U.S.C. § 2000e-2(a)(2) without showing a disparate impact on hiring or promotion”); see also Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 912 (2017) (“Many courts and commentators have simply assumed that section 703(a)(2) is synonymous with disparate impact doctrine. However, the text of (a)(2) makes no mention of ‘disparate impact,’ ‘discriminatory effects,’ ‘business necessity,’ or ‘job relatedness.’ These concepts are codified in section 703(k), leaving open the possibility that section 703(a)(2) has meaning beyond or apart from established disparate impact doctrine.”).

<sup>148</sup> 647 F.2d 441 (4th Cir. 1981).

<sup>149</sup> *Id.* at 443.

<sup>150</sup> *Id.* at 443–44.

<sup>151</sup> *Id.* at 444.

<sup>152</sup> *Id.* at 444–45.

<sup>153</sup> 442 F.3d 661 (8th Cir. 2006).

shower room, doors were not secure, males had the keys, and where female restrooms existed, they were unsanitary and often used as storage rooms.”<sup>154</sup> The court reasoned that “a lack of adequate protective clothing and private, sanitary shower and restroom facilities” were “conditions [that] jeopardize [a female firefighter’s] ability to perform the core functions of her job in a safe and efficient manner” and could thus constitute actionable sex discrimination.<sup>155</sup> Sex quarantines are not the same as the express job classifications in *Armstrong* or the tangible limitations at the center of *Widow*, yet all three inhibit the ability of women to perform on the job, contravening Title VII’s proscription of employer practices that “deprive or tend to deprive any individual of employment opportunities” because of their sex.<sup>156</sup>

Moreover, employer policies or workplace environments that manufacture space between men and women are akin to sex segregation. Workforce segregation along protected class lines is a “Title VII violation in its own right.”<sup>157</sup> The Second Circuit’s ruling in *Knight v. Nassau County Civil Service Commission*<sup>158</sup> is instructive. James Knight began his tenure with Nassau County in 1968 where he helped create civil service examinations for the county.<sup>159</sup> In 1973, Knight was transferred against his wishes to the Commission’s Recruitment Division “with the expectation that he would participate in a program to encourage more members of minority groups to apply for Civil Service jobs.”<sup>160</sup> Knight argued that even though his salary and benefits were the same, the transfer was “racist and demeaning.”<sup>161</sup>

The Second Circuit held that “[n]o matter how laudable the Commission’s intention” may have been, the transfer “was based on a racial stereotype that blacks work better with blacks and on the premise that Knight’s race was directly related to his ability to do the job.”<sup>162</sup> Because the county relied on stereotypes to make staffing decisions, Title VII’s § 703(a)(2) equal opportunity mandate was violated notwithstanding the employee’s lack of an adverse employment decision.<sup>163</sup> The perpetuation of stereotypes and stigmatization is a

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<sup>154</sup> *Id.* at 667–68.

<sup>155</sup> *Id.* at 671–72.

<sup>156</sup> 42 U.S.C. § 2000e-2(a)(2) (2012).

<sup>157</sup> *Lloyd v. Phillips Bros., Inc.*, 25 F.3d 518, 525 (7th Cir. 1994).

<sup>158</sup> 649 F.2d 157 (2d Cir. 1981).

<sup>159</sup> *Id.* at 159.

<sup>160</sup> *Id.* at 160, 162.

<sup>161</sup> *Id.* at 162.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

sufficient harm that runs afoul of Title VII's purpose to eradicate biased decision-making in the workplace.<sup>164</sup> Similar to the racial stereotypes relied upon in *Knight*, sex-based rules of workplace engagement that limit interactions between men and women perpetuate stereotypes rooted deeply in ambivalent sexist thought that women make false accusations against men, that women use feminine qualities to seduce and trap men into making poor decisions, and that men are naturally unable to restrain themselves in the workplace.<sup>165</sup>

Employers must actively prevent sex-segregated work environments to avoid liability. This includes *work-related socialization customs* that keep women at arm's length from male superiors because of their sex. Take the example of *Firefighters Institute for Racial Equality v. City of St. Louis*,<sup>166</sup> where the Eighth Circuit reasoned that an employer's duty to provide a nondiscriminatory working environment

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<sup>164</sup> See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (taking notice that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees."); *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 305 (4th Cir. 2019), *cert. denied* 140 S. Ct. 115 (2019) (recognizing the harm that can arise from sex stereotypes about women using their sexuality to advance in the workplace); *Spain v. Gallegos*, 26 F.3d 439, 448 (3d Cir. 1994) (recognizing that "traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society").

<sup>165</sup> See Grossman, *supra* note 93 ("Why might men refuse to work with women, either generally or one in particular? Some fear that temptation will cause them to overstep a marital boundary by having a consensual affair—or a legal boundary by engaging in unwelcome harassment. Others fear just the appearance of a sexual or romantic liaison—which could provoke wifely jealousy, concerns about sexual favoritism, or reputational harm to the male boss who might wrongfully be labeled a creep."); Arielle Lapiano, *Dear Sir—Don't Let #MeToo Make You Afraid of Me*, FORBES (Jan. 9, 2019, 10:13 AM), <https://www.forbes.com/sites/ellevate/2019/01/09/dear-sir-dont-let-metoo-make-you-afraid-of-me/#2c05eca63b59> [<https://perma.cc/8NWG-UWA-X>] (observing that men have "become distrustful of women colleagues whom they believe may be looking for an opportunity to falsely yell, 'Me too!'"); W. Brad Johnson & David G. Smith, *Men Shouldn't Refuse to Be Alone with Female Colleagues*, HARV. BUS. REV. (May 5, 2017), <https://hbr.org/2017/05/men-shouldnt-refuse-to-be-alone-with-female-colleagues> [<https://perma.cc/X9NT-S37P>] ("Whether codified or informal, sex quarantines are rooted in fear. At the heart of it, policies curbing contact between men and women at work serve to perpetuate the notions that women are toxic temptresses, who want to either seduce powerful men or falsely accuse them of sexual harassment. This framing allows men to justify their anxiety about feeling attracted to women at work, and, sometimes, their own sexual boundary violations. It also undermines the perceived validity of claims by women who have been harassed or assaulted."); see also *supra* notes 50–53 and accompanying text.

<sup>166</sup> 549 F.2d 506 (8th Cir. 1977).

under Title VII extended to informal onsite social arrangements.<sup>167</sup> In *Firefighters*, African-American firefighters challenged segregated informal supper clubs for on-duty firefighters at city firehouses.<sup>168</sup> The city provided kitchen facilities for on-duty personnel who were required to supply their own food.<sup>169</sup> The city's fire departments developed a tradition of supper clubs where groups of on-duty personnel would eat together at the firehouse by invitation of the supper club's cook.<sup>170</sup> The tradition evolved into racially segregated affairs, leaving black firefighters "cooking and eating apart from their white associates."<sup>171</sup>

Recognizing that, although the city did not directly organize or sanction the supper clubs, "the inclusion of blacks and the reduction of racial tension in firehouses cannot help but aid the City as an employer where the job at hand requires the close cooperation of its employees and a concerted team effort."<sup>172</sup> Mindful of the corrosive effects that on-site social segregation had on the overall workplace environment, the Eighth Circuit directed the trial court on remand to supervise the promulgation of regulations requiring "that use of city facilities by supper clubs may not continue in a discriminatory and segregated manner" and to ensure that the city would "comport with its duty to provide a nondiscriminatory working environment."<sup>173</sup>

Absent an admission that an employer culture or practice of sex quarantining exists vis-à-vis a Graham-Pence Rule, courts will need to set a standard for what constitutes a sex-segregated work environment akin to those for hostile work environments and sexual harassment. Courts should evaluate the sufficiency of a plaintiff's evidence, assessing the scope and frequency of exclusionary incidents contained in the evidence proffered. Much like the stray remarks rule, isolated incidents of exclusion or petty slights unrelated to employment tasks should not subject employers to liability for sex-segregated job sites.<sup>174</sup>

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<sup>167</sup> *Id.* at 515.

<sup>168</sup> *Id.* at 514.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 515.

<sup>173</sup> *Id.* The court in a decision issued over a decade later indicated in dicta that the principle articulated in *Firefighters* applied to women. *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) ("We cannot believe that had the supper clubs excluded women, the court would have held the exclusion not to be actionable because it was not 'conduct of a sexual nature.'").

<sup>174</sup> David M. Litman, *What Is the Stray Remarks Doctrine? An Explanation and A Defense*, 65 CASE W. RES. L. REV. 823, 835 (2015) (explaining that under the stray remarks doctrine, courts commonly consider "[w]hether the comments were made by a *decision maker* or by an

Rather, courts should look favorably upon claims challenging sex quarantines where evidence reveals a pattern of sex-based rules of workplace engagement, particularly when the evidence implicates important decision-makers.<sup>175</sup>

## 2. *Identifying the Adverse Effects of Sex Quarantines*

Though § 703(a)(2) is a promising vehicle for challenging sex segregation, the operative text contains an important limiting principle.<sup>176</sup> Employment practices that result in sex segregation, like sex quarantines, are actionable only if they “deprive or tend to deprive” employment opportunities.<sup>177</sup> If an established system of sex quarantining is shown, that practice should be understood—without more—as a deprivation of employment opportunities. This approach is consistent with the rationale adhered to in *Knight*<sup>178</sup> because sex-segregation is inherently injurious.

The proposition that sex segregation is on its own terms unequal and harmful is derived from the Supreme Court’s decisions in *Brown v. Board of Education*<sup>179</sup> and *United States v. Virginia* (“*VMI*”).<sup>180</sup> In *Brown*, the Court held that “[s]eparate educational facilities are inherently unequal” because race-based segregation alone was detrimental to schoolchildren regardless of how technically equal school facilities might be in terms of funding, staffing, and infrastructure.<sup>181</sup> In *VMI*, which involved a challenge to sex segregation at the Virginia Military Institute, the Court similarly required states to afford women “genuinely equal” educational opportunities and cautioned against sex-segregated programs that carried less prestige for women.<sup>182</sup> While these cases arise from the constitutional context and in education-related litigation, the principles are nevertheless significant in light of Title

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agent within the scope of his employment; whether they were *related* to the decision-making process; whether they were *more than merely vague*, ambiguous, or isolated remarks; and whether they were *proximate in time* to the act of termination” (quoting *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994))).

<sup>175</sup> See *id.*

<sup>176</sup> 42 U.S.C. § 2000e-2(a)(2) (2018).

<sup>177</sup> *Id.*

<sup>178</sup> See *supra* notes 162–65 discussing the *Knight* decision.

<sup>179</sup> 347 U.S. 483 (1954).

<sup>180</sup> 518 U.S. 515 (1996).

<sup>181</sup> 347 U.S. at 483, 493–95.

<sup>182</sup> 518 U.S. at 557. Title IX regulations similarly adopt this approach. 34 C.F.R. § 106.34(a) (2018) (“[A] recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex.”).

VII's "main purpose," which is "to extend the constitutional prohibition against discrimination from public to private action."<sup>183</sup>

As stated in *VMI*, not every form of sex segregation necessarily produces an adverse effect on the basis of sex.<sup>184</sup> For example, employers who have onsite sex-segregated restroom or locker room facilities do not generally impede employment opportunities on the basis of sex or cause severe dignitary harms for employees.<sup>185</sup> This notion, however, comes with a crucial caveat—even typically benign, non-invidious forms of sex segregation can be actionable if they impede job performance and the ability to carry out workplace responsibilities.<sup>186</sup> A recent decision by the Seventh Circuit highlights why identifying adverse effects is crucial for both litigation and understanding defensive glass ceiling tactics as unlawful under a robust theory of sex discrimination.

In *EEOC v. AutoZone, Inc.*,<sup>187</sup> Kevin Stuckey worked as a sales manager between 2008 and 2012 at the auto parts retailer AutoZone, Inc. and was transferred among various Chicagoland stores.<sup>188</sup> Stuckey, an African-American man, worked at AutoZone's Kedzie location soon after it opened in 2010 until mid-2012.<sup>189</sup> The Kedzie store was in a predominantly Hispanic neighborhood and the clientele were similarly majority Hispanic.<sup>190</sup> In July 2012, Robert Harris, the district manager, transferred Stuckey out of the Kedzie store to a store on the South Side of Chicago with a majority black staff.<sup>191</sup> When Stuckey inquired about the reasons for his transfer, Harris replied that he wanted to "keep [the Kedzie store] predominantly Hispanic" and was concerned that "sales [were] down."<sup>192</sup> The transfer did not result in any "reduction in [Stuckey's] pay, benefits, or job responsibilities."<sup>193</sup>

The EEOC filed a lawsuit on Stuckey's behalf alleging that the transfer from the Kedzie store violated § 703(a)(2)'s prohibition on

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<sup>183</sup> Rutherglen & Ortiz, *supra* note 115 at, 470.

<sup>184</sup> 518 U.S. at 550 n.19 ("Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.").

<sup>185</sup> See generally Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465 (2018).

<sup>186</sup> See *supra* text accompanying notes 153–56 (discussing the *Wedow* decision).

<sup>187</sup> 860 F.3d 564 (7th Cir. 2017).

<sup>188</sup> *Id.* at 565.

<sup>189</sup> *Id.* at 566.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> 860 F.3d at 567.

<sup>193</sup> *Id.*



employer race-based segregation.<sup>194</sup> The district court granted summary judgment for AutoZone and the Seventh Circuit affirmed on appeal.<sup>195</sup> The court viewed Stuckey's transfer as "purely lateral," which would be unactionable under § 703(a)(1) because it would not constitute an adverse employment action.<sup>196</sup> The court acknowledged that § 703(a)(2) "cast[s] a wider net than subsection (a)(1)" and does not require an adverse employment action but nevertheless concluded that AutoZone should prevail for want of any evidence showing that the Kedzie transfer "tended to deprive Stuckey of any job opportunity."<sup>197</sup>

The flaw in the Seventh Circuit decision lies in its cramped apprehension of discriminatory harm. The court focused improperly on Stuckey, as an individual transferee, and his long-term opportunity for advancement.<sup>198</sup> In doing so, the court glossed over the larger spillover caused by AutoZone's policy of segregated stores, which broadly limited employment opportunities for current and prospective employees by creating zones of opportunity in particular stores on racial lines.<sup>199</sup> Moreover the EEOC's decision to litigate the case against AutoZone should have mitigated the court's concerns about the individualized adverse effect that the company's policy had on any single employee.<sup>200</sup> The *AutoZone* decision highlights the need to identify precisely the damaging consequences of defensive rules of engagement that inhibit women's success in the workplace.<sup>201</sup>

The Supreme Court's decision in *Nashville Gas Co. v. Satty*<sup>202</sup> illustrates the long-term career harms that the prohibition of sex-based segregation and classifications is intended to prevent. In *Satty*, the Supreme Court held that a seniority policy that disparately harmed female employees' future employment opportunities was unlawful under § 703(a)(2).<sup>203</sup> Nashville Gas Company required pregnant em-

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 566.

<sup>196</sup> *Id.* at 568.

<sup>197</sup> *Id.* at 569 (emphasis omitted).

<sup>198</sup> *See id.* at 569–70.

<sup>199</sup> *See id.* at 566–68.

<sup>200</sup> *Id.* at 567; *see also* EEOC, SYSTEMIC TASK FORCE REPORT 1 (2006), [http://www.eeoc.gov/eeoc/task\\_reports/upload/systemic.pdf](http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf) [<https://perma.cc/65BU-3WRP>] (noting the EEOC has a "unique role and responsibility in combating systemic discrimination").

<sup>201</sup> This decision might also be an example of bad facts making bad law. The evidence provided by the complainant was weak and contradictory. *See AutoZone*, 860 F.3d at 567–68.

<sup>202</sup> 434 U.S. 136 (1977).

<sup>203</sup> *Id.* at 136.

ployees to formally take a leave of absence.<sup>204</sup> Women who wished to return after their pregnancies were eligible to fill vacant permanent positions, but any seniority that they accrued previously only applied to employee benefits.<sup>205</sup> When an employee applied for future jobs, she lost the seniority that she accumulated before the pregnancy-related leave of absence.<sup>206</sup> Yet, employees that availed themselves of leaves because of any other illness or disability not only retained their accumulated seniority but continued to accrue seniority during their absence.<sup>207</sup> The Court reasoned that the practice could not square with § 703(a)(2) because a woman returning to the company after a pregnancy would feel “the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, for the remainder of her career.”<sup>208</sup>

*Satty* is particularly important because it not only indicates that intentional discrimination claims can proceed under § 703(a)(2)<sup>209</sup> but also highlights the kind of harms that § 703(a)(2) safeguards against—burdens imposed on women that stigmatize and artificially stunt their long-term career trajectory,<sup>210</sup> like lower future pay rates,<sup>211</sup> are impermissible.<sup>212</sup> These are the same identifiable harms caused by defensive glass ceilings.

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<sup>204</sup> *Id.* at 137.

<sup>205</sup> *Id.* at 139.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 140.

<sup>208</sup> *Id.* at 141.

<sup>209</sup> *Id.* at 141 (acknowledging that “both intentional discrimination and policies neutral on their face but having a discriminatory effect may run afoul of § 703(a)(2)”).

<sup>210</sup> See Theresa M. Beiner, *Do Reindeer Games Count As Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 649 (1996) (arguing that recurrent exclusion from workplace social networks has a “psychological effect on those who are not asked to participate” because the designation of “a less favored status . . . can be demoralizing and can lead to frustration, causing the employee’s job performance to suffer”).

<sup>211</sup> In one Equal Pay Act case, for example, a district court acknowledged that evidence of sex-segregated socialization, which was initiated by the decision-maker, provided clarifying context to the statistical evidence of salaries, raise history, and employee backgrounds that proved the presence of a gender pay disparity. The court signaled that it afforded significantly less weight to the anecdotal socialization culture evidence, however. *EEOC v. Shelby Cty. Gov’t, Bd. of Cty. Comm’rs*, 707 F. Supp. 969, 986 (W.D. Tenn. 1988).

<sup>212</sup> See *Patrolmen’s Benevolent Ass’n of New York, Inc. v. City of New York*, 74 F. Supp. 2d 321, 336 (S.D.N.Y. 1999) (ruling that “when combined with the loss of promotion opportunities and ‘good-will’ accrued among supervisors in their former precincts,” plaintiff police officers’ claim that precinct transfer decisions were made based on their race was “sufficient to constitute an adverse employment action”).

### 3. *Anticipating Employer Justifications*

Inevitably, employers may argue that defensive workplace policies are necessary to prevent the kinds of workplace cultures that permit sexual harassment to harm women.<sup>213</sup> Employers can implement various strategies to stop sexual harassment, however, without subjecting women to discriminatory norms: terminate harassers, hire managers that prioritize antidiscrimination policy enforcement, promulgate gender-neutral office rules, or ensure greater diversity in management.

Furthermore, these justifications are belied by the Supreme Court's decisions in *United Auto Workers v. Johnson Controls, Inc.*<sup>214</sup> and *Ricci v. DeStefano*.<sup>215</sup> In *Johnson Controls*, the Court made it clear that employers' paternalistic motives could not shield the company from Title VII sex discrimination liability.<sup>216</sup> In *Ricci*, the Court warned that "before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying" disparities that disadvantage minorities in the workplace, "the employer must have a strong basis in evidence" for taking that action.<sup>217</sup> And in the case of sex quarantines, unlike in *Ricci*, there is no inevitable conflict between disparate treatment and disparate impact.<sup>218</sup> It is imperative that courts reject arguments in support of defensive sex quarantines that are grounded in baseless conjecture and ambivalent sexism.

## III. PROTECTED JOBSITE ASSOCIATIONS

Employment antidiscrimination laws bar discrimination against individuals because of their membership in a protected class, like race or sex.<sup>219</sup> While employers can generally consider personal relationships without running afoul of equal opportunity mandates,<sup>220</sup> employ-

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<sup>213</sup> See French, *supra* note 67.

<sup>214</sup> 499 U.S. 187, 206 (1991).

<sup>215</sup> 557 U.S. 557, 585 (2009).

<sup>216</sup> 499 U.S. at 206 (holding policy restricting women's employment because of fetal harm unlawful because "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents").

<sup>217</sup> 557 U.S. at 585; see also *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235–36 (5th Cir. 1969) (rejecting argument that women were not qualified to perform job requiring 30 pounds of lifting capacity because the employer "introduced no evidence concerning the lifting abilities of women" but rather asked the court to "'assume,' on the basis of a 'stereotyped characterization' that few or no women can safely lift 30 pounds, while all men are treated as if they can").

<sup>218</sup> See 557 U.S. at 580, 583–84.

<sup>219</sup> See *supra* notes 1–2.

<sup>220</sup> See Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 121

ment antidiscrimination protections also prohibit adverse employment decisions because of a person's association or relationship that take a protected trait into account. Thus, workplace relationships that trigger an adverse employment decision because of the mixed-sex composition of the relationship—including platonic or professional relationships that are personally meaningful to employees and potentially key for long-term career advancement—should garner the fullest protections under § 703(a)(1) and parallel state statutory provisions.<sup>221</sup>

In recent years, employers have sought to modernize the workplace with changes like open floor plans,<sup>222</sup> flexible scheduling,<sup>223</sup> and pets on the premises.<sup>224</sup> One bottom-up trend in the contemporary work environment, however, is workers seeking meaningful relationships with other people in their work orbit.<sup>225</sup> One term used to describe these kinds of workplace friendships is “work spouse.”<sup>226</sup> Work spouses are platonic friendships that people form with coworkers with whom they can build trust and respect and can engage to reduce office tension and manage stress.<sup>227</sup> These deeply meaningful connections

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(2011) (noting that “workplace law has largely placed other personal relationships at work outside of the domain of explicit legal regulation”).

<sup>221</sup> See 42 U.S.C. § 2000e-2(a)(1) (2018).

<sup>222</sup> See Jeff Pochehan, *This Office Design Trend Is Causing a Privacy Crisis. Here's What It Means for You*, INC. (Feb. 14, 2018), <https://www.inc.com/jeff-pochepan/this-office-design-trend-is-causing-a-privacy-crisis-heres-what-it-means-for-you.html> [<https://perma.cc/CX3Z-3PTG>].

<sup>223</sup> See Steve Price, *How a Flexible Work Culture Works for Everyone*, FORBES (Dec. 8, 2017, 8:30 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/12/08/how-a-flexible-work-culture-works-for-everyone/#247d95be3b7f> [<https://perma.cc/8VPR-UYTT>].

<sup>224</sup> See Krystal D'Costa, *The Rising Trend of Pets at Work*, SCI. AM. (May 11, 2017), <https://blogs.scientificamerican.com/anthropology-in-practice/the-rising-trend-of-pets-at-work/> [<https://perma.cc/SQWQ-5R4J>].

<sup>225</sup> Jana Kasperkevic, *Why Having a Work Spouse Is Good for You*, MARKETPLACE (Feb. 9, 2018), <https://www.marketplace.org/2018/02/09/business/why-having-work-spouse-good-you> [<https://perma.cc/ZA5T-7USL>].

<sup>226</sup> The term “work spouse” describes a close, equality-reinforcing relationship of mutual benefit. The workplace marriage metaphor, however, has different meanings and has evolved over time:

A metaphor that was once used to describe a relationship arising out of coercion and lack of opportunity is now used to describe relationships arising out of choice. This move has created room for multiple, and shifting, conceptions of the work wife. Some portrayals of work wives still hinge on subordination, much like those in the pre-Title VII workplace, whereas others focus on the privileges attaching to both parties in the relationship. Some of the work wives portrayed continue to be women, but some are now men. The metaphor continues to be used to describe male-female relationships, but it is also used to describe same-sex relationships. The term “work wife” remains, but it is often replaced by the gender-neutral term “work spouse” or even “work husband.”

Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 348 (2013).

<sup>227</sup> Kasperkevic, *supra* note 225; see Schultz, *supra* note 54, at 2069 (critiquing the dangers

can consequently reduce environmental toxicity,<sup>228</sup> improve productivity,<sup>229</sup> and improve workers' long-term mental health.<sup>230</sup>

In 2017, a survey indicated that 70% of workers had a close friend at work, an increase from the 65% and 32% of workers in 2010 and 2006 respectively who said that they had a meaningful relationship at work.<sup>231</sup> Polling by Gallup focusing on women in the workplace reported that women who said that they have a best friend at work also reported higher levels of engagement compared to women who did not.<sup>232</sup> Workplace friendships, it should be emphasized, can take any number of forms. They can be between two men, two women, or between a man and a woman.<sup>233</sup> These bonds can form between people of varying sexual orientations and gender identities.<sup>234</sup>

The positive yields of these close-knit friendships spill over to employers in the form of improved information sharing,<sup>235</sup> higher net profits, increased customer engagement, and fewer safety incidents.<sup>236</sup> Moreover, employers benefit from employees who have a greater sense of investment in their workplace with friends present—these employees may be less likely to leave their job, more likely to innovate, be more ethical, and be more willing to exceed expectations.<sup>237</sup>

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of sanitizing the workplace because of sexual harassment fears and explaining that “when managers punish employees for sexualized interactions with each other, they create a climate that may stifle workplace friendships and solidarity more generally”).

<sup>228</sup> Kasperkevic, *supra* note 225.

<sup>229</sup> See Seunghoo Chung et al., *Friends with Performance Benefits: A Meta-Analysis on the Relationship Between Friendship and Group Performance*, 44 PERSONALITY & SOC. PSYCHOL. BULL. 63, 63 (2018) (evaluating data from 26 studies to conclude that “friendship has a significant positive effect on group task performance”).

<sup>230</sup> See Emma Seppälä & Marissa King, *Having Work Friends Can Be Tricky, but It's Worth It*, HARV. BUS. REV. (Aug. 8, 2017), <https://hbr.org/2017/08/having-work-friends-can-be-tricky-but-its-worth-it> [<https://perma.cc/Y6SC-QVRX>] (“[P]eople who have a ‘best friend at work’ are not only more likely to be happier and healthier, they are also seven times as likely to be engaged in their job. What’s more, employees who report having friends at work have higher levels of productivity, retention, and job satisfaction than those who don’t.”).

<sup>231</sup> *Cubicle Comradery and the Proliferation of the Work Spouse*, OFF. PULSE (Feb. 14, 2017), [https://officepulse.captivate.com/workspouse\\_2017](https://officepulse.captivate.com/workspouse_2017) [<https://perma.cc/F4A8-UNMB>].

<sup>232</sup> Annamarie Mann, *Why We Need Best Friends at Work*, GALLUP (Jan. 15, 2018), [https://www.gallup.com/workplace/236213/why-need-best-friends-work.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_content=morelink&utm\\_campaign=syndication](https://www.gallup.com/workplace/236213/why-need-best-friends-work.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication) [<https://perma.cc/RT2L-B6TX>].

<sup>233</sup> See Kasperkevic, *supra* note 225.

<sup>234</sup> See *id.*

<sup>235</sup> Chung et al., *supra* note 229, at 66 (2018).

<sup>236</sup> Mann, *supra* note 232 (positing that if six out of ten employees forged strong friendships at the workplace, employers would see 36% fewer safety incidents, 7% more engaged customers, and 12% higher profits).

<sup>237</sup> *Id.*

The positive gains notwithstanding, mixing pleasure with business can be a dangerous venture.<sup>238</sup> Close friendships in professional settings can also cause conflict and lead to adverse employment actions for reasons like hurt feelings, anger, or envy.<sup>239</sup> Not all workplace decisions that negatively affect employees and arise from a workplace friendship constitute unlawful discrimination. There are particular kinds of actions, however, that should be viewed as invidious in the sex discrimination context—for example, if an employee is terminated because of spousal or supervisor jealousy, speculative fears of sexual harassment, or challenges that the employee's relationship presents to workplace gender dynamics. Employment decisions that take workers' platonic relationships into account for these reasons constitute sex-based discrimination. They are also sexist acts intended to reinforce gender norms and double down on sex stereotypes that women are temptresses,<sup>240</sup> men lack self-control,<sup>241</sup> and men need to isolate themselves from women to gain an upper hand on women who threaten male strangleholds on power.<sup>242</sup> Such power structures are

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<sup>238</sup> Melissa Dahl, *Why Office Friendships Can Feel So Awkward*, N.Y. TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/28/smarter-living/why-office-friendships-can-feel-so-awkward.html> [<https://perma.cc/A7HU-LPYH>] (discussing research showing workers with workplace friendships “tend[] to report more emotional exhaustion” because they assume “two roles at once: friend and colleague. Friends unconditionally support each other, but colleagues can’t always do that, especially when their own reputation is at stake. It can be draining to have to decide which role to play, and when.”).

<sup>239</sup> See Seppälä & King, *supra* note 230 (“The difficult truth is it just may not be possible to have friendships at work without some degree of fallout.”); *Cubicle Comradery and the Proliferation of the Work Spouse*, *supra* note 231 (explaining that “[w]hether lines are being crossed or not, these workplace relationships can . . . spark a little tension” or provoke feelings of jealousy in an employee’s “real” spouse).

<sup>240</sup> See Glick & Fiske, *supra* note 40, at 494.

<sup>241</sup> See Levin, *supra* note 15; see also Andrew Goldfinger, *Men Are Wild Animals—I Should Know, I Am One*, BALTIMORE SUN (Jan. 10, 2018, 8:05 AM) (writing in response to outcry against sexual abuse and harassment that “[men] are taught never to trust ourselves [around women] until the day of our death”).

<sup>242</sup> See Sophie Soklaridis et al., *Men’s Fear of Mentoring in the #MeToo Era—What’s at Stake for Academic Medicine?*, 379 N. ENG. J. MED. 2270, 2272 (2018) (“The backlash against #MeToo is an example of hostile sexism: it punishes women by withdrawing mentorship opportunities from those who challenge the status quo.”); *When Men Mentor Women*, HARV. BUS. REV. (Oct. 23, 2018), <https://hbr.org/ideacast/2018/10/when-men-mentor-women.html> [<https://perma.cc/DA22-47WH>] (explaining that “men tend to be the stakeholders—the power holders—in the organizations because they’re in the positions of leadership where they can make a difference,” and as a result, women “may not be in the same positions of power to offer the same opportunities that these other men can do”); Shelley Zalis, *The Future Of Masculinity: Overcoming Stereotypes*, FORBES (Jan. 22, 2019, 12:13 AM), <https://www.forbes.com/sites/shelleyzalis/2019/01/22/the-future-of-masculinity-overcoming-stereotypes/#6e500b881af3> [<https://perma.cc/EC97-AV8X>] (“[R]esearch . . . shows that many men think women are dangerous. This defensive, black-and-white thinking is a reaction to a change in the rules and power status.”).

often reinforced by male-dominated socialization networks.<sup>243</sup> The perpetuation of gender-based stigmas like these stymies progress towards basic workforce equality.

#### A. *The Error of Jealousy Fixation*

In 1999, Dr. James Knight hired a dental assistant, Melissa Nelson, to work at his dental office.<sup>244</sup> For nearly 11 years, Nelson worked for Dr. Knight and was by Dr. Knight's own admission a good employee.<sup>245</sup> Nelson enjoyed a good working relationship with Dr. Knight and thought highly of him.<sup>246</sup> Nelson and Knight texted one another about work and personal issues towards the end of their employment relationship.<sup>247</sup> Both Knight and Nelson welcomed the texts and both initiated texting.<sup>248</sup> While some of the texts from Dr. Knight contained some sexual innuendo, Nelson said that she only thought of

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<sup>243</sup> See Ronald J. Burke, *Organizational Culture, Work Investments, and the Careers of Men: Disadvantages to Women?*, in *THE OXFORD HANDBOOK OF GENDER IN ORGANIZATIONS* 373 (2014) (finding that gendered workplace cultures lead "male decision-makers . . . to use gender-related factors and criteria in their selection and promotion decisions"); Fiona Anderson-Gough et al., "*Helping Them to Forget*": *The Organizational Embedding of Gender Relations in Public Audit Firms*, 30 *ACCT, ORGS, & SOC.* 469, 469–70 (2005) (describing male social networks in the accounting field); Debra A. Garguilo et al., *Women in Surgery: Do We Really Understand the Deterrents?*, 141 *ARCHIVES OF SURGERY* 405, 405 (2006) (finding "the perceived surgical personality and surgical culture is a sex-specific deterrence to a career in surgery for women"); Elizabeth H. Gorman & Julie A. Kmec, *Hierarchical Rank and Women's Organizational Mobility: Glass Ceilings in Corporate Law Firms*, 114 *AM. J. SOC.* 1428, 1465 (2009) (finding male social networks retard women's career mobility in law firms particularly with respect to internal promotions); Herminia Ibarra, *Homophily and Differential Returns: Sex Differences in Network Structure and Access in an Advertising Firm*, 37 *ADMIN. SCI. Q.* 422, 422 (1992) (observing that social networks "reinforce gender inequalities in the organizational distribution of power" because of the "tendency to form same-sex network relationships"); Judith G. Oakley, *Gender-Based Barriers to Senior Management Positions: Understanding the Scarcity of Female CEOs*, 27 *J. BUS. ETHICS* 321, 328 (2000) (describing the old boy network as "an informal male social system that stretches within and across organizations, and excludes less powerful males and all women from membership"); Liz Elting, *How to Navigate a Boys' Club Culture*, *FORBES* (July 27, 2018), <https://www.forbes.com/sites/lizelting/2018/07/27/how-to-navigate-a-boys-club-culture/#124eb23f4025> [<https://perma.cc/PL2R-F94C>] (critiquing "boys' club culture" as "a death knell for women wherever we encounter them; they promote from within and provide networking and professional mentoring opportunities that are simply not available to anyone who isn't a part of them. And since so many are also havens for toxicity, relying on a degree of sexist humor and objectification for their camaraderie, women are rarely admitted.").

<sup>244</sup> *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 65 (Iowa 2013).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> See *id.*

Dr. Knight as a friend, mentor, and father figure in whom she had no sexual or romantic interest.<sup>249</sup>

Dr. Knight's wife discovered the text messages.<sup>250</sup> Mrs. Knight, who also worked at the dental practice, demanded Nelson's termination because she viewed Nelson as a threat to the marriage.<sup>251</sup> After calling his pastor to serve as a witness, Dr. Knight fired Nelson by reading a prepared statement that her continued employment was unhealthy for him and his family.<sup>252</sup> Nelson's husband asked to meet with Dr. Knight and discuss his decision.<sup>253</sup> Dr. Knight told Nelson's husband that she "had not done anything wrong or inappropriate and that she was the best dental assistant he ever had."<sup>254</sup> Knight hired another woman to fill the vacant position.<sup>255</sup>

Nelson sued under the Iowa Civil Rights Act claiming that her termination was unlawful sex discrimination because Dr. Knight dismissed "her because of her gender and would not have terminated her if she was male."<sup>256</sup> The Iowa Supreme Court rejected Nelson's arguments and held that Knight's decision to fire Nelson did not constitute sex discrimination.<sup>257</sup> Noting that "Title VII and the Iowa Civil Rights Act are not general fairness laws" but instead bar "discrimination based upon the employee's protected status,"<sup>258</sup> the court reasoned that Knight cut ties with Nelson without running afoul of the Iowa Civil Rights Act because his wife "unfairly or not, viewed [Nelson] as a threat to [their] marriage."<sup>259</sup> In short, the Iowa Supreme Court considered marital anxiety to be a kind of toxic workplace circumstance distinct from sex discrimination.

The court erred, however, by failing to recognize that Nelson's relationship with Knight should have been a protected sex-based association and that employers should not be able to take protected associations into account when taking materially adverse preemptive measures to prevent unfounded fears of future acts of sexual harassment. Nelson's only crime was engaging in the kind of workplace so-

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<sup>249</sup> *Id.* at 65–66.

<sup>250</sup> *Id.* at 66.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *See id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 65, 67.

<sup>257</sup> *Id.* at 64.

<sup>258</sup> *Id.* at 69.

<sup>259</sup> *Id.* at 71.



cialization that men have enjoyed for decades. By shielding her employer from liability, the court's ruling turned a blind eye to the harms of ambivalent sexism. Nelson was denied the protection of the law for forming the same kinds of interpersonal connections that men use to advance their careers because the court viewed her termination as the unfortunate consequence of a man looking out for the needs of his spouse. The court's fixation on spousal jealousy doubled down on the ambivalent sexism to which Nelson fell victim.

Though the Iowa Supreme Court decision was recent, similarly flavored decisions date back years. Take, for example, *Platner v. Cash & Thomas Contractors, Inc.*,<sup>260</sup> where Jeri Platner filed a Title VII sex discrimination suit after her boss and company owner Jack Thomas terminated her employment.<sup>261</sup> Platner worked at the company alongside Thomas's son and daughter-in-law.<sup>262</sup> The company provided a recreation area where employees often socialized over beers after the workday.<sup>263</sup> Platner took part in the socialization, including with Thomas's son, which caused Thomas's daughter-in-law to become "unduly jealous" and develop "a heightened sense of need to protect her marital interest."<sup>264</sup>

Though she was a good employee by all accounts,<sup>265</sup> Thomas fired Platner purportedly in the interest of protecting his son's marriage.<sup>266</sup> Despite finding that "Platner's conduct in socializing . . . while not entirely 'prudent' once it became clear how [her coworker's wife] felt, [was] basically blameless and no different from that of the male employees," the district court held that she did not have a viable claim of sex discrimination.<sup>267</sup> The Eleventh Circuit affirmed, concluding that the "ultimate basis for Platner's dismissal was not gender but simply favoritism for a close relative."<sup>268</sup>

Like the Iowa high court in *Nelson v. Knight*,<sup>269</sup> the *Platner* court overlooked that the plaintiff would not have suffered an adverse employment decision had she been a man engaged in similar socialization habits *even though the district court all but reached that exact conclu-*

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<sup>260</sup> 908 F.2d 902 (11th Cir. 1990).

<sup>261</sup> *Id.* at 903–04.

<sup>262</sup> *Id.* at 903.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *See id.*

<sup>266</sup> *Id.* at 904.

<sup>267</sup> *Id.* at 903.

<sup>268</sup> *Id.* at 905.

<sup>269</sup> 834 N.W.2d 64 (Iowa 2013).

sion.<sup>270</sup> Rather than address head on the associational discrimination at the heart of the case, the panel brushed off Platner's claim because the court viewed her plight as the product of unfortunate circumstances rather than as sexism.<sup>271</sup> Worse yet, however, was the district court's paternalistic description of Platner's behavior at work as imprudent notwithstanding the court's attribution of no wrongdoing to her.<sup>272</sup> Herein lies the challenge of the law: unlike hostile forms of sexism, acts of ambivalent sexism committed for the preservation of marital harmony are more likely to fly under the judicial radar.

### B. Romantic Discrimination and Favoritism

When office romances sour or illicit workplace sexual relationships are discovered, those dynamics can be problematic for corporate decision-makers, especially when they involve a supervisor and a subordinate.<sup>273</sup> In these circumstances, adverse employment consequences may fall on subordinate employees because their supervisors are spurned lovers, resentful,<sup>274</sup> or desperate to save another preexisting relationship like a marriage.<sup>275</sup> Of course, motivated decision-making of this species is improper sexual harassment if it is taken because the advances are unwelcomed and rejected.<sup>276</sup> The consequences that flow from a noncoercive voluntary romantic relationship gone wrong are different, with crucial caveats.<sup>277</sup> Employers may be liable for sex-

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<sup>270</sup> See *Platner*, 908 F.2d at 903.

<sup>271</sup> See *id.* at 905 (describing the nepotism underlying Thomas's decision to terminate Platner as "unseemly and regrettable").

<sup>272</sup> See *id.* at 903.

<sup>273</sup> See Larsa K. Ramsini, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 WM. & MARY L. REV. 1961, 1991-92 (2014).

<sup>274</sup> See Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 577 (2006) ("[W]hen a supervisor fails to promote a subordinate who is otherwise entitled to a promotion because the subordinate refused his unwelcome sexual advances . . . such a failure to promote would constitute the requisite change in employment status precisely because the supervisor prevented the employee from receiving something to which the employee was entitled.").

<sup>275</sup> See *supra* Section III.A.

<sup>276</sup> See Ramsini, *supra* note 273, at 1966 ("Under a *quid pro quo* theory, the plaintiff must show that the accused 'explicitly or implicitly condition[ed] a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct.'").

<sup>277</sup> See *id.* at 1968 (noting the importance of legal requirements that prevent "consensual workplace sex" from forming "the basis for a civil action" (quoting Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991))).

ual harassment when intimate relationships are coerced or expected widely for company advancement.<sup>278</sup>

But, because current precedent excludes isolated and noncoercive relationships from antidiscrimination law's protections, it is important to distinguish them from associational discrimination. Judges have mistakenly collapsed existing doctrine governing employment consequences flowing from one-off, voluntary, noncoercive intimate relationships at the workplace with platonic relationships rather than properly viewing intimate relationships as falling generally outside the ambit of the defensive glass ceiling category.

Even happy office romances can cause disquiet in the workplace where the relationship between a supervisor and a subordinate is perceived by the subordinate's coworkers as stifling career opportunities because of favoritism.<sup>279</sup> While understandably miffed, coworkers who believe that the subordinate is receiving prime assignments, favorable compensation, or leeway to bend company rules have no actionable claim arising from the disadvantage.<sup>280</sup> Courts have rebuffed plaintiffs' attempts to shoehorn paramour favoritism as a form of sex discrimination.<sup>281</sup> While fundamentally unjust, a romantic relationship's negative externalities, like the fallout from broken voluntary romances, are not actionable sex-based discrimination.<sup>282</sup>

Title VII and parallel state laws govern employment practices that block opportunities because of an individuals' traits.<sup>283</sup> They are not tools to combat bristly personalities, sanitize the workplace, or impose rigid requirements that constrict employers from making personal judgments about the kind of businesses that they want to run.<sup>284</sup>

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<sup>278</sup> See *id.* at 1966.

<sup>279</sup> See Bethany A. Corbin, *The Goldilocks Dilemma—Why Being “Too Hot” Isn’t “Just Right”: An Analysis of Sex Discrimination in Light of Nelson v. Knight and the “Irresistible” Employee*, 23 TEX. J. WOMEN & L. 95, 106 (2014) (“Preferential treatment in the workplace disadvantages both males and females in the office who are not involved in the sexual relationship.”).

<sup>280</sup> See *id.* at 105–06 (explaining that “[i]solated instances of sexual favoritism were not found to violate Title VII” because preferential treatment based on a consensual romantic relationship in the workplace constitutes “a gender neutral, albeit unfair, justification” for disadvantaging other employees, both men and women) (citation omitted).

<sup>281</sup> See *infra* note 293.

<sup>282</sup> Some courts, however, have recognized claims of discrimination where employees enter a sexual relationship with a supervisor because a decision-maker sets that expectation or where there is evidence of widespread sexual favoritism that creates a hostile work environment. See *infra* note 297.

<sup>283</sup> See *supra* notes 258–59.

<sup>284</sup> See *supra* note 102, 227, text accompanying notes 258–59; *infra* note 334, text accompanying note 350.

This is exactly where the Iowa Supreme Court in *Nelson v. Knight* went astray, for example, by conflating platonic and ordinary associations with relationships that involve illicit conduct. When an employee knowingly crosses the line from platonic friendly relationships in the workplace to intimate or romantic relationships, any employment decision made because of that relationship is not governed by antidiscrimination law's sex discrimination provisions—with a cardinal caveat that former relationships do not provide jilted lovers with *carte blanche* to engage in sex discrimination against former partners.<sup>285</sup> These calculations are devoid of the type of stereotyping about the proper roles of men and women in the shared workplace or anxiety that would not arise but for the employee's relationship status.<sup>286</sup> Rather, because they turn on the employee's voluntary conduct,<sup>287</sup> these kinds of deeply personal motivated actions are not part of a structural barrier to employment opportunities that antidiscrimination law's sex-based protections safeguards against.<sup>288</sup>

For example, in *Tenge v. Phillips Modern Ag Co.*,<sup>289</sup> the Eighth Circuit affirmed summary judgment for an employer who terminated an employee at the urging of the owner's wife because she was seen flirting repeatedly with the owner. The employee admitted to engaging in physical flirtatious contact with the husband and writing "notes

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285 The First Circuit Court of Appeals ably explained this proposition:

In cases involving a prior failed relationship between an accused harasser and alleged victim, reasoning that the harassment could not have been motivated by the victim's sex because it was instead motivated by a romantic relationship gone sour establishes a false dichotomy. Presumably the prior relationship would never have occurred if the victim were not a member of the sex preferred by the harasser, and thus the victim's sex is inextricably linked to the harasser's decision to harass. To interpret sexual harassment perpetrated by a jilted lover in all cases not as gender discrimination, but rather as discrimination on the basis of the failed interpersonal relationship is as flawed a proposition under Title VII as the corollary that "ordinary" sexual harassment does not violate Title VII when the [ ] asserted purpose is the establishment of a "new interpersonal relationship." Whether a harasser picks his or her targets because of a prior intimate relationship, desire for a future intimate relationship, or any other factor that draws the harasser's attention should not be the focus of the Title VII analysis. Instead, improper gender bias can be inferred from conduct; if the harassing conduct is gender-based, Title VII's requirement that the harassment be "based upon sex" is satisfied.

*Forrest v. Brinker Int'l Payroll Co.*, 511 F.3d 225, 229 (1st Cir. 2007) (alteration in original) (internal quotations and citations omitted).

286 See *infra* notes 289–92 and accompanying text.

287 See *infra* notes 289–92 and accompanying text.

288 See *infra* notes 293–95 and accompanying text.

289 446 F.3d 903, 906 (8th Cir. 2006).

of a sexual or intimate nature” that were posted conspicuously.<sup>290</sup> Rejecting the employee’s claims of sex discrimination under Title VII and the Iowa Civil Rights Act, the court held that the termination was not about her sex but her “own actions and therefore is permissible under Title VII.”<sup>291</sup> The “ultimate basis” for the employee’s dismissal was her “admitted sexual behavior.”<sup>292</sup>

This principle is derived from decades of precedent holding that paramour discrimination and sexual favoritism is not generally actionable under Title VII.<sup>293</sup> An early decision by the Second Circuit illustrates the leading rationale for why favoritism claims fall generally outside the ambit of statutory prohibitions on workplace sex discrimination. In *DeCintio v. Westchester County Medical Center*,<sup>294</sup> a number of male respiratory therapists sued their employer because they were denied a promotion over a female coworker who was involved romantically with their superior. The Second Circuit held that the alleged sexual favoritism failed to support a sex discrimination claim, concluding that the male employees were disfavored in the same way as female employees because the supervisor took his *relationship* into account, not their *sex*.<sup>295</sup>

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 910.

<sup>292</sup> *Id.*

<sup>293</sup> *E.g.*, *Knadler v. Furth*, 253 F. App’x 661, 664 (9th Cir. 2007) (“We have not accepted the ‘paramour’ theory of gender discrimination.”); *Ackel v. Nat’l Comm’n, Inc.*, 339 F.3d 376, 382 (5th Cir. 2003) (“[W]hen an employer discriminates in favor of a paramour, such an action is not sex-based discrimination, as the favoritism, while unfair, disadvantages both sexes alike for reasons other than gender.”) (citation omitted); *Schobert v. Ill. Dep’t of Transp.*, 304 F.3d 725, 732–33 (7th Cir. 2002) (“Title VII does not . . . prevent employers from favoring employees because of personal relationships” because, “[h]ad there been other women in the [workplace], they would have suffered in exactly the same way [as the male plaintiff] . . . which also shows why this is not really a sex discrimination problem.”); *Womack v. Runyon*, 147 F.3d 1298, 1299–1301 (11th Cir. 1998) (affirming dismissal of sex discrimination claim arising from sexual favoritism affecting a promotion decision); *Taken v. Okla. Corp. Comm’n*, 125 F.3d 1366, 1370 (10th Cir. 1997) (holding allegations that a “supervisor preselected his paramour for a [benefit] even though she was less qualified than either [p]laintiff” were not cognizable under Title VII because the selection was “based on a voluntary romantic affiliation, and not on any gender differences”); *Becerra v. Dalton*, 94 F.3d 145, 149–50 (4th Cir. 1996) (holding claim that a supervisor passed over the plaintiff for a promotion in favor of a coworker because of sexual favors was not a violation of Title VII); *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 501 (W.D. Pa. 1988) (“[P]referential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender-based discrimination.”), *aff’d mem.*, 856 F.2d 184 (3d Cir. 1988). For a state court ruling adopting a similar approach, see *Patterson v. State, Dep’t of Health & Welfare*, 256 P.3d 718, 727 (Idaho 2011) (holding that paramour discrimination or sexual favoritism is not barred by the Idaho Human Rights Act).

<sup>294</sup> 807 F.2d 304, 305–06 (2d Cir. 1986).

<sup>295</sup> *Id.* at 308.

While the negative externalities of sexual favoritism may often disproportionately burden employees of one sex—presuming that the biased decision-maker is not attracted to individuals of the same sex—the actual harms in terms of foreclosed opportunities are shouldered by all employees.<sup>296</sup> Thus, there is an understandable disconnect between the way disfavored employees process their disadvantaged position and the aggregate harm. If sexual favoritism is widespread at a workplace rather than an isolated occurrence, there may be sufficient evidence to state a claim, which is consistent with the notion that paramour cases are not actionable *because they are not structural or systemic* sex-based roadblocks to equal workplace opportunity.<sup>297</sup>

The lesson here is that courts view sexual favoritism cases like *Tenge* as a different side of the same coin as *DeCintio*. If the law can leave third parties who are denied opportunities because of sexual favoritism with no recourse because that discrimination is not based on sex, employees who face negative consequences because of their own initiated sexual advances or voluntary sexual relationships cannot cloak themselves in statutory protections either. Ultimately, these favoritism cases are one offs that harm every employee except the employee with favored status.<sup>298</sup> Consequently, favoritism cases are neither structural nor based in sex stereotypes. Confusing this line of cases rejecting sex discrimination claims emanating from paramour discrimination and sexual favoritism for the kind of associational discrimination at the heart of *Nelson v. Knight*,<sup>299</sup> however, is a mistake.

### C. Using Associational Theory to Protect Equal Opportunity

In 1970, the EEOC determined that associational claims were actionable under Title VII.<sup>300</sup> Though courts' initial reception to rela-

<sup>296</sup> See *id.*

<sup>297</sup> See *Miller v. Dep't of Corr.*, 115 P.3d 77, 90 (Cal. 2005) (holding actionable sexual harassment claims can be brought under the California Fair Employment and Housing Act if "widespread sexual favoritism [i]s severe or pervasive enough to alter [an employee's] working conditions and create a hostile work environment"); EEOC, Policy Guidance on Employer Liability Under Title VII For Sexual Favoritism, 1990 WL 1104702, at \*3 (Jan. 12, 1990) (taking the position that isolated acts of favoritism are not actionable, but widespread expectations of sexual favors or incidents of sexual favoritism in the workplace can establish a hostile work environment).

<sup>298</sup> See Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551, 555 (2009) ("While hiring an individual paramour may violate nepotism rules and may be undesirable from the perspective of the good functioning of a particular workplace, it is not sex discrimination because no one of any sex, other than this particular person, could have gotten the job.").

<sup>299</sup> See *supra* notes 244–59.

<sup>300</sup> EEOC Decision No. 71-909, 3 Fair Empl. Prac. Cas. (BNA) 269 (1970) (finding Title

tionship-based claims was mixed,<sup>301</sup> a landmark New York district court decision blazed a path forward for associational claims under Title VII. In *Whitney v. Greater New York Corp. of Seventh Day Adventists*,<sup>302</sup> a district court permitted a white woman's Title VII claim to go forward on the theory that she was discharged because of her social involvement with a black man.<sup>303</sup> The court reasoned:

Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black [man], her complaint falls within the statutory language that she was "[d]ischarged . . . because of [her] race."<sup>304</sup>

The Eleventh Circuit in 1986 recognized the associational theory of discrimination in *Parr v. Woodmen of the World Life Insurance Co.*<sup>305</sup> In *Parr*, Don Parr applied for an insurance salesman position but was not hired after the company became aware he was in an interracial marriage.<sup>306</sup> The district court granted the company's motion to dismiss because Parr was not discriminated against because of his race.<sup>307</sup> The circuit court reversed, holding that "Title VII proscribes race-conscious discriminatory practices" and that "[i]t would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had

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VII applied to claim by white employee that he was discharged for fraternizing with nonwhite employees); see also Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 218–19 (2012) (noting courts' acknowledgement of early EEOC determinations that Title VII prohibits discrimination on the basis of interracial associations).

<sup>301</sup> See *Adams v. Governor's Comm. on Post-Secondary Educ.*, 26 F.E.P. Cases 1348, 1351 (N.D. Ga. 1981) (rejecting a white man's Title VII claim for unlawful discharge because of his interracial marriage); *Clark v. Louisa Cty. Sch. Bd.*, 472 F. Supp. 321, 324 (E.D. Va. 1979) ("Plaintiff sufficiently alleges that she, a member of the white race, has been discriminated against because she is married to a member of the black race."); *Holiday v. Belle's Rest.*, 409 F. Supp. 904, 907–09 (W.D. Pa. 1976) (denying motion to dismiss race discrimination association claim); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205, 208 (N.D. Ala. 1973) (dismissing a white employee's lawsuit alleging termination because of his association with black employees for want of a claim that he "suffered any detriment on account of *his* race") (emphasis added).

<sup>302</sup> 401 F. Supp. 1363 (S.D.N.Y. 1975).

<sup>303</sup> *Id.* at 1366.

<sup>304</sup> *Id.*

<sup>305</sup> 791 F.2d 888, 892 (11th Cir. 1986).

<sup>306</sup> *Id.* at 889.

<sup>307</sup> *Id.*

the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired."<sup>308</sup>

The Eleventh Circuit was the first to recognize relationship-based claims under Title VII,<sup>309</sup> but every circuit court to consider the associational theory followed the Eleventh Circuit's decision.<sup>310</sup> Following the reasoning in *Whitney* and *Parr*, the Second Circuit described the logic behind an associational theory of discrimination as "simple" because "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."<sup>311</sup> Recent decisions examining Title VII's scope with respect to sexual orientation discrimination have relied on associational theory to conclude that sexual orientation discrimination is unlawful discrimination on the basis of sex.

In the first appellate decision to hold that sexual orientation discrimination is cognizable under Title VII's existing framework, *Hively v. Ivy Tech Community College of Indiana*,<sup>312</sup> the court used associational theory to reach its conclusion. Kimberly Hively's employment at Ivy Tech Community College in South Bend, Indiana started in 2000.<sup>313</sup> For nine years, Hively's time as an adjunct math teacher was seemingly uneventful, until she was seen kissing her girlfriend goodbye in a parking lot.<sup>314</sup> Hively claimed that an Ivy Tech administrator reprimanded her the following day for the kiss.<sup>315</sup> Ivy Tech subsequently declined to hire her full time or to renew her adjunct teaching

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<sup>308</sup> *Id.* at 892.

<sup>309</sup> *Id.*

<sup>310</sup> See *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998).

<sup>311</sup> *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008). Unlike in the constitutional setting, "under Title VII a distinction based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083–84 (1983); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (indicating that "[n]othing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be" prohibited like racial harassment).

<sup>312</sup> 853 F.3d 339, 340–42, 347–49 (7th Cir. 2017).

<sup>313</sup> *Id.* at 341.

<sup>314</sup> See Elyssa Cherney, *In Case Involving Indiana Teacher, Judges Consider Workplace Protections for LGBT Community*, CHI. TRIB. (Dec. 1, 2016), <https://www.chicagotribune.com/nation-world/ct-kimberly-hively-lgbt-workplace-bias-appeal-20161130-story.html> [<https://perma.cc/UDJ9-ZKL8>].

<sup>315</sup> *Id.*



contract when it expired in 2014.<sup>316</sup> Hively believed that Ivy Tech refused to hire her for a full-time position because of her sexual orientation.<sup>317</sup>

After receiving a right-to-sue letter from the EEOC, Hively filed a pro se action under Title VII.<sup>318</sup> Ivy Tech filed a motion to dismiss, which the court granted, citing Seventh Circuit precedent that sexual orientation discrimination claims are not cognizable under Title VII.<sup>319</sup> On appeal and sitting en banc, the *Hively* court explained that, under the associational theory outlined in *Parr*, if an employer discriminated against an employee because the employee was in an interracial relationship, the employer's conduct would be unlawful because the employer took race into account.<sup>320</sup> Extending that logic to Hively's claim, the court reasoned: "If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex."<sup>321</sup> As a result,

to the extent that [Title VII] prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.<sup>322</sup>

The same rule can apply to situations in which an employee is treated adversely because of a meaningful platonic workplace relationship that threatens power dynamics on the jobsite or sparks jealousy, or because a decision-maker who is a party to the relationship has an unsubstantiated fear that the relationship will cause a hostile work environment. When adverse employment actions are taken in this vein, the associational discrimination would not have happened

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<sup>316</sup> *Hively*, 853 F.3d at 341.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-CV-1791, 2015 WL 926015, at \*1, 3 (N.D. Ind. Mar. 3, 2015), *aff'd sub nom. Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 830 F.3d 698 (7th Cir. 2016), *reh'g en banc granted, opinion vacated*, *Hively v. Ivy Tech Cmty. Coll.*, S. Bend, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *rev'd sub nom. Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

<sup>320</sup> *Hively*, 853 F.3d at 347–48 (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1996)).

<sup>321</sup> *Id.* at 349.

<sup>322</sup> *Id.*

but for the fears, jealousy, or defensive factors that arise because of the employee's sex. This kind of decision-making, when used against women specifically, penalizes them for the kind of socialization commonly expected within male circles to advance male employees' careers.<sup>323</sup>

While associational discrimination is often discussed in terms of animus projected at a romantic relationship or a marriage, other associations are also protected under federal law.<sup>324</sup> As the Sixth Circuit determined in *Barrett v. Whirlpool Corp.*,<sup>325</sup> associations "need not necessarily be familial or intimate" to state an associational discrimination claim. The *Barrett* court issued its decision notwithstanding the district court's finding that the plaintiffs only alleged discrimination because of "casual, friendly relationships that commonly develop among co-workers but that tend to be limited to the workplace."<sup>326</sup> The appellate court's holding parallels the principle recognized by the Seventh Circuit that in order to state an associational claim, plaintiffs need only show "whether [an] employee has been discriminated against and whether that discrimination was 'because of' the employee's [protected status]."<sup>327</sup> Taken together, these cases stand for the proposition that women who are penalized in the workplace because they form meaningful relationships with coworkers, subordinates, or supervisors that trigger unfounded fears of jealousy, animus for female ambition, or male anxiety about self-control, are treated adversely because of their mixed-sex associations and the attendant stereotypes and threatened power dynamics.

#### IV. BEAUTY BIAS IN THE WORKPLACE

A third defensive hiring practice that adversely harms individuals and may be on the rise in the wake of #MeToo is attraction-based hiring, where individuals are denied employment opportunities because they are perceived as too attractive.<sup>328</sup> Consider, for example, a

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<sup>323</sup> See *supra* notes 242–43.

<sup>324</sup> See, e.g., *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1108, 1118 (9th Cir. 2004) (antidiscrimination protections extend to interracial friendships with coworkers); *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT*, 618 F. Supp. 1458, 1459–60 (D. Colo. 1985) (antidiscrimination protections extend to association with Hispanic community); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (antidiscrimination protections extend to social relationship with African-American nonemployee).

<sup>325</sup> 556 F.3d 502, 512 (6th Cir. 2009) (quoting *Barrett v. Whirlpool Corp.*, 543 F. Supp. 2d 812, 826 (M.D. Tenn. 2008)).

<sup>326</sup> *Id.*

<sup>327</sup> *Drake v. Minnesota Mining. & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998).

<sup>328</sup> See Kim Elssesser, *Are Attractive Women Being Shunned By Employers?* *Tony Robbins*

woman who applies for a position but is ultimately not chosen for the position because a decision-maker is worried that her sex appeal will undermine his ability to control himself in the workplace.<sup>329</sup> Crucially, while attraction-based denials may have the veneer of benign self-preservation, something much more sinister is afoot. This type of thinking is grounded in stereotypes that attractive women are more likely to be victims of sexual harassment.<sup>330</sup> Another iteration of attraction-based hiring, like association-based discrimination, is an employment action emanating from an intimate partner's jealousy. Take, for example, a man whose husband exerts pressure on him to terminate a male employee because the man believes his husband will stray in light of the employee's perceived attractiveness.<sup>331</sup> Such an action is both defensive and a form of sex discrimination because but for the employee's sex, the worker's physical attractiveness would not have caused his dismissal.<sup>332</sup>

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*Says Yes*, FORBES (Apr. 12, 2018, 3:15 PM), <https://www.forbes.com/sites/kimelsesser/2018/04/12/are-attractive-women-being-shunned-by-employers-tony-robbins-says-yes/#57279bdf3e85> [https://perma.cc/FM4V-25WX].

<sup>329</sup> In an NPR interview, New York Magazine writer Ijeoma Oluo recalled:

I was a manager at a predominantly male environment. I was the only female manager outside of the [human resources ("HR")] manager. And we would have these manager meetings. And I remember we were talking about another manager who wasn't in the meeting. And HR says, we have a problem with him. You know, he keeps sexually harassing women in the office. We have to do something about it. And they were trying to hire more staff. And the response that was given was, well, we just have to stop hiring attractive women . . . We can't risk it. You know, and they're making these jokes—let's hire some old lady. You know, let's hire, you know, an old dude. And I was sitting there in this room going, you know, the women impacted by this don't even know they were impacted by this . . .

All Things Considered, *Where Does The #MeToo Movement Go from Here?*, NPR, (Dec. 15, 2017, 4:23 PM), <https://www.npr.org/2017/12/15/571199923/where-does-the-metoo-movement-go-from-here> [https://perma.cc/NKW3-RV59].

<sup>330</sup> See John H. Golden III et al., *Sexual Harassment in the Workplace: Exploring the Effects of Attractiveness on Perception of Harassment*, 45 SEX ROLES 767, 767 (2001) (finding in a study of college students that "behavior of attractive males was less likely to be seen as harassing" and that "[a]ttractive females were more likely to be seen as harassed, especially when the potential harasser was unattractive"); Juan M. Madera et al., *Schematic Responses to Sexual Harassment Complainants: The Influence of Gender and Physical Attractiveness*, 56 SEX ROLES 223, 228 (2007) (finding victims of sexual harassment are more likely to be believed if the complainant is perceived to be attractive).

<sup>331</sup> Kristy Dahl Rogers, *An Irresistible Attraction: Rethinking Romantic Jealousy as a Basis for Sex-Discrimination Claims*, 64 DUKE L.J. 1453, 1464 (2015).

<sup>332</sup> But see *id.* at 1476 ("Once an employee demonstrates that jealousy would not have occurred but for her gender, an employer can rely on garden-variety jealousy as a legitimate nondiscriminatory reason for an employment decision because it is not inherently gendered.").

Manifestly unjust treatment in the labor market is not always actionable.<sup>333</sup> Equal opportunity statutes governing unlawful employment practices like Title VII do not generally bar employers from taking into consideration an individual's appearance or attractiveness.<sup>334</sup> Two statewide jurisdictions, however, have express protections against forms of "lookism." Michigan's Elliot-Larsen Civil Rights Act, enacted in 1976, prohibited height and weight discrimination.<sup>335</sup> The District of Columbia adopted the Human Rights Act, which included "appearance" among the unlawful bases for employment decisions, in 1977.<sup>336</sup>

This rule rests on the presumption that workplace lookism applies equally across protected classes. Under Title VII, courts have permitted employers to enforce sex-differentiated appearance and grooming requirements unless one sex is burdened unequally or a dress code furthers sexual harassment.<sup>337</sup> As Deborah Rhode argued, however, sex-differentiated grooming standards like "[m]akeup and

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<sup>333</sup> See *supra* notes 258–59.

<sup>334</sup> See, e.g., *Alam v. Reno Hilton Corp.*, 819 F. Supp. 905, 913–14 (D. Nev. 1993) ("Staffing decisions based on such subjective qualities demonstrates a rather atavistic approach on the part of the employer; however, when such criteria are applied to different classes of people, the practice is not actionable."); *Malarkey v. Texaco, Inc.*, 559 F. Supp. 117, 122 (S.D.N.Y. 1982) (holding that an employer's favoring of attractive women over less attractive women was not violative of Title VII).

<sup>335</sup> MICH. COMP. LAWS ANN. § 37.2202(1)(a) (West 2008).

<sup>336</sup> D.C. CODE ANN. § 2-1402.11 (West 2001).

<sup>337</sup> See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) ("The material issue under our settled law is not whether [grooming] policies are different, but whether the policy . . . creates an 'unequal burden.'") (internal quotations omitted); see also *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215, 1217 (8th Cir. 1985) (holding news station's appearance standards for female anchors permissible where station also imposed male grooming standards); *Gerdorn v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605–06 (9th Cir. 1982) (disallowing weight limits for female flight attendants because it imposed on them a "significantly greater burden of compliance"); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1032–33 (7th Cir. 1979) (holding uniform requirement for female employees discriminatory because it suggested a "lesser professional status" and was not "justified by business necessity"); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755–56 (9th Cir. 1977) (holding different grooming standards for male and female employees that were not "overly burdensome" to either sex permissible); *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (determining that a shorter hair length requirement for men was not actionable sex discrimination); *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) ("[M]inor differences in personal appearance regulations that reflect customary modes of grooming do not constitute sex discrimination."); *Baker v. Cal. Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) ("Congress was not prompted to add 'sex' to Title VII on account of regulations by employers of dress or cosmetic or grooming practices which an employer might think his particular business required."); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) ("Title VII never was intended to encompass sexual classifications having only an insignificant effect on employment opportunities."); *EEOC v. Sage Realty Corp.*, 87 F.R.D. 365, 370 (S.D.N.Y. 1980) (explaining that employers do not have "unfettered discretion"

manicure requirements may be trivial” but courts “[h]olding only women to standards of sexual attractiveness perpetuates gender roles that are separate and by no means equal.”<sup>338</sup>

### A. *Sex-Plus Theory of Liability and Look Standards*

For individuals who find themselves discriminated against because their bosses might find them too attractive to resist or who are denied opportunities because of internal or external jealousies or power struggles, Title VII’s sex-plus theory of liability is a useful paradigm. Sex-plus claims arise when employers treat a particular characteristic worse for one sex than the employer does for the opposite sex.<sup>339</sup> The landmark Supreme Court decision permitting sex-plus claims was *Phillips v. Martin Marietta Corp.*,<sup>340</sup> where Martin Marietta Corporation refused to employ women with preschool-aged children. The company did not entirely reject women applicants, but it did hire men with preschool-aged children.<sup>341</sup> The Court rejected lower court rulings that the company’s hiring policies were not actionable under Title VII.<sup>342</sup>

Plaintiffs have used sex-plus theories to successfully state claims alleging violations of Title VII because they are unwed mothers,<sup>343</sup> lesbians,<sup>344</sup> older women,<sup>345</sup> black women,<sup>346</sup> and women who did not take their husband’s names.<sup>347</sup> Although these kinds of claims have helped combat subsets of sex discrimination, some courts have limited their range to characteristics that implicate immutable qualities or are

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to require “employees to wear *any* type of uniform the employer chooses, including uniforms which may be characterized as revealing and sexually provocative”).

<sup>338</sup> Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1057 (2009).

<sup>339</sup> *Lax v. 29 Woodmere Blvd. Owners, Inc.*, 812 F. Supp. 2d 228, 235 (E.D.N.Y. 2011).

<sup>340</sup> 400 U.S. 542, 543 (1971).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 544.

<sup>343</sup> *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 267 (N.D. Iowa 1980).

<sup>344</sup> *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018); *Valdes v. Lumberman’s Mut. Cas. Co.*, 507 F. Supp. 10, 13 (S.D. Fla. 1980).

<sup>345</sup> *DeAngelo v. DentalEZ, Inc.*, 738 F. Supp. 2d 572, 585–86 (E.D. Pa. 2010); *Arnett v. Aspin*, 846 F. Supp. 1234, 1241 (E.D. Pa. 1994); *see also Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 109–10 (2d Cir. 2010) (suggesting plaintiff had a colorable sex-plus-age discrimination claim but declining to rule on the issue because plaintiff did not include the claim in her complaint).

<sup>346</sup> *Jeffries v. Harris Cty. Cmty. Action Ass’n*, 615 F.2d 1025, 1034–35 (5th Cir. 1980); *Berndt v. Cal. Dep’t of Corr.*, No. C03-3174 THE, 2005 WL 2596452, at \*7–8 (N.D. Cal. Oct. 13, 2005).

<sup>347</sup> *Allen v. Lovejoy*, 533 F.2d. 522, 523–24 (6th Cir. 1977).

related to fundamental rights.<sup>348</sup> For this reason, sex-differentiation policies for grooming and appearance can withstand legal attacks more easily,<sup>349</sup> as the Fifth Circuit Court of Appeals explained:

Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women *if* the distinction is based on some fundamental right. But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity.<sup>350</sup>

This immutability-fundamental rights rule has no basis in statutory text, does not square with the Supreme Court's holding that imposing racially disparate punishments on employees who have committed the same criminal offenses against their employer is actionable under Title VII,<sup>351</sup> and is in tension with gender nonconformity doctrine arising from *Price Waterhouse v. Hopkins*.<sup>352</sup> Courts' messy

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<sup>348</sup> E.g., *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979) (reconciling Title VII's protections for female parents and unmarried women against sex-differentiated dress codes because Congress intended to eliminate discrimination on the basis of "(1) immutable characteristics, (2) characteristics which are changeable but which involve fundamental rights (such as having children or getting married), and (3) characteristics which are changeable but which significantly affect employment opportunities afforded to one sex"); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 124 n.307 (2003) (explaining that an additional factor in sex-plus cases "must be either a fundamental right, such as having children or marrying, or an immutable physical characteristic"); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 205 (2004) ("More commonly [than not] courts interpreted *Martin Marietta* narrowly, as prohibiting only sex-specific trait discrimination based on immutable characteristics or fundamental rights.").

<sup>349</sup> A federal district court initially upheld makeup and hair requirements for women employed at Harrah's casino under this rationale:

Because a fair reading of the policy indicates that it is applied evenhandedly to employees of both sexes, we conclude that this situation is more like the sex-differentiated standards that impose equal but different burdens on both sexes, than [a weight limit requirement] which imposed a different and heavier burden on women. Moreover, the makeup requirement involves a mutable characteristic, which does not infringe on equal employment opportunities due to one's sex. Therefore, it does not violate Title VII under a disparate treatment theory.

*Jespersen v. Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1193 (D. Nev. 2002), *aff'd* 392 F.3d 1076 (9th Cir. 2004), *aff'd on reh'g en banc* 444 F.3d 1104 (9th Cir. 2006) (internal quotations and citations omitted).

<sup>350</sup> *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

<sup>351</sup> See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282–83 (1976).

<sup>352</sup> 490 U.S. 228 (1989). In this case, the Supreme Court held that Ann Hopkins could state

line-drawing between permissible and impermissible looks-based sex differentiation in the workplace aside, employers cannot take into account sex plus an involuntary characteristic.

### *B. Defensive Attraction Justifications as Gendered Power Moves*

The sex-plus and grooming cases illustrate that individuals who are rejected, fired, or denied advancement opportunities because a decision-maker believes that the individual is too attractive and thus poses an unsubstantiated liability can state a sex discrimination claim, because the decision-maker's bias imposed a burden not shared by attractive members of the opposite sex.<sup>353</sup> The Ninth Circuit's decision in *Frank v. United Airlines, Inc.*<sup>354</sup> supports this principle. In *Frank*, the court addressed the permissibility of United Airlines' physical build requirements and the policy's attendant detriment to women.<sup>355</sup> The airline had maximum weight requirements that forced "female flight attendants to weigh between 14 and 25 pounds less than their male colleagues" of equal age and height.<sup>356</sup> The court held that the policy was unlawful but did not articulate whether it rejected the policy as an appearance standard or under a sex-plus theory:

We need not decide whether a rule or regulation that compels individuals to change or modify their physical structure or composition, as opposed to simply presenting themselves in a neat or acceptable manner, qualifies as an appearance standard. Even if United's weight rules constituted an appearance standard, they would still be invalid. A sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a [bona fide occupational qualification].<sup>357</sup>

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a sex discrimination claim under Title VII when evaluators negatively rated her job performance. *Id.* at 234–35, 258. Assessors perceived Hopkins as too aggressive as well as lacking in feminine appearance and charm. *Id.* at 234–35. While this case is often discussed as an example of sex stereotype discrimination or gender nonconformity discrimination, it is also framed plausibly as a sex-plus case: sex plus aggressive workplace demeanor.

<sup>353</sup> On one hand, it is difficult to classify these claims as sex-plus because "physically attractive" is not an objective, discrete subclass—though this is the thrust of some sex-plus-age claims. *See, e.g.,* *Malarkey v. Texaco, Inc.*, 559 F. Supp. 117, 122 (S.D.N.Y. 1982). On the other hand, these claims do not fit neatly into the appearance/grooming line of cases to the extent that there is no general policy, like uniform or makeup requirements. *See supra* note 337.

<sup>354</sup> 216 F.3d 845 (9th Cir. 2000).

<sup>355</sup> *Id.* at 848.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 855.

A sex discrimination claim arising from physical attraction fears comports with existing sex-plus and appearance standard doctrine. A New York appellate court rightly recognized this in *Edwards v. Nicolai*,<sup>358</sup> where an employer allegedly terminated a woman despite their “purely professional” relationship out of fear that “his wife might become jealous” because the female employee was “too cute.”<sup>359</sup> The state appellate court reasoned that because “adverse employment actions motivated by sexual attraction are gender-based and, therefore, constitute unlawful gender discrimination,” the employer’s motivation to “discharge her by his desire to appease his wife’s unjustified jealousy” was prohibited by New York State and New York City employment antidiscrimination law.<sup>360</sup>

The *Nicolai* decision was correct, but the rationale overly emphasizes sexual attraction as motivation without acknowledging that the employer’s defensive actions reinforced sex-based power dynamics by using stereotypes that reflect principles of hostile sexism and justifications that stem from benevolent sexist thinking.<sup>361</sup> If sexual attraction is the touchstone of sex discrimination, sex discrimination doctrine risks becoming overinclusive because it will necessarily sweep in all forms of favoritism.<sup>362</sup> Conversely, overemphasizing sexual attraction could be underinclusive by overstating the “sexual” in sex discrimination at the expense of understanding sex discrimination as fundamentally about power and gender norms.<sup>363</sup>

If an employee is treated differently because decision-makers fear the negative repercussions of their attraction to their employees, the employees would not have been adversely treated but for their sex and the decision-makers’ underlying aim to reorder the workplace power dynamics in their favor—a commonality shared with decision-making that favors sex quarantines and sex-based associational discrimination.

## CONCLUSION

Over 50 years ago, Congress took significant steps to eradicate artificial barriers to employment opportunities. The sweep of sex discrimination doctrine has evolved dramatically in the time since. The

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<sup>358</sup> 60 N.Y.S.3d 40 (N.Y. App. Div. 2017).

<sup>359</sup> *Id.* at 41.

<sup>360</sup> *Id.* at 42.

<sup>361</sup> *See supra* notes 42–49, 54.

<sup>362</sup> *See supra* notes 54, 280–81, 293.

<sup>363</sup> *See supra* notes 54, 240–42.



law has developed appreciably through judicial interpretation and statutory amendments to combat forms of bias well beyond basic ontological sex discrimination. Today, employment antidiscrimination law protects workers from sexual harassment, gender nonconformity discrimination, sexual orientation bias, and the mistreatment of transgender persons. But for all its progress, employment discrimination doctrine's full potential is hampered by considerable blind spots. The law must continue to mature and afford robust protections to workers who are discriminated against because of anxious decision-makers and defensive workplace environments. The #MeToo Era is an appropriate moment to rethink the law's prior understanding of sexism and renew scrutiny of defensive employment practices that penalize individuals because of ambivalent sexism.