Internalized Oppression: The Impact of Gender and Racial Bias in Employment on the Health Status of Women of Color

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As advocates from the #MeToo and #TimesUp movements work to end sexual harassment and unequal pay in employment, they must not ignore the unique problems women of color face.[1] *As noted in Kimberle Crenshaw's theory of intersectionality, women of color face gender and racial bias in employment, thus eradicating gender bias will not make women of color whole because they will still face racial bias.*[2] *Furthermore, simply focusing on the economic harms of gender and racial bias in employment fails to take into consideration the impact that these biases have on the health status of women of color. Over the last two decades, research has shown that experiencing gender and racial bias is associated with increased rates of hypertension, non-adherence to medication, obesity, smoking, alcohol use,*

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[1] Tarana Burke, an African American woman activist who started the #MeToo movement, understands how other identities besides gender impact women's equality, but not all #MeToo advocates understand the need to address the issues of non-majority women. *See* Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017), https://www.washingtonpost.com/news/post-nation/wp/ 2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too [https://perma.cc/22.XR-GUEJ]; Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105 (2018). This article highlights the need for all advocates supporting women's equality to understand that other identities besides gender such as race, class, disability, religion, and age impact women's employment experiences by using race as a case study.

[2] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

substance abuse, psychological distress, and depression in women of color.[3] *This Article broadly reviews studies regarding the influence of experiencing gender and racial bias on women of color's health status, studies and cases discussing gender and racial bias in employment that impacts women of color, and gaps in the scope and application of civil rights laws prohibiting these biases. The Article concludes with legal and policy solutions to address gender and racial bias in employment and its influence on the health status of women of color.*

[3] *See* Diane R. Brown et al., (*Dis)respected and (Dis)regarded: Experiences of Racism and Psychological Distress*, *in* IN AND OUT OF OUR RIGHT MINDS: THE MENTAL HEALTH OF AFRICAN AMERICAN WOMEN 85 (Diane R. Brown & Verna M. Keith eds., 2003); NiCole T. Buchanan & Louise F. Fitzgerald, *Effects of Racial and Sexual Harassment on Work and the Psychological Well-Being of African American Women*, 13 J. OCCUPATIONAL HEALTH PSYCHOL. 137, 137 (2008); James W. Collins, Jr. et al., *Very Low Birthweight in African American Infants: The Role of Maternal Exposure to Interpersonal Racial Discrimination*, 94 AM. J. PUB. HEALTH 2132, 2132–38 (2004); Yvette Cozier et al., *Racial Discrimination and the Incidence of Hypertension in US Black Women*, 16 ANNALS EPIDEMIOLOGY 681, 681–83 (2006) [hereinafter Cozier et al., *Racial Discrimination*]; Yvette C. Cozier et al., *Racism, Segregation, and Risk of Obesity in the Black Women's Health Study*, 179 AM. J. EPIDEMIOLOGY 875, 879–81 (2014) [hereinafter Cozier et al., *Racism, Segregation, and Risk of Obesity*]; Jessica Forsyth et al., *Perceived Discrimination and Medication Adherence in Black Hypertensive Patients: The Role of Stress and Depression*, 76 PSYCHOSOMATIC MED. 229, 229–30, 233 (2014); Frederick X. Gibbons et al., *Effects of Perceived Racial Discrimination on Health Status and Health Behavior: A Differential Mediation Hypothesis*, 33 HEALTH PSYCHOL. 11, 11, 18 (2014); Nancy Krieger, *Racial and Gender Discrimination: Risk Factors for High Blood Pressure?*, 30 SOC. SCI. & MED. 1273, 1276–77 (1990); Tracy Curry Owens & Fleda Mask Jackson, *Examining Life-Course Socioeconomic Position, Contextualized Stress, and Depression Among Well-Educated African-American Pregnant Women*, 25 WOMEN'S HEALTH ISSUES 382, 387 (2015); Jonathan Platt et al., *Unequal Depression for Equal Work? How the Wage Gap Explains Gendered Disparities in Mood Disorders*, 149 SOC. SCI. & MED. 1, 6–7 (2016); Pamela J. Sawyer et al., *Discrimination and the Stress Response: Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions*, 102 AM. J. PUB. HEALTH 1020, 1022 (2012); Brandon L. Velez et al., *Discrimination, Work Outcomes, and Mental Health Among Women of Color: The Protective Role of Womanist Attitudes*, 65 J. COUNSELING PSYCHOL. 178, 183, 185, 187–90 (2018).

I. INTRODUCTION

Over the last two decades, research has shown that experiencing gender and racial bias is associated with increased rates of hypertension, non-adherence to medication, obesity, smoking, alcohol use, substance abuse, psychological distress, and depression[4] in women of color.[5] Yet, scholars are just beginning to study the influence of experiencing gender and racial bias in employment on women of color's health status.[6] Gender and racial bias in employment is caused by actions on two different levels: institutional and interpersonal.[7]

Bias on the institutional level operates through "neutral" organizational practices and policies that deny women of color equal pay. An example of institutional level bias in employment is the "neutral" decision to use salary history to determine wages, even though it results in women of color being

[4] *See* Brown et al., *supra* note 3, at 85; Collins, Jr. et al., *supra* note 3, at 2132–38; Cozier et al., *Racial Discrimination*, *supra* note 3, at 681–83; Cozier et al., *Racism, Segregation, and Risk of Obesity*, *supra* note 3, at 879–88; Forsyth et al., *supra* note 3, at 229–30, 233; Gibbons et al., *supra* note 3, at 11, 18; Krieger, *supra* note 3, at 1276–77; Owens & Jackson, *supra* note 3, at 387; Sawyer et al., *supra* note 3, at 1022.

[5] The term "women of color" includes African American, American Indian and Alaska Native, Asian, and Latino women. Even though Latino was treated as an ethnicity for the 2010 Census, it is treated as a race in terms of bias and discrimination, so for the purposes of this article Latino is treated as a race. *See* Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 69–75 (2013). According to the 2017 U.S. Census Bureau population estimates, there are approximately 24.9 million Latino women, 19.9 million African American women, 7.7 million Asian women, and 1.1 million American Indian and Alaska Native women in the United States. *See 2017 Population Estimates: Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2017 (Not Hispanic Origin)*, U.S. CENSUS BUREAU (June 2018), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk; *see also 2017 Population Estimates: Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2017 (Hispanic Origin)*, U.S. CENSUS BUREAU (June 2018), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[6] *See* Buchanan & Fitzgerald, *supra* note 3, at 137; Platt et al., *supra* note 3, at 6–7; Velez et al., *supra* note 3, at 183, 185, 187–90.

[7] Gender and racial bias in employment is also a result of structural level bias. *See* Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1 (2018); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court's Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583 (2014); Ruqaiijah Yearby, *The Impact of Structural Racism in Employment and Wages on Minority Women's Health*, HUM. RTS. MAG., NOV. 2018, at 21. In employment, structural level bias is the power used by the dominant group to structure employment and pay in a manner that not only advantages them, but also disadvantages women of color. The author is also currently working on a paper entitled, *The Political Economy of Medicaid Work Requirements: Reinforcing Gender, Racial, and Class Hierarchies of Inequality*, which discusses structural level gender, racial, and class bias in employment and its impact on women's access to health care.

paid less than White men who do the same work. Bias on the interpersonal level operates through individual interactions, where an individual's conscious and/or unconscious prejudice limits women of color's access to equal employment and pay. Interpersonal level bias in employment is illustrated by the use of race to decide whom to interview and hire, as well as an employee's pay rate. As a result of institutional and interpersonal bias in employment, there are gender and racial inequities in hiring and pay, which are not rectified by civil rights laws prohibiting employment discrimination because of gaps in the scope and application of these laws. Thus, the civil rights laws need to be changed to not only address these gaps, but also to provide relief to women of color for the physical and mental harms they suffer as a result of experiencing employment discrimination.[8]

Using research studies, Part II of this Article examines the influence of experiencing gender and racial bias on women of color's health status. Part III summarizes research studies and cases that document the continuation of institutional and interpersonal level gender and racial bias in employment that lead to gender and racial inequities in hiring and pay. Many research studies and cases fail to discuss both gender *and* racial bias, thus some of the discussion in this Article will focus on either gender *or* racial bias. Furthermore, many studies suggest that the persistence of gender and racial inequities in hiring and pay are a result of bias, but not all bias has been deemed discriminatory. Thus, the part also briefly reviews the difference between bias and discrimination currently prohibited by the law. Part IV discusses the gaps in the scope and application of civil rights laws prohibiting employment discrimination that allow gender and racial inequities in hiring and pay to persist. Most civil rights laws focus on the individual economic harms caused by employment discrimination, ignoring the physical and mental harm suffered by women of color, who have experienced employment discrimination. Part V proposes solutions to put an end to gender and racial bias in employment, and improve the health status of women of color who have experienced employment discrimination.

[8] Under Title VII of the Civil Rights Act of 1964, a plaintiff may recover for damages for lost wages and other equitable relief including compensatory damages for emotional distress. 42 U.S.C. § 2000e-2(a)(1) (2018); *see also* Gregg Polsky & Stephen Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 IOWA L. REV. 67, 71 (2004). Although available, compensatory damages fail to fully redress the emotional harm of experiencing employment discrimination and do not cover physical harms such as obesity or breast cancer. Eric Bachman, *Emotional Distress Damages in Employment Discrimination and Harassment cases*, NAT. L. REV. (July 20, 2017) https://www.natlawreview.com/article/emotional-distress-damages-employment-discrimination-and-harassment-cases; Krista Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1462 (1986).

II. IMPACT ON HEALTH STATUS

Experiencing gender and racial bias[9] has been associated with increased rates of hypertension, non-adherence to hypertension medication, obesity, smoking, alcohol use, psychological distress, depression, and substance abuse in women of color.[10] For example, both U.S.-born and foreign-born African American women, who have experienced racial bias, were more likely to have hypertension or hypertension events.[11] As a matter of fact, African American women who had experienced racial bias and had chosen not to object to it were 4.4 times more likely to have hypertension than those who stated that they took action or talked to somebody.[12] Experiencing racial bias by African American women is also associated with poor medication adherence for hypertension.[13] Additionally, research shows that there is a positive correlation between anticipation of prejudice and increased psychological and cardiovascular stress among Latino women.[14]

Obesity in Asian Americans and African American women has also been linked to experiencing racial bias on an interpersonal level.[15] More specifically, experiencing racial bias on an interpersonal level has been linked to African American women's smoking, alcohol consumption, and high consumption of red meat/fried foods, which are all risk factors of obesity.[16] It has also been "linked to worse self-reported health and to increased risk for hypertension, infectious illnesses, and lifetime history of a

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[9] Some research studies use experiencing discrimination, perceptions of discrimination, and/or perceiving experiences of discrimination. These terms are not defined, so it is unclear whether there is a difference in these terms and whether the terms refer to legally actionable discrimination. Thus, for clarity, this article will use the term experiencing bias to discuss research studies using the terms experiencing discrimination, perceptions of discrimination, and/or perceiving experiences of discrimination. For a discussion concerning the difference between bias and discrimination, see *infra* Part III.C.

[10] *See* Brown et al., *supra* note 3, at 85; Collins, Jr. et al., *supra* note 3, at 2132–38; Cozier et al., *Racial Discrimination*, *supra* note 3, at 681–83; Cozier et al., *Racism, Segregation, and Risk of Obesity*, *supra* note 3, at 879–81; Forsyth et al., *supra* note 3, at 229–30, 233; Gibbons et al., *supra* note 3, at 11, 18; Krieger, *supra* note 3, at 1276–77; Owens & Jackson, *supra* note 3, at 387; Sawyer et al., *supra* note 3, at 1022.

[11] Cozier et al., *Racial Discrimination*, *supra* note 3, at 681–83.

[12] Krieger, *supra* note 3, at 1276–77.

[13] *See* Forsyth et al., *supra* note 3, at 229–30, 233. Seventy-four percent of the subjects in the study were African American women. *Id.*

[14] *See* Sawyer et al., *supra* note 3, at 1020, 1024–25.

[15] *See* Gilbert C. Gee et al., *Disentangling the Effects of Racial and Weight Discrimination on Body Mass Index and Obesity Among Asian Americans*, 98 AM. J. PUB. HEALTH 493, 493 (2008); Cozier et al., *Racism, Segregation, and Risk of Obesity*, *supra* note 3, at 879–81. In African American women, "greater experiences of racism were independently associated with higher incidence of obesity among African American women during the period in which the greatest weight gain occurs—young adulthood through middle age." *Id.* at 881.

[16] *See* Cozier et al., *Racial Discrimination*, *supra* note 3, at 881.

range of physical diseases" for African American women.[17]

Furthermore, experiencing racial bias has been associated with psychological stress for African Americans generally,[18] and for African American women it has been associated with increased depression symptoms[19] and decreased well-being during pregnancy.[20] Research suggests that pregnant African American women experiencing higher levels of racial bias have higher rates of depression and depressive symptoms.[21] More specifically, "well-educated African-American women reported having financial pressures and fewer opportunities than White women," and this income inequity was a significant stressor for African American women throughout their life, including during pregnancy.[22]

Experiencing racial bias also impacts birth outcomes.[23] African American mothers who delivered preterm infants of "very low birthweight" (VLBW) were more likely to report experiencing interpersonal racial bias during their lifetime than were African American mothers who delivered infants at term.[24] This is of great significance because VLBW "accounts for more than half of the neonatal deaths and 63% of the Black-White gap in infant mortality in the United States."[25]

Moreover, experiencing gender and racial bias at work has been associated with poor mental health for all demographics, including women, minorities, and women of color.[26] Specifically, research shows that experiencing gender and racial bias is associated with higher psychological

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[17] Brea L. Perry et al., *Racial and Gender Discrimination in the Stress Process: Implications for African American Women's Health and Well-Being*, 56 SOC. PERSP. 25, 28 (2013).

[18] *See* Brown et al., *supra* note 3, at 85.

[19] Kira Hudson Banks et al., *An Examination of African American Experience of Everyday Discrimination and Symptoms of Psychological Distress*, 42 COMMUNITY MENTAL HEALTH J. 555, 555, 568–69 (2006); Kira Hudson Banks & Laura P. Kohn-Wood, *Gender, Ethnicity, and Depression: Intersectionality in Mental Health Research with African American Women*, 8 AFR. AM. RES. PERSP. 174 (2002).

[20] Owens & Jackson, *supra* note 3, at 387.

[21] *Id.*; *see also* Karen A. Ertel et al., *Racial Discrimination, Response to Unfair Treatment, and Depressive Symptoms Among Pregnant Black and African American Women in the United States*, 22 ANNALS EPIDEMIOLOGY 840, 840 (2012).

[22] Owens & Jackson, *supra* note 3, at 384.

[23] *See* Nana Matoba & James W. Collins, Jr., *Racial Disparity in Infant Mortality*, 41 SEMINARS PERINATOLOGY 354, 357 (2017); Collins, Jr. et al., *supra* note 3, 2132, 2135.

[24] Collins, Jr. et al., *supra* note 3, 2132, 2135.

[25] *Id.* at 2132.

[26] *See* Catherine E. Harnois & João L. Bastos, *Discrimination, Harassment, and Gendered Health Inequalities: Do Perceptions of Workplace Mistreatment Contribute to the Gender Gap in Self-reported Health?*, 59 J. HEALTH & SOC. BEHAV. 283, 290–291, 295 (2018); Buchanan & Fitzgerald, *supra* note 3, at 137; Velez et al., *supra* note 3, at 183, 185, 187–90.

stress for women of color,[27] and self-reported poor mental health.[28] Experiencing gender and racial bias at work has also been linked to lower psychological well-being for African American women,[29] including "higher job stress and posttraumatic stress symptoms."[30] Finally, this bias has been linked to problem drinking, including alcoholism and drinking to intoxication, and substance abuse in minorities and African American women.[31] Research studies and cases show that gender and racial bias in employment continues more than fifty years after the passage of civil rights laws to address employment discrimination.[32]

III. GENDER AND RACIAL BIAS IN EMPLOYMENT ON AN INSTITUTIONAL AND INTERPERSONAL LEVEL

In a 2017 study that did not distinguish between types of bias, fifty-three percent of African American women reported experiencing bias at work compared to forty percent of White women, forty percent of Latino women, and twenty-two percent of men.[33] Forty-four percent of all the women who reported experiencing bias at work were between the ages of thirty and forty-nine, and fifty-seven percent had a postgraduate degree.[34] Of all the women who reported experiencing bias, twenty-five percent said that they earned less than men doing the same job, twenty-three percent said they were treated as if they were not competent, ten percent said they had been passed over for the most important assignments, and seven percent said they were denied a promotion or turned down for the job.[35] Institutional and

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27 Velez et al., *supra* note 3, at 183, 185, 187–90.

28 Harnois & Bastos, *supra* note 26, at 290–291, 295. Perceptions of sexual harassment at the workplace are associated with poor physical health. *Id.* at 295.

29 Velez et al., *supra* note 3, at 179.

30 *Id.*

31 *See* Judith A. Richman et al., *Sexual Harassment and Generalized Workplace Abuse Among University Employees: Prevalence and Mental Health Correlates*, 89 AM. J. PUB. HEALTH 358, 360 (1999); Kathleen M. Rospenda et al., *Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study*, 24 J. INTERPERSONAL VIOLENCE 819, 821, 827, 835–36 (2009); Gibbons et al., *supra* note 3, at 11, 18.

32 Laura Giuliano et al., *Manager Race and the Race of New Hires*, 27 J. LAB. ECON. 589, 590 (2009); Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777 (2009); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181 (2008); Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RES. CTR. (Dec. 14, 2017), https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/.

33 Parker & Funk, *supra* note 32.

34 *Id.*

35 *Id.*

interpersonal level bias in employment cause gender and racial inequities in hiring and pay that are not fully explained by work hours, level of experience, or willingness to negotiate.[36]

A. *Institutional Level Gender and Racial Bias*

Institutional level gender and racial bias operates through institutional "neutral" practices and policies related to pay that establish "separate and independent" barriers for women of color.[37] Not all institutional actions related to pay that disproportionately affect women of color are biased. In order to constitute institutional level bias, an action must reinforce the gender and racial hierarchy, in which women of color are viewed as inferior, and impose substantial harm on women of color.[38] Once this occurs, the institution's actions constitute institutional level bias, even if the actions are seemingly gender and race neutral. Institutional level bias in employment continues, as evidenced by research studies and cases concerning the use of salary history in pay.

Regardless of the type of occupation (low-wage versus higher-wage), women are paid less than men. Employers argue that unequal pay is based on the "neutral" policy of using salary history. For example, based on employment salary and hiring data collected by the government, Oracle is alleged to have used prior salary history as a way to pay women and racial minorities less than White men.[39] The evidence also shows that the company channeled women and minorities into lower-paid careers. Nike has also been alleged to use salary history to set women's current salary resulting in unequal pay for women regardless of the fact that they have the same job, skill, effort, and responsibility as men.[40]

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[36] *See* Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORG. BEHAV. HUM. DECISION PROCESS 84 (2007); Morela Hernandez et al., *Bargaining While Black: The Role of Race in Salary Negotiations*, 104 J. APPLIED PSYCHOL. 581 (2018); Timothy J. Hoff, *Doing the Same and Earning Less: Male and Female Physicians in a New Medical Specialty*, 41 INQUIRY 301, 302 (2004) (citing National Association of Inpatient Physicians 2000); Anthony T. Lo Sasso et al., *The $16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women*, 30 HEALTH AFF. 193, 193, 196–98 (2011).

[37] Leith Mullings & Amy J. Schulz, *Intersectionality and Health: An Introduction*, *in* GENDER, RACE, CLASS & HEALTH 3, 12 (Amy J. Schulz & Leith Mullings eds., 2005).

[38] Rene Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79, 82 (2001) (citing Ian F. Haney-Lopéz, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1809 (1999)).

[39] *See* OFCCP v. Oracle America, 2017-OFC-00006, OFCCP's Motion for Leave to File Second Amended Complaint (Dep't of Labor Jan. 22, 2019).

[40] Brief for Defendant at 10, Cahill v. Nike, Inc., No. 3:18-cv-01477- JR (D. Or. Feb. 26, 2019).

When companies use prior salary to determine current salary, even when the female and racial minority employees have the same job, skill, effort, and responsibility as White men, it reinforces the gender and racial hierarchy of the inferiority of women, racial minorities, and women of color because competency and work ethic are associated with pay. Even though women, racial minorities, and women of color are putting forth the same work effort, they are paid less, and thus believed to be less qualified as White men. It also substantially harms women's health. A recent study observed that there was a gender disparity in depression and anxiety disorders when women earned less than their male counterparts, which was substantially reduced when women earn more than their male counterparts.[41] Thus, the researchers noted that bias embeds inequality in pay policies, which impacts the health of women.[42]

There are also cases when a "neutral" policy is not only used to hire a man, but pay him more than women, reinforcing the gender hierarchy of the inferiority of women. This is what allegedly happened in the Enoch Pratt Free Library case.[43] The library not only changed its internal hiring practices to hire a man when there were no openings, but it also changed the internal pay practices to pay him more than the women currently working in the same position. Specifically, the man had previously worked as a library supervisor in the Enoch Pratt library system.[44] When he left his job in 2014, he was a library supervisor and was paid $56,500, less than all of the women because the pay was based on longevity of services.[45] In June 2015, the library system re-hired the man even though there was no position available and changed its pay system to be solely focused on "merit," which was not clearly defined.

Due to the "neutral" changes in the pay policies that focused on "merit," the man was paid $68,900, even though all the women had more years of library and library supervisory experience. When the women complained about the pay disparity, the library did not fix the problem. Instead, it argued that the man was paid more because of competing salary offers.[46] This ignores the fact that at the time of his hiring, there was no available position,

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41 Platt et al., *supra* note 3, at 6–7.

42 *Id.* at 1, 6–7.

43 *See* Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Enoch Pratt Free Library, Baltimore Mayor and City Council for Pay Discrimination (Sept. 27, 2017) [hereinafter U.S. Equal Emp't Opportunity Comm'n, EEOC Sues for Pay Discrimination], https://www1.eeoc.gov//eeoc/newsroom/release/9-27-17n.cfm?renderforprint=1.

44 *Id.*

45 EEOC's Jury Trial Demand, EEOC v. Enoch Pratt Free Library, No. 17-cv-2860 (D. Md. Sept. 27, 2017).

46 EEOC v. Enoch Pratt Free Library, No. CCB-17-2860, 2018 U.S. Dist. LEXIS 130297, at *9 (D. Md. Aug. 2, 2018).

so there was no need to hire him or match competing offers. Thus, by creating a position for a man and paying him more than women working in the same position, the library has reinforced the gender hierarchy, that the women working in the library were inferior, otherwise there was no need to hire the man and pay him more for doing the same work. Furthermore, it substantially harms the women economically since they were paid less for completing the same amount of work. Women of color also experience bias at the interpersonal level that limits their access to equal employment and pay.

B. *Interpersonal Level Gender and Racial Bias*

Gender and racial bias on the interpersonal level operates through individual interactions, where an individual's conscious and/or unconscious prejudice prevents women of color from being hired and receiving equal pay. Recent studies show that African Americans with non-White-sounding names, like Lakisha, received 50% fewer callbacks than African Americans with White sounding names.[47] If applicants "whiten" their résumés, the number of callbacks they received doubles.[48] For example, 25.5% of résumés received callbacks if African American candidates' names and experiences were "whitened," while only 10% received callbacks if they left their name and experience unaltered.[49] This is because non-African American managers tend to hire more Whites due to their conscious and/or unconscious prejudice.[50]

Even if women of color are hired, pay gaps persist.[51] Overall, women's

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[47] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha And Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991, 1011–13 (2004).

[48] Sonia K. Kang et al., *Whitened Résumés: Race and Self-Presentation in the Labor Market*, 61 ADMIN. SCI. Q. 469, 491 (2016).

[49] *Id.* For jobs with pro-diversity language the difference in callbacks was twenty-five percent if the résumé was whitened compared to eleven percent if the résumé was not whitened. *Id.*

[50] *See* Giuliano et al., *supra* note 32, at 590.

[51] *See* ARIANE HEGEWISCH, INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP: EARNINGS DIFFERENCES BY GENDER, RACE, AND ETHNICITY 2017, at 3 (2018), https://iwpr.org/wp-content/uploads/2018/09/C473.pdf; ARIANE HEGEWISCH & EMMA WILLIAMS-BARON, INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP BY OCCUPATION AND BY RACE AND ETHNICITY 2017, at 3–4 (2018), https://iwpr.org/wp-content/uploads/2018/04/C467_2018-Occupational-Wage-Gap.pdf; BRANDIE TEMPLE & JASMINE TUCKER, NAT'L WOMEN'S LAW CTR., WORKPLACE JUSTICE: EQUAL PAY FOR BLACK WOMEN (2017), https://nwlc.org/wp-content/uploads/2017/07/Equal-Pay-for-Black-Women.pdf; Amanda Rossie Barroso, *For Native Women, 21 Months Is Too Long to Wait for Equal Pay*, NAT'L WOMEN'S L. CTR. (Sept. 27, 2018), https://nwlc.org/blog/for-native-women-21-months-is-too-long-to-wait-for-equal-pay/; Leslie Kane, *Medscape Physician Compensation Report 2018*, MEDSCAPE (Apr. 11, 2018), https://www.medscape.com/slideshow/2018-compensation-overview-6009667; Valerie Wilson et al., *Black Women Have to*

median annual earnings have been less than men's annual earnings since 1960.[52] In fact, women earn less than men in all of the most common occupations for women and in all of the most common occupations for men, which is illustrated in Tables 1 and 2, using the ten most common occupations for women and men.[53]

TABLE 1. THE GENDER WAGE GAP IN THE TEN MOST COMMON OCCUPATIONS FOR WOMEN (FULL-TIME WORKERS ONLY), 2017[54]

	Women's median weekly earnings	**Women's earnings as a percent of men's**	**Men's median weekly earnings**	**Share of female workers in occupation (percent)**	**Share of male workers in occupation as percent of all male workers**	**Share of female workers in occupation as percent of all female workers**
All Full-time Workers	**$770**	**81.8%**	**$941**	**44.4%**	**100% (62,980,00)**	**100% (50,291,000)**
10 Most Common Occupations for Women						
Registered nurses	$1,143	90.7%	$1,260	88.8%	0.4%	4.5%
Elementary and middle school teachers	$987	86.7%	$1,139	78.4%	1.0%	4.4%
Secretaries and administrative assistants	$735	86.3%	$852	94.5%	0.2%	4.1%
Customer service representatives	$637	89.5%	$712	65.6%	1.0%	2.5%
Nursing, psychiatric, and home health aides	$493	84.6%	$583	88.2%	0.3%	2.4%
Managers, all other	$1,251	76.8%	$1,629	38.7%	2.9%	2.3%
First-line supervisors of retail sales workers	$639	71.7%	$891	42.4%	2.2%	2.0%
Cashiers	$422	85.6%	$493	72.2%	0.6%	2.0%

Work 7 Months Into 2017 to Be Paid the Same as White Men in 2016, ECON. POL'Y INST.: WORKING ECON. BLOG (July 28, 2017), https://www.epi.org/blog/black-women-have-to-work-7-months-into-2017-to-be-paid-the-same-as-white-men-in-2016.

52 *See* HEGEWISCH, *supra* note 51, tbl.2.

53 *See* HEGEWISCH & WILLIAMS-BARON, *supra* note 51.

54 *Id.* at 3 (citing *Labor Force Statistics from the Current Population Survey: Household Data Annual Averages: Median Weekly Earnings of Full-time Wage and Salary Workers by Detailed Occupation and Sex*, U.S. DEP'T. OF LAB.: BUREAU OF LAB. STAT. [hereinafter *Median Weekly Earnings*] (last modified Jan. 18, 2019), http://www.bls.gov/cps/cpsaat39.htm). Earnings data are published only for occupations with an estimated minimum of 50,000 workers. *Id.*

Accountants and auditors	$1,065	76.7%	$1,389	58.9%	1.0%	1.8%
First-line supervisors of office and administrative support workers	$819	83.0%	$987	67.7%	0.6%	1.7%
Percent of all men and women					*15.1%*	*40.7%*

TABLE 2. THE WAGE GAP IN THE TEN MOST COMMON OCCUPATIONS FOR MEN (FULL-TIME WORKERS ONLY), 2017[55]

	Women's median weekly earnings	**Women's earnings as a percent of men's**	**Men's median weekly earnings**	**Share of female workers in occupation (percent)**	**Share of male workers in occupation as percent of all male workers**	**Share of female workers in occupation as percent of all female workers**
All Full-time Workers	**$770**	**81.8%**	**$941**	**44.4%**	**100% (62,980,00)**	**100% (50,291,00)**
10 Most Common Occupations for Men						
Driver/sales workers and truck drivers	$589	73.0%	$807	4.9%	4.3%	0.3%
Managers, all other	$1,251	76.8%	$1,629	38.7%	2.9%	2.3%
Construction laborers	N/A	N/A	$667	3.0%	2.2%	0.1%
First-line supervisors of retail sales workers	$639	71.7%	$891	42.4%	2.2%	2.0%
Laborers and freight, stock, and material movers, hand	$500	84.0%	$595	17.5%	1.9%	0.5%
Software developers, applications, and systems software	$1,543	82.8%	$1,863	18.4%	1.9%	0.5%
Retail salespersons	$523	74.3%	$704	38.8%	1.8%	1.5%
Janitors and building cleaners	$481	83.8%	$574	28.8%	1.8%	0.9%
Cooks	$436	90.6%	$481	37.1%	1.4%	1.0%
Carpenters	N/A	N/A	$789	2.2%	1.4%	0.0%
Percent of all men and women					*32.9%*	*20.3%*

[55] *Id.* at 4 (citing *Median Weekly Earnings*, *supra* note 54). Earnings data are published only for occupations with an estimated minimum of 50,000 workers. *Id.*

The differences in earnings are even starker for women of color. African American women working as physicians and surgeons make $0.54 for every $1 that White male physicians and surgeons make.[56] In a 2018 study, White male primary care physicians reported making an average of $335,000 compared to $250,000 for White female primary care physicians, $234,000 for Asian female primary care physicians, $225,000 for African American female primary care physicians, and $223,000 for Latino women primary care physicians.[57]

When taking into consideration all occupations, White women made seventy-seven percent, African American women made sixty-one percent, and Latino women made fifty-three percent of what White men made in 2017 based on annual median earnings.[58] Consequently, White women had to work four months, African American women had to work seven months, Native American women had to work nine months, and Latino women had to work ten months into 2018 to be paid the same as White men in 2017.[59] If pay rates stay the same, it will take White women until 2056, African American women until 2124, and Latino women until 2248 to reach pay parity with White men.[60]

Moreover, based on annual median earnings, White women will have a lifetime wage gap of $487,360 and must work until age 71,[61] while African American women will have a lifetime wage gap of $867,920 and have to work until age 84 to earn what a White man will earn by the age of 60.[62] It is even worse for Native American and Latino women. Native American women will have a lifetime wage gap of $960,280 and must work until age 90,[63] while Latino women will have a lifetime wage gap of $1,056,120 and must work until age 94 to earn what a White man will earn by the age of 60.[64]

These pay gaps are not explained by work hours, level of experience, or willingness to negotiate. A ten-year study of newly trained New York

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56 TEMPLE & TUCKER, *supra* note 51.

57 Kane, *supra* note 51.

58 HEGEWISCH, *supra* note 51, at 2.

59 Barroso, *supra* note 51; Wilson et al., *supra* note 51.

60 *See* INST. FOR WOMEN'S POLICY RESEARCH, IF CURRENT TRENDS CONTINUE, HISPANIC WOMEN WILL WAIT 232 YEARS FOR EQUAL PAY; BLACK WOMEN WILL WAIT 108 YEARS 1 (2016), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q058_final.pdf.

61 NAT'L WOMEN'S LAW CTR., LIFETIME WAGE GAP LOSSES FOR WHITE, NON-HISPANIC WOMEN: 2016 STATE RANKINGS 1 (2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/03/White-Women-Lifetime-Losses-State-by-State-2018.pdf.

62 *Id.*

63 *Id.*

64 *Id.*

physicians found a $16,819 pay gap between female and male physicians in 2008, which had *increased substantially* from the $3,600 difference in 1999.[65] Overall, new male physicians earned $209,300 in 2008 compared to the $174,000 new women physicians made. In 1999, new male physicians earned $173,400 compared to the $151,200 new women physicians made. Thus, it took new women physicians almost ten years to catch up to the pay of male physicians in 1999. The authors noted that specialty choice, practice setting, *work hours*, or other characteristics couldn't explain the wage gap. A 2004 study comparing male and female hospitalists[66] found that female hospitalists earned less even when controlling for type of compensation mechanism, *tenure in the job*, age, employment status (e.g., self-employed), marital status, initial motivations for becoming a hospitalist, and *tenure in the career itself*.[67]

Studies also show that women and minorities are penalized for trying to negotiate higher pay.[68] A 2006 study noted that female candidates initiating salary negotiations were penalized more than male candidates.[69] Specifically, male and female evaluators were less inclined to work with female candidates that initiated salary negotiations compared to female candidates that did not initiate negotiations.[70] Additionally, a 2018 study found that African American job seekers were penalized for trying to negotiate equal or higher salaries than their White counterparts.[71] In fact, African American "job seekers are expected to negotiate less than their White counterparts and are penalized in negotiations with lower salary outcomes when this expectation is violated."[72] Hence, an individual's conscious and/or unconscious prejudice limited women and minorities pay, even when they tried to negotiate an equal salary.

Cases also show that willingness to negotiate does not prevent women from being paid less. For instance, the Unified School District 245 LeRoy-Gridley (Kansas) allegedly failed to pay a woman principal equally even

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65 Lo Sasso et al., *supra* note 36, at 193, 196–98.

66 "Hospitalists are formally defined as doctors 'whose primary professional focus is the general medical care of hospitalized patients. Their activities include patient care, teaching, research, and leadership related to hospital care.'" Hoff, *supra* note 36, at 302 (citing National Association of Inpatient Physicians 2000).

67 *Id.* at 309.

68 *See* Bowles et al., *supra* note 36, at 84, 94–96; Hernandez et al., *supra* note 36, at 581, 587.

69 Bowles et al., *supra* note 36, at 84, 94–96.

70 *Id.*

71 Hernandez et al., *supra* note 36, at 581.

72 *Id.* at 581, 587. This is especially true when the evaluator is more racially biased. *Id.* "When these race-stereotypic expectancies are violated during actual negotiations, job evaluators are less willing to make concessions and, ultimately, assign Black job seekers significantly lower salaries than White job seekers." *Id.* at 587.

after she tried to negotiate for equal pay.[73] Her male predecessor was paid $50,000 to be principal and her male successor was paid the same amount. Yet, she was only initially paid $45,000.[74] After requesting equal pay, her pay was only increased to $46,500.[75] Consequently, even when she tried to negotiate, she was not paid an equal salary of $50,000.[76] Instead, she has been forced to file a lawsuit against the school district to receive equal pay.[77] Hence, an individual's conscious and/or unconscious prejudice limited her pay even when she tried to negotiate a higher salary. Since the pay gaps are not fully explained by work hours, level of experience, or willingness to negotiate, some argue that the pay gap is a result of discrimination.[78] Yet, there is a difference in how the law treats bias and discrimination.

C. *Bias Versus Discrimination*

Currently, the civil rights laws concerning employment discrimination in hiring and pay prohibit some institutional level bias (disparate impact discrimination) and interpersonal level bias (disparate treatment discrimination). Yet, there are a few differences between what is deemed bias in research studies and what is deemed as legally discriminatory. The first difference is that, in research studies, gender is the word used to discuss differences between women and men, but in employment law, sex is used to discuss this difference. Second, Latinos are considered an ethnicity for research studies, but in employment law Latinos are treated as a race or national origin.[79] Third, research studies track group level differences in industries or occupations, but the civil rights laws only address a specific employer's actions.[80] Hence, laws are only concerned with: (1) whether an individual's prejudice leads to disparate treatment of women *or* minorities; or (2) whether a specific employer's policies disparately impact a woman *or*

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[73] Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Kansas School District for Paying Female Principal Less than Male Principles (Aug. 6, 2018) [hereinafter U.S. Equal Emp't Opportunity Comm'n, EEOC Sues Kansas School District] https://www.eeoc.gov/eeoc/newsroom/release/8-6-18a.cfm.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *See* Platt et al., *supra* note 3, at 6–7; Velez et al., *supra* note 3, at 183, 185, 187–90.

[79] Even though Latino was treated as an ethnicity for the 2010 Census, it is treated as a race in terms of bias and discrimination, so for the purposes of this article Latino is treated as a race. Bridges, *supra* note 5, at 69–75.

[80] For example, several research studies discuss differences in pay in industries or occupations based on gender or racial groups, *supra* notes 36 and 51, even though Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *See* 42 U.S.C. § 2000e-2(a)(1) (2018).

a minority. Thus, research may show group level sex and race inequities in hiring or pay in an entire industry or occupation, but this is not legally actionable discrimination without a specific employer or employee to blame. This failure to address industry wide or occupational sex and race inequities in hiring and pay is just one of the many gaps in the scope and application of civil rights discussed in the next part.

IV. GAPS IN DISCRIMINATION LAWS

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment, including hiring and compensation, based on race or sex,[81] while the Equal Pay Act of 1963 (EPA) prohibits differential pay based on sex between women and men working in the same establishment who perform jobs that require substantially the same skill, effort, and responsibility.[82] An individual woman of color, or a group of women of color, can bring a case under Title VII and the EPA. The U.S. Equal Employment Opportunity Commission (EEOC), in charge of enforcing Title VII and the EPA, also brings lawsuits on behalf of individuals.[83] As a matter of fact, the EEOC has identified pay discrimination as one of its national areas of priorities for fiscal years 2017 to 2021.[84] Nevertheless, there are still a number of problems with the current enforcement system due to gaps in the scope and application of Title VII and the EPA, which allows sex and race discrimination to continue, and prevents women of color from bringing Title VII and EPA claims.

First, Title VII fails to provide recovery for internalized oppression resulting from experiencing sex or race employment discrimination. Under Title VII, a plaintiff may request reinstatement or recover damages for lost wages and other equitable relief including compensatory damages for emotional distress.[85] Although available, compensatory damages fail to fully redress the emotional harm of experiencing employment discrimination because recovery is limited to $300,000 and is not available in disparate

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[81] It also prohibits employment discrimination based on "color, religion, . . . and national origin." § 2000e-2(a)(1).

[82] The Equal Pay Act of 1963, 29 U.S.C. § 206 (1963). The Equal Pay Act of 1963 amended the Fair Labor Standards Act of 1938. *Id*.

[83] *SEE* 42 U.S.C. § 2000E-5 (2018); *SEE ALSO* EEOC V. DENTON CTY., NO. 4:17-CV-00614, 2018 U.S. DIST. LEXIS 175794, AT *2 (E.D. TEX. OCT. 12, 2018); PRESS RELEASE, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, DENTON COUNTY TO PAY $115,000 AFTER JUDGMENT IN EEOC EQUAL PAY LAWSUIT (OCT. 24, 2018) [HEREINAFTER U.S. EQUAL EMP'T OPPORTUNITY COMM'N, DENTON COUNTY TO PAY $115,000] (ON FILE WITH AUTHOR); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC SUES FOR PAY DISCRIMINATION, *SUPRA* NOTE 43; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC SUES KANSAS SCHOOL DISTRICT, *SUPRA* NOTE 73.

[84] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN: FISCAL YEARS 2017-2021, at 1–3, 8 (2017), https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf.

[85] 42 U.S.C. § 2000e-2(a)(1) (2018); *see also* Polsky & Befort, *supra* note 8, at 71.

impact claims.[86] Additionally, the compensatory damages do not provide support for the physical harms resulting from experiencing employment discrimination.[87] According to Professor Kotkin, "these forms of relief do not provide sufficient incentive for victims of discrimination to pursue the arduous course of federal litigation, which inevitably entails defending against the employer's charges of incompetence or lack of qualification. Nor do they provide a sufficient incentive for employers to examine their subjective decisionmaking for evidence of discrimination."[88]

Second, current employment laws require a showing that a specific employer or employee is to blame for discrimination, rather than allowing individuals to present evidence of industry wide or occupational sex and race inequities in hiring and pay. For example, research studies show that women of color who have higher educational attainment than White males are paid less than these White males. Specifically, African American women with some college get paid $15.58 an hour compared to $22.51 an hour for White men with some college.[89] In fact, African American women with some college get paid only $0.42 more an hour than White men *without* a high school degree.[90] African American women with an advanced degree, such as a master's degree, get paid $31.57 an hour compared to the $48.27 an hour for White men with an advanced degree.[91]

In terms of annual pay, African American women with a bachelor's degree made $46,694, which was $35 *less* than a White man with a high school degree.[92] A White man with a bachelor's degree made $75,080 annually, about $28,000 more than an African American woman with a bachelor's degree.[93] African American women with a master's degree make $56,072 compared to $87,051 for White men with a master's degree.[94]

Latino women are paid $0.54 for every $1 paid to a White man, the largest gap between all men and women.[95] Specifically, women of Central American origin make 46.8% of what White men make, while women from Mexico make 50%, women from the Dominican Republic make 52%, and

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86 Bachman, *supra* note 8; Schoenheider, *supra* note 8, at 1462.

87 Schoenheider, *supra* note 8, at 1462.

88 Minna Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1306 (1990).

89 Wilson et al., *supra* note 51.

90 *Id.*

91 *Id.*

92 TEMPLE & TUCKER, *supra* note 51.

93 *Id.*

94 *Id.*

95 KAYLA PATRICK, NAT'L WOMEN'S LAW CTR., WORKPLACE JUSTICE: EQUAL PAY FOR LATINAS (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/10/Equal-Pay-for-Latina-Women-2017.pdf.

women from Cuba, Puerto Rico, and South America make less than 67% of what White men make.[96] Latino women with an advanced degree get paid $7.53 *less* an hour than White men with *only* a college degree.[97] Although Native American women are paid $0.57 for every $1 paid to a White man, as Native American women *increase* their educational attainment, their pay gap with White men *increases*.[98] In fact, Native American women need a master's degree before they surpass the wages of a White man with only a high school degree.[99] This research can be used as evidence of industry wide discrimination against women of color because it shows that even when women of color have greater educational attainment than White men, women of color are paid less. Yet, these studies cannot be used to bring a discrimination case unless the studies can show a specific employer paid women of color less because of sex *or* race.

EEOC v. Denton County is an example of evidence that can be used to support a legally actionable discrimination case against a specific employer that should have been used to address industry wide practices.[100] Denton County hired Dr. Martha C. Storrie to work as a primary care clinician with a starting salary of $120,000.[101] A male physician was hired to perform the same duties as Dr. Storrie, but was paid $170,000 as a starting wage, $50,000 more than Dr. Storrie's starting salary and $34,000 more than her current salary.[102] As a result of a newspaper article that published the top ten highest paid employees of Denton County, Dr. Storrie discovered the pay discrepancy and asked for equal pay.[103] The Denton County director of public health refused to pay Dr. Storrie equal wages, and fired her shortly thereafter because of Dr. Storrie's allegedly disruptive behavior.[104] Following a federal court judgment, Denton County was required to pay Dr. Storrie $115,000, implement a new written policy regarding compensation of new physicians in the public health department, and provide training for equal pay for women.[105]

This EEOC case addressed the specific employer action that lead to

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96 *Id.*

97 *Id.*

98 KAYLA PATRICK & JASMINE TUCKER, NAT'L WOMEN'S LAW CTR., WORKPLACE JUSTICE: EQUAL PAY FOR NATIVE WOMEN (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/Equal-Pay-for-Native-Women-2017.pdf.

99 *Id.*

100 *See* No. 4:17-CV-00614, 2018 U.S. Dist. LEXIS 175794 (E.D. Tex. Oct. 12, 2018).

101 *Id.* at *1.

102 *Id.* at *2.

103 *Id.*

104 *Id.*; *see also* U.S. Equal Emp't Opportunity Comm'n, Denton County to Pay $115,000, *supra* note 83.

105 U.S. Equal Emp't Opportunity Comm'n, Denton County to Pay $115,000, *supra* note 83.

unequal pay, yet the EEOC should have pushed for countywide changes. In fact, the EEOC noted in a press release regarding the case that they were hopeful that the case would lead other county departments to periodically review their pay to ensure that women were equally compensated compared to men. Nevertheless, it did not mandate that the county conduct this countywide review,[106] missing an opportunity to ensure pay equity for all the women working for the county, instead of just one female physician working for the county. The failure to recognize county (i.e. industry) wide actions of discrimination that impact women, beyond those bringing a lawsuit, allows the county to continue to pay other women less than men. This is a gap in the application of Title VII, precluding women of color from bringing legally substantiated Title VII claims.

Third, under Title VII, an African American woman can file a claim for discrimination based on being African American or a woman, but not for being an African American woman.[107] Title VII does not explicitly cover discrimination based on more than one category. Even though the EEOC has recognized that women of color experience both sex *and* race discrimination in its guidance materials and initiatives, which it notes is a violation of Title VII,[108] many courts refuse to recognize the intersection of sex and race discrimination that women of color face in Title VII claims, limiting the claims to sex *or* race discrimination.[109]

For instance, in *Lee v. Walters*, an Asian American woman was working as a physician at the Veterans Administration Medical Center.[110] She claimed that she was denied a promotion to a higher salary level because of sex *and* race discrimination. The court dismissed her claim, finding that

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106 *See id.*

107 *See* Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 15–23 (2019); Mary Elizabeth Powell, Comment, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV. 413, 421–22 (1996); Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1472–73 (1989).

108 *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL: SECTION 15: RACE AND COLOR DISCRIMINATION 3, 8–9 (2006), https://www.eeoc.gov/policy/docs/race-color.pdf; *Why Do We Need E-RACE?*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www1.eeoc.gov/eeoc/initiatives/e-race/why_e-race.cfm (last visited Apr. 21, 2019); *see also* Pappoe, *supra* note 107, at 17–19 (discussing the need for changes by the executive, legislative, and judicial branches to address the gaps in Title VII enforcement concerning women of color).

109 *See, e.g.*, DeGraffenreid v. Gen. Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480 (8th Cir. 1977); *see also* Crenshaw, *supra* note 2. The U.S. Court of Appeals for the Ninth Circuit also failed to allow an African American woman to serve as a class representative in a sex discrimination case because she was claiming discrimination as a *black* female, and thus she could not represent *all* female employees. *See* Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983).

110 NO. 85-5383, 1988 U.S. DIST. LEXIS 11336, AT *7 (E.D. PA. OCT. 11, 1988).

she did not experience sex *or* race discrimination because White women and an Asian man had been promoted.[111] Some courts have allowed claims based on a sex-plus theory, allowing women of color to bring claims of both sex and race discrimination.[112] Yet, scholars argue that this makes race discrimination secondary to sex discrimination and fails to take into consideration that race and sex have a multiplier impact that leaves women of color worse off than White women or minority men especially in the employment context.[113] The failure to recognize women of color's experience of sex and race discrimination in employment is a gap in the application of law, preventing women of color from bringing legally substantiated Title VII claims.

Fourth, in order to prove a violation of Title VII based on hiring, a woman of color has to show specific evidence that the employer intentionally discriminated against her in terms of hiring (disparate treatment)[114] or that the employer's actions disproportionately impacted her by showing statistically significantly differences in hiring between women and men (disparate impact).[115] Yet, lawsuits for sex and race discrimination in hiring are hard to prove because of the lack of readily available employer specific data.

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111 In fact, the court focused on a discussion of national origin discrimination. *Id.* at 4–6.

112 *See* Pappoe, *supra* note 107, at 15–23; Powell, *supra* note 107, at 420; Scarborough, *supra* note 107, at 1472–73. Even if women of color are able to bring intersectionality claims of sex and race discrimination, they rarely win. *See, e.g.*, Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 992 (2011). For a similar study with updated numbers and similar results, see Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127–29 (2009).

113 *See* Deborah King, *Multiple Jeopardy, Multiple Consciousness: The Context of Black Feminist Ideology*, 14 J. WOMEN CULTURE & SOC'Y 42, 46–52 (1988); Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21, 21 (1991) ("No other group in America has so had their identity socialized out of existence as have black women. We are rarely recognized as a group separate and distinct from black men, or as a present part of the larger group 'women' in this culture . . . . When black people are talked about the focus tends to be on black *men*; and when women are talked about the focus tends to be on *white* women." (quoting BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 7 (1981) (alteration in original) (emphasis added))).

114 To establish a *prima facie* case for disparate treatment, an individual must show that: (1) she is a member of a protected class; (2) she applied for the job for which the employer is seeking applications; (3) despite her qualifications, she was rejected; and (4) after her rejection, the position remained open and the employer continued to seek applicants with similar qualifications. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

115 *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The disparate impact framework was changed in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), yet Congress responded by passing the Civil Rights Act of 1991 to re-instate the framework. Pub L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 1981–1981a (2018)). For a brief discussion of the legal history of Title VII and the employment discrimination framework, see Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 74–79 (2011).

Title VII requires employers to make and keep records in order to determine whether unlawful employment practices, including hiring, have been or are being committed.[116] Since 1966, the EEOC has required employers with more than 100 employees to file annual job reports of the number of individuals employed by job category, sex, race, and ethnicity.[117] After removing information that could be used to identify a specific employer, the EEOC annually publishes the data for major geographic areas and industry groups, making it available to the public.[118] Thus, the data can be used for research studies concerning race and sex inequities in hiring and by employers to self-assess their compliance with Title VII, but it cannot be used by women of color, who are not hired by a specific employer, to determine if sex and race discrimination prevented them from being hired. Obviously, this approach of publishing de-identified hiring data that is not usable by potential plaintiffs has not worked in putting an end to sex and race discrimination in hiring as evidenced by the studies and cases summarized in Part III of this Article.[119] Hence, this is a gap in the application of the law that prevents women of color from bringing legally substantiated Title VII claims.

Fifth, in order to prove unequal compensation, including unequal pay, under Title VII, a woman of color has to show that her employer intentionally discriminated against her (disparate treatment)[120] or that the employer's actions disproportionately impacted her (disparate impact).[121] A woman of color filing a complaint with the EEOC bears the burden of proof to show that she is paid unequal compensation based on race or sex.[122] Because most employers are not required to disclose to current employees salary

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116 42 U.S.C. § 2000e-8(c) (2018).

117 29 C.F.R. §1602.7 (2019). The data collected by the EEOC is also used by the U.S. Department of Labor Office of Office of Federal Contract Compliance Programs (OFCCP) to ensure federal contractors and subcontracts are not discriminating based on sex and race in employment. Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965); Agency Information Collection Activities Notice, 81 Fed. Reg. 45479, 45484 (July 14, 2016). For a fuller discussion of the OFCCP, see *infra* Part V.

118 *See* Nat'l Women's Law Ctr. v. OMB, 358 F. Supp. 3d 66, 73 (2019).

119 *See supra* Part III.A.

120 *See* § 2000e-2(a)(1). Disparate treatment cases are defined as cases where there is direct evidence of discrimination. *See* Sperino, *supra* note 115, at 75–78.

121 *See* § 2000e-2(k)(1)(A)(i); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL: SECTION 10: COMPENSATION DISCRIMINATION (2000) [hereinafter U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL: SECTION 10], https://www.eeoc.gov/policy/docs/compensation.html.

122 Before an individual can file a claim under Title VII in federal court, the individual must file a complaint with the EEOC. *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/howtofile.cf (last visited Apr. 21, 2019)

information for current or past employees doing the same job[123] and some employers also prohibit employees from sharing salary data,[124] it is often hard to prove these cases.

In 2010, the EEOC, as well as other federal agencies, began to investigate ways to better address pay discrimination.[125] After a six-year process, the EEOC issued a Federal Register notice requesting three-year approval from the Office of Management and Budget (OMB) to collect pay data from employers with more than 100 employees beginning March 31, 2018.[126] OMB stayed the data collection on August 29, 2017.[127] As a result, the EEOC published a notice on September 15, 2017 halting the data

[123] Most federal agencies and some state employers are required to publicly report salary information. For a list of federal salaries with bonuses, see *Search Federal Employee Salaries*, FEDSDATACENTER.COM, https://www.fedsdatacenter.com/federal-pay-rates/ (last visited Apr. 21, 2019). California has a database that contains minimum and maximum salaries for state employers, along with information from W-2 forms, including stipends, overtime and other pay often not accounted for in base salaries. *See Government Compensation in California*, ST. CONTROLLER'S OFF., https://publicpay.ca.gov (last visited Apr. 21, 2019). Illinois, Kansas, Kentucky, and New Hampshire are among states maintaining databases identifying specific employee compensation. *See Employee Salary* Database, ILL. COMPTROLLER'S OFF., https://illinoiscomptroller.gov/financial-data/state-expenditures/employee-salary-database/ (last visited Apr. 21, 2019); *Employee Compensation by Agency*, KANVIEW, http://kanview.ks.gov/PayRates/PayRates Agency.aspx (last visited Apr. 21, 2019); *Salary Search*, TRANSPARENCY.KY.GOV, https://transparency.ky.gov/search/Pages/SalarySearch.aspx#/welcome (last visited Apr. 21, 2019); *State Employee Pay Search*, TRANSPARENT NH, https://business.nh.gov/paytransparency/ (last visited Apr. 21, 2019). New York also makes salary information public. *See State Employee* Salaries, NY DATABASES, http://nydatabases.com/database/state-employee-salaries (last visited Apr. 21, 2019). Nonprofits are also required to disclose some salary data. *See* 26 U.S.C. § 501(c)(1)(3) (2018). Once a nonprofit corporation has obtained tax-exempt status, it must file its financial statements, including the salaries of directors, officers, and key personnel on IRS form 990. *Exempt Organizations Annual Reporting Requirements - Form 990, Part VII and Schedule J: Whose Compensation Must Be Reported in Part VII, Form 990*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/exempt-organizations-annual-reporting-requirements-form-990-part-vii-and-schedule-j-whose-compensation-must-be-reported-in-part-vii-form-990 (last updated Apr. 16, 2019).

[124] *But see* Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) (prohibiting federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation).

[125] *See* Agency Information Collection Activities Notice, 81 Fed. Reg. 5113, 5114 (Feb. 1, 2016).

[126] Agency Information Collection Activities Notice, 81 Fed. Reg. 45479, 45484 (July 14, 2016). The pay information collected from employers would be part of the same reporting of employment information. *Id.* at 45481. The pay information would include W-2 income and hours worked data. *Id.* at 45479; *see also* Nat'l Women's Law Ctr. v. OMB, 358 F. Supp. 3d 66, 71–76 (2019) (offering a more detailed discussion about the six-year process and why the OMB had to approve the proposed data collection).

[127] *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 76 (citing Memorandum from Neomi Rao, Adm'r, Office of Info. & Regulatory Affairs, to Victoria Lipnic, Acting Chair, Equal Emp't Opportunity Comm'n (Aug. 29, 2017).

collection,[128] but the stay was overturned on March 4, 2019.[129] It is unclear whether OMB will appeal the ruling and whether this data collection will go into effect, yet even if it does it still leaves women of color without access to necessary information. After removing information that could be used to identify a specific employer, the EEOC stated that it "expect[ed] to periodically publish reports on pay disparities by race, sex, industry, occupational groupings, and Metropolitan Statistical Area (MSA)."[130] The EEOC also noted that it would use the information to assess charges of discrimination once an individual files a complaint.[131] Thus, just like the hiring data the EEOC releases to the public, the pay data can be used for research studies concerning race and sex inequities in pay and by employers

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[128] Stay the Effectiveness of the EEO-1 Pay Data Collection Notice, 82 Fed. Reg. 43362 (Sept. 15, 2017).

[129] *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 93.

[130] Agency Information Collection Activities Notice, 81 Fed. Reg. 45840, 45491 (July 14, 2016).

[131] *Id.* at 45490. For example, if a woman files a complaint with the EEOC alleging that she was paid less than her male colleagues in the same job category, the EEOC's enforcement staff might use the pay data to generate a report comparing the distribution of the pay of women to that of men in the same job category. *Id.*

> They also might use statistical tools to determine generally whether there are significant disparities in reported pay in job groups based on race, gender, or ethnicity.
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> ….
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> EEOC enforcement staff could then examine how the employer compares to similar employers in its labor market by using a statistical test to compare the distribution of women's pay in the respondent's . . . report to the distribution of women's pay among the respondent's competitors in the same labor market. With the proposed addition of hours-worked data . . . statistical tests could be used to determine whether pay disparities remain among relevant groups such as men and women, controlling for hours worked. More specifically, statistical tests could determine whether factors such as race, ethnicity, gender, and hours worked impact the distribution of individuals in pay bands. The EEOC envisions that any statistical test would be accompanied by an indication of the practical significance of pay differences.
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> ….
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> After considering the results of several statistical analyses in conjunction with allegations in the charge, and sometimes also assessing how the . . . pay data compares to statistics for comparable workers using Census data, EEOC enforcement staff would decide how to focus the investigation and what information to request from the employer. When EEOC enforcement staff requests information from an employer, the employer has the opportunity to explain its practices, provide additional data, and explain the non-discriminatory reasons for its pay practices and decisions. Only after considering all of this information, and possibly additional information, would the EEOC reach a conclusion about whether discrimination was the likely cause of the pay disparities.

Id.

to self-assess their compliance with Title VII and the EPA, but it cannot be used by women of color to determine if their specific employer has sex and race pay disparities. This is a gap in the application of the law that prevents women of color from bringing legally substantiated Title VII and EPA claims.

Sixth, in order to prove a violation of the EPA, a woman has to show specific evidence that the employer paid her less than a male employee at the same establishment performing a job that required substantially the same skill, effort, and responsibility.[132] A woman may choose to file a claim under the EPA instead of under Title VII because she can receive liquidated damages. In addition, under the EPA, once she proves a pay disparity, the employer bears the burden of proof to show that the unequal pay is due to a factor other than sex, unlike under Title VII where she has to also prove that the unequal pay was a result of sex or race discrimination.[133] Yet, the EPA and state equal pay laws prohibit *only* sex discrimination,[134] so women of color challenging pay disparities are compared to their male counterparts, not to White men who are making the most. An illustrative example of this problem is the primary care physician (PCP) survey discussed in Part III.B.[135] Specifically, White male PCPs reported making an average of $335,000 compared to $327,000 for Asian male PCPs, $322,000 for African American male PCPs, and $303,000 for Latino male PCPs. Thus, under the EPA, the most a woman of color working as a PCP would receive is $327,000, which is $8,000 less than a White man, even if she had the same skill, effort, and responsibility as a White man. This is a gap in the scope of the EPA that allows sex and race discrimination to continue because women of color will never be paid their full worth.

Seventh, some courts allow employers to use an employee's pay history as a job-related defense to pay a woman less than a man under the EPA, even if the woman was working in the same establishment and performing a job that required substantially the same skill, effort, and responsibility as the man.[136] The Ninth Circuit Court of Appeals recently ruled that using prior

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[132] *See* 29 U.S.C. §206(d) (2018). Under Title VII, there is no requirement to prove the job is substantially equal or that the woman works in the same establishment as the higher paid male employee. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL: SECTION 10, *supra* note 121, at sec. 10-II. Additionally, under the EPA, there is no requirement to file a complaint with the EEOC before filing a federal court lawsuit. *See id.* at sec. 10-IV.

[133] *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, COMPLIANCE MANUAL: SECTION 10, *supra* note 121, at secs. 10-III and 10-IV.

[134] *See* 29 U.S.C. § 206 (2018); CAL. LAB. CODE § 432.3 (Deering 2019); HAW. REV. STAT. § 378-2.4 (2019); OR. REV. STAT. § 659A.357 (2019).

[135] *See supra* Part III.B.

[136] *See* Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2003); Covington v. S. Ill. Univ., 816 F.2d 317, 322–23 (7th Cir. 1987).

pay as a job-related defense is prohibited because prior salary is not a legitimate measure of work experience, ability, performance, or any other job-related quality.[137] Although the Supreme Court overturned this opinion because the author of the opinion died before it was published,[138] many states such as California, Hawaii, and Oregon have passed equal pay laws banning employers from the use of pay history to determine salary.[139]

On July 5, 2018, Hawaii Governor David Y. Ige signed Senate Bill 2351, which prohibits prospective employers in the state from requesting or considering the wage or salary history of job applicants as part of an employment application process or compensation offer.[140] Additionally, it prohibits enforced wage secrecy and retaliation or discrimination against employees who disclose, discuss, or inquire about their own wages or wages of a coworker.[141] On July 18, 2018, California Governor Jerry Brown signed Assembly Bill 2282, which clarifies the state's existing law prohibiting salary history inquiries by employers.[142] The law also made clear that under the California Equal Pay Act, employers cannot pay employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, except where the employer demonstrates the wage differential is based upon one or more listed factors. Finally, Oregon's Equal Pay Initiative, first passed in 2017 and fully implemented in 2019, prohibits employers from screening applicants or setting starting pay for new hires based on salary history. Employers are also banned from seeking an applicant's salary history, either from the applicant or from other employers.[143] Notwithstanding the state pay history bans, the EPA currently does not ban the use of salary history. This gap in the EPA prevents women

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137 Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018), *vacated*, 139 S. Ct. 706, 710 (2019).

138 Yovino v. Rizo, 139 S. Ct. 706, 710 (2019).

139 *See* LAB. § 432.3; § 378-2.4; § 659A.357. Because these laws only focus on sex pay discrimination, women of color will still be paid less than their White male counterparts who do the same job. *See Pay Transparency and Equal Pay Protections*, U.S. DEP'T OF LAB., WOMEN'S BUREAU, https://www.dol.gov/wb/equalpay/equalpay_txt.htm (last visited Mar. 22, 2019) (providing a fifty-state review of equal pay laws).

140 *See* § 378-2.4; *see also* S.B. 2351, 30th Leg., Reg. Sess. § 1 (Haw. 2018).

141 S.B. 2351, 13th Leg., Reg. Sess. § 1 (Haw. 2018).

142 Assembly Bill 2282 took effect on January 1, 2019. Prior to January 1, the existing law prohibited employers from relying on salary history information of applicants for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant. Existing law also requires employers, upon reasonable request, to provide the pay scale for a position to an applicant. Assembly Bill 2282 clarifies the definitions for "pay scale," "reasonable request," and "applicant" for purposes of these provisions and specifies that these provisions do not prohibit an employer from asking an applicant for salary expectations. Assemb. B. 2282, 2018 Leg., Reg. Sess. (Cal. 2018); *see also* LAB. § 432.3.

143 *Id.* Oregon's Equal Pay Initiative also expanded protected class pay equity on the basis of race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, *or* age. *Id.*

of color from being paid equally. Suggestions for how to address these gaps are discussed in detail in the next part.

V. SOLUTIONS: ACHIEVING EQUITY

The studies discussed in Part II begin to illustrate how experiencing gender and racial bias negatively impacts women of color's health status. Yet, more research needs to be conducted. For example, most of the current research focuses on African American women. Hence, research should be conducted on the impact of gender and racial bias on Asian, Latino, and Native American women's health status. Researchers also need to prove the causal link, not just the associations, between experiencing gender and racial bias and poor health status.

Additionally, research linking gender and racial bias, utilization and access to healthcare, negative work outcomes, and poor health status should be conducted. Specifically, research should examine the impact of gender and racial bias in employment on women of color's work history and career trajectory, linking it to the health status of women of color of working age (eighteen to sixty-four years old). Finally, research studies need to focus on specific employers, so the results of the study showing gender and racial bias can be used to support sex and race discrimination lawsuits.

Notwithstanding the need for more research, the laws concerning sex and race discrimination need to consider the physical and mental harms suffered by women of color. Thus, I propose that courts expand the definition of equitable relief under Title VII to be available for disparate impact claims, physical harms, and have no monetary limit.

Additionally, the EEOC needs to make it clear to employers that it is illegal to discriminate against women of color based on sex *and* race discrimination. If relevant, all EEOC court filings on behalf of women of color should include sex and race discrimination claims. Some scholars argue that Congress needs to amend Title VII.[144] Specifically, Professors Castro and Corral suggest adding "or any combination thereof" to Title VII so it reads:

It shall be an unlawful employment practice for an employer— (1)

[144] *See, e.g.*, Bradley Allen Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R. L.J. 199, 214 (2006) (discussing the fact that, although a number of court decisions have validated intersectional claims, "none of these decisions have generated enough publicity or been handed down by a court with sufficient authority to set a genuine precedent in an area lacking clear guidance" (footnote omitted)); Rosalio Catro & Lucia Corral, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 BERKELEY LA RAZA L.J. 159, 172 (1993); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-) History*, 95 B.U. L. REV. 713, 727 (2015) (discussing the fact that although intersectional experiences of women of color "inform[ed] the origins and early development of Title VII, court opinions that acknowledged, much less discussed, intersectionality were few and far between").

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin, *or any combination thereof.*[145]

I suggest that this language be added to any federal proposal to address unequal pay. I also suggest that state equal pay laws be amended to address sex and race pay discrimination, not just sex discrimination.

Second, the EEOC needs to conduct periodic audits of the hiring and pay practices of employers with more than 100 employees. The EEOC already collects hiring data from these employers and is set to collect pay data.[146] Using this data, the EEOC should create an audit process similar to the one used by the U.S. Department of Labor Office of Federal Contract Compliance Programs (OFCCP).

The OFCCP requires certain contractors and subcontractors with more than fifty employees to submit employment data, including job category and pay information by sex, race, and ethnicity.[147] The OFCCP audits a subset of these reports each year to assess hiring, pay, promotion, and other practices.[148] The OFCCP uses statistical analysis to determine whether there is a statistically significant difference in hiring and pay based on sex *or* race, then reviews documents and conducts interviews to determine if there is a valid reason for the differences.[149] Based on these reports, the OFCCP has fined Oracle, Dell, and other companies for unequal hiring and pay based on sex or race, putting the burden of proof on employers to show that unequal

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[145] *See* Catro & Corral, *supra* note 144, at 169, 172 (citing 42 U.S.C. § 2000e-2(a)(1) (2018)).

[146] *See* Nat'l Women's Law Ctr. v. OMB, 358 F. Supp. 3d 66, 73 (2019); 29 C.F.R. § 1602.7 (2019); Agency Information Collection Activities Notice, 81 Fed. Reg. 45479 (July 14, 2016).

[147] *See* 41 C.F.R. § 60-1.7(a) (2019). The information includes hiring, pay, promotion, and other practices. *Id.*

[148] *See* U.S DEP'T OF LABOR, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, FY 2017 CONGRESSIONAL BUDGET JUSTIFICATION (2017), https://www.dol.gov/sites/dolgov/files/legacy-files/documents/general/budget/CBJ-2017-V2-10.pdf.

[149] *See id.*

> Generally speaking, any business or organization that (1) holds a single federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has federal contracts or subcontracts that have a combined total in excess of $10,000 in any 12-month period; or (3) holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount will be subject to the requirements of Executive Order 11246.

Frequently Asked Questions: Pay Transparency Regulations, U.S. DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/ofccp/regs/compliance/faqs/paytransparencyfaqs.html#Q0 (last visited Mar. 23, 2019).

pay is based on qualifications or workload.[150] The EEOC should adopt this audit process, putting the burden on employers to show that the unequal pay is based on qualifications or workload.[151]

The OFCCP process does have flaws, which the EEOC process should not include. The OFCCP process looks at sex *or* race inequities, but the EEOC process must include an intersectionality approach, considering both sex *and* race inequities in pay and hiring. Additionally, the OFCCP audit process reviews individual employers across industries, yet the EEOC should use its auditing process to audit employers in an entire industry in order to address industry wide discrimination practices, such as paying women of color with more educational attainment less than White men with the same educational attainment. The OFCCP audits yearly reports, yet the EEOC audit period should include the current year and the preceding five years, just like the Internal Revenue Service audit period.[152] While the OFCCP focuses primarily on monetary relief,[153] the EEOC must also require changes in policies and monitor businesses that are found in violation of Title VII and the EPA as it has done in other cases.[154] Finally, any recovery must

[150] *See* Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965); Chris Opfer & Paige Smith, *Oracle Owes $400M to Women, Black, Asian Workers, DOL Says*, BLOOMBERG L. (Jan. 22, 2019), https://www.bna.com/oracle-owes-400m-n57982095607/; Porter Wells, *Dell Set to Pay $2.9M to Settle Labor Dept.'s Pay Bias Claims*, BLOOMBERG L. (May 14, 2018), https://news.bloomberglaw.com/daily-labor-report/dell-set-to-pay-29m-to-settle-labor-depts-pay-bias-claims-1.

[151] Each year, the OFCCP releases a list of its compliance reviews, Corporate Management Compliance Evaluations (CME), Functional Affirmative Action Program reviews, Section 503 of the Rehabilitation Act (Disability) Focused Reviews, and Compliance Checks. *See The Corporate Scheduling Announcement List (CSAL)*, U.S. DEP'T OF LAB., OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/ofccp/regs/compliance/faqs/csalfaqs.htm. The EEOC should coordinate with the OFCCP to ensure that they are not auditing the same company. The EEOC and OFCCP already have a memorandum of understanding in which they work together when there are Title VII complaints filed with both the EEOC and OFCCP. *See Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Nov. 9, 2011), https://www1.eeoc.gov//laws/mous/eeoc_ofccp.cfm?renderforprint=1. The EEOC and OFCCP should use the same agreement to govern the auditing process to ensure that they are not duplicating efforts.

[152] *See* United States v. Home Concrete & Supply, LLC, 566 U.S. 478 (2012); Beeler v. Comm'r, 105 T.C.M. (CCH) 1772 (T.C. 2013).

[153] The OFFCP also has the power to seek jobs, injunctive relief, and, in extreme cases, debarment. U.S DEP'T OF LABOR, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, *supra* note 148.

[154] *See* EEOC v. CollegeAmerica Denver, Inc., 869 F.3d 1171 (10th Cir. 2017); Complaint at 8, EEOC v. Enoch Pratt Free Library, No. 17-cv-2860 (D. Md. Sept. 27, 2017); Complaint at 4, EEOC v. Denton County, No. 4:17-cv-00614 (E.D. Tex. Aug. 31, 2017); Press Release, U.S. Equal Emp't Opportunity Comm'n, Scion Dental, a Unit of SkyGen USA, Ordered to Face Trial for Racial Discrimination in EEOC Suit (May 11, 2018), https://www.eeoc.gov/eeoc/newsroom/release/5-11-18.cfm; Press Release, U.S. Equal Emp't Opportunity Comm'n, University of Denver to Pay $2.66 Million and Increase Salaries to

include not only fines for pay, but also costs for health care associated with experiencing sex and race discrimination.

Third, the EEOC needs to share more detailed information with the public regarding employer job and pay disparities. In terms of hiring data, the EEOC needs to use the hiring data it collects from employers to create a database showing whom an employer hires based on sex, race, and qualifications. The database should be password protected and only available to those who have applied for a job and meet the minimum qualifications for the job. In terms of pay data, once the EEOC begins to collect pay data, it should create a database showing pay information for current employees linked to job title and responsibility. The database should be password protected and only available to those who are working for the employer or have received a formal offer from the employer.

Finally, the federal Paycheck Fairness Act (the "Act"), first introduced in 1997, should be passed with some changes to the current language. The Act requires data collection for pay as well as a few significant changes to the current laws.[155] It requires the EEOC to collect pay data[156] and the U.S. Department of Labor (DOL) to collect and make readily available information about compensation discrimination.[157] The Act needs to make it clear that the data will be shared with the public and that if the data is shared with the public it will include enough information to support individual claims for discrimination under the EPA. The Act should also clearly state that it prohibits sex *and* race pay discrimination, which women of color experience.

The Act also notes that the DOL is responsible for, "investigating and prosecuting systemic gender based pay discrimination involving government contractors."[158] This language should either be changed backed to the original language from the January 30, 2019 version that stated "the DOL is responsible for being proactive in investigating and prosecuting equal pay violations, especially systemic violations and enforcing all of its mandates,"[159] or language should be added that "the EEOC is going to be responsible for investigating and prosecuting systemic gender based pay discrimination." This would be the first step toward holding industries responsible for systemic violations, such as group level differences in hiring

Settle EEOC Equal Pay Lawsuit (June 1, 2018), https://www.eeoc.gov/eeoc/newsroom/release/6-1-18.cfm; U.S. Equal Emp't Opportunity Comm'n, Denton County to Pay $115,000, *supra* note 83.

155 *See* Paycheck Fairness Act, H.R. 7, 116th Cong. (March 28, 2019 version).

156 *Id.* § 8.

157 *Id.* § 9(c).

158 *Id.* § 2(6)(E).

159 *See* Paycheck Fairness Act, H.R. 7, 116th Cong. (January 30, 2019 version).

and pay without the need for direct evidence of a specific employer causing harm. In order to make this clear, the Act should require the DOL and/or the EEOC to promulgate rules to address industry wide systemic violations that impact groups, such as paying women of color with higher educational attainment less than White men with the same educational attainment. The Act also prohibits the use of pay history to set current wages for prospective employees.[160] This section should include language requiring that prospective employee wages be the same as current or past employees doing the same job. Finally, the Act provides funding for negotiation skills training for girls and women.[161] Yet, as noted in Part III, even when women and racial minorities try to negotiate their salary, they do not receive equal pay because employers do not believe that they deserve equal pay. Thus, the Act should include employer training to address this issue.

Adopting all of the solutions discussed above would not only begin to close the gaps in Title VII and the EPA, but it would also begin to improve women of color's health status. None of these recommendations, however, will put an end to sex and race discrimination in employment, unless employers also begin to value the contributions of women of color.

160 *See* Paycheck Fairness Act, H.R. 7, 116th Cong. § 10(a) (March 28, 2019 version).

161 *Id.* § 5.