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Scaling the Corporate Ladder: Do Women Really Have a Fair Chance To Advance in Corporate America? The Glass Ceiling and Proposed Title VII Solutions to Unconscious Discrimination.

Michelle Alfonso Gunderson

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Introduction:

Marissa Mayer, President and CEO of Yahoo Inc.,[1] became a proud parent of a baby boy in late September of 2012.[2] Mayer took control of the board at Yahoo during her third trimester with every step of her pregnancy scrutinized by the media.[3] This news, if heard merely 30 years ago would have probably shocked women around America. Yet, in modern society this news symbolizes a major success for women from a long uphill struggle. Mayer has accomplished what some women wouldn't dare to dream even with the contemporary notions of equal opportunity for men and women. Mayer's extraordinary story begs the question whether more stories like hers will come into fruition and whether the glass ceiling has been shattered once and for all?

Unfortunately, this paper answers this question in the negative. Women are still underrepresented when it comes to the highest earning positions in *Fortune* 500 companies.[4] The statistical evidence in this paper focuses on the *Fortune* 500 and large companies because these entities serve as a guidepost for American corporate culture that are most likely best equipped with resources to provide opportunities to women.[5] Arguably, if gender discrimination exists in the *Fortune* 500 and large companies, which generally provide programs to incentivize

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[1] Yahoo, Inc., Quarterly Report (Form 10-Q) (Aug. 9, 2012).
[2] Nicole Perlroth, *Yahoo Chief Marissa Mayer Welcomes New Baby Boy,* N.Y. TIMES, (Oct. 1, 2012), http://bits.blogs.nytimes.com/2012/10/01/yahoo-ceo-marissa-mayer-welcomes-new-baby-boy/
[3] *Id.*
[4] Catalyst, 2010 *Targeting Inequity: The Gender Gap in U.S. Corporate Leadership*, 2, (2012) available http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=90f0aade-d9f5-43e7-8501-46bbd1c69bb8.
[5] *See id*. at 2.

and promote advancement of women, then it is likely that gender discrimination may be prevalent in smaller business that may not have the resources to provide these incentives.

Although we have made great strides with gender equality since the inception of 1964 Civil Rights Act,[6] the current interpretation of Title VII[7] still gives insufficient protection for women in the workplace attempting entry into upper level management.[8] While many scholars explain the glass ceiling by attributing the lack of women in leadership to personal preferences,[9] or the maternal wall,[10] this paper proposes that other reasons, such as implicit discrimination,[11] may also be keeping certain women from reaching higher positions in corporate America. Implicit bias[12] is prevalent in workplaces,[13] as stereotypes have long captured women into certain traditional gender roles and these perceptions may also be hindering their path up the corporate ladder.[14]

Title VII could provide some remedy to the implicit bias problem by raising the employer's evidentiary burden in Title VII disparate treatment cases.[15] In the proposed solution, an employer would have to show by clear and convincing evidence, instead of by a preponderance of the evidence, that an employment decision was not made due to

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[6] Title VII is legislation that prohibits employment discrimination on the basis of race, sex, color, religion or national origin. Title VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e-2 (1993).

[7] *Id.*

[8] *See infra* Part III.

[9] *See infra* Part II.A.

[10] *See, e.g.*, Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 Colum. L. Rev. 1, 14 (2010).

[11] *See infra* Part II.B.1

[12] *See infra* Part II.B.1

[13] *See* Evelyn F. Murphy WITH E.J. Graff, *Getting Even*, 175 (2005).

[14] *See infra* Part II.B.

[15] In disparate treatment cases, Plaintiffs can prove discrimination under Title VII by showing an employment decision was "tied to a discriminatory animus that an illegitimate factor had a "motivating" or "substantial" role in the employment decision." Employers can subsequently defend this claim by providing a legitimate business reason, by a showing of a preponderance of the evidence. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 522 (3d Cir. 1992).

discrimination. Therefore, potentially alleviating the plaintiff from arguing the defendant's reason was a pretext if the employer fails to meet the higher burden.[16] Another possible solution presented in this paper is to interpret Title VII to cover implicit bias or workplace bias. This proposed cause of action would involve a plaintiff putting forth a case that an employer was aware of and maintained a gender biased work environment. Unlike a hostile work environment claim,[17] which requires overt actions by employers or management, this claim would attempt to capture the more subtle aspects of workplace discrimination. In order to claim this under Title VII, an employer's work environment would have to impact the plaintiff's ability to obtain a promotion or advancement, while a plaintiff would be qualified for advancement and meets expected performance metrics. For example, an employer could be held liable for promoting male oriented corporate activities, such as golf, football games, etc or for failure to provide women with adequate female mentors. Similar to the hostile work environment theory, the proposed "biased work environment" interpretation would make employers liable for creating and maintaining a biased work environment or furthering implicit or structural discrimination.

This paper proceeds as follows: Part I introduces and discusses the problem—why more women are not seated at the helm of *Fortune* 500 companies, if recent statistics show it may be better for business.[18] Part II will explore why corporate America, which by its nature is the most prepared of all employers in the nation to address this issue, yet cannot seem to fix the problem. Part III will discuss the defects in Title VII when it comes to protecting women climbing the

[16] Under *Ezold,* if the employer's defense is sufficient, the Plaintiff would otherwise have to argue that the employers justification was a pretext and not really the basis of its policy. *Id.* at 523

[17] A hostile work environment is found when a workplace is both objectively and subjectively offensive, one that a reasonable person would find abusive. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

[18] See *Gender Diversity & Corporate Performance*, CREDIT SUISSE, (2012), https://infocus.creditsuisse.com/data/_product_documents/_shop/360145/csri_gender_diversity_and_corporate_performance.pdf; *see also* Catalyst, *supra* note 4.

corporate ladder. Part IV will discuss two proposed solutions. One proposed solution would be to raise the evidentiary burden of Title VII disparate treatment cases, and another would be to interpret Title VII to create stronger workplace bias protections. The paper will conclude with a discussion of each solution and provide a recommendation that would attempt to solve the problem.

I. Corporate America's Efforts to Increase Women Leaders

The corporate world is making vast efforts to include women and expand the gender diversity of their workers.[19] A quick website search of some of the companies on the *Fortune* 500 reveals many incentives for women, such as programs for advancement of women, providing flexible work hours, or touting of stories of women workers and women leaders.[20] Examples of women's advancement initiatives include programs such as GM's Women's Retail Network, which strives to increase the female presence in the automotive industry.[21] Dow Chemical's WIN program, offers women mentoring and networking opportunities.[22] To assist family needs, companies provide flexible schedules such as Bank of America's compressed work-weeks, telecommuting and "Flextime."[23] Some, more extreme examples of these types of initiatives include Sun Microsystems, Inc., which allows almost half of the employees at Sun

[19] *Female Power*, ECONOMIST (Dec. 30 2009), http://www.economist.com/node/15174418

[20] *See Id. See also*, *e.g.* GENERAL MOTORS CO., http://www.gmdealerdevelopment.com/wri/index.html (last visited Oct. 27, 2012); DOW CHEMICAl COMPANY, http://www.dow.com/careers/diversity/environment/woman.htm (last visited Oct. 27, 2012); BANK OF AMERICA CORP., http://careers.bankofamerica.com/learnmore/flexible_wa.asp (last visited Oct. 27, 2012).

[21] GENERAL MOTORS CO, http://www.gmdealerdevelopment.com/wri/index.html (last visited Oct. 27, 2012).

[22] DOW CHEMICAL COMPANY, http://www.dow.com/careers/diversity/environment/woman.htm (last visited Oct. 27, 2012).

[23] BANK OF AMERICA CORP, http://careers.bankofamerica.com/learnmore/flexible_wa.asp (last visited Oct. 27, 2012).

Microsystems to work from home and Raytheon, allows workers every other Friday off to take care of family business.[24]

A. American Women Struggle Up the Corporate Ladder

Despite these growing corporate women's initiatives, a report provided by Catalyst Inc., a nonprofit think-tank organized to promote advancement of women in business, samples the years 1996 to 2009 and depicts the slow rate of progress for women in the *Fortune* 500.[25] "While women constitute nearly half of the total work force[26] and earn 57 percent of Bachelor's degrees, 60 percent of Masters degrees,[27] and control or influence 73 percent of the consumer decisions[28]....women make up less than three percent of CEOs and hold roughly 15 percent of board seats."[29] Although the number of women CEO's are technically at a record high, given the weaker historical significance of women leadership in corporate governance, this is not a miraculous accomplishment. The report further documents that the number of women are still underrepresented in leadership at the *Fortune 500* and these leadership positions decrease the further up the corporate ladder women ascend.[30]

Not only are women underrepresented in corporate governance, but there is also evidence that women are still are paid less than men. Historical evidence suggests a long-term discrimination between the salaries of comparable men and women.[31] The earnings gap for women in 2012 is 77 cents on the dollar compared to men according to the most recent U.S.

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[24] Economist, *supra* note 19.
[25] Catalyst, *supra* note 4.
[26] BUREAU OF LABOR STATISTICS, ANNUAL AVERAGES TABLES FROM THE 2009 CURRENT POPULATION SURVEY (2010).
[27] NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS (2009).
[28] MICHAEL J. SILVERSTEIN ET AL., WOMEN WANT MORE: HOW TO CAPTURE YOUR SHARE OF THE WORLD'S LARGEST, FASTEST-GROWING MARKET (2009).
[29] Catalyst, *supra* note 4, at 2
[30] *Id.*
[31] FRANCINE D. BLAU, MARY C. BRINTON & DAVID B. GRUSKY, DECLINING SIGNIFICANCE OF GENDER, 113 (2006).

census.[32] With respect to corporate America, the Catalyst report suggests that women in *Fortune* 500 companies still earned less than men, as women tend to start behind and therefore stay behind, equally qualified men.[33] The Catalyst report found that women averaged $4,600 less in their initial jobs, which because of percentage based raises, result in men's salary growth outpacing women's salary growth.[34] Also, when women return to the corporate track after leaving for motherhood or other reasons, they pay more penalty in position and compensation compared to men.[35]

This is not solely an insular concern in corporate America, these statistics are becoming a broader socioeconomic concern via *macroeconomic deskilling*.[36] Macroeconomic deskilling is an idea suggesting that the U.S. stands to lose global competitiveness if it continues to expend resources in educating women, but not utilizing them to their full capacity.[37] Women are driven out of the workforce or into less skilled or advanced jobs due to inflexible workplaces and family responsibility discrimination.[38] The continued deskilling has large impacts on the economy and could present long-term problems for the U.S. economy competing in a global marketplace.[39]

B. The Case for Gender Diversity in Corporate Governance

Corporate America may have very compelling reasons to include more women in leadership positions. First, there is evidence to suggest that having women in leadership

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[32] U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, available at http://www.census.gov/prod/2011pubs/p60-239.pdf.

[33] Catalyst, *supra* note 4, at 10.

[34] *Id.*

[35] *Id.* ("Although women and men step off the corporate track at equal rates, women paid a greater penalty than men in position and compensation when they return.").

[36] Joan C. Williams, Jessica Manvell, & Stephanie Bornstien, *Opt-Out or Pushed-Out? How the Press Covers Work/Family Conflict: The Untold Story of Why Women Leave the Workforce*, HASTINGS: THE CTR FOR WORK-LIFE LAW, 43 (2006), http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf

[37] *Id. see also Women and the World Economy: A guide to Womenomics*, ECONOMIST (April 12, 2006). http://www.economist.com/finance/displaystory. cfm?story_id=6802551

[38] *Id.*

[39] *Id.*

positions may help company performance.[40] Recent studies provide that companies with more women in senior roles are positively correlated to better performance and potentially higher profits.[41] Although none of these studies have demonstrated a causal link, companies may benefit from a more diverse workforce given current metrics.[42] The Catalyst report concluded that "companies with more women board members, on average, significantly outperform those with fewer women, by 53 percent on Return on Equity, 42 percent on Return on Sales and...66 percent of Return on Invested Capital."[43] A report by Credit Suisse sampled companies in Europe and the U.S. and discovered that companies with women board members outperformed those who did not have any women on their board's in terms of price share performance over the past six years.[44] The Credit Suisse report also reached similar conclusions, as the Catalyst report stating that on average, return on equity was much higher for companies that had women leaders than those who did not.[45] In addition, the Credit Suisse report found that companies with women on the board also had increased growth rates at 14%, compared to 10% for companies with only males on the board.[46] A Mckinsey & Co. study found using the McKinsey Organizational Health Index ("OHI"),[47] that companies with three or more women in top positions scored higher than

[40] Bryce Covert, *Memo to Corporate America: More Women Leaders Means Better Bottom Line*, FORBES WOMAN, (Aug. 1, 2012), http://www.forbes.com/sites/brycecovert/2012/08/01/memo-to-corporate-america-more-women-leaders-means-a-better-bottom-line/

[41] *Closing the Gap*, ECONOMIST (Nov. 26, 2011), www.economist.com/node/21539932

[42] *Id.*

[43] Catalyst, *supra* note 4, at 12.

[44] *See* e.g. Covert, *supra* note 40; *see also Gender Diversity & Corporate Performance*, CREDIT SUISSE (Aug. 2012), https://infocus.creditsuisse.com/data/_product_documents/_shop/360145/csri_gender_diversity_and_corporate_performance.pdf

[45] See *Gender Diversity & Corporate Performance, supra note 44 at 18*

[46] *Id.* at 14.

[47] The OHI measures nine factors, ranging from external orientation to coordination and control, that are linked to well-functioning organizations. *See* Joanna Barsh & Lareina Yee, MCKINSEY & CO., UNLOCKING THE FULL POTENTIAL OF WOMEN IN THE US ECONOMY, (2011) available at www.mckinsey.com/client_service/organization/latest_thinking/unlocking_the_full_potential.

their peers, and companies which score higher on the OHI demonstrate superior financial performance.[48]

Additionally, corporate America certainly has other strong incentives to advance women through its ranks to maintain efficiency, increase diversity and improve performance. Corporate America loses many of its qualified women when they do not reach upper level management. It is very expensive for companies to spend resources training and developing women without being able to capitalize this investment, as women do not advance through the ranks or leave the workforce.[49] Arguably, companies should want to retain these women to obtain the benefits of a broader talent pool, and also reduce costs by improving retention rates. Additionally, gender diversity may help promote different perspectives, as this may be helpful in innovation or development of new methods or ideas. Studies show that greater team diversity including gender diversity can lead to better average performance.[50] Also, research suggests that introducing women in leadership allows for a better balance of leadership skills, as women possess certain leadership qualities that are beneficial which men generally do not exhibit. Combining both men and women leaders together would have a beneficial effect of balancing these skills.[51] For example, a study found that women tend to define and communicate responsibilities more clearly and serve as stronger mentors and coaches to employees.[52] Women's leadership styles focus on the needs of others, whereas men's styles are geared towards competition.[53] The combination of these respective gender traits would allow for a better balance of essential leadership qualities among a group of managers.

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[48] *Id.*
[49] *Women and Work, Too Many Suits,* ECONOMIST (Nov. 26 2009), http://www.economist.com/node/21539924
[50] *Gender Diversity & Corporate Performance*, *supra* note 44, at 18
[51] *Id.*
[52] *Id.*
[53] *Id.*

Part II. Corporate America and Discrimination Against Women

This section discusses the possible explanations for the glass ceiling, other than discrimination. Throughout the years, many scholars have argued against the idea of the glass ceiling and posit that the problem is not a product of the workplace, rather many argue that women seek not to advance to leadership positions, as women believe family life is more important or rewarding than having a career or that pregnancy and motherhood deters women from being able to focus on their careers. Although these are valid arguments, these may not be the only explanations for the lack of women leaders. The section will subsequently discuss the possibility of unconscious bias and its role of keeping women from advancing in the workplace.

A. Preference of American Women

Given the publicized statistical evidence showing diversity is good for the bottom line,[54] wouldn't corporations make greater efforts to include women in leadership roles? What could explain the disparity of women in leadership positions?[55] Could this be related to residual discrimination in corporate America? Numerous scholars argue that discrimination is not the main reason for these gender gaps between men and women in leadership roles at the *Fortune 500.* Popularly presented theories in the social sciences suggest reasons, such as *the opt-out revolution*[56] and *maternal wall*[57] are keeping women from reaching the top spots.

1. The Opt-Out Revolution

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[54] *See supra* Part I.B.

[55] *See supra* Part I.A.

[56] Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG. (Oct. 26, 2003), www.nytimes.com/2003/10/26/magazine/26WOMEN.html?pagewanted=all

[57] Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 78 (2003).

One explanation of the wide gender gap in leadership could be due to personal preferences of women. The "*opt-out revolution"* a phrase coined by New York Times reporter, Lisa Belkin, embodies the phenomenon of women's voluntary choices seeking not to advance workplace, despite having equal qualifications to men. In her piece, Belkin interviewed women with education from prestigious universities who had the abilities to advance in their respective fields, yet chose not to.[58] Belkin asserts that females do not necessarily want to become leaders.[59] She posits that although women would like to be in these positions, they are not willing to "do what it takes to get there."[60] She argues that instead of traditional male-oriented forms of success, like money and power, once heralded as goals by women struggling to "get even" with men, now women are shifting their own ideas of success to include sanity, balance and work satisfaction.[61] She notes that the shifting goals of approximately 50% of the employee base is beginning to create a response in employers as well, who are now providing more flexible schedules and increasing untraditional forms of working to retain their employees.[62]

Since this article was released there has been plenty of discussion within academic community of the merits of Belkin's argument. Critics of the *opt-out-revolution* find that the decision of women to voluntarily leave the workforce is more closely related to weaknesses in the labor market, rather than the opt-out theory.[63] Other critics suggest, that the opt-out theory is a misdiagnosis of the problem, such that women are essentially pushed-out instead of opting-out because of the demands of the profession.[64] Issues like workplace inflexibility, lack of family

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[58] *See Belkin, supra* note 56.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *See* Heather Boushey, CTR FOR ECONOMIC AND POL'Y RESEARCH, *Are Women Opting Out? Debunking the Myth* 9-10, 13 (2005).
[64] *Id*. at 420.

support and workplace bias against mothers seem to be drivers of push-out theory.[65] Experts explain that workforce and workplace mismatch[66] is the underlying rational of the push-out theory, as inflexible schedules and outdated notions of the ideal worker creates *macroeconomic deskilling.*[67]

2. Maternal Wall

Although sometimes argued alongside with opt-out-theory, the mere fact that women physically give birth is widely accepted explanation for the gender gap in leadership positions in corporate America.[68] Some scholars call this rational the "maternal wall"[69] describing when women reach a motherhood stage, some form of discrimination prevents her from advancing at work and results in increasing wage gaps between men and women.[70] This maternal wall develops in three points, when a woman gets pregnant, when she becomes a mother, or when she begins working on a part-time or flexible work arrangement.[71] The maternal wall form of discrimination is premised on the idea that a woman's responsibilities for her children are preventing her from being a reliable employee.[72] Generally, strong stereotypes of incompetence

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[65] *Id.*

[66] *See* Williams, *supra* note 36, at 43. *see also* Boushey, *supra* note 63, at 13

[67] *See* Williams, *supra* note 56, *see also* Boushey, *supra* note 62, at 13

[68] *See* Priscilla Painton, *The Maternal Wall,* TIME (May 10, 1993), http://www.time.com/time/magazine/article/0,9171,978472,00.html; *see also* Nicole Porter, *Re-Defining Superwoman: An Essay on Overcoming the Maternal Wall in the Legal Workplace,* 13 DUKE J. GENDER L. & POL'Y, 55 (2006).

[69] *See* generally Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

[70] Id., *See also* CENSUS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011 (2012).

[71] *See* Williams, *supra* note 26, at 78.

[72] *See* Claire-Therese D. Luceno, *Maternal Wall Discrimination: Evidence Required for Litigation and Cost-Effective Solutions for A Flexible Workplace*, 3 HASTINGS BUS. L.J. 157, 159 (2006).

are associated with mothers,[73] and therefore the maternal wall is an explanation for mothers' inability to advance up the corporate ladder.

Although the maternal wall is prevalent argument, there is reason to suggest that this concept may no longer present major problems for women's struggle to advance up the ranks at *Fortune 500* companies, as the law appears to have a remedy for this form of discrimination under the FMLA[74], Title VII[75] and Equal Pay Act.[76] Recently, many mothers or caregivers are either filing administrative complaints or suing and courts are often finding in their favor.[77] Armed with successful precedent, mothers may hold a bargaining chip against employers in the future, as employers may become more conscious of maternal wall discrimination to avoid these types of situations. Despite more favorable litigation results, the maternal wall form of discrimination is most likely not completely eviscerated from corporate America; however, it maybe somewhat easier to pinpoint maternal discrimination because of noticeable and evident issues arising with childcare or birth, which allows the law to develop further remedies as the need arises.

B. Behind the Scenes Discrimination: Implicit Bias and Structural Problems in the Workplace

Both concepts of the *opt-out theory* and the *maternal wall* suggest that women will always face external difficulties when balancing work and family commitments. However, other

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[73] *See* Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 429 (2003)).

[74] FAMILY MEDICAL LEAVE ACT 29 U.S.C.A. § 2601 (1993).

[75] CIVIL RIGHTS ACT OF 1964, 42 U.S.C.A. § 2000e-2 (1993).

[76] EQUAL PAY ACT OF 1963, §29 U.S.C.A. § 201 (1963).

[77] *See* Joan C. Williams, Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Careers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31, 32 (2006) (concludes that employers have significant incentives to avoid maternal wall or caregiver discrimination because of successful litigation under Title VII or Equal Pay Act); *see also Nev. Dep't of Human Res. v. Hibbs, 538* U.S. 721, 731-32 n.5 (2003). (stereotype that "women's family duties trump those of the workplace" is a "gender stereotype"); *Plaetzer v. Borton Auto., Inc., No*. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at 6 (D. Minn. Aug. 13, 2004) (holding that "where an employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible, such treatment is gender based and is properly addressed under Title VII.").

forms of discrimination that are inherent due to general social stereotypes may be even more harmful to women as a whole than more salient forms of discrimination. While overt discrimination will keep women from advancing up the corporate ladder because of external pressures or decisions by employers, implicit discrimination[78] or unconscious bias[79] could keep women from wanting to advance altogether. Social awareness of implicit bias can remove the thought of women seeing themselves achieving corner office status. In other words, implicit discrimination nips women's ambitions in the bud and prevents women from trying achieve top positions in the first place, keeping great proportion of women far from potential executive talent pools altogether. Unlike opt-out theory, which Belkin proposes that women leave to obtain goals such as balance and sanity, structural discrimination[80] or workplace bias[81] may be one of the factors serving as an impetus for women to take the "mommy track"[82] or leave to raise a family, as they anticipate their efforts may be more efficient, worthwhile or productive in areas other than the workplace due to their awareness of implicit bias in certain work environments.

1. Scholars Explain the Phenomenon of Unconscious Bias

Social science suggests that implicit or unconscious bias in the workplace remains widespread, but this bias goes undetected as it lies within thoughts and is not visible on paper or more outspoken forms.[83] Empirical research developed by Anthony Greenwald and Mahzarin

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[78] Implicit Association Test, https://implicit.harvard.edu/implicit/demo/background/index.jsp (last visited Nov. 1, 2012). *See generally*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV., 477 (2007).

[79] *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001), *See also*, Tristin K. Green, *A Structural Approach As Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 854 (2007).

[80] See *infra* Part II.

[81] *Id.*

[82] Rachel Emma Silverman, *Is the Mommy Track Still Taboo*, WALL ST. J. (May 27, 2011, 11:21pm), http://blogs.wsj.com/juggle/2011/03/27/is-the-mommy-track-still-taboo/.

[83] *See* e.g., Tristin K. Green, *A Structural Approach As Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 854 (2007), *see also* Jessica L. Martens, *Thinking Outside the Big Box: Applying A Structural*

Bajaji suggests a substantial disassociation between explicit and internal attitudes through the implicit associations test ("IAT").[84] The implicit association test generally states that internal attitudes and biases turn into actual behavior in the workplace. [85] Another study by Dr. Martha Foshi, revealed a double standard existed with perceived competence of men and women, involving the same tasks.[86] Scholars provide the term "structural discrimination," which embodies organizational behavior related to implicit bias.[87] Structural discrimination theorist suggests that this type of discrimination is not a problem of isolated work decisions, but causes a bias in the workplace environments on a day-to-day basis.[88] Professor Tristin Green elaborates the findings of unconscious bias and the implicit association test:

> A correlation between scores on implicit attitude tests and behavior toward group members, suggest that these biases actually do translate into behavior....In one recent study, researchers responded to over 1300 help-wanted advertisements with sets of four fictitious resumes. Each resume was randomly assigned an African American-sounding name (e.g., Jamal or Lakisha) or a white-sounding name (e.g., Greg or Emily), and each set of four resumes included two higher-qualified applicants and two lesser-qualified applicants. The white-sounding names received fifty percent more callbacks than the African American-sounding names, and while the better resume assisted white-sounding names by thirty percent, the better resume only minimally assisted African American-sounding names.[89]

These implicit or structural biases also applies to men and women, as employers may associate women with presupposed notions of how they are supposed to act, rather than how they actually

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Theory of Discrimination to Wal-Mart Stores Inc. v. Dukes (131 S. Ct. 2541 (2011)), 51 WASHBURN L.J. 411, 418 (2012); Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 450 (2010).

[84] Implicit Association Test, https://implicit.harvard.edu/implicit/demo/background/index.jsp (last visited Nov. 1, 2012).

[85] *See* Green, *supra* note 83, *at* 855.

[86] *See* Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237 (Sept. 1996).

[87] *Id.* at 857.

[88] *Id,* 857. *see also* Williams, *supra* note 73, at 416; Janet K. Swim & Lawrence J. Sana, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures,* 22 PERSONALITY & SOC. PSYCHO. BULL. 507 (1996).

[89] *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward A Structural Account of Disparate Treatment Theory,* 38 HARV. C.R.-C.L. L. REV. 91, 109-10 (2003).

act in the workplace.[90] For example, some of these biases include different internal associations for actions by men and women respectively. Studies suggest that male social behavior would be regarded as mentoring, rainmaking or negotiating a business deal, whereas similar behavior in women is interpreted as frivolous, non-work related sociability such as gossip.[91] Another example of an internal association was found when an employee took time to make a decision. The study showed an association that a man "really think things through" whereas the woman was thought to be too hesitant.[92]

Adding to the framework of the structural discrimination argument, social science suggests that women have more work environment barriers to success when compared to men. A Mckinsey & Co. study revealed that women perceive advancing in organizations as arduous because of workplace environment reasons such as the lack of role models, exclusion from informal networks and not having sponsors in upper management to create opportunities.[93]

2. Gender Biased Workplaces or Discrimination Not Captured by Title VII: Practical Examples & Case Law

Although implicit discrimination or structural discrimination may be present throughout corporate America, plaintiffs have a difficult time bringing a Title VII claim for these forms of discrimination.[94] As we have seen in prior case law, successful Title VII with respect to disparate impact claims are often found when discrimination is obvious.[95] *Dukes v. Wal-Mart* provides a clear example of an entire corporate culture overtly biased against women. Although

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[90] Williams, *supra* note 73, at 458. For an example in case law *see also Bailey v. Scott-Gallaher*, Inc., 480 S.E.2d 502 (Va. 1997), (where mother was told to "act like a real mother" and stay home with child).

[91] *Id.* at 416. For more examples *see* Swim, *supra* note 88 at 507.

[92] Discussing differential attributions applied to male and female employees encountered on the phone during work hours. *Williams*, *supra* note 73 at 416.

[93] *See* Barsh, *supra* note 47.

[94] *See infra* Part III

[95] *See, Price Waterhouse v. Hopkins* 490 U.S. 228 (1989) (where Plaintiff was successful using blatant evidence about sex-based bias, such as supervisors commenting she was "macho" and another said she should take "lessons in charm school").

Wal-Mart was successful in defending a class action certification claim in U.S. Supreme Court and the case was never argued substantively, Lisa Featherstone, in her book *Selling Women Short*, provides that evidence of sex-bias in its corporate culture was apparent throughout the discovery process.[96] Featherstone's book is wrought with examples of gender discrimination, with personal tales of women's plight to reach management. Featherstone interviewed many Wal-mart employees, which all had similar stories of pervasive gender discrimination. One specific plaintiff, Christine Kwapnoski faced comments from mangers such as "doll-up" and "dust the cobwebs off" [her makeup] and was told she had to have certain requirements prior to promotions, which males were never subject to.[97] Moreover, Wal-mart's percentage of women in management was significantly behind their competitors.[98] Although, Wal-mart posited that it had a significant amount of women in management when including their "department managers," these positions were paid hourly, unlike the male dominated manager roles that were salaried positions.[99] Featherstone argues that few companies would define an hourly worker as a "manager," additionally these "managers" are significantly paid less than salaried managers.[100] The Wal-mart department managers do not have "managerial-like" responsibilities as they cannot terminate employees or give raises.[101] Department managers make significantly less than other managers, for example, a woman working as an hourly department manager makes on average $21,709 a year, whereas an assistant manager, the lowest level of salaried management, makes on average $37,322.[102] Essentially, Wal-Mart was justifying its numbers of male-female

[96] *See* LIZA FEATHERSTONE, SELLING WOMEN SHORT, 71 (2004).
[97] *Id.* at 95.
[98] *Id.* at 100
[99] *Id.* at 101
[100] *Id.* at 102
[101] *Id.*
[102] *Id.*

ratio goals by relying on positions that were clearly not similar to traditional management positions.

Apart from clear cases with substantial direct evidence of sex discrimination, structural bias is more difficult to locate within the Title VII context. Some case law suggests that structural bias may be apparent; however, without proper legal framework for these types of claims, it is unlikely that litigators would advance any cases without direct evidence or very strong circumstantial evidence. An example of potential structural bias claims could be found in cases such as, *Brooks v. Ashtabula County Welfare Dept.*, where plaintiff's Title VII claim was dismissed, as a director's allegation of her "ill-temper" was sufficient to describe why plaintiff was not promoted, despite repeated recommendations by her direct supervisor. [103] The employment decision in *Brooks* was based on a director's sole belief of Brook's temperament.[104] The director did not promote Brooks because he believed her attitude was "abrasive and judgmental" "she had a propensity to make arbitrary moral judgments and she aggravated co-workers and other professionals her job brought her contact into.[105] He also believed she donned a "superior attitude" towards clerical workers.[106] However, nothing of this attitude was noted in her personnel file, in fact, her file contained a favorable recommendation from her direct supervisor. The evidence of her bad attitude was based on the sole director's testimony, and the court held this to be sufficient by a preponderance of the evidence. While the court may have found some evidence of non-discriminatory motives for the employment decision in this case, the facts presented could seriously indicate some forms implicit or unconscious bias on behalf of the director in his unilateral subjective decision not to promote Brooks.

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[103] *See Brooks v. Ashtabula County Welfare Dept*., 717 F.2d 263, 264 (6th Cir. 1983).
[104] *Id.*
[105] *Id.* at 264.
[106] *Id*. at 266.

Another example of potential structural bias could be found in *Reilly v. Califano*, where plaintiff did not survive a Title VII claim, because of the employer's belief that plaintiff was too shy and not assertive was sufficient to rebut a prima facie claim. [107] He believed that she did not "possess the sort of personality and demeanor necessary for the position."[108] Again, in this case, it is possible for the hiring manager to have implicit bias when making a decision, yet the court gave deference to the employer's subjective justification of Reilly's shy personality.

Additional examples of these subjective biases with personality traits could bee seen in *Kelner v. Green Refractories,* where the supervisor believed "her attitude, loud and aggressive nature was sufficient to rebut a prima facie Title VII claim.[109] In this case, the plaintiff was even more qualified than the competition, yet she did not obtain a promotion due her supervisor's subjective belief of her "attitude."[110] *Metzsh v. Avaya, Inc*., is another example of potential subjective bias in employment decisions, as in this case, plaintiff's bad attitude with respect to certain assignments was held sufficient to rebut a prima facie claim of discrimination.[111] In cases such as *Reily, Brooks, Kelner* and *Metzch* where plaintiffs' personalities and not qualifications are the deciding factors of litigation may be largely influenced by structural discrimination, yet given some these results, Title VII fails to capture some forms of unconscious or implicit discrimination.

III. Title VII and Structural Discrimination

[107] *See Reilly v. Califano*, 537 F. Supp. 349 (N.D. Ill. 1981).
[108] *Id. at 354.*
[109] *Kellner v. Gen. Refractories Co.,* 631 F. Supp. 939, 942 (N.D. Ind. 1986).
[110] *Id.*
[111] *Metzsh v. Avaya, Inc*., 159 F. App'x 736 (8th Cir. 2005).

Plaintiffs have various methods of pursuing violations under Title VII of the Civil Rights Act of 1964[112] for gender discrimination in the workplace. A string of United States Supreme Court cases has developed over time to include various interpretations of sexual discrimination within Title VII.[113] There are two basic legal theories that are helpful for women in gender discrimination claims in the workplace with respect to glass ceiling issues: disparate treatment and disparate impact.[114]

Disparate treatment includes "pretext," "mixed motive" and "hostile work environment" claims.[115] To succeed in a "pretext" case courts generally require a three-step process, as provided in *McDonnell Douglas Corp. v. Green*. The woman must first prove a prima facie case by showing that she is a member of a protected class, she must be qualified for the position, and was rejected by her employer.[116] Then the burden shifts to the Defendant to offer a nondiscriminatory reason for the decision.[117] If the Defendant offers a sufficient reason, the burden shifts back to the employee to prove the Defendant's reason is pretext for sex discrimination.[118] Mixed-motive cases require impermissible criteria that were a substantial or motivating factor for an employment decision. [119] Hostile work environment claims are another subset of disparate treatment theory, which requires that women be exposed to workplace with

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[112] CIVIL RIGHTS ACT OF 1964, 42 U.S.C.A. § 2000e-2 (1993).

[113] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) for hostile work environment cases, *See also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc*., 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991) for disparate treatment claims; *Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S. Ct. 347, 54 L. Ed. 2d 356 (1977) for disparate impact claims.

[114] *See* FAY J. CROSBY, MARGARET S. STOCKDALE & S. ANN ROPP, SEX DISCRIMINATION IN THE WORKPLACE, 101 (2008).

[115] *See generally Int'l Broth. of Teamsters v. United States*, 431 U.S. 324, 390, 97 S. Ct. 1843, 1882, 52 L. Ed. 2d 396 (1977); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116, 122 S. Ct. 2061, 2074, 153 L. Ed. 2d 106 (2002).

[116] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[117] *Id*. at 802.

[118] *Id*. at 802.

[119] *See Hopkins*, 490 U.S. at 228.

overt discrimination, intimidation, ridicule and insult, and that employer was aware, yet failed to prevent discriminatory conduct in the workplace.[120]

Another major legal theory under Title VII includes "disparate impact" claims, which allow plaintiffs to challenge employment practices that appear to be neutral, but have a harmful impact on a protected group. [121] In order to establish a claim under this interpretation, a plaintiff needs to demonstrate that an employer's facially neutral practice or plan operates in a discriminatory pattern.[122] Once this is shown, and employer must rebut plaintiffs claim by justifying that its practice or standards have a manifest relation to employment.[123] If the employer is able to prove this defense, the plaintiff can still argue that the practice is a pretext.[124]

A. Disparate Treatment: Burden on the Defendant

The problem with glass ceiling cases and the disparate treatment arguments under Title VII is that generally, the higher one ascends within an organization, the more subjective employment decisions may become; therefore the risk of structural or implicit bias may become highly associated to employment decisions.[125] One main disadvantage with the disparate treatment analysis under the current U.S. Supreme Court interpretation is that the burden of proof for employers is very easy to overcome with respect to rebutting a prima facie showing of discrimination. The burden of production for defending disparate treatment cases is still under discussion and has been disputed prior to the *Hopkins* case.[126] In *Hopkins*, the U.S. Supreme Court refused to adopt a clear & convincing standard for the defendant's response to a prima

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[120] *See Ellerth*, 524 U.S. at 742.
[121] *See* Crosby, *supra* note, 114 at 101.
[122] *Dothard v. Rawlinson*, 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977).
[123] *Id.*
[124] *Id.*
[125] *See* Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 292 (1994).
[126] See Tristin K. Green, *Making Sense of the Mcdonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 993-94 (1999).

facie case by only requiring a preponderance of the evidence standard.[127] Subsequently, the Civil Rights Act of 1991 ("CRA") altered the *Hopkins* standard and offered an easier "motivating-factor" method, which allows plaintiff to prevail, even though the discrimination is not the but for cause of the adverse decision.[128] Although the burden is somewhat more favorable for plaintiffs, a preponderance of the evidence standard may still be insufficient in light of the unconscious bias that may be involved in decision-making processes.

When unconscious bias is at play, its is very difficult to determine whether it has taken place. An employer can arguably set forth any reason for its action, so long as it is rational and sounds convincing. As hiring decisions in upper management may be very subjective,[129] employers are easily able to defend a prima facie claim by providing a legitimate reason, yet still retain bias at the same time. For example, in *Ezold v. Wolf Block, Schoor & Solis,* an attorney (Ezold) was able to provide a prima facie case of discrimination, but because the employer provided a defense that the attorney lacked analytical ability (even though there was evidence that her intellectual growth was stymied by structural bias in her given assignments) the court held employers defense sufficient. The court assumed that employer's decision into her assignments were not caused by discrimination and gave strong deference to the employer with respect to its decision not to give Ezold more complex assignments. One explanation of the employer's decision could be related to implicit bias against her abilities as a female, yet this was not considered by the Court. [130] Other case law prior to the Civil Right Act of 1991 evidences the entry of structural discrimination. In earlier cases, so long as employers created a rational business reason for the seemingly discriminatory acts, the court would not uphold a disparate

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[127] *See Hopkins*, 490 at 253.
[128] *See* Green, *supra* note 126, at 993-94.
[129] *See Crosby supra note*114, *at 103-105*
[130] *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 513 (3d Cir. 1992).

treatment claim, even though implicit discrimination could be a motivating factor for an employment decision. [131]

B. Arguing Disparate Impact

Disparate impact[132] theory is also not an effective method for a glass-ceiling claimant. Initially a claimant could probably easily make a prima facie showing on a disparate impact claim, as this theory is based on facially neutral practices and do not require proof of motive or intent of discrimination by employers.[133] Given the statistics of few women in management positions,[134] theoretically a female plaintiff would probably be able to obtain evidence showing some form of disparate impact of an employer's hiring practices, if she can provide statistical evidence.[135] However, these statistics may be hard to compare, as employment decisions are made on an individualized basis.[136] Moreover, disparate impact necessitates a showing that a "particular employment practice" has a disparate impact on a protected group, or if an employer's selection process has a disparate impact and the components of that process cannot be separated by analysis.[137] Thus, a glass-ceiling plaintiff would have to identify a specific practice that is impacting her group.[138] This may, in application, prove very difficult if the employment practice or barrier is implicit or subjective internal decision made by hiring managers that is not based on a company-wide policy. Unfortunately, there are also statutory exemptions that make disparate

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[131] *See, eg. Meyer v. Lehman*, C-82-4913-WWS, 1983 WL 30290 (N.D. Cal. May 5, 1983) (holding that a possibility of motivation by unconscious or conscious gender-based preference is not enough to show the employers decision as pretext); *see also, Judge v. Marsh*, 649 F. Supp. 770, 781 (D.D.C. 1986) (where court held that subjective criteria may include discrimination, but having subjective hiring criteria is not unlawful per se).

[132] 42 U.S.C.A. § 2000e-2 (West).

[133] *See Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977); *see also* Crosby Et. Al. *supra,* note 115, at 109

[134] *See infra,* Part I.

[135] *Rawlinson*, 433 U.S. at 338. (The Supreme Court noted "a prima facie case of discrimination under Title VII can be established or disproven solely on the basis of statistical evidence").

[136] Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1193 (1988).

[137] Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 967 (2005).

[138] *Id.*

impact claims unappetizing for a glass-ceiling claimant, such as the lack of jury trials, limited remedies, and exemptions for seniority or merit systems.[139]

Additionally, under this theory employers can also easily defend disparate impact claims, as current black letter law states that employer's burden to show the practice has a "manifest relation to the employment,"[140] as opposed to the more stringent requirement of "bonefide occupational quality,"[141] which only applies when a policy is facially discriminatory.[142] A manifest relation to employment has generally been interpreted to mean that the actions are based on legitimate business reasons, but historically courts have had an ambiguous interpretation to this defense. [143] The *Wards Cove* opinion is a U.S. Supreme Court case that attempted to elaborate the interpretation of the employer's defense. The majority adopted a business necessity standard stating that the challenged practice did not need to be essential or indispensible to employer's interest but it must serve the employers legitimate employment goals. [144] The *Wards Cove* opinion also was somewhat ambiguous with respect to burden of production and persuasion for the employer. [145] The Civil Rights Act of 1991 helped clarify the ambiguity after *Wards Cove*, as the statute provides that an employer bears both burdens of production and persuasion when providing a defense for a prima facie disparate impact claim.[146] The Civil Rights Act of 1991 reiterates that a defending party must prove a business necessity after a showing of disparate impact; however, if the defending party can prove that the

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[139] CIVIL RIGHTS ACT OF 1964 42 U.S.C.A. § 2000e-2 (1993), *see also* Sullivan, *supra note 137*.
[140] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S. Ct. 849, 854, 28 L. Ed. 2d 158 (U.S.N.C. 1971).
[141] *Wilson v. Sw. Airlines Co*., 517 F. Supp. 292, 293 (N.D. Tex. 1981).
[142] *Id.*
[143] See Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to A Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 353 (2008).
[144] *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659, 109 S. Ct. 2115, 2126, 104 L. Ed. 2d 733 (1989).
[145] *Id.* (the burden of proof was placed on the employer, yet the burden of persuasion lies entirely on the employee throughout the entirety of the disparate impact claim).
[146] CIVIL RIGHTS ACT OF 1964 42 U.S.C.A. § 2000e-2 (1993).

employment practice does not cause the disparate impact, it does not need to show a business necessity defense.[147] This would probably be a common pitfall the glass-ceiling plaintiff, who cannot identify a specific employment practices that results in a disparate impact. Thus, rendering this theory problematic for the unconscious and subjective aspects of her claim.

C. Title VII: Disparate Treatment & Disparate Impact Claims

Title VII disparate treatment claims are not sufficient to capture the structural and implicit discrimination that social science has determined is exists in the workplace.[148] Prior to *Hopkins*, courts have conceded that subjective decision making could lead to influences of bias and discrimination that are unconscious and even conscious, but are difficult to trace during litigation and are not sufficient to counter an employer's justifications.[149] Although the court in *Hopkins,* found discrimination through a disparate treatment claim, the actions were so obvert, a situation like this would be difficult to find at this point in time.

Some cases support that plaintiffs are failing to make prima facie case even though facts suggest that implicit bias is a motivating factor for an employment decision. For example, in *Infante v. Ambac*, there was considerable evidence that a woman's motherhood was taken into consideration during the interview process. The employer asked questions like: "How does this fit into the mix of you now being a mother of two living in New Jersey, is this really what you want to do? How does that fit into the mix?....She was also asked "with [your] situation now, do [you] want to come back to Ambac, do [you] really want to come back, is this what [you] want?

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147 *Id.*
148 *See supra* Part II.
149 *See* Tolson, *supra* note 143.

The employer proceeded to hire a male after the plaintiff's interview, yet the court found that the plaintiff failed to make a prima facie case of discrimination.[150]

Moreover, scholars argue Title VII is no longer viable as a remedy for structural discrimination, as corporations or employers tend to create "sham" internal processes that do not really battle structural bias, these practices are merely reactions to potential litigation and do not really solve the foundational problems. [151] Thus, neither disparate treatment, nor disparate impact claims can capture implicit bias and they do not "examine or directly encourage revision of the intra-organizational culture and decision processes that entrench bias, stereotyping, and unequal access."[152] This line of reasoning suggests that current Title VII remedies are no longer sufficient to address the underlying issues within structural bias and are calling for other alternatives, such as Sturm's arguments for a new regulatory approach, or Tristin Green who suggests a revamping disparate treatment claims under a structural approach for discrimination.[153]

IV. Solution: Proposals

Implicit bias has proven to be a difficult task to litigate, as without physical or conscious evidence of discrimination, it would be nearly impossible for a plaintiff to bring forth sufficient evidence of unconscious discrimination.[154] Apart from completely rewriting Title VII or creating a regulatory system to capture implicit discrimination some smaller changes can be done which would assist in protecting women from unconscious bias in the workplace.

A. An Alternate Interpretation: Disparate Treatment

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[150] *See Infante v. Ambac Fin. Group*, 03 CV 8880 (KMW), 2006 WL 44172 (S.D.N.Y. Jan. 5, 2006) aff'd, 25.
[151] *See* Sturm, *supra* note 79, at 467-68.
[152] *Id.* at 490.
[153] *See* Sturm and Green, *supra* note 66.
[154] *See* Tolson, *supra* note 143 at 350.

Although disparate impact theory provides less burden in that it does not require evidence of discriminatory intent, modifying the disparate impact theory to include glass ceiling type suits could bring seriously threat to the competing interest of employers rights to its professional judgments courts have always protected.[155] One potential alteration to Title VII would be to raise the employers' burden of persuasion when providing a response to a prima facie disparate treatment claim to a clear and convincing standard. Although a preponderance of the evidence standard is generally used in Title VII cases,[156] the burden of persuasion should be lifted for disparate treatment type of cases because discrimination can be so subtle and employers may more easily evade structural or implicit bias issues with a preponderance of the evidence standard. Although lifting the standard will not completely eviscerate unconscious bias because implicit bias is difficult to pinpoint, having an employer prove a business necessity defense under a higher standard may help weed out unconscious discrimination problems by requiring more concrete evidence of legitimate business reasons from an employer. The higher standard may also prompt employers to be more careful about the potential of employment discrimination and ensure that supervisors are aware of the dangers of unconscious bias in the workplace. Although some may claim that this would entice frivolous lawsuits, placing a higher burden on the defendant would not detract from the fact that plaintiffs would have to still prove a prima facie case and still provide a safeguard from meritless suits.

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[155] See *Billet v. CIGNA Corp.,* 940 F.2d 812 (3d Cir.1991), ("a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions.") *see also Ezold*, 983 F.2d at 527, ("These cautions against 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualifications for promotion within a profession inform the remainder of our analysis.").

[156] *See Hopkins*, 490 U.S. at 253.

B. Biased Work Environment Claim

Another more radical alternative would be to provide an added framework argument for a Title VII, which would provide for relief for those who challenge discrimination due to a "biased work environment" claim under a disparate treatment theory. The claim would act similar to a hostile work environment[157] claim, in that it would be actionable based on an objective and subjective standard. While a hostile work environment deals with sexual harassment and abusive work environment issues, the biased work environment claim would be another cause of action attempting to control a gender biased work environments. The proposed claim would have very limited parameters and a plaintiff would have to casually connect the biased environment to some type of negative employment decision in order to prevent frivolous litigation. Essentially, the goal for this proposed biased work environment claim would attempt to encourage employers to consider implicit bias with respect to the work environment it creates and would hold employers liable for furthering or creating a biased work environments.

A biased work environment cause of action would include aspects of structural discrimination such as informal policies that may inhibit employees from advancing,[158] such as maintaining "old boy"[159] networks or disparate availability of mentorship opportunities.[160] Male-oriented or dominated networking activities still reign in corporate America.[161] These environments may prevent women from socializing and creating valuable networks, which are useful in advancing to the top. [162] Some examples of these types of claims could include

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[157] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 798, 118 S. Ct. 2275, 2288, 141 L. Ed. 2d 662 (1998).
[158] *See* Debra E. Meyerson & Joyce K. Fletcher, A Modest Manifesto for Shattering the Glass Ceiling, HARV. BUS. REV., Jan.-Feb. 2000, at 128; *see also* Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 380 (2004).
[159] *See* Meyerson, *supra* note 158 at 82.
[160] *Id.*
[161] *See* Geri Stengel, *Three Ways Women Can Push Through the Glass Ceiling,* FORBES (Feb. 22, 2012) http://www.forbes.com/sites/geristengel/2012/02/22/3-ways-women-can-push-through-the-glass-ceiling/2/,
[162] *See The Conundrum of the Glass Ceiling*, ECONOMIST, (Jul. 21, 2005) http://www.economist.com/node/4197626

employers being aware of or promoting informal networking events for male-dominated or oriented activities. Although the event may not have excluded women facially, the nature of the activity precluded women from attending due to sex-based stereotypes, which may have made them feel uncomfortable in attending (such as golf outings, fantasy football, nightclubs). Other examples would include showing stigmatization for working from home, even though employers maintain a telecommuting policy or if an employer failed to assist women employees in finding suitable women mentors.

While litigating this type of claim may have some practical limits, as many of these scenarios are difficult to prove in the context of litigation, the proposed claim would be more useful as a warning to corporations. The fact that a plaintiff would be enabled to bring this type of claim could cause some corporations to reconsider their work environments and create systems to solve the problem rather than seeking prevent litigation. Critics of this type of claim would suggest that government is intruding upon the employer's autonomy and their rights in management of the workplace. This would be a policy question, that legislature would have to balance the importance of an avenue structural discrimination claims against employers' autonomy.

Part V: Conclusion

Part of the difficulties of Title VII disparate impact claims and unconscious discrimination could be related to courts strong adherence to the doctrine employment at-will.[163] The reasoning underlying this connection is that if employers are able to terminate employees at will, their promotion decisions should also be allowed great deference. Although a violation of

[163] The employment at will doctrine stands for the proposition that: "a man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause." *Johnson v. Delchamps, Inc.*, 897 F.2d 808, 810 (5th Cir. 1990).

the Civil Rights Act works like an exception to the at-will doctrine,[164] courts may still adhere to policy reasons for upholding an at-will mentality, especially when discrimination may not be obvious. The Supreme Court in *Hopkins* and Civil Rights Act of 1991 decisions not to lift employers burden of persuasion of a legitimate business interest to clear and convincing standard[165] may be partially due to the notion of common law at-will contracts that reiterate the long-held beliefs that employers are entitled to deference when they make employment decisions.

Some scholars argue that strengthening Title VII claims does nothing more than create inefficiencies and does not address the underlying problem.[166] Many argue that employers will respond to threat of Title VII liability by over-investing in measures that will not likely reduce implicit bias.[167] However, if we were to create a claim under Title VII that specifically forces employers to consider unconscious bias or structural discrimination when creating a work environment, this would help avoid the issues of "sham" internal processes. [168] The proposed workplace bias claim could have a result in encouraging employers to rethink how they structure their workplaces and create a more gender diverse work environments. Although corporate America is well on its way to addressing some of these issues, it seems that more needs to be done given the current statistics of women leaders. A new Title VII claim could help nudge companies who talk-the-talk, but do not walk-the-walk when it comes to providing equal opportunities for its women leaders.

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[164] *See e.g.* Harry Hutchison, *The Collision of Employment-at-Will, Section 1981 & Gonzalez: Discharge, Consent and Contract Sufficiency*, 3 U. PA. J. LAB. & EMP. L. 207, 232 (2001), *See also* Tolson, *supra* note 134 352-53.
[165] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 253, 109 S. Ct. 1775, 1792, 104 L. Ed. 2d 268 (1989).
[166] *See* Tolson, *supra* note 143, at *370; see also Amy L. Wax, Discrimination As Accident*, 74 IND. L.J. 1129, 1134 (1999).
[167] Tolson, supra note 143 at 370., *See also,* Sturm, *supra* note 109.
[168] See Sturm, *supra* note 79.