Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination

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In 1993, Philloria Green's estranged husband broke into her house, raped her at gunpoint, and severely beat her with a pipe.[1] Philloria never imagined that these events would provoke her dismissal from the doctor's office where she worked. A responsible and diligent employee, she managed to return to work only a few days after the violent incident. Upon her return to the office, Philloria's employer informed her that she was being terminated because she was a victim of domestic violence.[2]

Philloria is not alone in her plight.[3] Every year, more than one and a half million women suffer physical or sexual assault at the hands of an intimate partner.[4] Like Philloria, many of these

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1. Green v. Bryant, 887 F. Supp. 798, 800 (E.D. Pa. 1995). Philloria's lawsuit alleged tort and contract claims against the defendant employer. *Id.*

2. *Id.*

3. *See, e.g.*, Robin R. Runge et al., *Domestic Violence as a Barrier to Employment*, 34 CLEARINGHOUSE REV. 552, 553 (2001) (describing a situation where a woman, who had recently started a new job, requested a day off to obtain an order of protection against her abusive ex-boyfriend and was fired upon her return to work for "bringing her personal life into work"); *Union Vote Scheduled This Week at Hospital Under Federal Probe for Labor Practices*, Associated Press, Oct. 2, 2000, at 1, *available at* LEXIS ACADEMIC UNIVERSE, State and Regional Section (describing how Donna Ray, an employee at St. Mary's Hospital, was terminated after her estranged husband abducted her and her three children at gunpoint from a street corner); Martha F. Davis, Legal Director of NOW Legal Defense and Education Fund, Testimony at the Joint Hearing of the General Welfare and The Women's Issues Committees, 5-6 (January 26, 2000) (transcript on file with author) (describing a situation in which a woman was fired for asking her employer to lock the door of the manufacturing facility where she worked the day after she left her batterer).

4. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE & CTRS. FOR

women are not only victimized by their batterers, but also are penalized by their employers for being in an abusive relationship. Fortunately, these women are not without recourse. Employers who discriminate against battered women on the basis of their condition as victims of domestic violence engage in unlawful sex discrimination and can be held accountable under Title VII of the Civil Rights Act.[5]

This Article argues that Title VII provides a viable means by which domestic violence victims[6] can challenge unlawful discrimination in the workplace and establishes disparate impact as the best alternative for disputing discriminatory practices. Part I describes the magnitude of the problem and demonstrates why violence between intimates is a workplace issue.[7] Part II briefly discusses the local, state, and federal laws available to abused women who want to bring discrimination claims against their employers and concludes that Title VII is the most widely available remedy.[8] Part III applies the three sex discrimination theories – sexual harassment, disparate treatment, and disparate impact – to potential domestic violence claims and assesses the relative advantages and disadvantages of litigating a case under each one of the theories.[9] Part IV reviews the likelihood of success under each of the three sex discrimination theories and concludes that the disparate impact theory is the most useful for battered women.

DISEASE CONTROL & PREVENTION, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000). In this survey, "intimate partners" include current and former dates, spouses, and cohabitating partners. *Id.* at 5. *See also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BETWEEN INTIMATES 2 (1994) [hereinafter VIOLENCE BETWEEN INTIMATES] (estimating that between 1987 and 1991, an average of nearly two million women were victims of violent incidents each year); Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-being?*, 273 JAMA 1781, 1781 (1995) (estimating that four million women are battered every year by their partners).

5. 42 U.S.C. § 2000e-2 (2002). *See also* discussion *infra* Parts II and III.

6. I have deliberately chosen to use the term "victim" rather than "survivor" to describe women who suffer domestic abuse in recognition that although many women are able to leave their abusers, many others remain trapped in these relationships. I believe the term "victim" is more accurate as it captures the larger group of women who suffer physical and emotional abuse at the hands of their intimate partners.

7. *See infra* notes 10-29 and accompanying text.

8. *See infra* notes 30-46 and accompanying text.

9. *See infra* notes 47-135 and accompanying text.

I. Domestic Violence as a Workplace Issue

Domestic violence has reached epidemic proportions. The Journal of the American Medical Association estimates that at least one fifth of all women will be physically assaulted by a partner or ex-partner during their lifetime.[10] The U.S. Surgeon General reported that domestic violence is "the single largest cause of injury to women in the United States,"[11] accounting for more injuries than automobile accidents, rape, and muggings combined.[12]

A survey of crime victims by The U.S. Department of Justice reveals the gender asymmetry underlying this epidemic: more than ninety percent of victims of domestic abuse are women.[13] The study additionally reveals that women are six times more likely than men to experience violence committed by an intimate and nine times more likely to be killed by an intimate.[14] Other studies show that women are also more susceptible to serious physical injuries at the hands of an intimate than those of

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10. Hyman, *supra* note 4, at 1781.

11. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46 (1992) (quoting Nikki R. Van Hightower & Susan A. MacManus, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269, 269 (1989)).

12. *See* 137 CONG. REC. H8782 (daily ed. Oct. 30, 1991) (statement of Rep. McDermott) (stating further that domestic violence accounts for roughly one-third of hospital emergency room admissions for women); Council on Scientific Affairs, *Am. Med. Ass'n, Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3185 (1992) (describing a 1985 survey of intact couples, in which nearly one of every eight husbands acknowledged having carried out an act of physical aggression against his female partner during the survey year).

13. *See* VIOLENCE BETWEEN INTIMATES, *supra* note 4 (reporting statistics in the National Crime Victimization Survey from 1987 to 1991). *See also* CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T. OF JUSTICE, INTIMATE PARTNER VIOLENCE 8 (2000) (noting that between 1993 and 1998, an average of 937,490 women were victims of intimate partner violence each year compared to 144,620 men during the same time frame).

14. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995) [hereinafter VIOLENCE AGAINST WOMEN]. Although some studies have attempted to refute these data by trying to demonstrate that women are as likely as men to be aggressors, such studies ignore data showing that most women who attack their intimates do so in self-defense. *See, e.g.*, Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings*, *in* FEMINIST PERSPECTIVES ON WIFE ABUSE, 103, 107-08 (Kersti Yllö et al. eds., 1988) (discussing a study contending that women only strike back in self-defense); Joan Zorza, *Letter to the Editor: Women Rarely Batter Men Except When Abused Themselves*, N.Y. TIMES, Feb. 17, 1994, at A22 (emphasizing the importance of context in evaluating domestic violence statistics).

a stranger.[15]

As these statistics suggest, assaults by an intimate partner can involve a tremendous amount of violence. Domestic violence often results in death, rape, maiming, disability, and other physical injury.[16] For some women, the effects extend beyond the physical harms, causing substance abuse, severe psychological trauma, and stress-related illnesses.[17] The consequences of the violence, however, are not confined to the personal sphere. For many victims, domestic violence becomes a barrier to employment, affecting their ability to obtain or maintain a job.[18]

A survey of employed battered women reveals that thirty-five to fifty-six percent of domestic violence victims are harassed by their abusers at work.[19] In some cases, the abuser will be a manager or co-employee who harasses, abuses, or assaults the victim in the workplace. In many cases, however, the abuser will not share a workplace with his victim. The intimate will be a non-employee who intentionally interferes with his victim's productivity. The batterer may either harass the victim in person or take actions that interfere with her work without ever approaching the workplace.[20] For instance, the batterer may make unsolicited telephone calls, follow his victim to and from work, or send offensive mail, e-mails, or notes with colleagues.[21]

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15. *See* Council on Scientific Affairs, *supra* note 12, at 3186 (describing a report by the American Medical Association's Council on Scientific Affairs which calculates that over eighty percent of all assaults against spouses and ex-spouses result in injuries, compared with fifty-four percent of violent attacks committed by a stranger). *See also* TJADEN & THOENNES, *supra* note 4, at 11. Tjaden and Thoennes report that women are two to three times more likely than men to report that an intimate partner threw an object at them, pushed, grabbed, or shoved them. *Id.* Additionally, women are seven to fourteen times more likely to report that an intimate partner beat them, choked them or tried to drown them. Id. Finally, women are seven to fourteen times more likely to report that their partner threatened them with a gun or actually used a gun on them. *Id.*

16. *See, e.g.*, Victims' Economic Security and Safety Act, S. 1249, 107th Cong. § 2 (2001); VIOLENCE AGAINST WOMEN, *supra* note 14**Error! Bookmark not defined.**, at 1.

17. *See* 137 CONG. REC. H8782 (daily ed. Oct. 30, 1991) (statement of Rep. McDermott) (reporting a Seattle study regarding the health-related impacts of domestic violence).

18. S. 1249 § 2 (reporting that victims of domestic violence are more likely to depend on welfare and report low personal incomes than other women).

19. U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 19 (1998). *See also* S. 1249 § 2 (explaining that homicide is the leading cause of death for women on the job and that fifteen percent of all workplace homicides against women are perpetrated by a husband, boyfriend, or ex-partner).

20. *See* S. 1249, § 2.

21. This information was obtained during interviews I conducted with battered

Outside the workplace, batterers may also engage in conduct that interferes with their victims' ability to work. Abusers may destroy the victim's clothing, inflict visible injuries,[22] renege on promises to provide child care, or keep the victim up late at night the day before a critical event like an exam or a meeting.[23] Even when the batterer does not directly interfere with his victim during business hours, the domestic violence itself may interfere with the woman's ability to perform her job. For instance, studies show that seventy-five percent of domestic violence victims use company time to obtain legal and medical services, to call shelters and counselors, or simply to talk to family or friends about the abuse.[24]

All of these interferences have a tangible effect on the workplace, both on the women who must tolerate the abuse and on their employers. According to the Bureau of National Affairs, domestic violence costs employers an estimated three to five billion dollars every year in absenteeism, lost productivity, higher turnover, and increased health care costs.[25] In spite of this reality, most employers continue to resist addressing abusive relationships as a workplace issue and insist on treating them exclusively as a private matter.[26] This attitude helps to explain the reaction a significant portion of employers have when confronted with

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women who were harassed by their abusers at work. *See also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 19, at 7 (reporting research indicating that abusers come to the work site unannounced or call frequently during the workday).

22. U.S. GEN. ACCOUNTING OFFICE, *supra* note 19, at 7.

23. CATHERINE T. KENNEY & KAREN R. BROWN, NOW LEGAL DEF. AND EDUC. FUND, REPORT FROM THE FRONT LINES: THE IMPACT OF VIOLENCE ON POOR WOMEN, 14-16 (1996). *See also* THOMAS MOORE & VICKY SELKOWE, THE INST. FOR WISCONSIN'S FUTURE, DOMESTIC VIOLENCE VICTIMS IN TRANSITION FROM WELFARE TO WORK, 5-6 (1992) (explaining how domestic violence may also prevent a woman on welfare from re-entering the labor force).

24. Marta B. Varela, *Protection Of Domestic Violence Victims Under the New York City Human Rights Law's Provisions Prohibiting Discrimination on the Basis of Disability*, 27 FORDHAM URB. L.J. 1231, 1257 (2000) (reporting New York State Labor Department statistics).

25. Norm Maleng, *Employers Can Help Stop Workplace Violence*, PUGET SOUND BUS. J., Nov. 14, 1997, at 79. *See* S. 1249 § 1 (stating that forty-nine percent of senior executives consider domestic violence harmful to their companies' productivity, forty-seven percent believe it negatively affects attendance, and forty-four percent found that it increases health care costs).

26. KENNEY & BROWN, *supra* note 23, at 3 (citing a survey of corporate executives conducted by the ABA Commission on Domestic Violence revealing that ninety-five percent of those interviewed considered domestic violence to be a family matter). *See also* Ellie Moon, *Domestic Violence Poll Reveals Workplace Secrets*, DAILY PRESS, Aug. 6, 2001, *available at* http://www.vvdailypress.com/cgi-bin/newspro/viewnews.cgi?newsid997111271,61504, (describing a study at the local level showing that business leaders do not consider domestic violence a relevant workplace issue).

domestic violence situations.[27] A study by the U.S. General Accounting Office reports that one-quarter to one-half of all battered women lose their jobs due to domestic abuse.[28]

Advocates for victims of domestic violence have attempted to remedy this situation by identifying low or no-cost steps that employers can implement to make the workplace safer for domestic violence victims.[29] These changes in the workplace would enable employers to retain these employees, while realizing significant financial savings.

II. Suing the Employer: Title VII and Other Available Remedies

In addition to suffering the financial consequences of domestic violence in the workplace, employers that refuse to address these issues expose themselves to legal liability. Victims of domestic violence seeking to obtain a remedy for discrimination suffered in the workplace have access to a number of local, state, and federal statutes.[30] For example, at the local level, abused women in the City of New York may invoke a statute proscribing all forms of employment discrimination against victims of domestic violence.[31] Similarly, battered women in several states enjoy the protection of laws prohibiting employers from firing or retaliating against them under certain circumstances.[32] Outside

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27. U.S. GEN. ACCOUNTING OFFICE, *supra* note 19, at 19.

28. *Id.*

29. *See, e.g.*, NOW LEGAL DEF. AND EDUC. FUND, SAFETY PLANNING IN THE WORKPLACE, *available at* http://www.nowldef.org/html/issues/vio/ersastart.shtmlv (last visited Sept. 18, 2002) (listing the following examples: changing the victim's telephone extension, routing all her calls to a receptionist or voicemail, allowing the employee to change desks or work stations, implementing a system where co-workers or security personnel escort the victim to her car, allowing an employee to change her job site or shifts, and encouraging victims to file orders of protection with security personnel); Stephanie L. Perin, *Employers May Have to Pay When Domestic Violence Goes to Work*, 18 REV. LITIG. 365, 395-400 (1999) (detailing guidelines on how to provide a safer workplace for battered women); Robin R. Runge & Marcellene E. Hearn, *Employment Rights and Advocacy for Battered Women*, 5 DOMESTIC VIOLENCE REP. 17, 18-26 (2000) (listing common sense steps women can take to protect themselves in the workplace).

30. *See infra* notes 31-33 and accompanying text.

31. N.Y.C. ADMIN. CODE 8-107.1(2) (2001) (making it unlawful for employers to refuse to hire, discharge, or discriminate against an individual because of that individual's actual or perceived status as a victim of domestic violence).

32. Runge, *supra* note 3, at 554 (citing CAL. LAB. CODE § 230 (West 2000) (prohibiting employers from discharging, discriminating, or retaliating against an employee who requests to takes time off to obtain judicial relief or to ensure her health and/or safety); ME. REV. STAT. ANN. 26 § 850 (2001) (imposing a $200 penalty on employers that refuse to grant victims of domestic violence "reasonable and necessary" leave to attend court proceedings, receive medical treatment, or

these jurisdictions, victims of domestic violence must rely on common law or federal laws to sue their employers.[33]

In spite of recent congressional efforts to enact federal laws specific to this issue, Title VII of the Civil Rights Act of 1964[34] remains the sole federal option for most battered women.[35] In July of 2001, both houses of Congress introduced the Victims' Employment Sustainability Act (VESA).[36] This new bill represents the first federal attempt to specifically tackle the problem of workplace discrimination against victims of domestic violence.[37] The legislation proposes to prohibit all forms of discrimination in the workplace against battered women by requiring employers to accommodate this group of employees.[38] The bill, however, has received little, if any attention over the past year, and thus seems unlikely to garner sufficient support to become law this Congress.

Even if supporters of VESA were to galvanize enough votes to enact the bill into law, the shortcomings of the proposed statute

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obtain other necessary services); N.Y. PENAL LAW § 215.14 (McKinney 2000) (proscribing employers from discharging or penalizing the victim of a violent crime for taking time off to appear in court or file an order of protection); R.I. GEN. LAWS § 12-28-10 (2000) (prohibiting discrimination against an employee who obtains an order of protection)).

33. *See* Perin, *supra* note 29, at 371-93; Runge, *supra* note 3, at 553-59 (describing a limited number of state and federal statutory provisions under which an employer may be liable to a victim of domestic violence).

34. 42 U.S.C. § 2000e-2 (2002).

35. *See infra* Part III.

36. *See* Victims' Economic Security and Safety Act, S. 1249, 107th Cong. §§ 301-03 (2001). VESA appears as Title III of the Victims' Economic Security and Safety Act. *Id.*

37. *Compare* Violence Against Women Act (VAWA), 42 U.S.C. § 13981 (2002) *with* S. 1249. Note that VAWA does not specifically provide protection for workplace discrimination for victims of domestic abuse. 42 U.S.C. § 13981.

38. S. 1249 § 303(a) provides in relevant part that:

> An employer shall not fail to hire, refuse to hire, discharge, or harass any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual ... because (1) the individual involved (A) is or is perceived to be a victim of domestic or sexual violence; (B) attended, participated in, prepared for, or requested leave to attend, participate in, or prepare for, a criminal or civil court proceeding relating to an incident of domestic or sexual violence ... (C) requested an adjustment to a job structure, workplace facility, or work requirement, including a transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a safety procedure, in response to actual or threatened domestic or sexual violence, regardless of whether the request was granted; or (2) the workplace is disrupted or threatened by the action of a person whom the individual states has committed or threatened to commit domestic or sexual violence against the individual ....

Id.

limit its appeal as a solution to workplace discrimination. The bill's similarities to the American with Disabilities Act (ADA) are to blame for its deficiencies.[39] Like the ADA, the new bill only requires employers to offer reasonable accommodations for victims of domestic violence, with the reasonableness of the accommodations to be measured in terms of the hardship imposed on the employer.[40] The bill does not clearly articulate standards for this assessment, but only provides examples of the factors to be considered.[41] Empirical research of ADA cases demonstrates the consequences this ambiguity creates for employees: in the overwhelming majority of cases, employers were able to defeat discrimination claims under this statute.[42] For potential VESA plaintiffs, this disadvantage will prove most obvious for those seeking needed, but expensive, accommodations such as leave from work and health insurance, because employers are likely to

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39. *Compare* 42 U.S.C. § 12112(b)(5)(A) (2002) ("[T]he term discriminate includes ... not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an ... employee, unless [the] entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] entity") *with* S. 1249 § 303(b)(1) ("The term 'discriminate', used with respect to the terms, conditions, or privileges of employment ... includes not making a reasonable accommodation to the known limitations of an otherwise qualified individual ... unless the employer ... can demonstrate that the accommodation would impose an undue hardship on the operation of the employer ....").

40. *See* S. 1249. § 303(a).

41. *See id.* VESA specifies that:

> In determining whether a reasonable accommodation would impose an undue hardship on the operation of an employer or public agency, factors to be considered include (i) the nature and cost of the reasonable accommodation needed under this section; (ii) the overall financial resources of the facility involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation on the operation of the facility; (iii) the overall financial resources of the employer ..., the overall size of the business ... with respect to the number of employees ..., and the number, type, and location of the facilities of an employer ... ; (iv) the type of operation of the employer ..., including the composition, structure, and functions of the workforce of the employer ..., the geographic separateness of the facility from the employer ..., and the administrative or fiscal relationship of the facility to the employer ....

Id. at § 303(b)(4)(b). *See also* 42 U.S.C. § 12111(10)(B) (2002) (mentioning cost of the accommodation, the overall financial resources of the employer, and the type of operation of the employer as some of the factors to consider in the ADA inquiry).

42. *Cf.* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) (explaining that "defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits" and eighty-four percent of cases on appeal); Martha Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 348-49 (2000) (describing an ABA report that estimates only eight percent of disabled employees prevail on their discrimination claims).

avoid legal liability for failing to provide these accomodations. The disproportionate advantage VESA tacitly grants employers greatly diminishes the benefits this bill may present for battered women.

Another problem with the proposed statute lies in its unwillingness to protect victims of domestic violence in the higher corporate echelon.[43] Section 102 of the Act exempts employers from extending emergency leave to its earners in the top ten percent range, subject to certain limitations.[44] This prohibition undermines the bill's goals of helping all victims of domestic violence to maintain their jobs and of combating the stigma attached to spousal abuse.[45]

The only advantage the bill presents to battered women relates to damages. Under VESA, victims of workplace discrimination would be able to recover more damages than in a Title VII action, because they would have access to nonpecuniary as well as pecuniary losses.[46] Nonetheless, the possibility of larger awards is insufficient to outweigh the bill's shortcomings. The inherent advantages to employers entrenched in the bill's language leave Title VII of the Civil Rights Act as the best federal alternative for victims of domestic violence.

III. The Title VII Claim

Title VII prohibits discrimination against employees on the basis of their sex with respect to hiring, firing, or other terms and conditions of employment.[47] Battered women seeking relief for

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43. S. 1249 § 102(e)(2) (explaining that an employer may deny reinstatement to an employee who is among the highest paid ten percent of the employees "if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer").

44. *Id.*

45. *Id.*

46. VESA states that:

> Any employer ... that violates section 303 shall be liable to any individual affected for (A) damages equal to the amount of wages, salary, employment benefits, public assistance, or other compensation denied or lost to such individual by reason of the violation, and the interest on that amount calculated at the prevailing rate; (B) compensatory damages, including damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment or life, and other nonpecuniary losses ... and (D) such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

Id. § 304(a)(1). *Cf.* LEX K. LARSON, EMPLOYMENT DISCRIMINATION, §§ 93.01-.05, at 93-1 to 93-25 (2d ed. 2002) (explaining that Title VII provides for the award of limited compensatory and punitive damages to complaining parties in cases where an employer engaged in intentional discrimination but makes damages unavailable in disparate impact cases).

47. 42 U.S.C. § 2000e-2(a)(1) (2002).

discriminatory conduct may pursue a Title VII claim using one or more of three available theories: sexual harassment, disparate treatment, and disparate impact.[48] Each of these theories presents domestic violence victims with different possibilities for litigating their Title VII claims.

The sexual harassment theory is unique because it allows a woman to sue her employer for its agents' behavior.[49] Under this theory, an employer may be liable for the acts of its employees, customers, or business partners.[50] This theory enables women who suffer their batterers' harassment during business hours to sue their employers for failing to protect them from the abusive behavior.

Contrary to sexual harassment theories, the disparate treatment and disparate impact theories focus on the employers' actual practices and policies.[51] Disparate treatment allows battered women to challenge any adverse decisions motivated by a discriminatory animus.[52] To sue under this theory, a battered woman must prove that her employer discriminated against her because of her sex.[53] This evidentiary requirement tends to favor women employed in organizations that have explicitly discriminatory practices or policies.

Women who are not employed by organizations that deal with domestic violence situations can instead use the disparate impact theory to challenge their employers' discriminatory practices. Disparate impact differs from disparate treatment in that the inquiry under disparate impact does not consider intent but rather focuses on the results of a particular practice.[54] Under the disparate impact theory, an employer can be held liable for

48. *See* LARSON, *supra* note 46, §§ 1.09, 46.01, at 1-67 to 1-70, 46-4 to 46-7 (discussing the three sex discrimination theories).

49. *See id.* § 46.07, at 46-91 to 46.130.04; Faragher v. City of Boca Raton, 524 U.S. 775, 790-92 (1998) (holding that employees act as the employer's agent, thus making the employer liable for the supervisory employees' behavior); Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity.").

50. *See* LARSON, *supra* note 46, § 46.07, at 46-91 to 46-130.04.

51. *See id.* § 1.09, at 1-67 to 1-70 (describing the disparate treatment and disparate impact theories).

52. Int'l. Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that disparate treatment occurs any time an employer intentionally "treats some people less favorably than others because of their race, color, religion, sex, or national origin").

53. LARSON, *supra* note 46, § 1.09, at 1-67.

54. *Id.* § 20.03, at 20-11.

instituting neutral practices or policies that disproportionately affect battered women.[55] Although all three sex discrimination theories protect victims of domestic violence from illegal discrimination, the specific allegations a plaintiff includes in a claim ultimately depend on the factual circumstances and the plaintiff's ability to meet the evidentiary requirements of each particular theory.

A. Sexual Harassment Applied

Sexual harassment claims provide an avenue for battered women who suffer their abusers' persecution in the workplace. These types of claims are litigated under one of two theories: quid pro quo harassment or hostile work environment.[56]

Quid pro quo sexual harassment occurs when submission to or rejection of unwelcome sexual conduct is used as the basis for employment decisions.[57] The nature of the quid pro quo theory requires that the batterer be in a position of authority over his victim.[58] This need for a specific power structure limits the number of lawsuits that may be brought using this approach. Only women who work directly under the supervision of their intimate partners or in a department managed by their abusers will have the option of invoking this theory.[59] For instance, to litigate a quid pro quo claim a battered woman would have to show that her harasser threatened her with termination if she broke off the relationship.[60] This specific hierarchical requirement of the quid pro quo claim makes it more likely that women who are harassed by their intimate partners at work will bring their cases using a hostile work environment theory.

A hostile work environment exists whenever an employee's

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55. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (establishing that Title VII prohibits not only overt discrimination but also "practices that are fair in form, but discriminatory in operation").

56. LARSON, *supra* note 46, § 46.01, at 46-4.

57. *See id.* § 46.05[2], at 46-51 (quoting 29 C.F.R. § 1604.11(a)(1) (2001) and explaining that actionable harassment under a quid pro quo theory exists whenever a supervisor implicitly or explicitly conditions employment on the employees' willingness to submit to his sexual advances).

58. *See id.* (explaining that quid pro quo is applicable in cases where the supervisor harasses a subordinate).

59. *See id.* § 46.05[2], at 46-51 to 46-54 (discussing examples of situations in which a subordinate can utilize the quid pro quo framework).

60. Keppler v. Hinsdale Township High Sch. Dist. 86, 715 F. Supp. 862, 869 (N.D. Ill. 1989). In *Keppler* a teacher brought a sexual harassment claim after she ended an intimate relationship with the school's principal. *Id.* The court found that the termination was a response to her as an individual and not based upon her sex. *Id.* *See* LARSON, *supra* note 46, § 46.05[2], at 46-51.

conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[61] To prove that a workplace culture violates Title VII, a battered woman must show that the harassment is "sufficiently severe or pervasive to alter the conditions of [her] employment."[62] Simply proving the existence of a hostile work environment will not suffice.[63] An employer will only be liable if the court finds that the employer was aware, or should have been aware, of the harassment but failed to take prompt remedial action.[64] Thus, only women who disclose the abusive nature of their intimate relationships to their employers or women who exhibit the physical signs of abuse can successfully sue under this theory.[65]

In spite of the dangers accompanying the disclosure requirements,[66] the hostile work environment model affords a viable alternative to a specific group of battered women. This class includes women who do not work with their intimates, but suffer regular interferences during the workday. These women can take advantage of the Equal Employment Opportunity

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61. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (explaining that any unwelcome sexual conduct which interferes with the victim's ability to work constitutes actionable sex discrimination (quoting 29 C.F.R. § 1604.11(a)(3) (1985))).

62. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 446 (2002) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The author explains that pervasiveness of the harassment is "inversely related" to "severity," such that "the greater the severity of the individual incidents, the fewer there need be to be actionable (and vice versa)." *Id.* *See, e.g.*, EEOC v. Sam Sons Produce Co., 872 F.Supp. 29, 35 (W.D.N.Y. 1994); Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability"); Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464 (7th Cir. 1990) (holding that a single incident where a supervisor picked up plaintiff and forced her face against his crotch was sufficient to create a hostile work environment).

63. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (explaining that no liability should be found against the employer who took reasonable care if the victim did not attempt to avoid the harm by taking advantage of any preventative programs).

64. *See* LARSON, *supra* note 46, § 46.07[3], at 46-104.

65. Even in such cases, an employer may avoid liability if it can establish that it exercised reasonable care to prevent or correct the harassing behavior and that the victim failed to take advantage of available preventive or corrective opportunities. *See id.* § 46.07[3], at 46-106.1 to 46.106.3.

66. Anecdotal evidence suggests that the risk of abuse outside the workplace may increase once the victim has complained about the harassment to her employer. For victims of domestic violence, disclosure can present a serious risk, since abusers usually have access to the victims' personal information (e.g., friends and family's telephone numbers, addresses, employer's telephone number, etc.).

Commission guidelines, which make employers liable for the acts of non-employees.[67] Under the guidelines, employers can be held responsible for all sexual harassment as long as the harassment occurs at the workplace and the employer is aware of the conduct.[68] Courts have used the guidelines to find employers liable for the acts of customers, patients, and business clients.[69]

It is possible that in cases involving domestic violence victims, the employers may try to avoid liability under the guidelines by arguing that the employee's personal circumstances, not the job itself, exposed the victim to the harassment. Battered women might be able to defeat such a distinction if they can show that their jobs required them to come into contact with their batterers. In particular, women who work in the service sector, in jobs that require constant interaction with the public, have a better chance of undermining the employer's argument that their jobs did not expose them to the abuse.[70] This specific group of women stands to benefit the most from the hostile work environment theory.

Ironically, women who work with their partners, and experience the harassment in their shared workplace, are less likely to prevail on their sexual harassment claims than women who are harassed by non-employees. The Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*[71] accounts for this difference. "Although [*Oncale*] is generally known for its holding that same-sex harassment is actionable under Title VII, the decision is more frequently cited for its instruction to consider

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67. *See* 29 C.F.R. § 1604.11(e) (2001) ("An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace, where the employer ... knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

68. *Id.*

69. *See, e.g.*, Little v. Windermere Relocation Inc., 265 F.3d 903, 912 (9th Cir. 2001) (holding that the employer acquiesced in the harassment by failing to act after one of its employees reported she had been raped by a client during a business dinner); Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001) (upholding the jury's decision to hold employer liable for patient harassment of hospital psychologist); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073 (10th Cir. 1998) (holding the restaurant responsible for acts of customers).

70. Although the following cases do not involve domestic violence, they illustrate the courts' reaction to evidence that the employer is requiring the employee to come into contact with her harasser. *See, e.g., Lockard*, 162 F.3d at 1074 (finding the employer liable after plaintiff complained that a group of male customers were making her feel uncomfortable and the manager instructed her to continue to wait on their table); Rodriguez-Hernadez v. Miranda-Velez, 132 F.3d 848, 854 (1st Cir. 1998) (finding employer liable for requiring a female employee to acquiesce to a customer's sexual demands).

71. 523 U.S. 75, 81-82 (1998).

social context when analyzing hostile work environment claims."[72] In dicta, the Court explained that the impact of particular behavior on the workplace could only be understood in the context of the social milieu in which the employees interact.[73] Without social context, a court may impose liability on behavior that, although offensive to most, is acceptable within the confines of the specific workplace.[74]

In cases of domestic violence, social context refers to the consensual relationship the victims share, or have shared, with their harassers.[75] This consideration may serve to undermine the woman's claim – especially if the courts choose to interpret the harassment as a personal feud, rather than as targeted harassment based on the victim's gender. Although, to date, no court has explicitly considered the impact of domestic violence on sexual harassment cases, litigated claims between former spouses or lovers illustrate the challenges *Oncale*'s mandate can create for battered women. Judge Posner's opinion in the Seventh Circuit's case of *Galloway v. Motors Service Parts Operations* is one such case.[76]

Rochelle Galloway was a packer in the parts department of General Motors when she and her co-worker Bullock became romantically involved.[77] Once the relationship soured, Bullock started publicly insulting Rochelle by calling her a "sick bitch" in front of her colleagues and making offensive gestures.[78] In a unanimous opinion, the Seventh Circuit panel held that Bullock's behavior did not create a hostile work environment.[79] The court found that, in this context, the harasser's insults reflected his "exacerbated animosity arising out of the failed relationship, rather than anything to do with a belief that women [did] not belong in the work force or [were] not entitled to equal treatment with male employees."[80] The court interpreted the harassment as

72. Frank, *supra* note 62, at 437.

73. *Oncale*, 523 U.S. at 81-82.

74. *See* Frank, *supra* note 62, at 437 (explaining that social context is necessary to determine if a reasonable person would find the behavior hostile or abusive).

75. *See* Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1165 (7th Cir. 1996) (considering the nature of the relationship between the harasser and his victim).

76. *Id.* at 1165. Although *Galloway* was decided prior to *Oncale*, the Seventh Circuit decision is permeated with the same concern for social context evinced by the Supreme Court in *Oncale*. *See id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1168.

80. *Id.*

the natural fallout from the breakup.[81]

Although two circuits have disagreed with the Seventh Circuit's position, their decisions carry little precedential weight since they were all decided prior to the Supreme Court's review of *Oncale*.[82] The new emphasis on social context is likely to significantly restrict a battered woman's likelihood of prevailing on a sexual harassment claim. To overcome the bias against intimates, plaintiffs may try to introduce evidence that alters the social context. For instance, a plaintiff may try to bolster her claim by showing that the harassment started prior to the separation or that her ex-partner treated other female employees with similar disdain.[83] Short of these options, such victims of domestic violence probably have little opportunity of defeating *Oncale*'s instruction.

As these cases illustrate, the sexual harassment claim affords protection to a restricted number of women (i.e., battered women harassed by non-employees in the service industry). The evidentiary and disclosure requirements that burden this theory make it an unworkable model for most women.[84] Domestic violence victims who cannot bring their claims under this theory must use either disparate treatment or disparate impact theories to litigate their cases.

B. Disparate Treatment Applied

An employer is liable under a disparate treatment theory whenever a similarly situated male and female receive dissimilar

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81. There are additional examples of courts dismissing a sexual harassment claim between intimates. *See, e.g.*, Succar v. Dade County Sch. Bd., 229 F.3d 1343, 1345 (11th Cir. 2000) (per curiam); Huebschen v. Dept. of Health & Soc. Servs., 716 F.2d 1167, 1172 (7th Cir. 1983); Keppler v. Hinsdale Township High Sch. Dist. 86, 715 F. Supp. 862, 869 (N.D. Ill. 1989); and Freeman v. Cont'l Tech. Servs., Inc., 710 F. Supp. 328, 330-31 (N.D. Ga. 1988).

82. *See, e.g.*, Excel Corp. v. Bosley, 165 F.3d 635, 637 (8th Cir. 1999) (affirming a claim against an employer who failed to take action after an employee complained that her ex-husband, a co-worker, was harassing her at work); Fuller v. City of Oakland, 47 F.3d 1522, 1525 (9th Cir. 1995) (finding a police department liable for failing to take action after an officer had complained that her former boyfriend, a colleague, was using information from the department's personnel files to harass her at home and work).

83. This evidence may help counter an argument, similar to the one in *Galloway*, that the harassment was just the natural fallout of the relationship. *See Galloway*, 78 F.3d at 1168. Through this evidence the victim may be able to minimize the impact of the personal relationship on the analysis and establish the harasser's discriminatory motive. *See supra* note 75.

84. *See supra* notes 58-60 and accompanying text (explaining the evidentiary restrictions of the quid pro model). *See supra* notes 61-65 and accompanying text (describing the disclosure requirements under a hostile work environment theory).

treatment.[85] To successfully establish disparate treatment, a battered woman must present her case according to the *McDonnell Douglas* burden-shifting model.[86] This model requires the plaintiff to first prove her prima facie case by showing she is a member of a protected class, she was qualified for a position, a damaging action was taken against her, and that the position continued to remain open.[87] Once the employee has satisfied these requirements, the burden shifts to the employer to articulate some "legitimate, nondiscriminatory reason" to justify the challenged action.[88] Even if the employer can provide a nondiscriminatory reason to explain its actions, the employee may still prevail if she can show that the proffered reason is a pretext for discrimination.[89]

Similar to the sexual harassment model, disparate treatment is only accessible to a restricted class of battered women. The cases that arise under this theory entail one of two possible factual circumstances: situations where battered women seek a privilege extended to their male co-workers, or where the same corporation employs both intimate partners and treats them differently upon learning about their abusive relationship.[90] Only claims arising under the former scenario tend to favor plaintiffs. These cases involve situations where the employer openly excludes women from enjoying certain benefits.[91] An example of this would be when an employer denies a battered woman time off to attend criminal proceedings or to seek a protective order, though it regularly grants time off to perpetrators to defend themselves in criminal proceedings or to serve sentences for violating orders of protection.[92]

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85. *See* LARSON, *supra* note 46, § 8.06, at 8-79 (defining disparate treatment as a situation where the employer "treats some people less favorably than others because of their race, color, religion, sex, or national origin").

86. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (announcing the burden-shifting model under which disparate treatment cases are assessed). *See also* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-54 (1981) (describing the McDonnell Douglas burden shifting model); LARSON, *supra* note 46, §§ 8.01-.02, at 8-3 to 8-32.8.

87. *See* LARSON, *supra* note 46, § 8.01[1], at 8-3 to 8-4. *See also McDonnell Douglas Corp.*, 411 U.S. at 802.

88. *McDonnell Douglas Corp.*, 411 U.S. at 802. *See generally* LARSON, *supra* note 46, § 8.03[1], at 8-33 (describing the employer's burden to rebut a plaintiff's case).

89. *McDonnell Douglas Corp.*, 411 U.S. at 804. *See also* LARSON, *supra* note 46, § 8.04, at 8-56 to 8-57 (describing how plaintiffs may disprove the employer's justification. Specifically, the "most commonly employed method of demonstrating that an employer's explanation is pretextual is to show that similarly situated persons of a different race or sex received more favorable treatment.").

90. *See infra* notes 100-109 and accompanying text.

91. *See* Runge, *supra* note 3, at 557.

92. This example presents only one possible scenario in which this type of claim

Employers that overtly discriminate against victims of domestic violence may try to justify practices by invoking the bona fide occupational qualification (BFOQ) defense.[93] This narrow statutory defense protects employers that refuse to hire and employ females wherever such discrimination is essential to the continuing viability of the employer's business operation.[94] Employers may prevail on this defense in cases where, for example, they show that their decision to exclusively hire men is based on the fact that only males can perform the central tasks of a job.[95] The exception, however, is not available for the full range of discriminatory actions and may not be used to discriminate in the provision of fringe benefits.[96] Because domestic violence cases are likely to involve fringe benefits, employers facing these suits will probably be unable to shield themselves from liability by invoking the BFOQ defense.

Unlike cases involving unequal access to benefits, claims involving a situation where both partners work for the same corporation that treats them differently upon learning about their abusive relationship present more challenges for plaintiffs. In this context, a disparate treatment claim may arise if an employer, having learned about the employees' abusive relationship, suddenly takes adverse action against only the woman or where

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may arise. Other possible situations include, but are not limited to, instances where an employer has an explicit policy of instructing managers to terminate all victims of domestic violence, but not perpetrators, or where the employer affords male employees medical insurance for injuries they suffer due to criminal acts, but fails to provide the same medical benefits to victims of domestic violence. *See also Violence Against Women in the Workplace: The Extent of the Problem and What Government and Businesses are Doing About It, Before the Senate Health, Education, Labor and Pensions Committee*, 107th Cong. (2002), 2002 WL 20319468 (statement of Kathy Rodgers, President, NOW Legal Defense and Education Fund) (discussing examples of specific actions employers take that punish the woman who is abused but not the abuser).

93. *See* 42 U.S.C. § 2000e-2(e)(1) (2002) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of ... sex ... in those certain instances where ... sex ... is a bona fide occupational qualification ....").

94. Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (holding that all women would be unable to perform the essential duties of an Alabama prison guard position). *See also* LARSON, *supra* note 46, § 11.02[1], at 11-3.

95. *Dothard*, 433 U.S. at 336-37 (finding for an employer that refused to hire female guards for "contact positions" with violent male inmates).

96. *See* EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1366-67 (9th Cir. 1986) (refusing to apply the BFOQ defense to a religious school that denied health benefits to female employees). *See also* LARSON, *supra* note 46, §§ 14.04, 14.06, at 14-26 to 14-27, 14-32 (explaining that employers must afford all employees identical health benefits, vacation time, and leave from work on a non-discriminatory basis).

the woman suffers the brunt of the employer's retribution following an altercation in the workplace.[97] In cases exhibiting these factual circumstances, the rebuttal stage presents more of an obstacle for the plaintiff than in the benefit cases. To defeat the employee's prima facie case, the employer only needs to raise a genuine issue of fact as to whether it discriminated against the plaintiff, not "persuade the court that it was actually motivated by the proffered reasons."[98] This relatively light burden means that an employer will defeat the prima facie case as long as it can offer a reasonable explanation for its decision to take more severe action against the battered woman than her abuser.

In contrast, in order to survive the employer's rebuttal, the woman must bring forward either convincing evidence showing that the employer was actually motivated by a discriminatory animus against women, or other compelling evidence contradicting the employer's proffered reason.[99] Linda Rohde's case provides an example of the type of evidence a plaintiff needs to rebut an employer's justification.[100]

Linda was a secretary at K.O. Steels where she had an open romantic relationship with Arnulfo Lopez, a cleaning foreman for the same company.[101] On the evening of July 15, 1976, Arnulfo went to Linda's apartment and struck her during a fight.[102] Linda immediately informed her company's personnel director of the incident and was instructed to stay home.[103] She returned to work two days later only to be assaulted by Arnulfo in the office.[104] This time the personnel director asked Linda to take the remainder of the week off and terminated her the following Monday when she

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97. Available cases generally feature a physical altercation between the couple. *See, e.g.*, Rohde v. K.O. Steel Castings, Inc., 649 F.2d 317, 319 (5th Cir. 1981); RAP, Inc. v. D.C. Comm'n on Rights, 485 A.2d 173, 176 (D.C. 1984); Complaint at 9, Valdez v. Truss Components, Inc. (Oct. 23, 1998) (No. CV98-1310).

98. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). ("It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection."). *See generally* LARSON, *supra* note 46, § 8.03[1], at 8-33 (discussing the employer's burden to produce admissible evidence).

99. *See* LARSON, *supra* note 46, § 8.04, at 8-55 to 8-67. *See also* Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 31 (1996) (providing a detailed explanation of the pretext-stage).

100. *Rohde*, 649 F.2d at 319.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

returned to work.[105] The company, however, did not to take any remedial action against her batterer – Arnulfo kept his job and his performance appraisals were "meritorious."[106] Linda prevailed on her Title VII claim because she established a prima facie case for discrimination and the company did not prove Linda "would have been fired anyway, in the absence of discrimination."[107] Linda's case was sufficient to undermine K.O. Steel's proffered justification that its decision to terminate Linda was justified because of her relatively inferior work record compared to that of her abuser.[108]

Not all claimants will be as fortunate as Linda. Many victims of domestic violence lack access to the necessary evidentiary information to disprove their employer's contention that their abusive partners were better employees. In particular, a woman who does not have a visible problem that interferes with the abuser's ability to work will find it more difficult to show that she performed as well as her abuser. For this reason, women who, like Linda, are involved in a physical altercation with their intimates at work will generally be better situated to rebut the employer's proffered justification. In these cases, "similarly situated" merely requires that both employees are involved or accused of the same offense and are disciplined in different ways.[109] The narrower focus of this inquiry eases the plaintiff's burden of proof by diminishing the unequal access to information between the plaintiff and the employer. Women in this position will only need to show that following the altercation they suffered the brunt of the employer's retribution.

An analysis of disparate treatment theory shows that, like sexual harassment, this model favors only a small segment of domestic violence victims. Only women employed by organizations that feature explicitly discriminatory policies or practices are

105. *Id.*

106. *Id.*

107. *Id.* at 323 (discussing how the employer offered no records of Lopez's work history, no attendance records, and no payroll sheets). Lopez's supervisor also admitted Lopez came to work under the influence of alcohol. *Id.* The supervisor recommended counseling for this problem. *Id.*

108. *Id.*

109. *Id.* at 322. *See* RAP, Inc. v. D.C. Comm'n on Rights, 485 A.2d 173, 178 (D.C. 1984) (finding that an employer's decision to fire and reprimand a husband and wife, respectively, was justifiable because although they were similarly situated on the job, the wife threatened her husband with a knife during an altercation in the parking lot). *See also* Pearson v. Macon-Bibb County Hosp. Auth., 952 F.2d 1274, 1280 (11th Cir. 1992) (discussing how a black senior staff nurse and three white employees were not "similarly situated" regarding a contamination issue).

likely to benefit from bringing their cases under this theory.[110] All other victims will face significant obstacles, and will need to rely on the disparate impact theory to successfully litigate their claims.

C. Disparate Impact Applied

Disparate impact occurs when an employment practice, although neutral on its face, has a disproportionately negative effect on members of a legally protected class.[111] This theory may represent the only option for many victims of domestic violence. Women who are not harassed by their abusers at work, who do not want to disclose the abuse to their employers, who are not aware of how their employers treat male co-workers with respect to domestic violence situations, who are not employed by an organization that overtly discriminates against battered women, or who do not work with their intimates, may only sue under this theory. In spite of the fact that this theory probably covers the largest number of battered women, very few victims to date have used this theory to bring a lawsuit against their employers.[112] One such plaintiff – who did not use the disparate treatment model when filing her claim – was Philloria Green.[113]

Unlike disparate treatment cases, the disparate impact theory does not require a battered woman to prove that her employer harbors an invidious purpose.[114] Instead, she can bring a claim by demonstrating that a specific employment practice or policy induces a statistically significant disparity between female and male employees and that a causal relationship exists between

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110. *See supra* notes 90-92 and accompanying text.

111. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2002). The statute specifies that:

> An unlawful employment practice based on disparate impact is established under this subchapter only if ... a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity ....

Id.

112. My research of Title VII claims brought under a disparate impact theory did not yield any results. I am currently only aware of one claim that has been filed using the disparate impact theory to challenge an employer's practice and policies. *See* Complaint of Jill Kelly Against Bright Horizons Family Solutions, filed with Illinois Department of Human Rights and E.E.O.C. (Feb. 2, 2002) (on file with author) (explaining Bright Horizons' termination of Jill Kelly immediately after she handed a copy of a protection order against her ex-husband to a security officer at the facility where she worked).

113. *See* Green v. Bryant, 887 F. Supp. 798, 800 (E.D. Pa. 1995).

114. LARSON, *supra* note 46, § 20.03, at 20-11 to 20-12.

the employment practice in question and the resulting disparity.[115] To challenge a practice, a plaintiff does not need to show a pattern of discrimination; a single decision by an employer qualifies as an actionable "employment practice."[116]

Many disparate impact cases arise in situations where the plaintiff is seeking relief from exclusionary hiring practices. In these cases, plaintiffs are required to demonstrate disparity by pointing to either applicant flow statistics or the relevant labor market.[117] Domestic violence cases differ in that they would mostly concern employees who suffer adverse actions subsequent to employment. This distinction, however, does not alter the evidentiary requirements during the prima facie stage.[118] Even in the context of domestic violence, a plaintiff would still have to rely on statistics to demonstrate that the challenged practice disproportionately affects women employees. For instance, in Philloria Green's case, she would have to statistically demonstrate that a facially neutral practice of terminating any employee injured in a domestic violence incident impacts more women than men. Similarly, a plaintiff would need statistical evidence to support a claim that a policy requiring the termination of all employees who hold orders of protection against an intimate disproportionately affects women. Given the existing gender asymmetry of domestic violence,[119] plaintiffs should be able to easily demonstrate that any practice predicated on an employee's condition as a victim of domestic abuse will disproportionately affect women.[120]

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115. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-57 (1989) (explaining that to establish a prima facie case the plaintiff must show that a specific practice caused the statistical disparity).

116. *See* Council 31, AFSCME v. Ward, 978 F.2d 373, 378 (7th Cir. 1992) (indicating that single employer actions, whether intentional or not intentional, are actionable under Title VII).

117. *Wards Cove*, 490 U.S. at 650-51 (discussing the proper bases for initial inquiry in a disparate impact case). The Court stated that:

> It is such a comparison – between the ... qualified persons in the labor market and the persons holding at issue jobs – that generally forms the proper basis for the initial inquiry in a disparate impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics – such as measures indicating the ... composition of "otherwise-qualified applicants" for at-issue jobs – are equally probative for this purpose.

Id.

118. *See* LARSON, *supra* note 46, § 20.01, at 20-3.

119. *See* VIOLENCE AGAINST WOMEN, *supra* note 14, at 1 (reporting that ninety to ninety-five percent of domestic violence victims are women).

120. *See* LARSON, *supra* note 46, § 22.10[2], at 22-48 (explaining that a

Similar to the disparate treatment theory, the disparate impact model also allows the employer to rebut the plaintiff's allegation.[121] However, the burden for employers under this theory can be more onerous than under the other Title VII claims. Once the plaintiff has successfully established a prima facie case, the burden shifts to the employer to present a business justification for the challenged practice.[122] Here the defendant may not merely put forward a nondiscriminatory reason, but must actually prove "that the challenged practice is job related for the position in question and consistent with business necessity...."[123]

The most significant obstacle plaintiffs face under a disparate impact theory stems from the existing doctrinal confusion surrounding the term "business necessity."[124] The absence of a clear definition has created two possible interpretations.[125] The term "necessity" may be strictly interpreted to require a showing analogous to a BFOQ – where the employer is required to show that the discriminatory practice is essential to the continued viability of the business – or it can be understood to merely require a showing that the challenged practice is reasonably related to the job.[126] This subtle but significant distinction is critical to the

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discrepancy of four-fifths or eighty percent usually qualifies as evidence of adverse impact). *See, e.g.*, Woodard v. Lehman, 530 F. Supp. 139, 144-45 (1982) (citing the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1981)).

121. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2002). The statute states that:

> An unlawful employment practice based on disparate impact is established under this subchapter only if ... a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of ... sex ... and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity ....

Id.

122. *See id.*. *See also* LARSON, *supra* note 46, § 23.04[1], at 23-4.

123. 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See also* Albermale Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (explaining that even if the defendant meets its burden during the rebuttal stage, the plaintiff may still prevail if she can offer a non-discriminatory alternative that would correct the disparity and meet the employer's legitimate business goals).

124. Susan S. Grover, *The Business Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 388-95 (1996) (describing the two different interpretations of "business necessity" and arguing in favor of the stricter construction of the term). *See also* LARSON, *supra* note 46, § 23.04[1], at 23-7 to 23-8 (noting that the Civil Rights Act of 1991 returned courts to the same state of confusion relating to the term "necessity" in disparate impact cases).

125. LARSON, *supra* note 46, § 23.04[1], at 23-7 (explaining the inconsistency between the concepts of "business necessity" and "job relatedness").

126. *See id.* § 23.04, at 23-7 n.15.1 (explaining that although some courts have interpreted the provision of the 1991 Civil Rights Act to require the lesser showing, the term "necessity" suggests that Congress had a stricter requirement in mind, giving courts the flexibility to adopt the older, stricter standard of necessity

success of lawsuits brought by battered women.

In domestic violence cases, employers will often attempt to defend their actions by pointing to the danger the violence may pose to other employees or clients. For instance, in Philloria's case, the employer was a doctor who argued that the decision to terminate her stemmed from his concern for the physical and emotional well being of his other employees and patients.[127] Were this case to be considered in a court that interprets "business necessity" as merely requiring a reasonable relation to the business at hand, Philloria's employer would only have to prove that he could not reasonably protect his other employees or patients from Philloria's ex-husband. A defendant in this situation would face a lighter burden than if the court construed "business necessity" as strictly as a BFOQ defense. In that case, it would only need to show that keeping this particular individual from the workplace would require additional security measures that it could not afford.

In contrast, an employer in a court that adopts the stricter interpretation would have to show that the possibility that her abuser might attack her at work would be sufficient to paralyze the entire office.[128] To meet this burden, the employer would have to demonstrate that maintaining safety in the workplace is indispensable to its ability "to perform the primary ... service it offers."[129] Similarly, an employer that requires the dismissal of all employees holding orders of protection against a spouse would need to show that the existence of this legal restriction hampers its operations to such an extent that it cannot properly function. This heightened evidentiary burden would significantly limit employers' ability to defeat battered women's claims during the rebuttal stage.[130]

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requiring employers to demonstrate that the challenged practice is central to their operation). See *Bryant v. City of Chicago*, 200 F.3d 1092, 1094 (7th Cir. 2000), *cert. denied*, 531 U.S. 821 (2000), *Lanning v. SEPTA*, 181 F.3d 478, 489 (3d Cir. 1999) for examples of recent cases interpreting business necessity as a practice that is reasonably related to the employer's business.

127. Green v. Bryant, 887 F. Supp. 798, 800 (E.D. Pa. 1995).

128. Dothard v. Rawlinson, 433 U.S. 321, 333-34 (1977) (holding that the narrow BFOQ exception is only available when the qualification is central to the essence of the business operation).

129. *See, e.g.*, Wilson v. Southwest Airlines Co., 517 F.Supp. 292, 304 (N.D. Tex. 1981) (finding customer preference insufficient to disqualify males from working as flight attendants and counter agents).

130. *See, e.g.*, *Dothard*, 433 U.S. at 331 (holding that, for both private and public employers, a challenged practice must be necessary to safe and efficient job performance to survive a Title VII claim).

Although the stricter interpretation would present a significant obstacle for employers, the more flexible interpretation still presents employers with a higher burden than the rebuttal stage under the disparate treatment theory.[131] In disparate impact cases, the defendant is required to reasonably justify the practice or policy, and may not defeat plaintiff's claim with an unrelated explanation for its discriminatory behavior.[132] This more burdensome evidentiary requirement presents a considerable advantage for plaintiff domestic violence victims.

There is one situation, however, where the employer may be able to prevail even under a strict interpretation of "business necessity." In *Chambers v. Omaha Girls Club*,[133] the Club successfully used the BFOQ defense to shield itself from liability after it terminated an unmarried expectant mother.[134] The organization justified its decision by arguing that the presence of a single mother was sufficient to undermine its goal of encouraging girls to avoid teen pregnancy.[135] A social organization with a similar purpose may be able to successfully employ a role-model-type defense to dismiss a battered woman. The organization could argue that the presence of a domestic violence victim would provide a bad role model for young women who are themselves susceptible to abusive relationships. The role-model-type defense, however, will only be applicable in a narrow set of cases and should not preclude a plaintiff from invoking the disparate impact theory.

IV. Conclusion

Victims of domestic violence have in the disparate impact theory a powerful tool to fight discrimination in the workplace. Unlike the disparate treatment and sexual harassment theories, which are burdened by a series of limiting requirements, disparate impact is available as a viable option to almost all victims of domestic violence. The procedural architecture of disparate impact accounts for this difference. Disparate impact is not encumbered with the restrictive evidentiary requirements that limit the number of potential plaintiffs under its two sister

131. *See* LARSON, *supra* note 46, § 23.04[1], at 23-8 (explaining that the job-relatedness requirement is not trivial).

132. *See id.* § 23.04[1], at 23-4. *See also supra* note 98 and accompanying text (describing the rebuttal stage under the disparate treatment theory).

133. 834 F.3d 697 (8th Cir. 1987).

134. *Id.* at 703.

135. *Id.* at 701-02.

theories.

In addition to its accessibility, the disparate impact model offers the advantage of being the only sex discrimination theory that places a stricter evidentiary burden on defendants than on plaintiffs. This remains true even for the courts that adopt the less strict interpretation of business necessity. Under the disparate impact theory, defendants must actually validate their employment practices and policies. This increased burden makes it less likely that employers will be able to avoid liability by offering pretextual justifications for their discriminatory practices. Battered women should not continue to overlook the disparate impact theory, as it provides a powerful tool to challenge an employer's discriminatory practices, and for many of them may even hold the key to breaking the cycle of violence.