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The Rainbow Connection: Revisiting the Mixed-Motive Summary Judgement Standard in Bostock's Afterglow

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THE RAINBOW CONNECTION: REVISITING THE MIXED-MOTIVE SUMMARY JUDGMENT STANDARD IN *BOSTOCK*'S AFTERGLOW

Courtney Vice*

"You never completely have your rights, one person, until you all have your rights."

- Marsha P. Johnson¹

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1. Bianca Rodriguez, *Unforgettable Quotes by Marsha P. Johnson*, MARIE CLAIRE (June 3, 2020), <https://www.marieclaire.com/politics/a32745825/marsha-p-johnson-quotes/> [https://perma.cc/72SG-TY3F].

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INTRODUCTION

Since the 1969 Stonewall Riots, June has been revered as a month of revolution for LGBTQ*² rights.³ In 2000, President Bill Clinton officially declared June as Gay and Lesbian Pride Month, and, in 2011, President Barack Obama expanded the observance of pride to include transgender and bisexual identities.⁴ June's spark struck again when the Supreme Court upheld same-sex couples' right to marriage in their 2015 *Obergefell v. Hodges* decision.⁵ June was recently an important time for the LGBTQ* community in 2020. On June 15 of that year, the Supreme Court decided *Bostock v. Clayton County*,⁶ which asked whether Title VII of the Civil Rights Act of 1964 (Title VII)⁷ prohibited employment discrimination based on one's sexual orientation and/or gender identity.⁸ In a 6-3 opinion, the Court said yes.⁹

Upon hearing the *Bostock* decision, the LGBTQ* community audibly sighed in relief. Decades of fighting to express their sexual orientation and

2. LGBTQ* here means "lesbian, gay, bisexual, transgender and queer," with "queer" used as an umbrella term to describe the limitless identities that exist outside of rigid categories of gender and sexual orientation. The asterisk encompasses any identities not listed.

3. See Jenna Marina Lee, *Why Do We Celebrate Pride Month in June and LGBT History Month in October?*, UCFTODAY (June 1, 2021), <https://www.ucf.edu/news/why-do-we-celebrate-pride-month-in-june-and-lgbt-history-month-in-october/> [<https://perma.cc/8YBZ-MPR8>].

4. *See id.*

5. 576 U.S. 644 (2015).

6. 140 S. Ct. 1731 (2020).

7. *See* Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e-2.

8. *See Bostock*, 140 S. Ct. at 1737.

9. *See id.* at 1746 ("[T]here is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex.").

gender identity in the workplace without fear had finally culminated in *Bostock*.¹⁰ Duke Law Professor Trina Jones succinctly described the decision's impact: "The decision increases the possibility that the more than 8 million members of the LGBT[Q*] community will be treated with the dignity and respect that people deserve in every aspect of life, and especially when they are simply trying to earn a living."¹¹ Nevertheless, a question lingered in the silence that followed: was this *really* the end of employment discrimination for the LGBTQ* community?

Title VII forbids employers from discriminating against employees "on the basis of race, color, religion, sex, or national origin."¹² Despite Title VII's prohibition on discrimination based on "sex," until *Bostock*, courts had not yet consistently expanded "sex" to include LGBTQ* status as a protected class. In fact, until *Bostock*, even the Court's most expansive readings of "sex" never explicitly included transgender and gender non-conforming people.¹³ The Equal Employment Opportunity Commission (EEOC) had evolved in its own interpretations, expanding Title VII to apply to gender identity in *Macy v. Department of Justice*¹⁴ and further extending it to sexual orientation in 2015 in *Baldwin v. Department of Transportation*.¹⁵ However, the circuit courts were split on whether sexual orientation and gender identity fell into discrimination because of sex.¹⁶ *Bostock* affirmed the EEOC's and certain circuits' expansion of Title VII, finally settling this long-standing disagreement.

10. See Jason Baumann, Susan Dillon & Douglas Dillon, *The Long History of LGBTQ Employment Rights Activism*, N.Y. PUB. LIBR. (June 18, 2020), <https://www.nypl.org/blog/2020/06/18/supreme-court-ruling-lgbtq-employment-rights> [<https://perma.cc/5MLV-TRPY>].

11. *Duke Law Faculty React to Landmark Supreme Court Decision in Bostock v. Clayton County, Ga.*, DUKE L. NEWS (June 17, 2020), <https://law.duke.edu/news/duke-law-faculty-react-landmark-supreme-court-decision-bostock-v-clayton-county-ga/> [<https://perma.cc/W4A4-XP6V>].

12. See Civil Rights Act § 7.

13. See *generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding that refusal to promote a cisgender lesbian woman because she did not present femininely enough constituted sex-based stereotyping prohibited under Title VII).

14. No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

15. No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

16. See J. Dalton Courson, *Circuit Split on Interpretations of Title VII and Sexual Orientation-Based Claims*, AM. BAR ASS'N (Mar. 19, 2018), <https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2018/circuits-split-on-interpretations-of-title-vii-and-sexual-orientation-based-claims/> [<https://perma.cc/7L2U-PE4K>]. It is important to note the difference between gender and sex. While sex relates to the biological differences between male and female bodies, gender is more complex and includes personal expression and perceptions and societal attitudes and expectations. See *generally* Jennifer Tseng, *Sex, Gender, and Why the Differences Matter*, 10 AMA J. ETHICS 427 (2008).

Bostock and its consolidated cases were considered mixed-motive cases — as are most employment discrimination cases.¹⁷ These cases involve evidence that the employer may have had both lawful and discriminatory reasons for taking a particular adverse employment action. Courts' standard for evaluating mixed-motive cases has evolved alongside their understanding of how workplace discrimination manifests. The modern standard for evaluating such cases comes from the 1991 Civil Rights Act's (1991 CRA)¹⁸ § 2000e-2(m) provision, which holds that an employee must show that her protected identity was a “motivating factor” for an employer's adverse employment decision.¹⁹

Even with this more lenient standard, employment discrimination plaintiffs face steep hurdles in getting their cases past a defendant's motion to dismiss. This Note argues that the two major obstacles in succeeding past the summary judgment stage are the misplaced application of the more onerous *McDonnell Douglas Corp. v. Green*²⁰ standard at summary judgment and the courts' resistance to consider implicit bias when evaluating plaintiffs' claims and employers' same action defense. These obstacles are particularly damaging for LGBTQ* workers who have achieved surface-level societal acceptance but still regularly combat employers' and decisionmakers' lingering implicit biases.²¹ When someone is LGBTQ* and employed at will, they are more at risk of facing such implicit biases while having little chance for remedy.²² In response, this Note suggests (1) that the 2000e-2(m) standard should be the only one

17. See Maya R. Warrior, Note, *Dare to Step Out of the Fog: Single-Motive Versus Mixed-Motive Analysis in Title VII Employment Discrimination Cases*, 47 U. LOUISVILLE L. REV. 409, 424 (2008) (“[M]ixed motives are unusually prevalent in employment decision-making because (1) biased decision-making based on social-category information can occur without the decision maker's awareness and (2) people are experts in masking behavior that is often questionable or negatively viewed by society.” (citing Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCH., PUB. POL'Y, & L. 36, 39 (2006))).

18. Pub. L. 102-166, 105 Stat. 1071.

19. See 42 U.S.C. § 2000e-2(m).

20. 411 U.S. 792 (1973).

21. See *infra* Section II.C.

22. See *infra* Section II.B & II.C. Unlike with employees with just cause protections, “employers can fire at-will employees for ‘good cause, for no cause, or even for cause morally wrong.’ An at-will employee can be discharged for a single mistake, an argument with a supervisor, an unintentional violation, off-duty conduct, or even for reasons that are patently false.” Robert M. Schwartz, *Using ‘Just Cause’ to Defend Against Unfair Discipline*, LABORNOTES (Jan. 15, 2019), <https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline> [https://perma.cc/2PNS-8NXE]. Employment-at-will protects inconsistent terminations and discipline, which can make it harder to establish what is an arbitrary termination and what is a discriminatory termination only *thought* to be arbitrary.

offered at summary judgment for mixed-motive cases and (2) that courts include implicit bias evidence in their evaluation of mixed-motive discrimination cases.

Part I of this Note gives an overview of the concepts necessary for understanding its proposals. It first examines the employment-at-will doctrine and the evolution of the mixed-motive burden of proof through *Price Waterhouse v. Hopkins*,²³ the 1991 CRA, and *Desert Palace Inc. v. Costa*.²⁴ From this, it will discuss the ongoing debate amongst circuit courts on what is the proper standard for evaluating summary judgment motions for mixed-motive employment discrimination cases. Part II then discusses potential reasons why the 1991 CRA mixed-motive standard has not “revolutionized” employment discrimination law as some scholars expected.²⁵ It suggests that the current CRA standard is ill-suited to address the newly recognized forms of discrimination caused by implicit bias and that circuits’ continuing use of the *McDonnell Douglas* standard for mixed-motive cases is similarly improper. Part II further explains how these inadequate standards particularly affect LGBTQ* plaintiffs who are superficially accepted by society but still deal with implicit anti-LGBTQ* bias, even from truly pro-LGBTQ* employers. Part III will discuss previously offered solutions to this problem and examine how and why they fail to adequately resolve it. Lastly, Part IV will propose that, moving forward, courts should abandon the *McDonnell Douglas* analysis in mixed-motive cases and instead include implicit bias analysis when reviewing employees’ prima facie mixed-motive claims and employers’ affirmative defenses.

I. HISTORY

A. Employment-at-Will

Initially adopted from English law, employment-at-will’s (EAW) U.S. counterpart began to diverge from its European origins in the nineteenth century.²⁶ The modern U.S. idea of termination at-will allows for an employer to terminate an at-will employee at any time for any reason (or for no reason) — except for independently unlawful grounds — without

23. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in*, *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020).

24. 539 U.S. 90 (2003).

25. *See, e.g.*, Charles A. Sullivan, *Making Too Much of Too Little?: Why “Motivating Factor” Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357 (2020).

26. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976).

incurring legal liability.²⁷ Likewise, an employee may leave an at-will job at any time for any or no reason without adverse legal consequences.²⁸ All U.S. states (excluding Montana) are at will,²⁹ meaning that employees across the nation — including major cities like New York, Los Angeles, Chicago, Miami, Philadelphia, San Francisco, Austin, and Houston — are subject to EAW’s unpredictable nature.³⁰

The creation and expansion of antidiscrimination law have been the most restrictive exception to an employer’s ability to hire, fire, promote, and make other employment decisions. After all, EAW does not allow for unlawful terminations, including terminations considered discriminatory under Title VII.³¹ In theory, *Bostock*’s expansion of Title VII means that an employer cannot fire, deny promotions to, or terminate an employee because of his or her sexual orientation and gender identity. However, this Note will demonstrate this protection may be weaker in practice than it is on paper.

B. The Development of the Mixed-Motive Burden of Proof

i. Price Waterhouse v. Hopkins

Under Title VII, there are two theories of employer motive for adverse employment actions: single and mixed. The single-motive theory developed from the U.S. Supreme Court’s narrow interpretation of Title VII’s “because of” language.³² To the Court, “because of” meant that a single discriminatory reason motivated the adverse employment action.³³ The standard for evaluating such cases comes from the Supreme Court’s

27. See *At-Will-Employment — Overview*, NAT’L CONF. ST. LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [https://perma.cc/BZC6-S7S4].

28. See *id.*

29. See *id.*

30. The U.S. Census Bureau measures urban areas as having at least 2,500 people. See Michael Ratcliffe, *How Do We Measure Urban Areas?*, U.S. CENSUS BUREAU (Apr. 4, 2012), <https://www.census.gov/newsroom/blogs/random-samplings/2012/04/how-do-we-measure-urban-areas.html> [https://perma.cc/2DMZ-YUC9]. Each of these cities meets that criterion.

31. See *At-Will-Employment Overview*, *supra* note 27.

32. See Kaitlin Picco, *The Mixed Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 ABA J. LAB. & EMP. L. 461, 462 (2011) (explaining that this “because of” language means adverse employment actions made “because of” one of Title VII’s protected classes).

33. See *id.* An example of single-motive discrimination is an employer failing to promote an employee because of an attribute or feature that makes them a member of a protected class (e.g., their race) despite the employee qualifying for the promotion.

decision in *McDonnell Douglas*.³⁴ Under this standard, the plaintiff must first establish a prima facie case of discrimination.³⁵ The burden then shifts to the employer, who must articulate a legitimate and nondiscriminatory reason for their adverse employment action.³⁶ Lastly, if the employer is successful in articulating this reason, the burden shifts back to the plaintiff, who — to avoid losing her case — must demonstrate that the employer’s reasoning is pretextual for discrimination.³⁷

However, the Supreme Court reconsidered its narrow understanding of Title VII’s “because of” language in *Price Waterhouse v. Hopkins*.³⁸ The case centered on Ann Hopkins, a senior manager at Price Waterhouse who was proposed as a candidate for partnership.³⁹ Despite partners in Hopkins’s office praising her character and accomplishments,⁴⁰ some found her aggressive personality grating, describing her as “macho” and needing “a course at charm school.”⁴¹ The nail in the proverbial sexist coffin was when the head partner at the Washington office, Thomas Beyer, advised Hopkins to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴² In response to what she believed to be sex-based discrimination, Hopkins filed a Title VII claim in D.C. District Court.

Both the District Court and the Court of Appeals held in favor of Hopkins.⁴³ However, the two courts could not agree on whether an employer was relieved of liability if it proved it would have made the same decision regardless of its discriminatory motive.⁴⁴ Price Waterhouse, the losing party at both the district and circuit courts, appealed to the Supreme Court.⁴⁵

34. 411 U.S. 792 (1973).

35. *See id.* at 802.

36. *See id.*

37. *See id.* at 804.

38. *See generally* 490 U.S. 228 (1989).

39. *See id.* at 233.

40. *See id.* at 234.

41. *See id.* at 235.

42. *Id.*

43. *See generally* *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d*, 490 U.S. 228 (1989); *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985), *aff’d in part, rev’d in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d*, 490 U.S. 228 (1989).

44. *See Price Waterhouse*, 490 U.S. at 237 (“The Court of Appeals . . . held that even if a plaintiff proves that discrimination played a role in an employment decision, the defendant will not be found liable if it proves, by clear and convincing evidence, that it would have made the same decision in the absence of discrimination [W]hereas under the District Court’s approach, the employer’s proof in that respect only avoids equitable relief.”).

45. *See Price Waterhouse v. Hopkins*, 485 U.S. 933 (1988).

Even among the Justices, there was disagreement about how to determine employer liability.⁴⁶ This disagreement led to a four-justice plurality and two concurring opinions.⁴⁷ The plurality opinion, written by Justice Brennan, held “because of” does not mean “solely because of[.]”⁴⁸ an employer considering illegitimate and legitimate factors when making an employment decision is acting “because of” both factors.⁴⁹ Therefore, a mixed-motive plaintiff could establish that her employer’s adverse employment decision was discriminatory if she could prove that her protected status “play[ed] a motivating part in [the] employment decision.”⁵⁰ If the plaintiff met this initial burden, the employer could only avoid liability if it could prove that “even if it had not taken [the protected factor] into account, it would have come to the same decision.”⁵¹ To do so, the employer must provide objective evidence that the same decision would have been justified — *not* that the employer merely would have made the same decision absent the discriminatory motive.⁵² Following the D.C. Circuit’s rationale, Justice Brennan’s opinion held that if the employer proved this “same-decision” defense, it could not be liable under Title VII.⁵³

However, Justice O’Connor’s concurrence stated that only “direct evidence” would shift the burden from the plaintiff to the defendant.⁵⁴ Direct evidence is evidence that demonstrates discriminatory intent without presumption or inference;⁵⁵ conversely, circumstantial evidence is evidence requiring presumption or inference, such as “statistics demonstrating a clear pattern of discriminatory effect.”⁵⁶ Therefore, Justice O’Connor’s concurrence meant that an employee could only prevail on a mixed-motive action by presenting evidence explicitly showing discriminatory intent in

46. Compare *Price Waterhouse*, 490 U.S. at 253–54 (plurality opinion), with *id.* at 259–61 (White, J., concurring), and *id.* at 279 (Kennedy, J., dissenting).

47. See Paul W. Mollica, *What’s on the Secret Title VII Menu?: Proving “Motivating Factor” and “Same Action” Under the 1991 Civil Rights Act*, 35 ABA J. LAB. & EMP. L. 53, 59 (2020).

48. *Price Waterhouse*, 490 U.S. at 241 (emphasis added).

49. See *id.*

50. See Mollica, *supra* note 47 (citing *Price Waterhouse*, 490 U.S. at 252).

51. See *id.* (citing *Price Waterhouse*, 490 U.S. at 252).

52. See *Price Waterhouse*, 490 U.S. at 252.

53. See *id.* at 242.

54. See *id.* at 275 (O’Connor, J., concurring).

55. See U.S. DEP’T OF JUST., JUSTICE MANUAL § 6 (2021) (citing *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005)), <https://www.justice.gov/crt/fcs/T6Manual6> [<https://perma.cc/QQS2-ZRGT>].

56. *Id.*

relation to the adverse employment action. Despite not being binding,⁵⁷ Justice O'Connor's concurrence was "treated as the operative holding of the Court,"⁵⁸ with lower courts requiring plaintiffs to present direct evidence of a discriminatory motive.⁵⁹

ii. The 1991 Civil Rights Act

Price Waterhouse was quickly criticized for being too pro-employer; Justice Brennan's majority allowed discriminatory employers to evade liability, while Justice O'Connor's concurrence unfairly increased a plaintiff's initial burden.⁶⁰ However, just two years after the decision, Congress enacted the 1991 CRA.⁶¹ According to Section 3(4) of the 1991 Amendments, one of Congress's purposes in drafting the CRA was to prevent *Price Waterhouse* from jeopardizing the fundamental principle of Title VII: allowing victims of proven discrimination to obtain relief and perpetrators of discrimination to be held liable for their actions.⁶²

To do so, the 1991 CRA overrode parts of the decision, rejecting the lower courts' adherence to Justice O'Connor's direct evidence requirement and the meaning of Justice Brennan's "same decision" defense.⁶³ Congress's more pro-plaintiff approach, codified as 42 U.S.C. § 2000e-2(m), required that a plaintiff only prove that a protected class was a motivating factor in an adverse employment decision.⁶⁴ Under this new standard, a plaintiff established a mixed-motive discrimination claim under

57. See *Concurring Opinion*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/concurring_opinion [<https://perma.cc/J3HG-SFG9>] (last visited Mar. 3, 2022).

58. Jamie Darin Prenekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 532 (2008).

59. See Mollica, *supra* note 47, at 55.

60. See *id.* at 60 n.44 ("If an employer can escape liability by pointing generally to perceived problems with an employee's interpersonal skills, subtle but pervasive forms of discrimination will remain unchecked by [T]itle VII." (quoting citing *The Supreme Court, 1988 Term — Leading Cases*, 103 HARV. L. REV. 137, 350 (1989))); see also Susan Struth, Note, *Permissible Sexual Stereotyping Versus Impermissible Sexual Stereotyping: A Theory of Causation*, 34 N.Y.L. SCH. L. REV. 679, 696 (1989) (regarding the decision as "unjust to the plaintiff to permit an employer to absolve itself completely of liability after the plaintiff has already proven that the employer relied significantly on illegitimate considerations in reaching the employment decision").

61. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), with Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).

62. See Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 548-49 (2009) (quoting H.R. REP. NO. 120-40, pt. 1, at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 585).

63. See Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071.

64. See 42 U.S.C. § 2000e-2(m).

Title VII if he or she demonstrated that “race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁶⁵

This lower burden on the plaintiff was paired with an affirmative remedial defense for the defendant. Similar to Justice Brennan’s approach, Congress allowed an employer to assert a “same action” defense under 42 U.S.C. § 2000e-5(g)(2)(B).⁶⁶ However, Congress liberalized Brennan’s approach by still holding an employer who met this defense liable under Title VII.⁶⁷ But, in such a case, a plaintiff cannot get damages or reinstatement; he or she may only receive declaratory or injunctive relief and attorneys’ fees.⁶⁸

iii. Desert Palace, Inc. v. Costa

Despite the 1991 CRA implicitly relaxing the plaintiff’s evidentiary burden, its exclusion of Justice O’Connor’s direct evidence requirement resulted in a circuit split with the main question being whether the 1991 CRA entirely superseded *Price Waterhouse*’s causation standard for Title VII discrimination cases.⁶⁹ Some courts continued requiring mixed-motive plaintiffs to produce direct evidence and differed on what constituted as such.⁷⁰ In 2003, the Supreme Court’s opinion in *Desert Palace, Inc. v. Costa* helped to further override the direct evidence requirement and advocated instead for Congress’s motivating factor standard.⁷¹

In the majority opinion, written by Justice Thomas, the Court affirmed the lower court’s holding that a plaintiff did not require direct evidence to obtain a mixed-motive instruction under 2000e-2(m).⁷² Instead, the Court held that demonstrating a motivating factor under Title VII required “meet[ing] the burdens of production and persuasion.”⁷³ The Court even held that circumstantial evidence is “not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”⁷⁴ Despite this overt endorsement of the 1991 CRA, the *McDonnell Douglas* pretext

65. *Id.*

66. *See id.* § 2000e-5.

67. *See id.*

68. *See id.*

69. *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 886 (2012). The 1991 CRA never explicitly mentioned this standard. *See id.*

70. *See id.*; *see also* Mollica, *supra* note 47, at 55.

71. *See generally* 539 U.S. 90 (2003).

72. *See id.* at 101.

73. Mollica, *supra* note 47, at 62 (quoting *Desert Palace*, 539 U.S. at 99).

74. *Desert Palace*, 539 U.S. at 100 (citing *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

method remains the default standard for mixed-motive Title VII discrimination cases.⁷⁵

C. *Bostock's* Effect on Title VII

Seventeen years after *Desert Palace*, the Supreme Court decided *Bostock v. Clayton County*.⁷⁶ Prior to *Bostock*, research showed a dramatic shift in U.S. residents' views of LGBTQ* rights.⁷⁷ From 1973 through 1991, there was little change in public attitudes towards the LGBTQ*, with most viewing homosexuality as being “always wrong.”⁷⁸ In fact, until the 1990s and 2000s, many people in the United States limited their perception of LGBTQ* issues to a binary sphere of gay men and lesbian women; issues pertaining to the transgender community were considered separate from their gay and lesbian counterparts.⁷⁹ However, after 1991, there were many rapid changes in LGBTQ* support. For example, support for same-sex marriage went from 11% approval in 1988 to 46% in 2010.⁸⁰ In 2019, 62% of U.S. residents said they have become more supportive of transgender rights in the last five years.⁸¹

Yet, despite this growing acceptance of LGBTQ* people, circuits were split on whether “sex” in Title VII extended to sexual orientation and gender identity.⁸² Some believed that sexual orientation and gender identity were intrinsically related to the “sex stereotype” standard announced in *Price Waterhouse* and revisited in *Desert Palace*.⁸³ As stated by the Court in *Price Waterhouse*, acting on beliefs about how women and men should act inherently involves acting on the basis of gender.⁸⁴

75. See Mollica, *supra* note 47, at 63–64.

76. See 140 S. Ct. 1731 (2020).

77. See TOM W. SMITH, NORC, UNIV. OF CHIC., PUBLIC ATTITUDES TOWARDS HOMOSEXUALITY 1 (2011).

78. See *id.*

79. See Erin Blakemore, *From LGBT to LGBTQIA+: The Evolving Recognition of Identity*, NAT'L GEOGRAPHIC (Oct. 19, 2021), <https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity> [<https://perma.cc/JSX7-Q5GZ>].

80. See SMITH, *supra* note 77, at 1.

81. See Mark Mellman, *Mellman: Changing Views of Transgender Rights*, HILL (June 9, 2019, 7:30 PM) (citing PUB. RELIGION RSCH. INST., AMERICA'S GROWING SUPPORT FOR TRANSGENDER RIGHTS 7 (2019)), <https://thehill.com/opinion/civil-rights/448047-mellman-changing-views-of-transgender-rights> [<https://perma.cc/S5AC-MC5X>].

82. See Courson, *supra* note 16.

83. See, e.g., *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc).

84. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

The Seventh Circuit's *Hively v. Ivy Tech Community College of Indiana*⁸⁵ decision expanded this “sex stereotype” rationale to prohibiting discrimination based on sexual orientation. This case focused on Kimberly Hively — an openly lesbian, part-time, adjunct professor at an Indiana community college — who was continually not selected for a full-time position with the college.⁸⁶ In response, she filed a Title VII sex-based discrimination claim against her employer. The Seventh Circuit found for Hively under two theories.⁸⁷ First, under the “comparative method,”⁸⁸ Hively’s status as a lesbian represented a failure to conform to the female stereotype because she is attracted to other women, not men.⁸⁹ Second, under the “associational theory,”⁹⁰ the Circuit found that, just as discrimination against a member of an interracial couple implicated discrimination based on race, discrimination against gays and lesbians implicated discrimination based on sex.⁹¹

It is important to note how essential *Oncale v. Sundowner Offshore Servs., Inc.*⁹² was to Judge Wood’s reasoning in *Hively*. Coming a decade before the Seventh Circuit decision, *Oncale* recognized that same-sex sexual harassment was actionable under Title VII’s “because of . . . sex” prohibition.⁹³ Justice Scalia, writing for the majority, made it clear that, while same-sex harassment was not “the principal evil Congress was concerned with when it enacted Title VII, . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”⁹⁴ *Hively*’s majority expanded upon this new ground of “reasonably

85. See 853 F.3d 339 (7th Cir. 2017) (en banc); see also Courson, *supra* note 16.

86. *Hively*, 853 F.3d at 341.

87. See *id.* at 345 (“Hively offers two approaches in support of her contention that ‘sex discrimination’ includes discrimination on the basis of sexual orientation Although the analysis differs somewhat, both avenues end up in the same place: sex discrimination.”).

88. The comparative method is when the court “attempt[s] to isolate the significance of the plaintiff’s sex to the employer’s decision” and asks whether, “holding all other things constant and changing only . . . sex,” would the plaintiff have been treated the same way? See *id.* at 345.

89. See *id.*

90. The associational theory posits that one “who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits.” *Id.* at 347. The Circuit elaborates on the evolution of this theory through the development of what constituted race discrimination. See *id.* at 347–49. However, the Circuit applies the theory to other Title VII protected classes as well, stating that changing the sex of one partner in a lesbian relationship would make a difference in analyzing a sex-based discrimination claim just as changing the race of one partner in an interracial marriage would. See *id.* at 349.

91. See Courson, *supra* note 16; see also *Hively*, 853 F.3d at 347–49.

92. 523 U.S. 75 (1998).

93. See *id.* at 82.

94. *Id.* at 79.

comparable evils” in holding sexual orientation discrimination actionable under Title VII.⁹⁵

Contrary to the *Hively* decision, the Eleventh Circuit held in *Evans v. Georgia Regional Hospital*⁹⁶ that discrimination based on sexual orientation was not actionable under Title VII;⁹⁷ however, discrimination based on “gender nonconformity” was.⁹⁸ The surprisingly blunt majority opinion denied the plaintiff’s argument that she had faced workplace discrimination because of her sexual orientation.⁹⁹

The Supreme Court’s *Bostock* decision came only three years after the *Evans* decision.¹⁰⁰ It consisted of three consolidated cases from three different circuits: the Eleventh, the Second, and the Sixth.¹⁰¹ The Eleventh Circuit case focused on Gerald Bostock — the titular petitioner in this long-overdue case.¹⁰² In 2003, Bostock worked as a child welfare services coordinator in Atlanta, Georgia.¹⁰³ In January 2013, Bostock became involved in a gay recreational softball league.¹⁰⁴ This involvement had influential members of the community upset.¹⁰⁵ When his employer discovered this, he fired Bostock for conduct “unbecoming” of a county employee.¹⁰⁶ Prior to his termination, Bostock was considered a model employee with high-scoring performance evaluations.¹⁰⁷ After Bostock sued for sex discrimination under Title VII, the Eleventh Circuit reiterated its position in *Evans* and held that the statute did not prohibit employers

95. *Hively*, 853 F.3d at 341.

96. 850 F.3d 1248 (11th Cir. 2017).

97. *See id.* at 1255.

98. *See id.* at 1254.

99. *See id.* at 1255.

100. *See id.*; *see also* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

101. *See Bostock*, 140 S. Ct. at 1734.

102. *See id.*

103. *See id.* at 1737.

104. *See id.*; *see also* *Bostock v. Clayton Cnty.*, No. 1:16-CV-001460-ODE-WEJ, 2016 WL 9753356, *1 (N.D. Ga. Nov. 3, 2016).

105. *See Bostock*, 2016 WL 9753356, at *1–2. According to Bostock, months after joining the league, his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had a significant influence on his employer’s decision making. *See id.* These persons were not identified in any decision. Bostock also alleged that, during a May 2013 meeting with the Friends of Clayton County CASA Advisory board, where his supervisor was present, at least one individual made disparaging comments about Mr. Bostock’s sexual orientation and identity and participation in the softball league. *See id.* The individual was not identified in any decision. *See id.* at *2.

106. *See Bostock*, 140 S. Ct. at 1738.

107. *See Bostock*, 2016 WL 9753356, at *1.

from firing employees for being gay.¹⁰⁸ Bostock filed a petition for a writ of certiorari, which the Supreme Court granted.

The Second Circuit case was initiated by Donald Zarda.¹⁰⁹ In the summer of 2010, Zarda, a gay man, worked as a sky-driving instructor at Altitude Express.¹¹⁰ As part of his job, Zarda regularly worked in close physical proximity to clients.¹¹¹ Both Zarda and his co-workers routinely referenced sexual orientation around clients, and Zarda sometimes told female clients his sexual orientation to assuage their concerns regarding being strapped to a man for a tandem skydive.¹¹² Altitude Express fired Zarda days after he mentioned being gay to one of his clients.¹¹³ Like Bostock, Zarda filed suit under Title VII in the Second Circuit alleging sex discrimination.¹¹⁴ Unlike the Eleventh Circuit, the Second Circuit held for Zarda, concluding that sexual orientation discrimination does constitute sex discrimination under Title VII.¹¹⁵

The Sixth Circuit case was initiated by Aimee Stephens, who worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan.¹¹⁶ When she got the job, Stephens presented as a male. But two years into her service with the company, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman.¹¹⁷ In her sixth year at the funeral home, Ms. Stephens wrote a letter to her employer explaining that she planned to “live and work full-time as a woman” after returning from an upcoming vacation.¹¹⁸ The funeral home fired her, stating that “this is not going to work out.”¹¹⁹ The Sixth Circuit reached a similar

108. *See Bostock*, 140 S. Ct. at 1738; *see also* *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964, 965 (11th Cir. 2018), *rev’d and remanded sub nom. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

109. *See Bostock*, 140 S. Ct. at 1734. *See generally* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *aff’d sub nom. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

110. *See Bostock*, 140 S. Ct. at 1738; *see also Zarda*, 883 F.3d at 108.

111. *See Zarda*, 883 F.3d at 108.

112. *See id.*

113. *See id.*; *see also Bostock*, 140 S. Ct. at 1734.

114. *See Bostock*, 140 S. Ct. at 1738; *see also Zarda*, 883 F.3d at 107.

115. *See Bostock*, 140 S. Ct. at 1738; *see also Zarda*, 883 F.3d at 132. Unfortunately, during the proceedings, Zarda passed away. However, his estate continued to press his causes for the benefit of his heirs. However, as this Note will demonstrate, the fact that these cases made it to trial at all is itself a victory. *See infra* Section II.D.

116. *See Bostock*, 140 S. Ct. at 1734.

117. *See id.* at 1738.

118. *See id.*

119. *See id.*

decision to the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status.¹²⁰

D. The Current State of Mixed-Motive Antidiscrimination Law

Bostock is an unusual employment discrimination case in that it survived until trial. Ever since the Court's ruling in *Circuit City Stores v. Adams*,¹²¹ which permitted pre-hire employment agreements, most employment discrimination cases never reach litigation.¹²² To be hired, many modern employees must agree to forego all rights to lawsuits and instead arbitrate.¹²³ This style of alternate dispute resolution is known as mandatory arbitration and bars access to the courts for all types of legal claims, including Title VII discrimination claims.¹²⁴ In 2018, over 55% of workers were subject to mandatory arbitration, meaning that 60.1 million American workers had no court access and instead had to arbitrate their employment disputes, including discrimination.¹²⁵

Of the few employment discrimination cases that *do* make it to litigation, most are decided at summary judgment.¹²⁶ When the court grants an employer's motion for summary judgment, it decides that there is no genuine issue as to any material fact pertaining to the allegedly discriminatory decision.¹²⁷ Granting this motion also ends the plaintiff's employment discrimination claim.¹²⁸ Despite the seemingly settled Title VII mixed-motive standard used at trial, circuits are split on how to evaluate these cases at the summary judgment stage.¹²⁹ The Supreme

120. *See id.*; *see also* Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). Like Zarda, Stephens passed during the course of the proceedings, but her estate continued her claim for the benefit of her heirs.

121. 532 U.S. 105 (2001).

122. Only 6% of all employment discrimination cases ever make it to trial. *See* Ellen Berrey, Robert L. Nelson & Laura Beth Nielsen, *A Quantitative Analysis of Employment Civil Rights Litigation*, in *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* 54, 63 (2017).

123. *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 *BERKLEY J. EMP. & LAB. L.* 71, 76 (2014).

124. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, *ECON. POL'Y INST.* (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [<https://perma.cc/5QG2-2B4H>].

125. *See id.*

126. *See* Christopher J. Emden, Note, *Subverting Rule 56? McDonnell Douglas, White v. Baxter Healthcare Corp., and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 *WM. & MARY BUS. L. REV.* 139, 140 (2010).

127. *See* *FED. R. CIV. P.* 56(c).

128. *See id.*

129. *See* Sarah Keates, Note, *Surviving Summary Judgment in Mixed-Motive Cases* — *White v. Baxter Healthcare Corporation*, 78 *U. CIN. L. REV.* 785, 790 (2009).

Court's ruling in *Anderson v. Liberty Lobby* likely contributed to the split.¹³⁰ In *Anderson*, the Court held that, when ruling on summary judgment, a “judge must view the evidence presented through the prism of the substantive evidentiary burden.”¹³¹ Therefore, at summary judgment, trial courts determine not only if there is a factual dispute present but also if the plaintiff has satisfied their evidentiary burden of proof.¹³²

However, with the differing burdens elaborated in *Price Waterhouse*, 1991 CRA, and *Desert Palace* (and perhaps judicial stubbornness to congressional override),¹³³ lower courts clashed on what a mixed-motive plaintiff's burden was and what evidence satisfied it. Of this split, only the Eighth Circuit has held that *Desert Palace* had no impact on prior Eighth Circuit decisions.¹³⁴ Therefore, the Circuit held in *Griffith v. City of Des Moines*¹³⁵ that a plaintiff with direct evidence of illegal discrimination survived summary judgment.¹³⁶ If the plaintiff has no direct evidence, she must instead “creat[e] the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis.”¹³⁷

Instead of outright rejecting the 1991 CRA framework, the Fifth Circuit created a modified mixed-motive analysis, merging both the *McDonnell Douglas*'s and *Desert Palace*'s approaches.¹³⁸ The case establishing this merged analysis, *Rachid v. Jack in the Box, Inc.*,¹³⁹ held that plaintiffs with only circumstantial evidence of discrimination must proceed under the first two steps in *McDonnell Douglas*. Supposing the plaintiff is successful, the burden shifts to the employer to articulate a legitimate reason for its decision. The last step of the analysis allows plaintiffs to offer evidence that the employer's proffered reason was a pretext for discrimination (as available under *McDonnell Douglas*) or only one of the reasons for its conduct.¹⁴⁰

130. 477 U.S. 242 (1986).

131. *Id.* at 207.

132. See Emden, *supra* note 126, at 152 (quoting Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 47 (2000)).

133. See Widiss, *supra* note 62, at 523 (“[Courts] often interpret an override as establishing a narrow exception to a general rule and continue to rely upon the precedent that was overridden.”).

134. See Keates, *supra* note 129, at 790.

135. 387 F.3d 733, 736 (8th Cir. 2004).

136. See Keates, *supra* note 129, at 790–91.

137. See *id.* (citing *Griffith*, 387 F.3d at 736).

138. See *id.* at 791–92.

139. 376 F.3d 305 (5th Cir. 2004).

140. See *id.* at 312–13.

Four out of the 13 circuits reject using only the *McDonnell Douglas* standard.¹⁴¹ For the Fourth, Seventh, Ninth, and D.C. Circuits, plaintiffs may instead choose to establish their case under one of two standards.¹⁴² For the Fourth Circuit, a plaintiff can survive summary judgment either by presenting direct or circumstantial evidence that “raises a genuine issue of material fact as to whether an impermissible factor . . . motivated the employer’s adverse employment decision”¹⁴³ or by using the *McDonnell Douglas* approach. The Seventh Circuit has a similar binary set-up, with *McDonnell Douglas* used for the “indirect” method of proving mixed-motive discrimination and direct or circumstantial evidence used for the “direct” method.¹⁴⁴ The Ninth Circuit allows a similar choice; plaintiffs may proceed under the *McDonnell Douglas* framework or “may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the employer].”¹⁴⁵ The D.C. Circuit has an analogous two-option procedure.¹⁴⁶

However, only two circuits have explicitly and totally rejected the *McDonnell Douglas* standard: the Sixth and the Eleventh Circuit. In *White v. Baxter Healthcare Corp.*,¹⁴⁷ the Sixth Circuit decided that the *McDonnell Douglas* burden-shifting analysis was unnecessary for proving mixed-motive claims and similarly did not apply to such claims at summary judgment.¹⁴⁸ Instead, the Sixth Circuit held a position consistent with § 2000e-2(m)’s motivating factor standard.¹⁴⁹

141. See Johanna T. Wise & Alexander Meier, *Un-Mixing the Mixed-Motive Standard*, SEYFARTH SHAW LLP (Apr. 21, 2016), <https://www.laborandemploymentlawcounsel.com/2016/04/un-mixing-the-mixed-motive-standard/> [<https://perma.cc/6UCK-792L>]. The First Circuit has declined to analyze the role of the *McDonnell Douglas* framework post-*Desert Palace*, but “appears to have adopted a summary judgment approach similar to the Fourth, Seventh, Ninth, and D.C. Circuits’ approaches.” *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1239 n.8 (11th Cir. 2016) (citing *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38, 45 & n.8 (1st Cir. 2009)).

142. See Keates, *supra* note 129, at 792.

143. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005).

144. See *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860–61 (7th Cir. 2007).

145. Keates, *supra* note 129, at 792–93 (quoting *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004)).

146. See *Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C. Cir. 2007).

147. 533 F.3d 381 (6th Cir. 2008).

148. *Id.* at 398–400.

149. See Keates, *supra* note 129, at 795. The standard states that a plaintiff can defeat summary judgment by “(1) establishing that the defendant took an adverse employment action against the plaintiff and (2) by showing that race, color, religion, sex, or national origin was ‘a motivating factor’ for the defendant’s adverse employment action.” See *id.* (quoting *White*, 553 F.3d at 400).

While the Eleventh Circuit initially agreed with the Eighth Circuit's application of the *McDonnell Douglas*, it more recently reversed this opinion in *Quigg v. Thomas County School District*.¹⁵⁰ Relying on the Sixth Circuit's decision in *White*, the *Quigg* Court reasoned that, to properly evaluate such claims, it should "ask only whether a plaintiff offered evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was a motivating factor for the defendant's adverse employment action."¹⁵¹ Overall, while *Desert Palace* was initially hailed as *McDonnell Douglas*'s executioner,¹⁵² few circuits have truly shelved the *McDonnell Douglas* standard in its entirety.

II. THE GAPS IN THE CURRENT MIXED-MOTIVE STANDARD

A. Implicit Bias and Modern-Day Discrimination

Despite the growing acceptance of 2000e-2(m)'s more lenient standard, plaintiffs' attorneys shy away from using the mixed-motive standard.¹⁵³ This reluctance is due, in part, to 2000e-2(m)'s structure subjecting attorneys' clients to an employer's remedy-limiting affirmative "same-action" defense.¹⁵⁴ Judge Mark W. Bennett has described the motivating factor standard as a "Trojan horse" whose lower burden comes with the real possibility that a successful plaintiff may walk away with no monetary relief.¹⁵⁵ Because of 2000e-2(m)'s affirmative defense, Judge Bennett "doubts that many plaintiffs will be willing to run the risk of prevailing on liability, but still receiving no monetary compensation for their efforts."¹⁵⁶

This conflict of choice should be less apparent at the summary judgment stage since plaintiffs are not forced to make a final decision between the *McDonnell Douglas* and 2000e-2(m) litigation structures; if a triable issue exists under either standard, the motion should be denied.¹⁵⁷ Despite this alleged freedom, plaintiffs' employment discrimination claims are still

150. 814 F.3d 1227 (11th Cir. 2016); see also Wise & Meier, *supra* note 141.

151. *Quigg*, 814 F.3d at 1239 (quoting *White*, 533 F.3d at 400).

152. See Emden, *supra* note 126, at 148 n.67 ("From what the Court said, it necessarily follows that *McDonnell Douglas* is gone." (quoting William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1562 (2005))).

153. See Mollica, *supra* note 47, at 63; see also Sullivan, *supra* note 25, at 396.

154. See Sullivan, *supra* note 25, at 397.

155. See *id.* at 397–98 (citing *Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d 1055, 1097–98 (N.D. Iowa 2008)).

156. *Id.* at 397.

157. See *id.* at 396 n.164.

routinely dismissed at summary judgment.¹⁵⁸ This may be in part because courts deciding employment law summary judgment motions often view the evidence in a piecemeal manner and apply “formalistic rigidity to a complex and elusive phenomenon like workplace discrimination.”¹⁵⁹

Additionally, most discrimination cases no longer hinge on explicit discrimination from employers.¹⁶⁰ Instead, modern employers may now act on unconscious biases, prompting adverse employment decisions they believe to be nondiscriminatory but are actually based in prejudice. Justice Ginsburg stated this phenomenon in simple yet eloquent terms: “Managers, like all humankind, may be prey to biases of which they are unaware.”¹⁶¹ Therefore, judges’ piecemeal method of reviewing evidence may explain why so many cases are dismissed at summary judgment; the wrongs Title VII was enacted to combat have changed, and judges have not yet adapted accordingly.

This form of unconscious bias, also known as implicit bias, causes people to “act on the basis of prejudice and stereotypes without intending to.”¹⁶² The application of implicit bias is not limited to the social psychology sphere; many legal scholars have acknowledged how it might affect the application of the law.¹⁶³ Some scholars have tied implicit bias to the theory of behavioral realism.¹⁶⁴ In the context of antidiscrimination law, behavioral realism proposes that judges “remain continuous with progress in psychological science” and periodically revisit “judicial

158. See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007) (observing that 73% of summary judgment motions in employment discrimination cases are granted and that nearly all are in favor of defendants).

159. Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 116–17 (2011) (quoting Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 329 (2010)).

160. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001).

161. *Wal-Mart Stores, Inc v. Dukes*, 564 U.S. 338, 372–73 (2011) (Ginsberg, J., concurring in part, dissenting in part).

162. *Implicit Bias*, STAN. ENCYCLOPEDIA PHIL. (July 31, 2019), <https://plato.stanford.edu/entries/implicit-bias/> [<https://perma.cc/SCW6-HLQZ>].

163. See generally Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55 (2017); Annika L. Jones, Comment, *Implicit Bias as Social Framework Evidence in Employment Discrimination*, 165 U. PA. L. REV. 1221 (2017).

164. Behavioral realism proposes that legal “theories should remain consistent with advances in relevant fields of empirical inquiry,” including cognitive social psychology and the related social sciences. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1001 (2006).

models . . . of what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned.”¹⁶⁵

With increasing awareness of implicit bias has come similar awareness of discrimination’s complex and elusive nature. No longer do employers discriminate with smoking gun statements like: “This is no job for a woman” or “Irish need not apply.”¹⁶⁶ Employers are aware that such statements will almost always be understood as discriminatory under Title VII,¹⁶⁷ and many now have formal policies that prohibit discrimination and set procedures to enforce those policies.¹⁶⁸ Rather than coming from a deliberate and overt bias, implicit bias causes employers to unconsciously discriminate against their employees and potentially not even realize it.

Raiders’ coach Jon Gruden is a modern example of a potentially unaware, discriminatory employer. In numerous emails during a seven-year period starting in 2011, Gruden casually used homophobic slurs.¹⁶⁹ In these emails, he called the National Football League’s (NFL) commissioner, Roger Goodell, the f-slur, which is derogatory against LGBTQ* peoples, particularly gay men.¹⁷⁰ Gruden also said that Goodell should not have pressured Jeff Fisher — then coach of the Rams — to draft “queers” in reference to the team choosing Michael Sam, a gay man, to play for the team in 2014.¹⁷¹ In a statement issued on the Raiders’s Twitter, Gruden said about the emails: “I’m sorry, I never meant to hurt anyone.”¹⁷²

For present purposes, the Note accepts Gruden’s belated apology at face value without considering its pretext of discrimination. While Gruden’s use of slurs is explicit bias,¹⁷³ both the timing of his comments and his professed ignorance about its effects suggests that his anti-LGBTQ* bias

165. *Id.*

166. *See* Sturm, *supra* note 160, at 460.

167. *See id.* at 466 (“By the passage of Title VII, many companies had eliminated explicit policies of exclusion, but continued their exclusionary practices. These practices . . . were often obvious and pervasive, and conformed to a well understood idea of discrimination.”).

168. *See id.* at 460.

169. *See* Ken Belson & Katherine Rosman, *Raiders Coach Resigns After Homophobic and Misogynistic Emails*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/11/sports/football/what-did-jon-gruden-say.html> [<https://perma.cc/4VR7-SBYR>].

170. *See id.*

171. *See id.*

172. *Id.* (quoting Las Vegas Raiders (@Raiders), TWITTER (Oct. 11, 2021, 10:03 PM), <https://twitter.com/Raiders/status/1447744629168693250> [<https://perma.cc/VQ7S-5QAE>]).

173. The use of slurs is a type of hate speech. *See* Mihaela Popa-Wyatt & Jeremy L. Wyatt, *Slurs, Roles and Power*, 175 PHIL. STUDY 2879, 2880 (2018). Hate speech is commonly regarded as an expression of explicit bias. *See Explicit Bias*, PERCEPTION INST., <https://perception.org/research/explicit-bias/> [<https://perma.cc/FA34-W4HB>] (last visited Mar. 3, 2022).

was more akin to implicit bias than explicit. For example, during the time of Gruden's leaked emails, the term "gay" was frequently used to describe something or someone as "lame," "uncool," or, in Gruden's case, "weak."¹⁷⁴ Therefore, Gruden may believe that, in using homophobic slurs, he was not directly disparaging the sexual orientation. Yet, by associating the term "gay" with these negative terms, Gruden was inherently stereotyping gay people as "lame," "uncool," and "weak."¹⁷⁵ Furthermore, by using a slur with a history of oppressing sexual minorities, Gruden disparaged the LGBTQ* community as lesser than their heterosexual counterparts.¹⁷⁶

Furthermore, Gruden's professed ignorance about the harms of his comments suggests he might not have been aware of his own bias's impact.¹⁷⁷ Yet, during the time of his comments, Gruden was highly influential in the league.¹⁷⁸ As a head coach, Gruden wielded great influence over the player composition of his coached teams. In fact, along with the team's general manager, Gruden had the final say on drafting, retaining, and removing players.¹⁷⁹ With this amount of influence, it is possible that Gruden's disparaging language was not the full extent of the

174. See The Talk of the Nation, *Why Is It Ok to Say "That's So Gay?"*, NPR, at 2:07–2:18 (June 25, 2009, 1:00 PM), <https://www.npr.org/transcripts/105909348?storyId=105909348> [<https://perma.cc/KXF7-63FT>]; see also SuchIsLifeVideos, *Hilary Duff PSA "Think Before You Speak" Runs During Hannity*, YOUTUBE (Aug. 5, 2011), https://www.youtube.com/watch?v=z8fiwbr96j0&ab_channel=SuchIsLifeVideos [<https://perma.cc/KQM9-XRZE>].

175. See Robert Postic & Elizabeth Prough, *That's Gay! Gay as a Slur Among College Students*, 4 SAGE OPEN 1, 2 (2014).

176. See Lauren Ashwell, *Gendered Slurs*, 42 SOC. THEORY & PRAC. 228, 236 (2016) ("[T]he use of the slur is grounded in thinking of those to whom the slur applies as lesser than others simply because of something that *ought not be thought of* as marking you out as lesser than others.").

177. It is also possible that Gruden's thinking evolved from 2011 to 2018 — from being expressly homophobic to accepting certain societal changes. As Tessa Charlesworth and Mahzarin Banaji's article demonstrates, implicit views towards LGBTQ* people have rapidly changed from negative to positive. See generally Tessa E. S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability from 2007 to 2016*, 30 PSYCH. SCI. 174 (2019). While it is not impossible that Gruden experienced a similar change, empirical cognitive social psychology still supports Gruden's possible unawareness of his own bias. See Krieger & Fiske, *supra* note 164, at 1038 ("A well-meaning but implicitly biased decision maker can believe that he is basing a judgment about a member of a stereotyped group on legitimate nondiscriminatory reasons when, in fact, the target's group membership 'caused' the decision maker to view the target in a[n] unjustifiably negative light.").

178. See Belson & Rosman, *supra* note 169.

179. See Andrew Garda, *A Detailed List of an NFL Coach's Responsibility*, BLEACHER REP. (June 9, 2013), <https://bleacherreport.com/articles/1666834-a-detailed-list-of-an-nfl-coachs-responsibility> [<https://perma.cc/6FRU-R26E>].

harm caused by Gruden's anti-gay beliefs; he could have unconsciously allowed such beliefs to influence which players made up his teams.

Despite his private association of gay men with weakness, Gruden publicly posited himself as a proponent of LGBTQ* rights. For example, in June 2021, Carl Nassib, the Raiders's defensive lineman, publicly declared he was gay.¹⁸⁰ In response to Nassib coming out,¹⁸¹ Gruden, who was then the Raiders's head coach, publicly said that he had "learned a long time ago what makes a man different is what makes him great."¹⁸² If Gruden's emails had not been leaked, the public might have continued perceiving him as a supporter of gay rights. This dichotomy between Gruden's private and public persona may have resulted from his internal desire and society's external pressure to be seen as unbiased despite his true prejudice against the LGBTQ* community.¹⁸³ Having his private behavior supported by his co-workers likely also acted as an implicit endorsement that such behavior was acceptable.¹⁸⁴

B. Implicit Bias's Impact on Employment Discrimination Cases

The courts' limited use of implicit bias analysis in reviewing summary judgment motions affects mixed-motive employment discrimination cases in two ways. First, courts may be unable to recognize discrimination stemming from implicit bias and improperly rule that a plaintiff failed to

180. See Belson & Rosman, *supra* note 169 (citing Ken Belson, *Raiders' Carl Nassib Announces He's Gay, an N.F.L. First*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/06/21/sports/football/carl-nassib-gay-nfl.html> [<https://perma.cc/JF5W-BQDU>]).

181. To "come out" means to self-disclose one's sexual orientation and/or gender identity. *Coming Out*, DEFINITIONS, <https://www.definitions.net/definition/COMING%20OUT> [<https://perma.cc/SG7R-PKRF>] (last visited Mar. 3, 2022).

182. See Kevin Patra, *Jon Gruden Praises Carl Nassib: 'What Makes a Man Different Is What Makes Him Great.'* NFL (June 22, 2021, 7:48 AM) (citing Vincent Bon Signore, *Raiders DE Becomes First Active NFL Player to Come Out as Gay*, L.V. REV.-J. (June 21, 2021, 3:08 PM), https://www.reviewjournal.com/sports/raiders/raiders-de-becomes-first-active-nfl-player-to-come-out-as-gay-2383535/?itm_source=parsely-api [<https://perma.cc/8QCD-4Y4T>]), <https://www.nfl.com/news/jon-gruden-praises-carl-nassib-what-makes-a-man-different-is-what-makes-him-grea> [<https://perma.cc/4P6D-8QZ7>]).

183. See Joel T. Nadler et al., *Aversive Discrimination in Employment Interviews: Reducing Effects of Sexual Orientation Bias with Accountability*, 1 PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 480, 482 (2014) ("Internal motivations to appear egalitarian and aware of cultural norms of diversity and inclusion often result in people presenting themselves as being more nonprejudiced than they truly are.").

184. "If group norms support sexual prejudice, and if a heterosexual individual has a strong need for the group's approval and acceptance, expressing negative attitudes toward sexual minorities can be a means to gaining status and positive regard from the group." Gregory M. Herek, *Beyond "Homophobia": Thinking More Clearly About Stigma, Prejudice, and Sexual Orientation*, 85 AM. J. ORTHOPSYCHIATRY S29, S35 (2015).

satisfy her initial burden.¹⁸⁵ Second, the courts may improperly find that an employer met their same-action defense burden by failing to look at the defense as a decision influenced by subconscious bias. By dismissing the employee's claim, the courts fail to correct implicitly biased and discriminatory behavior, which can perpetuate discrimination, particularly aversive discrimination, which may result from implicit bias.¹⁸⁶ Aversive discrimination is a "subtle, often unintentional form of bias that is different from 'old-fashioned' or overt racism or discrimination."¹⁸⁷

Because there is no "smoking gun" with implicit bias, state and federal courts have struggled to find an effective way to evaluate this potential unconscious bias.¹⁸⁸ In some circumstances, the use of implicit bias is outright barred; for example, the *Wal-Mart Stores, Inc. v. Dukes*¹⁸⁹ decision set a precedent against using evidence of implicit bias to establish commonality amongst a class in a class action suit.¹⁹⁰ Prior to *Dukes*, implicit bias evidence was regularly used in employment discrimination claims.¹⁹¹ However, the Supreme Court held that such evidence was insufficient to support a theory of commonality amongst plaintiffs.¹⁹² Thankfully, *Dukes* did not bar implicit bias evidence from individual plaintiffs' discrimination claims.¹⁹³ Outside class certification, plaintiffs continue to use implicit bias evidence as proof of discrimination when explicit forms are absent.¹⁹⁴

However, not all courts have been so reluctant towards including implicit bias in Title VII discrimination analysis, even in class certification. Prior to the *Dukes* decision, the Southern District Court of New York addressed a similar problem in *Velez v. Novartis Pharmaceuticals Corp.*¹⁹⁵

185. See Christopher Cerullo, Note, *Everyone's a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 146 (2013).

186. "In the vast majority of cases, law re-inscribes ascriptive hierarchies by leaving untouched both those hierarchies, as well as the alleged injustices that give rise to employment civil rights litigation in the first place." Laura Beth Nielsen, Ellen C. Berrey & Robert L. Nelson, *Dignity and Discrimination: Employment Civil Rights in the Workplace and in Courts*, 92 CHI.-KENT L. REV. 1185, 1199 (2017).

187. See Nadler et al., *supra* note 183, at 481.

188. See Cerullo, *supra* note 185, at 147–51.

189. 564 U.S. 338, 354 (2011) (holding that an expert witness's testimony that Wal-Mart's policies left it vulnerable for gender bias but "could not calculate whether 0.5 or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking" did not meet the commonality requirement under Federal Rule of Civil Procedure Rule 23(a)(2)).

190. See Jones, *supra* note 163, at 1238 (citing *Dukes*, 564 U.S. at 354–55).

191. See *id.* at 1227.

192. See *id.* at 1229 (citing *Dukes*, 564 U.S. at 354–55).

193. See *id.* at 1230.

194. See *id.*

195. 244 F.R.D. 243, 258–59 (S.D.N.Y. 2007).

In *Velez*, a group of 62,000 female employees claimed that their employer's "personnel evaluation and management system [was] overly subjective, and that this subjectivity [led] to discrimination."¹⁹⁶ David Martin, the plaintiffs' offered expert, analyzed the employer's policies for "vulnerab[ility] to bias in decision[-]making" and found that there was potential for discrimination.¹⁹⁷ While alone this evidence was not sufficient, combined with the plaintiff's statistical and anecdotal evidence, the court supported the class certification.¹⁹⁸ While the *Velez* decision did not explicitly mention implicit bias, its recognition of how subjectivity could influence decision-making resembles how implicit bias may taint seemingly unbiased decisions.

More recently, the Eastern District of Wisconsin considered the role of implicit bias in *Kimble v. Wisconsin Department of Workforce Development*.¹⁹⁹ This was the first case explicitly recognizing and relying on implicit bias cognitive studies.²⁰⁰ In *Kimble*, the court evaluated the claim of an African American supervisor, Johnny Kimble, against his employer, the Equal Rights Division (ERD) of the Wisconsin Department of Workplace Development. Kimble alleged that the ERD discriminately denied him a raise. The court found that, while the ERD had provisions for awarding merit-based raises and bonuses, the generalness of these provisions necessitated additional, actual criteria.²⁰¹ The ERD never established specific policies, which allowed the decisionmaker (who, at the time, was J. Sheehan Donoghue) to award raises and bonuses without any objective checks against their biases.²⁰² The court's opinion relied on the subjectivity of the Donoghue's decision-making process and the lack of any meaningful review of her decisions.²⁰³ Given these factors, the system left "an opening through which any biases or stereotypes could infect the decision[-]making process."²⁰⁴

However, courts' reluctance to incorporate implicit bias analysis when reviewing an employee's discrimination claim may not be the only reason for low plaintiff success. Employers have a low bar in asserting a "same action" defense; if an employer presents evidence of a lawful factor sufficient by itself to explain the discharge, the employee will be unable to

196. See Jones, *supra* note 163, at 1228 (citing *Velez*, 244 F.R.D. at 258).

197. See *id.*

198. See *id.*

199. 690 F. Supp. 2d 765 (E.D. Wis. 2010).

200. See Cerullo, *supra* note 185, at 154.

201. See *id.* (citing *Kimble*, 690 F. Supp. 2d. at 772).

202. See *id.*

203. See *id.*

204. *Id.*

recover any damages and may only receive attorney's fees.²⁰⁵ Yet, as demonstrated by *Dukes*, some courts may fail to actively engage with the potential discriminatory motives behind an employer's seemingly nondiscriminatory reason. For example, in establishing an affirmative defense, an employer may claim it would have terminated an LGBTQ* employee absent a discriminatory motive due to an employee's lower-than-average performance evaluations. However, *Velez* and *Kimble*, along with a 2014 study, show that an unconsciously biased decisionmaker may evaluate certain employees — such as those belonging to racial out-groups or sexual minorities — more harshly, resulting in lower performance evaluation despite similar workstyles and productivity.²⁰⁶

C. Relevance to the LGBTQ* Community

As discussed in this Note's introduction, LGBTQ* history has been rife with fighting for long-deserved rights, including the right to be free from discrimination at work. While the *Bostock* opinion seemingly granted this right, the judiciary's insufficient recognition of implicit bias analysis combined with confusing summary judgment standards will particularly limit LGBTQ* plaintiffs' ability to establish their mixed-motive cases and their right to recovery. While increased exposure to LGBTQ* persons, legalization of same-sex marriage, and prohibition of employment discrimination based on sexual orientation and gender identity have

205. See Richard A. Weller, *The Mixed-Motive Defense in Workplace Discrimination Actions and Its Procedural Issues in the Eleventh Circuit*, 51 MERCER L. REV. 745, 758 (2000). It should be noted that plaintiffs' attorney's fees can be quite substantial. See, e.g., *Hernandez v. Chipotle Mexican Grill, Inc.*, 257 F. Supp. 3d 100 (D.D.C. 2017) (holding that \$825,621.77 in attorney fees was reasonable for a suit filed under Title VII).

206. See Nadler et al., *supra* note 183, at 485 (“[H]igh self-monitors were more likely to use stereotypes to evaluate applicants than low self-monitors, who were more likely to make evaluations using performance related factors.” (citing Tilman L. Sheets & Stephen C. Bushardt, *Effects of the Applicant's Gender-Appropriateness and Qualifications and Rater Self-Monitoring Propensities on Hiring Decisions*, 23 PUB. PERSONNEL MGMT. 373, 374–75 (1994))); see also *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 260 (S.D.N.Y. 2007) (holding that the systemically giving of lower scores to women compared to men presents a serious question of discrimination); *Cerullo*, *supra* note 185, at 154 n.254 (“Individuals draw lines and create categories based in part on race, gender and ethnicity, and the stereotypes they create can bias how they process and interpret information and how they judge other people.” (quoting *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 776 (E.D. Wis. 2010))).

changed public consensus about LGBTQ*,²⁰⁷ many still struggle with an unconscious bias towards the community.²⁰⁸

As mentioned, the public attitude towards the LGBTQ* community has had a dramatic shift in the positive direction.²⁰⁹ This has created a corresponding change in implicit bias towards them. According to a 2019 study conducted at Harvard University, implicit LGBTQ* bias has rapidly decreased, dropping 33% from 2007 to the end of 2016.²¹⁰ However, it has not yet reached neutrality,²¹¹ meaning that the general U.S. population remains at least somewhat implicitly biased against LGBTQ* individuals.²¹² This lingering bias may be due, in part, to LGBTQ* identities deviating from the cultural norm of heterosexuality and cisgenderism.²¹³ Those discomfited by such deviations may “create and defend their stereotypes to preserve or protect their normative societal model of sexuality.”²¹⁴ Jillian T. Weiss, a transgender employment and civil rights lawyer, succinctly describes this modern reality: “Even if there are fewer bigots who are out to discriminate, there is still implicit bias, so some managers can’t help but see a transgender person as a weirdo.”²¹⁵

Some employers attempt to combat more overt biases through antidiscrimination policies.²¹⁶ However, policy alone may not be adequate

207. See Charlesworth & Banaji, *supra* note 177, at 181–82 (“In the United States today . . . sexuality attitudes appear to be societally prioritized . . . and therefore are more frequently discussed Societal priority corresponds to more frequent and repeated exposure to debate or counterarguments that may, in turn, induce greater attitude change.”).

208. As of 2016, 56% of respondents in Charlesworth’s and Banaji’s survey still held weak, moderate, or strong pro-straight preferences. See Carey Goldberg, *Study: Bias Drops Dramatically for Sexual Orientation and Race — But Not Weight*, WBUR (Jan. 11, 2019), <https://www.wbur.org/news/2019/01/11/implicit-bias-gay-black-weight> [<https://perma.cc/KF8X-Z8QQ>] (citing Charlesworth & Banaji, *supra* note 177).

209. See *infra* Section I.B.

210. See Charlesworth & Banaji, *supra* note 177, at 182.

211. Implicit bias towards LGBTQ* persons is expected to pass neutrality by January 2025 and September 2045. See *id.*

212. These changes in attitude towards sexuality have been gradual and may be caused by period effects. See *id.* at 182. This means that even if implicit attitudes towards sexuality are moving towards neutrality, the fact that it has yet to implies still-existing implicit anti-LGBTQ* beliefs.

213. This concept of heterosexuality as the norm is also known as heteronormativity. *Heteronormativity*, APA DICTIONARY PSYCH., <https://dictionary.apa.org/heteronormativity> [<https://perma.cc/55JV-KSSK>] (last visited Mar. 3, 2022).

214. See Nadler et al., *supra* note 183, at 482.

215. See, e.g., Jenny B. Davis, *Advocating for Authenticity*, ABA J., Oct.–Nov. 2021, at 10.

216. See Valerie Bolden-Barrett, *Human Rights Campaign Awards 570 US Companies a Perfect Score on LGBTQ Equality*, HRDIVE (April 2, 2019), <https://www.hrdiver.com/news/human-rights-campaign-awards-570-us-companies-a-perfect-score-on-lgbtq-equa/551676/> [<https://perma.cc/U6P9-E2N9>] (“16.8 million U.S. employees have a corporate non-

to prevent aversive discrimination. For example, according to a 2014 study observing the effects of egalitarian hiring norms and accountability procedures on aversive discrimination, having nondiscriminatory hiring norms did not mitigate the effects of aversive discrimination against gay men.²¹⁷ Observing the interview process gives a better insight into these lingering biases since it is “particularly vulnerable to subjective biases, prejudices, and stereotypes on the part of interviewers.”²¹⁸

However, these biases persist past the hiring process. According to a 2020 McKinsey report, many LGBTQ* employees believe that they must outperform their non-LGBTQ* colleagues to gain recognition.²¹⁹ Around 40% of LGBTQ* women felt they needed to provide extra evidence of their competence as compared to their non-LGBTQ* peers.²²⁰ This is not a new phenomenon; Black women have reported feeling a similar need to work twice as hard as their white peers, and studies reveal employers hold Black workers to a stricter standard than their white peers.²²¹

Even pro-LGBTQ employers may demonstrate an implicit preference for more “conventional” forms of a queer identity, such as transgender men and women, versus their “unconventional” counterparts, such as nonbinary or agender persons.²²² This may be due to many transgender men and women adhering to binary rules of man-woman, which largely dominate

discrimination policy protecting them from sexual orientation or gender identity discrimination.”).

217. See Nadler et al., *supra* note 183, at 485.

218. *Id.* at 480 (citing R.D. AVERY & R.H. FALEY, *FAIRNESS IN SELECTING EMPLOYEES* 213 (2d ed. 1988)).

219. See PETER BALLINSON ET AL., *McKINSEY Q., LGBTQ* VOICES, LIVING FROM LEARNED EXPERIENCES* 6 (2020), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/lgbtq-plus-voices-learning-from-lived-experiences#download/%2F~%2Fmedia%2Fmckinsey%2Fbusiness%20functions%2Fpeople%20and%20organizational%20performance%2Four%20insights%2Flgbtq%20plus%20voices%20learning%20from%20lived%20experiences%2Flgbtq-learning-from-lived-experiences-web-final.pdf%3FshouldIndex%3Dfalse> [<https://perma.cc/PBB5-LWFQ>].

220. See *id.*

221. See Michele Heyward, *Black Women Need to Be Twice as Good in Workplace*, POSITIVE HIRE, <https://positivehire.co/black-women-need-to-be-twice-as-good-in-workplace/> [<https://perma.cc/F32Y-UHUC>] (last visited Mar. 3, 2022); see also Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, ATLANTIC (Oct. 7, 2015) (citing Costas Cavounidis & Kevin Lang, *Discrimination and Worker Evaluation* (Nat’l Bureau of Econ. Rsch., Working Paper No. 21612, 2015)), <http://www.theatlantic.com/business/archive/2015/10/why-black-workers-really-donneed-to-be-twice-as-good/409276/> [<https://perma.cc/8WFR-DWSW>] (explaining how higher levels of scrutiny for Black employees feed patterns of unemployment in the Black community).

222. See Kelly K. Dray et al., *Moving Beyond the Gender Binary: Examining Workplace Perceptions of Nonbinary and Transgender Employees*, 27 *GENDER, WORK, & ORG.* 1181, 1183 (2020).

our society.²²³ Conversely, nonbinary individuals “identify and often act outside of the gender binary . . . and are less able to fit into society’s views of gender as a result.”²²⁴ For example, nonbinary individuals who are “out” at work are more likely to be denied a promotion compared to transgender men and women.²²⁵ While knowledge of nonbinary individuals is growing,²²⁶ many still believe nonbinary identities to be attention-seeking or “a phase.”²²⁷ This paternalism invalidates nonbinary people’s identity and signals a limited, binary understanding of gender.

Because there is no “smoking gun” with implicit bias, many aversively discriminated LGBTQ* plaintiffs will likely not have direct evidence of such discrimination. This will force those in the Eighth and Fifth Circuits to fit their mixed-motive case into *McDonnell Douglas*’s single-motive standard. Even those using the 2000e-2m standard must attempt to prove a type of discrimination that courts have not widely recognized with evidence that courts usually will not accept.

For LGBTQ* employees who work at will, it can be even more difficult to tell when aversive discrimination has even occurred. This is because EAW “supports inconsistent, even irrational, management behavior by permitting arbitrary, not work-related, treatment of employees.”²²⁸ This inconsistency in behavior may allow bias to persist, as there is no standard for employees to differentiate discriminatory decisions from arbitrary ones. For example, in the absence of just-cause provisions, an employer can cite “performance issues, or budget cuts, or the generic need for new corporate direction” as justification for terminating an employee.²²⁹ Yet, according to a 2019 study of low-wage fast-food workers in New York City, all of whom are at will, 72% of employees felt that their employers did not have

223. *See id.*

224. *Id.*

225. *See id.* (citing Skylar Davidson, *Gender Inequality: Nonbinary Transgender People in the Workplace*, 2 COGENT SOC. SCIS. 1 (2016)).

226. “[A]bout a quarter (26%) say they know someone who prefers that others use gender-neutral pronouns such as ‘they’ instead of ‘he’ or ‘she’ when referring to them, up from 18% in 2018” Rachel Minkin & Anna Brown, *Rising Shares of U.S. Adults Know Someone Who Is Transgender or Goes by Gender-Neutral Pronouns*, PEW RSCH. CTR. (July 27, 2021), <https://www.pewresearch.org/fact-tank/2021/07/27/rising-shares-of-u-s-adults-know-someone-who-is-transgender-or-goes-by-gender-neutral-pronouns/> [https://perma.cc/256R-WYFD].

227. *See* Jessica A. Clarke, *They, Them, Theirs*, 132 HARV. L. REV. 894, 910–11 (2019).

228. Tara J. Radin & Patricia H. Werhane, *Employment-at-Will, Employee Rights, and Future Directions for Employment*, 13 BUS. ETHICS. Q. 113, 114 (2003).

229. Sarah Jones, *To Truly Protect LGBTQ Workers, Get Rid of At-Will Employment*, INTELLIGENCER (June 15, 2020), <https://nymag.com/intelligencer/2020/06/at-will-employment-leaves-lgbtq-workers-vulnerable.html> [https://perma.cc/LM3M-GVQT].

consistent expectations for performance, attendance, and customer service.²³⁰

Furthermore, many at-will workers are denied basic explanations for their terminations,²³¹ which can further complicate deciphering an arbitrary firing from a discriminatory one. Determining employer motive is especially difficult when the decisionmaker's bias is not explicit, subjective decisions are left unchecked by objective standards, and companies' policies appear egalitarian. Even when reasons are given, an employee may not have access to information that would allow them to better assess the merits of their potential case.²³² This can chill lawsuits in the first place since at-will employees will often be unsure of whether their termination was motivated by discrimination or, perhaps, some errant comment made the week before.²³³

Gruden's case is an example of this information gap. As noted, Gruden's use of slurs was more explicit than the implicit bias commonly present in subjective decision-making systems. However, he was seemingly unaware of its impacts and expressed these views outside of many employees' purview. Yet, Gruden could have acted on these views, even unconsciously. Even if Gruden believed himself to not be biased against LGBTQ* individuals, his inherent characterization of gay peoples as effeminate may have influenced his decisions to not draft or retain certain players based on their sexual orientation, perceived or otherwise. If this happened, players were likely unaware of such discriminatory motive, especially with Gruden publicly presenting himself as a proponent of LGBTQ* rights. Furthermore, Gruden's shift from synonymizing LGBTQ* peoples with weakness to public support of their rights is a microcosm of the larger societal acceptance of the LGBTQ* community — and just as sudden.

The higher likelihood of LGBTQ* persons being in poverty also makes them more vulnerable to the harmful aftereffects of employment discrimination. From 2014 to 2017, LGBTQ* people had a 15% to 17% higher risk of being poor than cisgender straight people.²³⁴ This risk

230. See CTR. FOR POPULAR DEMOCRACY ET AL., *FIRED ON A WHIM: THE PRECARIOUS EXISTENCE OF NYC FAST-FOOD WORKERS* 12 (2019), <https://www.populardemocracy.org/sites/default/files/Just%20Cause%20Complete%20Final%20%20Web%20V2%20FINAL.pdf> [<https://perma.cc/DZ4D-4Y8M>].

231. See *id.* at 1.

232. See Michael Selmi, *Why Are Employment Discrimination Cases so Hard to Win?*, 61 LA. L. REV. 555, 570 (2001).

233. See Schwartz, *supra* note 22 (discussing how an at-will employee can be discharged “for a single mistake”).

234. See M.V. LEE BADGETT, SOON KYU CHOI & BIANCA D.M. WILSON, UCLA SCH. OF L., *LGBT POVERTY IN THE UNITED STATES* 1, 5 (2019), <https://williamsinstitute.law>.

increased to 16% to 22% in 2021.²³⁵ This higher risk of poverty also means that, if fired, LGBTQ* employees are less likely to have adequate emergency savings to support themselves while being unemployed and finding work.²³⁶ Those in low-wage jobs, like the food service industry, are also likely to experience financial hardship because of their sudden at-will termination.²³⁷ Transgender and non-gender-conforming employees who lose jobs due to bias also experience four times the rate of homelessness compared to those who did not lose a job due to bias.²³⁸

Therefore, a recently terminated at-will LGBTQ* employee on the brink of poverty will have little time to consider the motives of their employer. Rather, to avoid homelessness, medical turmoil, or further indebtedness, they must immediately begin searching for new work and filing for unemployment (if they qualify). This urgency to find new work and the costs of litigation are likely to deter potential plaintiffs from pursuing claims, even if they are meritorious.

Kei Hopkins's alleged experience illustrates this dichotomy. In November 2017, Hopkins was working as a job coach in Cleveland for Vocational Guidance Services.²³⁹ Kei identifies as nonbinary — neither male nor female — and uses the gender-neutral pronouns “they” and “them.”²⁴⁰ One day at work, a client saw Kei's painted nails and began lobbing gay slurs. Kei reported the episode, assuming the company would

ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf
[<https://perma.cc/T9AP-4H2N>].

235. *The Complexity of LGBT Poverty in the United States*, INST. FOR RSCH. ON POVERTY (June 2021), <https://www.irp.wisc.edu/resource/the-complexity-of-lgbt-poverty-in-the-united-states/> [<https://perma.cc/9SSA-Q5BE>].

236. See Francisco Velasquez, *Over Half of Americans Have Less Than 3 Months Worth of Emergency Savings*, CNBC (July 28, 2021, 12:03 PM), <https://www.cnbc.com/2021/07/28/51percent-of-americans-have-less-than-3-months-worth-of-emergency-savings.html> [<https://perma.cc/STN8-JD4U>] (“Low-income households are much more likely to not have adequate emergency savings . . .”).

237. See CTR. FOR POPULAR DEMOCRACY ET AL., *supra* note 230.

238. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3* (2011).

239. See Ashley Wong, *A Patchwork of Anti-Discrimination Laws Don't Protect LGBTQ Workers*, CTR. FOR PUB. INTEGRITY (June 15, 2020), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/a-patchwork-of-anti-discrimination-laws-dont-protect-lgbtq-workers/> [<https://perma.cc/6E2A-7KUK>].

240. Pronouns are used by both transgender and cisgender people to refer to someone in the third person. It should be noted that pronouns are not always indicative of gender. See *How Do I Use Personal Pronouns?*, MYPRONOUNS.ORG, <https://www.mypronouns.org/how> [<https://perma.cc/23JG-5VHG>] (last visited Mar. 3, 2022) (“A person could be a man or a woman or both or neither and share any number of these sets of pronouns as the correct ones to use for them, but which set they go by is not necessarily indicative of their gender.”).

support them as it had never been openly transphobic to them before.²⁴¹ But the next day, the company fired Kei — allegedly for sleeping on the job a few days before.²⁴² Kei claimed that on that day, they were resting during break time, trying to get relief from pain caused by treatment for a jaw disorder.²⁴³ Nevertheless, Kei could do nothing but sign their notice of termination, knowing they were an at-will employee and that filing a complaint in the state of Ohio would present a legal ordeal.²⁴⁴

Some believe that anti-LGBTQ* sentiment is a relic restricted to the rural United States.²⁴⁵ While it is true that many LGBTQ* people live in urban areas,²⁴⁶ moving to cities to avoid the assumed prejudice of rural United States²⁴⁷ or for employment opportunities, this does not exclude them from being victimized by prejudice. Even in the most “liberal” metropolitan areas, such as New York City, there may still be the bigoted employer and the discriminated employee.²⁴⁸ Therefore, while urban areas are more accepting than rural areas (due in part to rural United States’s lingering anti-LGBTQ conservative beliefs),²⁴⁹ city limits are not a shield against discrimination.

241. See Wong, *supra* note 239.

242. See *id.*

243. See *id.*

244. See *id.*

245. See, e.g., Silas House, Opinion, *Small Towns, Small Hearts*, N.Y. TIMES (Oct. 22, 2014), <https://www.nytimes.com/2014/10/23/opinion/the-battle-for-gay-rights-in-rural-america.html> [<https://perma.cc/6WAU-6R5D>] (“The equality divide [for LGBTQ* persons] we face is no longer between red and blue states, but between urban and rural America. Even as we celebrate victories like this month’s Supreme Court order on same-sex marriage, the real front in the battle for equality remains the small towns that dot America’s landscape.”).

246. Metropolitan areas like San Francisco, Seattle, and even Salt Lake City have LGBTQ* populations higher than the national average of 4%. See Scott Van Voorhis, *What Cities Have the Largest Percentage of LGBT Residents?*, THE STREET (May 31, 2018, 2:31 PM), <https://www.thestreet.com/personal-finance/cities-with-largest-percentage-of-lgbt-residents-14605660> [<https://perma.cc/KRK7-GLAS>].

247. “Compounding rural male gender anxiety is the reality that, unlike in urban areas where many models of acceptable masculinity coexist, small towns offer few competing visions of normative masculinity.” Luke A. Boso, *Policing Masculinity in Small-Town America*, 23 TEMP. POL. & C.R. L. REV. 345, 355 (2014).

248. Demonstrative of this fact are the court dockets for the U.S. District Court for the Eastern and Southern District of New York — which cover “progressive” metropolitan areas like New York City and Brooklyn — from June 15, 2020 onwards. According to Bloomberg Law’s docket database, since the *Bostock* decision, these courts had 239 employment civil rights complaints containing the words “Title VII” and “sexual orientation” or “gender identity” filed.

249. See Boso, *supra* note 247, at 360.

III. PREVIOUSLY PROPOSED SOLUTIONS

A. Mandatory Arbitration Clauses

Some have argued that the shift from litigation to arbitration has the potential to enhance equality of access to justice for employees.²⁵⁰ Arbitration differs from traditional litigation in that there is “more limited discovery, less frequent use of summary judgment motions, and less stringent application of the rules of evidence.”²⁵¹ While this seemingly addresses employment discrimination cases’ frequent dismissals at summary judgment, the reality of arbitration proves different.

The defining characteristic of mandatory arbitration is that the employer unilaterally creates its procedure as a term and condition of employment.²⁵² This includes choosing which, if any, arbitrator service provider will administer the arbitrator and the rules of conduct for the arbitration.²⁵³ While unionized workplaces have a polarizing force of a union in the labor arbitrator selection process, this is absent in nonunion workplaces.²⁵⁴ Therefore, compared to larger employers who more frequently participate in employment arbitration, individual nonunion employees are at a distinct disadvantage.²⁵⁵

Employers are also systematically much more likely to be repeat players in arbitration, especially employers enforcing mandatory arbitration.²⁵⁶ Because arbitrators repeatedly see the same employers, they might tend to favor employers in arbitration in the hopes of securing future business.²⁵⁷ In a unionized workplace, this favoritism is offset by unions also being repeat players.²⁵⁸ However, it is rare for an individual employee to be a repeat arbitration participant, meaning there is no counterbalance in nonunionized workplaces.²⁵⁹

250. See Colvin, *supra* note 123, at 72 (citing Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Disruptive Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 561 (2001)).

251. *Id.* at 74.

252. *See id.* at 76.

253. *See id.*

254. See Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 CORNELL INDUS. & LAB. RELS. REV. 1019, 1021 (2015).

255. *See id.*

256. See Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 11 (2011).

257. *See id.*

258. *See id.*

259. *See id.*; see also Colvin & Gough, *supra* note 254.

The decisions of these mandatory arbitrations demonstrate this imbalance of power and employer favoritism. According to a 2011 study,²⁶⁰ employees won²⁶¹ only 21.4% of employer-promulgated arbitration procedures — compared to the 36.4% win rate for federal court litigations.²⁶² This employee win rate drops further during a “repeat-employer-arbitrator pairing” in which an employer has previously used an arbitrator.²⁶³ Among cases in which the employee received some amount of monetary damages, the median amount was \$36,500, and the mean award was \$109,858.²⁶⁴ This is far lower than the damages awarded in employment litigation, which had a median award of \$150,500.²⁶⁵

Furthermore, the arbitration system undermines one of the public policy goals of antidiscrimination law, which is to deter and educate prospective violators.²⁶⁶ Arbitration is a private system with generally confidential outcomes.²⁶⁷ Unlike courts, members of the public cannot attend

260. This study focused on arbitration decisions published by the American Arbitration Association in compliance with Section 1281.96 of the California Code of Civil Procedure. “Under the California Civil Procedure Code, organizations that provide arbitration services within the state are required to make available to the public certain prescribed information on arbitration cases administered by the service provider that involve consumers.” See Colvin, *supra* note 256, at 3. This information includes:

[T]he name of the employer, the name of the arbitrator, the prevailing party, the amount awarded, and whether the employee was self-represented. However, information regarding employee characteristics, types of claims being filed (e.g., FLSA, contract, Title VII), and the arbitrator’s complete written award are not covered by these disclosure requirements.

See Colvin & Gough, *supra* note 254, at 1026. The study analyzes 3,945 arbitration cases, of which 1,213 were decided by an award after a hearing, filed and reaching disposition between January 1, 2003, and December 31, 2007. See Colvin, *supra* note 256, at 4. While this Note would like to have a more limited analysis of Title VII arbitration decisions, it is difficult to limit success rates of certain types of claims as information about claim types are not required to be disclosed. See Colvin & Gough, *supra* note 254, at 1026.

261. Wins were classified “as including any case in which some award of damages, however small, is made in favor of the employee.” Colvin, *supra* note 256, at 5.

262. See *id.* at 5, 6.

263. See *id.* at 14 (“Whereas the employee win rate was 23.4 percent in cases that did not involve a repeat-employer–arbitrator pairing, the employee win rate was only 12.0 percent in cases involving a repeat pairing . . .”).

264. See *id.* at 7.

265. See *id.* (citing Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2003)). Colvin’s study was unable to compare the award outcomes of systematically matched cases in litigation and arbitration. See *id.* at 4.

266. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 427 (1999) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (stating that federal court relief under Title VII not only compensates victims but also vindicates broader public interest in deterring future discrimination)).

267. See *id.* at 402.

arbitration hearings, and there is no public record of filings, the hearing, or the award.²⁶⁸ Therefore, even the rare arbitration decisions in favor of the employee are only known to the parties of the suit. This privacy undercuts the deterrent effect found in public court decisions. For example, an employer publicly sanctioned through litigation for racial discrimination in hiring “may deter another employer from gender discrimination in hiring or, indeed, in promotions”²⁶⁹ and “stigmatizes the violator . . . [detering] other employers who seek to avoid that same stigma.”²⁷⁰ Conversely, in arbitration, there is no public knowledge of this sanction. Both the lack of a public record of arbitration proceedings and decisions and the fact that employers are rarely sanctioned in arbitration make arbitration a less than promising alternative to litigation.

B. In-House & Educational Solutions

Daniel Masakayan, an employer-side associate at McGuireWoods, LLP who has frequently written about employment issues,²⁷¹ argues that using Title VII to address aversive discrimination would only further burden plaintiffs and potentially worsen discrimination.²⁷² He cites Supreme Court precedent, such as *Dukes* and *Price Waterhouse*, stating that the Court has only provided “insufficient guidance” in these cases.²⁷³ To Masakayan, this “insufficient guidance . . . results in uncertainty for courts and additional barriers for victims of unconscious discrimination.”²⁷⁴

While admirable for its outside-of-court focus, Masakayan’s solution of using education and training towards eliminating implicit bias may allow biased employers to exert subjective discretion on educational programs and trainings.²⁷⁵ If employers and decisionmakers are unconsciously discriminating against LGBTQ* employees, then placing employers in a position to determine what programs correct implicit bias may do little to mitigate discrimination. Furthermore, two-thirds of human resource specialists report that diversity training has no positive effects.²⁷⁶

268. *See id.*

269. *Id.* at 431.

270. *Id.* (citing PAUL H. ROBINSON, CRIMINAL LAW 12 (1997)).

271. *See Daniel Masakayan*, JD SUPRA, <https://www.jdsupra.com/authors/daniel-masakayan1/> [<https://perma.cc/NXC9-K99M>] (last visited Mar. 3, 2022).

272. *See generally* Daniel Masakayan, *The Unconscious Discrimination Paradox: How Expanding Title VII to Incorporate Implicit Bias Cannot Solve the Issues Posed by Unconscious Discrimination*, 25 GEO. MASON L. REV. 246 (2017).

273. *See id.* at 259–60.

274. *Id.* at 260.

275. *See id.* at 283–85.

276. *See* Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work?: The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW 48, 48–49 (2018).

Some may argue that it is not the trainings themselves that are insufficient but rather the length of the programs. After all, unlearning unconscious bias requires altering one's subconscious, which likely requires more than one training session about implicit bias.²⁷⁷ In response, advocates of anti-bias trainings, like Masakayan, may argue for longer curriculums. While longer-term curriculums have been shown to reduce bias,²⁷⁸ employers may be resistant to costly programs.²⁷⁹ For example, Starbucks, which closed 8,000 stores for half a day to train 175,000 workers, lost \$12 million in doing so.²⁸⁰ To match the recommended curriculum best suited for reducing bias, they would need a dozen half-day sessions, every year, for more than half the workforce, which grows by 10,000 new workers every year.²⁸¹ While any reasonable employer seeks to mitigate employment discrimination claims, the costs associated with implementing effective anti-bias trainings are likely too untenable.

Similarly, Masakayan's suggestion of teaching students about implicit bias early and exposing them to diverse groups through the education system is laudable in principle but difficult in practice.²⁸² It is true that contact and exposure with out-groups, such as sexual minorities, mitigates bias but only when that contact is actual and sustained.²⁸³ Simply being in an area with a higher gay population will not impact bias.²⁸⁴ Therefore, for Masakayan's proposal to work, students must have long-term exposure to out-groups.

However, implementing programs with long-term exposure to these out-groups may be difficult. Affirmative action policies that prioritize sexual minorities in admissions may be deemed unconstitutional under the Supreme Court's strict judicial standard.²⁸⁵ The recent Supreme Court ruling in *Fisher v. University of Texas*²⁸⁶ held that colleges must demonstrate that they are using race in admissions only when "necessary,"

277. *See id.* at 49.

278. *See id.* (citing Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267 (2012)).

279. *See id.*; *see also* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 674 (2003).

280. *See* Dobbin & Kalev, *supra* note 276, at 49.

281. *See id.*

282. *See* Masakayan, *supra* note 272, at 284–85.

283. *See* Jordan Axt, *Intergroup Contact and Explicit and Implicit Biases*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/user/jaxt/blogposts/piblogpost009.html> [<https://perma.cc/GQ9W-752P>] (last visited Mar. 3, 2022).

284. *See id.*

285. *See generally* Gregory K. Davis, *Creating A Roadmap to a LGBTQ Affirmative Action Scheme: An Article on Parallel Histories, the Diversity Rationale, and Escaping Strict Scrutiny*, 26 NAT'L BLACK L.J. 43 (2017).

286. 136 S. Ct. 2198 (2016).

meaning no other method could produce the same results.²⁸⁷ Therefore, it is possible that, if a court were to review an LGBTQ* affirmative action scheme under the same standard, it would have to establish “a sexual minority-conscious admissions plan was ‘necessary’ to bringing about the benefits of sexual orientation diversity in the classroom and on campus.”²⁸⁸ Barring a constitutional law argument, eight states have banned affirmative action in totality.²⁸⁹ In 2014, these states made up 29% of all U.S. high school students.²⁹⁰ Under Masakayan’s solution, this 29% of students would have no guarantee of long-term exposure to out-groups in their education.

IV. HOW TO APPLY TITLE VII TO THE MODERN ERA

A. Including Implicit Bias in the 2000e-2(m) Standard

As previously discussed in Section II.C, LGBTQ* people are particularly at risk of having their claims improperly dismissed. Some courts, like those involved in *Kimble* and *Velez*, have begun to understand the importance of including implicit bias in their analysis. Courts that recognize implicit bias evidence usually analyze it through expert witness testimony, as done in *Kimble*.²⁹¹ Since it is at the summary judgment stage where most discrimination cases falter,²⁹² it is important to know whether such testimony is applicable pre-trial. Under Rule 56 of the Federal Rules of Civil Procedure, expert witnesses are allowed to testify on summary judgment.²⁹³ The evidence submitted in connection with summary judgment also does not necessarily have to be presented in an admissible

287. *See id.* at 2208.

288. Davis, *supra* note 285, at 74.

289. *See* Halley Potter, *What Can We Learn from States That Ban Affirmative Action?*, CENTURY FOUND. (June 26, 2014), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/?session=1> [<https://perma.cc/AR5U-LZTS>].

290. *See id.*

291. *See* Jones, *supra* note 163, at 1227 (“Most commonly, implicit-bias evidence was presented in the form of expert testimony on behalf of class action plaintiffs”); *see also id.* at 1233, 1234 (first citing Expert Report of Steven L. Neuberg at 3-7, *Palgut v. City of Colo. Springs*, No. 06-CV-042 (D. Colo. Mar. 31, 2010) (explaining how experts may introduce testimony summarizing brain cognition research on how and why individuals revert to implicit biases when making decisions), then citing *Samaha v. Wash. State Dep’t of Transp.*, No. CV-10-175, 2012 U.S. Dist. LEXIS 190352, at *10–11 (E.D. Wash. Jan. 3, 2012) (finding that Dr. Greenwald’s expert testimony on IAT research could be admitted under Federal Rule of Evidence 702)).

292. *See* Stone, *supra* note 159.

293. *See* FED. R. CIV. P. 56; *see also* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (applying expert testimony admissibility standard to expert affidavits in motion for summary judgment).

form.²⁹⁴ This means that, even if an expert witness's testimony would not be admitted in its current form in a normal trial, it can be supplementary to other evidence offered by the plaintiff at the summary judgment stage.

Even *Price Waterhouse* indirectly included evidence of implicit bias through an expert witness.²⁹⁵ During trial, Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified about how sex stereotyping affected the Price Waterhouse's partnership selection process.²⁹⁶ According to Dr. Fiske, "the subjectivity of the evaluations made it likely that sharply critical remarks such as [those experienced by Hopkins] were the product of sex stereotyping."²⁹⁷ This subjectivity assessment later surfaces in the courts' decision in *Kimble*²⁹⁸ and *Velez*.²⁹⁹ Therefore, the Supreme Court, whether intentionally or not, left the door open for expert witnesses to demonstrate implicit bias.

However, expert witnesses are expensive, and many plaintiffs cannot afford them.³⁰⁰ Instead, courts could allow a plaintiff to establish a Title VII discrimination claim through implicit bias evidence and view an employer's "same-action" defense in light of this demonstrated bias. Implicit bias analysis under Title VII could be introduced either through (1) federal judges educating themselves about its impacts and, subsequently, incorporating it into their decisions or (2) amendments to Title VII explicitly advocating for its inclusion. In assessing discrimination cases, judges already rely on "intuitive" or "common sense" psychological theories in constructing and justifying their application of legal doctrines.³⁰¹ Therefore, incorporating implicit bias — a well-known³⁰²

294. *See* *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 539 (4th Cir. 2015), *as amended* (June 24, 2015) (finding that the district court did not err in considering experts' reports at summary judgment as the admissibility of the reports is immaterial if the anticipated admissible form is explained by submitting party).

295. 490 U.S. 228, 235 (1989).

296. *See id.*

297. *See id.* at 235–36.

298. 600 F. Supp. 2d. 765, 772 (E.D. Wis. 2010).

299. 244 F.R.D. 243 (S.D.N.Y. 2007); *see also* Jones, *supra* note 163, at 1228.

300. According to the SEAK's 2017 National Guide to Expert Witness Fees and Billing Procedures, the median testimony hourly fee for non-medical expert witnesses is \$275/hour. *See Expert Witness Fees: How Much Does an Expert Witness Cost?*, SEAK EXPERT WITNESS DIRECTORY, <https://blog.seakexperts.com/expert-witness-fees-how-much-does-an-expert-witness-cost/> [<https://perma.cc/27UU-SYSZ>] (last visited Mar. 3, 2022). Furthermore, 31% of all experts (including medical) charge a minimum number of hours for trial testimony. *See id.* These high costs may dissuade a plaintiff from using expert witness testimony.

301. *See* Krieger & Fiske, *supra* note 164, at 1006.

phenomenon based on decades of scientific research³⁰³ — is simply an extension of applying these “common sense” theories.

Altering how judges analyze discrimination cases by incorporating a third step to the 2000e-2(m) mixed-motive analysis could be a way for judges to apply an implicit bias analysis. For example, in *Lapsley v. Columbia University-College of Physicians & Surgeons*,³⁰⁴ the Southern District of New York proposed such a process for determining whether discrimination, “subtle or otherwise,”³⁰⁵ exists. First, the jury evaluates the proof offered by the plaintiff, whether direct or circumstantial. The jury then evaluates the defendant’s evidence that no discrimination occurred in making its decision. Finally, the jury ponders the evidence as a whole, rather than separately, in deciding whether actual discrimination occurred or whether a sufficient inference can be drawn supporting an “ultimate” finding of intentional discrimination.

Judges could include implicit bias analysis by applying an altered *Lapsley* analysis when assessing mixed-motive summary judgment motions. At summary judgment, courts could evaluate an employer’s “same-action” defense through the lens of the plaintiff’s prima facie case, which can also be established through evidence of implicit bias, such as highly subjective decision-making.³⁰⁶ For example, assume a gay male plaintiff established that his employer evaluated gay men more harshly than their heterosexual counterparts in performance reviews. Upon reviewing the employer’s defense, the court should be skeptical of any assertion that the employer would have made the same decision because of the plaintiff’s low evaluations.

Conversely, Congress could legislatively incorporate implicit bias by following in its footsteps and issuing an act like the 1991 CRA. One strategy could be overriding the *Dukes* precedent, which some consider a

302. See Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78, 78 (2021) (“But now, the idea of implicit bias circulates widely in both popular and academic discussions. Even the casually interested judge knows a great deal about the topic.”).

303. See Krieger & Fiske, *supra* note 164, at 1034; see also John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RSCH. IN ORGANIZATIONAL BEHAV. 39, 42 (2009) (“The evidence . . . is strong enough to conclude that implicit bias is a genuine phenomenon that requires thoughtful analysis and a meaningful consideration of practical interventions and forms of redress.”).

304. 999 F. Supp. 506 (S.D.N.Y. 1998).

305. See *id.* at 515–16.

306. Under the *Kimble* standard, such evidence would likely be considered circumstantial evidence. See Anthony Kakoyannis, Note, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases*, 69 FL. L. REV. 1181, 1191–92 (2017).

fatal blow to implicit bias's inclusion in Title VII.³⁰⁷ For example, Congress could emphasize *Desert Palace's* assertion that circumstantial evidence can prove discrimination, even absent direct evidence. If Congress does decide to override the *Dukes* decision, it should be aware of the judiciary's responses to its previous overrides and act to limit such resistance.³⁰⁸

B. Removing *McDonnell Douglas* from Mixed-Motive Summary Judgments

While the 2000e-2(m) standard has been embraced by most circuits, many still offer the *McDonnell Douglas* standard in some variation at the summary judgment stage. However, applying the *McDonnell Douglas* pretext standard contradicts Congress's intention in enacting Title VII and clarifying the mixed-motive standard in the 1991 CRA. In *Wright v. Murray Guard, Inc.*,³⁰⁹ a Sixth Circuit case preceding the *White v. Baxter* decision, Judge Moore, writing for the majority and a separate concurring opinion, observed that *McDonnell Douglas's* pretext framework might unjustly terminate some mixed-motive claims at summary judgment.³¹⁰

In her concurrence, Judge Moore concisely described the flaws of both the Fifth Circuit's modified and the Eighth Circuit's unmodified *McDonnell Douglas* approach, offering a hypothetical circumstance where a discriminatory reason played some role in a plaintiff's adverse employment decision.³¹¹ While the plaintiff may not be able to assert a prima facie case, they might still be able to present evidence that a discriminatory reason motivated the decision.³¹² Analyzing this claim under *McDonnell Douglas* would bar what would otherwise be a successful mixed-motive claim.³¹³ *McDonnell Douglas* is aimed at "smoking out" the

307. See Jones, *supra* note 163, at 1230 n.56 (first citing Roger W. Reinsch & Sonia Goltz, *You Can't Get There from Here: Implications of the Wal-Mart v. Dukes Decision for Addressing Second-Generation Discrimination*, 9 Nw. J.L. & Soc. POL'Y 264, 274 (2014); then citing ALLAN G. KING & CAROLE F. WILDER, LITTLER, *DUKES V. WAL-MART: SOME CLOSED DOORS AND OPEN ISSUES* 5 (2012), https://www.littler.com/files/The_Littler_Report_Dukes_vs_Wal-Mart_2-12.pdf [<https://perma.cc/FW5A-Z2UN>]).

308. See Widiss, *supra* note 62, at 548–51 (explaining how courts still apply *Price Waterhouse* to various employment discrimination statutes despite Congress's indication that it undermined the "fundamental" principle that perpetrators of discrimination must be held liable for their actions); see also *id.* at 563.

309. 455 F.3d 702 (6th Cir. 2006).

310. See *id.* at 717 (Moore, J., concurring).

311. See *id.*

312. See *id.*

313. See *id.*

single, ultimate reason for adverse employment; mixed-motive claims do not fit neatly into such a narrow framework.³¹⁴

Applying the rationale of Judge Moore's concurrence to a real-life hypothetical better illustrates her points. Assume that an LGBTQ* plaintiff files a Title VII mixed-motive discrimination claim in the Eighth Circuit. She claims that her employer discharged her because she is LGBTQ*, though her employer claims her discharge was because of budget cuts. Even if the plaintiff can prove that her employer terminated her in a discriminatory manner, her employer can rebut her prima facie case by producing, not proving, a nondiscriminatory reason for its decision, such as the aforementioned budget cuts. The plaintiff is now left with the grueling task of demonstrating that her employer's proffered reason was pretextual for the "true," discriminatory reason. If there are multiple reasons for her termination — such as her LGBTQ* status *and* budget cuts — the plaintiff will fail her case and the employer will walk away, free from liability, despite their proven discrimination.

Circuits that offer an open choice between *McDonnell Douglas* and a motivating factor framework may also confuse plaintiffs since they are not clearly directed to choose either. *Fogg v. Gonzales*³¹⁵ demonstrates how this indecision can stymie lower courts.³¹⁶ In the case, the defendant filed a motion for judgment as a matter of law.³¹⁷ In their motion, the defendant mentioned pretext,³¹⁸ though they did not want the trial court to use a pretext framework.³¹⁹ However, because of the mention of pretext, the judge nonetheless applied *McDonnell Douglas*.³²⁰ What is particularly odd in this case is that it is the *plaintiffs* who should choose which theory applies, which even the opinion itself recognizes.³²¹ To ameliorate this confusion and potential backlogging of the judicial system, circuits should analyze mixed-motive cases under only the motivating standard and not offer *McDonnell Douglas*.

For these reasons, *McDonnell Douglas* should be removed entirely from the mixed-motive analysis. This removal may be done through courts relying more heavily on *Desert Palace*'s endorsement of the 2000e-2(m)

314. *See id.* at 720.

315. 492 F.3d 447 (D.C. Cir. 2007).

316. *See* Thomas F. Kondro, Comment, *Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(M) Of Title VII*, 54 ST. LOUIS U. L.J. 1439, 1453 (2010).

317. *See id.*

318. *See id.* at 1454 (citing *Fogg*, 492 F.3d at 451).

319. *See id.*

320. *See id.* at 1453–54.

321. *See Fogg*, 492 F.3d at 451 (explaining that “[u]sing the mixed-motive theory, a plaintiff can establish an unlawful employment practice” (emphasis added)).

standard and essentially overruling how *McDonnell Douglas* contravened Congress's intent in enacting the 1991 CRA — which was making Title VII more effective in the face of overly limiting precedent.

C. Legislative History Supports Including Implicit Bias and Excluding *McDonnell Douglas* in Mixed-Motive Cases

Since its enactment, Title VII has expanded to encompass newly recognized forms of discrimination. While Congress has, at times, restricted Title VII,³²² it has never overridden an expansive Supreme Court interpretation — only ones that Congress did not see as expansive enough.³²³ For example, in 1978, Congress amended Title VII to include pregnancy discrimination as unlawful sex discrimination — overriding the Court's more restrictive views on such discrimination.³²⁴

The 1991 CRA House Report stated that “[i]f Title VII’s ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.”³²⁵ Yet, as we have seen, Title VII’s current interpretive state does not actually offer victims effective relief, nor does it hold perpetrators liable. Due to their reluctance to accept implicit bias evidence, judges may routinely dismiss meritorious cases at summary judgment, leaving victims remediless. Even when the stray case moves to trial, plaintiffs who choose the 2000e-2(m) method risk losing any monetary recovery, while those opting for *McDonnell Douglas* face steeper evidentiary standards ill-suited for mixed-motive cases.

Some may argue that Title VII never guaranteed monetary relief to successful plaintiffs.³²⁶ However, declaratory and injunctive relief only prevent future violations without addressing the employer’s past misconduct’s effects on the plaintiff. Common types of injunctive relief,

322. When enacting Title VII, Congress included restrictive provisions as compromises “in order to pass expanded prohibition against discrimination.” George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. C.R. & C.L. 159, 160 (2014). Even the 1991 CRA contained restrictive provisions among its expansive ones. *See id.* at 160 & n.9.

323. *See id.* at 173 (“In the 1991 Act . . . Congress only rejected restrictive interpretations that cut back on the previous expansions of the law Where Congress has acted, it has invariably expanded the law to the benefit of plaintiffs.”).

324. *See Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/timeline-important-eeoc-events> [<https://perma.cc/JV9E-BLHR>] (last visited Mar. 3, 2022).

325. H.R. REP. NO. 102-40, pt. 1, at 21 (1991) (Conf. Rep.), *reprinted in* 1991 U.S.C.C.A.N. 549, 559.

326. *See* Kondro, *supra* note 316, at 1444 (“Even after the plaintiff established an illegitimate motive, the Act blocked most forms of monetary relief to the plaintiff . . .”).

such as mandating an employer establish an antidiscrimination policy,³²⁷ may also fail to adequately remedy the aversive discrimination previously described.³²⁸ This is not to say that all plaintiffs must be reinstated or given backpay to be made whole; if offered, many plaintiffs may reasonably refuse to be reinstated at a discriminatory workplace.³²⁹

However, Congress noted the importance of allowing private litigation when it enacted the Civil Rights Attorney's Fees Awards Act of 1976 (Attorney's Fees Act),³³⁰ which authorized fee-shifting in favor of prevailing plaintiffs.³³¹ Prior to the Act, courts used the "American rule," in which litigants typically bore their own fees and expenses incurred in litigation regardless of their success on the merits.³³² The Attorney's Fees Act was meant to incentivize private attorneys to litigate in favor of plaintiffs alleging a variety of civil rights claims, including discrimination.³³³ By assuring that attorneys would receive their fees, even if their plaintiffs' claims did not succeed, Congress hoped that private attorneys would be more willing to take on such cases.³³⁴ Despite these attempts to incentivize plaintiffs' attorneys to litigate discrimination claims, the current difficulty in establishing discrimination claims actively dissuades private attorneys from taking on such cases.³³⁵ Introducing implicit bias evidence not only modernizes the plaintiff's evidentiary burden, but plaintiffs' attorneys, knowing they have a better shot of establishing a successful claim with admissible implicit bias evidence, may

327. See, e.g., Eric M. Baum, *Can I Get My Employer to Change Their Policies Through My Discrimination Claim?*, EISENBERG & BAUM LLP (Dec. 23, 2015), <https://www.eandblaw.com/employment-discrimination-blog/2015/12/23/can-i-get-my-employer-to-change-their-policies-through-my-discrimination-claim/> [<https://perma.cc/LQX9-3NEY>] ("In 2012, for example, after a jury found manufacturing company AA Foundries, Inc. violated federal law by subjecting African-American employees to a racially hostile work environment, the court issued an order that . . . required the company to develop policies and procedures for handling racial discrimination complaints in the future.").

328. See *supra* notes 216–18 and accompanying text.

329. This may be due in part to the psychological injuries suffered because of discrimination. The Supreme Court has allowed plaintiffs to refuse reinstatement under these circumstances. See *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001).

330. Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified at 42 U.S.C. § 1988(b)).

331. See Rutherglen, *supra* note 322, at 170.

332. See *id.*

333. See *id.*

334. See *id.*

335. See Selmi, *supra* note 232, at 570 ("For those attorneys who are in the pursuit of profit, employment discrimination cases seem an especially poor choice to emphasize, since the claims are exceedingly difficult to win and offer the potential for limited damages, two factors that should suppress rather than encourage filings.").

incidentally fulfill the Attorney's Fees Act's goals by more willingly litigating discrimination cases.

D. Including Implicit Bias Analysis in Mixed-Motive Cases Will Not Overburden Employers' Decision-Making Abilities

Employers may perceive courts' analysis of implicit bias as improperly restricting their decision-making abilities. Title VII discourse has long been concerned about "thought control," which argues that Title VII sanctions employers "for having a biased individual in a position to hire or fire, regardless of whether any of his decisions are influenced by his beliefs."³³⁶ Scholars against including implicit bias under 2000e-2(m) point to the House Judiciary Committee's statement that "[2000e-2(m)] would not make mere discriminatory thoughts actionable."³³⁷ Yet, when acted upon, implicit bias is not "mere discriminatory thoughts." As this Note showed, implicit bias can influence workplace dynamics, performance evaluations, hiring processes, and, ultimately, terminations. This Note does not seek to penalize employers for having implicit bias. If the data collected by Harvard is to be believed, almost everyone has some form of implicit bias — even the LGBTQ* employees being discriminated against.³³⁸ It is the acting upon it, subconsciously or otherwise, that should be understood and remedied.

Employers may argue that there are no sufficient ways to prevent implicit bias in the workplace beyond trainings, which have been shown to be either insufficient in preventing bias or not financially feasible for most employers.³³⁹ However, the first step toward addressing implicit bias is acknowledging that it exists.³⁴⁰ By acknowledging implicit bias in their

336. Sullivan, *supra* note 25, at 376–77.

337. Matthew R. Scott & Russel D. Chapman, *Much Ado About Nothing — Why Desert Palace Neither Murdered McDonnell Douglas nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 403 n.51 (2005) (citing H.R. REP. NO. 102-40 (II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549).

338. See Charlesworth & Banaji, *supra* note 177, at 182; see also Lex Konnelly, *Both, And: Transmedicalism and Resistance in Non-Binary Narratives of Gender-Affirming Care 3* (Toronto Working Papers in Linguistics, Working Paper, 2021) ("[T]ransmedicalists . . . [are] those who . . . insist[] that deviating from the established medical model undermines public acceptance of trans communities and trivializes 'authentic' trans experiences. They criticize those deemed 'transtrenders,' individuals who 'inauthentically' claim to be transgender in the absence of medicalized criteria, particularly gender dysphoria.").

339. See *supra* Section III.B.

340. See *Eliminating Implicit Bias: First Step, Admit You Have It*, AM. BAR. ASS'N (July 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/july-2017/the-first-step-to-eliminating-implicit-bias—admit-you-have-it/> [<https://perma.cc/2HHK-QUE4>].

employment discrimination analysis, the judiciary may spur employers to conceive of better ways to manage implicit bias or, at the very least, have them think twice about whether their employment decisions are truly bias-free.

Some legal scholars have argued that *Bostock* demonstrates that Title VII already reaches non-explicit discrimination and, therefore, adding implicit bias analysis is unnecessary.³⁴¹ However, this argument relies on discrimination that, while not explicitly stated, is still readily observable. In all three cases consolidated in *Bostock*, the employees' termination occurred after their sexual orientation and gender identity were discovered by the employer. It is not outlandish to assume that such termination is "because of" sex. However, with more complicated cases, like that of *Kimble*, *Velez*, and even *Price Waterhouse*, implicit bias is an essential component of a fair assessment.

CONCLUSION

Despite the flaws in some courts' enforcement of Title VII and the mixed-motive standard, *Bostock* is still a historic precedent that should be celebrated. In providing protections for sexual orientation and gender identity, the Supreme Court furthered the U.S. values of fairness and equality to a group deserving of them. Yet, its victory is an incomplete one. Without changing how judges assess mixed-motive cases, LGBTQ* plaintiffs may only have superficial protection from workplace discrimination without the actual enforcement behind it. By removing *McDonnell Douglas* from mixed-motive analysis and allowing for implicit bias evidence under the 2000e-2(m) standard, *Bostock* can truly be as momentous as the public sees it to be.

341. See Joan C. Williams, Rachel M. Korn & Sky Mihaylo, *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 HASTINGS L.J. 337, 404–06 (2020).