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# The Cost of Non-Compensable Workplace Harm

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## I. INTRODUCTION

The achievement gap between men and women in the workplace in 2013 is real.[1] Women earn less money than men and continue to lag in positions of power and prestige.[2] Though women continue to enter the workplace in greater numbers[3] and are more welcome in the workplace than ever,[4] men continue to enjoy better prospects in the workplace than women.[5] Why the achievement gap persists given how far working women have come since the 1960s seems a mystery.[6] An achievement gap seems at odds with the progress made over the nearly 50 years since the passage of Title VII of the Civil Rights Act of 1964 (Title VII). However, Title VII's continued enforcement is not inconsistent with a gender achievement gap because Title VII has a coverage gap. Title VII does not cover all workplace behavior that

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* Professor of Law, University of Richmond. Professor Chambers wishes to thank all involved with the planning and execution of the Symposium.

1 *See* MADELEINE M. KUNIN, THE NEW FEMINIST AGENDA 182-87 (2012) (discussing the gender wage and achievement gap). However, some argue that the gap is closing or has closed. *See* Katharine B. Silbaugh, *Deliverable Male*, 34 SEATTLE U. L. REV. 733, 737-38 (2011) (discussing claims of a diminishing gender pay gap).

2 *See* Debra Barbezat, *Occupational Segregation Around the World*, *in* WOMEN, FAMILY AND WORK 177, 191 (Karine S. Moe ed., 2003); THOMAS A. KOCHAN, RESTORING THE AMERICAN DREAM 20 (2005) (discussing gender wage gap). The Paycheck Fairness Act, S. 84, 113th Cong. (2013), is an attempt to help resolve the gender wage gap.

3 *See* KOCHAN, *supra* note 2, at 17-18 (noting the continued increase of women in the workforce); KUNIN, *supra* note 1, at 6; Silbaugh, *supra* note 1, at 734.

4 *See The Harried Life of the Working Mother*, PEW RES. SOC. & DEMOGRAPHIC TRENDS PROJECT (Oct. 1, 2009), http://www.pewsocialtrends.org/2009/10/01/the-harried-life-of-the-working-mother/ (discussing changing attitudes toward working women and working mothers in the last few decades).

5 *See* KOCHAN, *supra* note 2, at 20 (noting a gender promotion gap); JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE 15 (2010) (noting that women may still experience a promotions glass ceiling).

6 *See* Joyce P. Jacobsen, *The Human Capital Explanation for the Gender Gap in Earnings*, *in* WOMEN, FAMILY AND WORK 161-74 (Karine S. Moe ed., 2003) (noting that the existence of the gender gap is somewhat of a puzzlement for economists).

can harm women's advancement in the workplace.[7] Consequently, if women are more likely to be subjected to non-compensable workplace behavior that can harm an employee's achievement than men are, Title VII's coverage gap makes the gender achievement gap predictable.[8]

Title VII has helped women in the workplace, but it does not cure all workplace ills. Passed, in part, to provide equality for women in the workplace, Title VII bars sex discrimination.[9] However, Title VII is an employment statute that focuses on harm to employment, and primarily on harm to an employee's compensation, or terms, conditions or privileges (TCP) of employment.[10] Remedying discrimination that harms an individual's TCP of employment is important, but does not address the full range of behavior that can harm an employee's employment or advancement. Title VII covers a broad spectrum of employment discrimination, but does not compensate for various forms of workplace harm that may stop an employee from reaching the employee's potential.[11]

Title VII's coverage gap has been made broader by judicial interpretations of Title VII. Courts are not necessarily hostile to Title VII. However, some may interpret Title VII narrowly precisely because Title VII's language explicitly bars only some workplace harm.[12] For example, though sexual harassment is actionable under Title VII, courts have interpreted Title VII to cover some, but not all, sexually harassing workplace conduct. Sexually harassing conduct that is not severe or pervasive enough to affect an employee's TCP of employment is not covered.[13]

Indeed, even when courts deem Title VII to cover some workplace behavior that may not affect an employee's TCP of employment explicitly, Title VII typically will not be interpreted to cover all behavior that can harm an employee. For example, retaliation may be ac-

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7 Title VII is the focus of this short essay, though the point applies to the broad range of employment discrimination statutes.

8 *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 747–48 (2001) (noting Title VII's coverage gap).

9 *See* 42 U.S.C. § 2000e-2.

10 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .").

11 *See* Jonah Gelbach, Jonathan Klick & Lesley Wexler, *Passive Discrimination: When Does It Make Sense To Pay Too Little?*, 76 U. CHI. L. REV. 797, 824-26 (2009) (noting Title VII's general limitations).

12 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (noting that Title VII is not supposed to be a "civility code" that makes every workplace slight actionable).

13 Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (discussing requirements for actionable sexual harassment).

tionable under Title VII, even when it does not explicitly alter the TCP of an employee's employment. However, retaliation that may harm an employee will not be covered by Title VII if it is deemed insufficiently severe to deter an employee from challenging an unlawful employment practice.[14] Though the harms from uncovered retaliation may damage an employee's productivity or impair an employee's advancement, Title VII does not address that conduct. Whether or not the courts are correct in their interpretations of Title VII, those interpretations suggest that substantial non-compensable workplace harm exists. If non-compensable workplace harm is visited on women more often than on men, a persistent achievement gap should be expected.

In addition to limiting Title VII's substantive reach, courts have limited Title VII's effective coverage through procedural rulings. The courts have shaped proof issues that make victory more difficult for Title VII plaintiffs. For example, courts grant summary judgment in cases that ought to be determined by a factfinder.[15] These decisions on procedural issues are not designed to harm women, but they effectively limit Title VII's remedial scope. Again, if workplace behavior tends to harm women more than men, the judicial response helps to explain the achievement gap.

This essay briefly addresses the limited fashion in which Title VII remedies sex discrimination in the workplace. Those limitations fall into three broad categories. The first encompasses how courts have applied procedural rules to Title VII claims. The second involves Title VII's explicit limitation on its coverage. The third includes substantive limitations that courts have placed on causes of action that are clearly covered by Title VII. This essay addresses those categories in turn.

## II. PROCEDURAL RULES AND TITLE VII UNDERENFORCEMENT

Procedural rules can effectively limit Title VII enforcement and leave some workplace discrimination non-compensable. For example, federal courts effectively use summary judgment to rid the court system of employment discrimination cases they believe are relatively weak.[16] By applying or misapplying the Supreme Court's summary judgment jurisprudence to employment discrimination cases, courts are eliminating winnable employment discrimination cases. Some of those cases will involve a claim of unlawful discrimination that a court

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14 *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

15 *See* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103 (2005).

16 Scholars have suggested this for years. *See generally, id.*; Ann McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

deems difficult to prove, though likely not impossible to prove to a jury's satisfaction.[17] If women tend to be more subject than men to discrimination that is dismissed because courts deem it difficult to prove, the subsequent underenforcement of Title VII will tend to help explain an achievement gap.

When used properly, summary judgment resolves cases that do not need to be heard by a jury because there is no role for the jury. Summary judgment is appropriate when a case has no issues of material fact for which a jury's wisdom is required.[18] In such cases, a trial is unnecessary because there is no dispute regarding the facts that matter to the ultimate decision.[19] In such a case, a reasonable jury could reach only one conclusion, whether for the plaintiff or the defendant. Similarly, cases that are proper for summary judgment should not require the weighing of evidence.[20] If evidence is to be weighed, a jury is necessary.[21] Lastly, cases that are proper for summary judgment should not require credibility determinations.[22] If credibility determinations need be made, a jury is necessary.[23] Summary judgment is appropriate only when the jury has no role to play.

When used improperly, summary judgment disposes of cases that should be decided by a factfinder.[24] Rather than limit summary judgment to cases where juries can serve no role, some courts have decided that relatively weak cases that would seem to require that

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17 However, even weak cases should survive summary judgment. *See* Wirtz v. Kan. Farm Bureau Servs., Inc. 274 F. Supp. 2d 1198, 1202 (D. Kan. 2003) ("The policy disfavoring pre-trial disposition of employment discrimination claims makes it difficult for the court to grant summary judgment even in what appears to be this relatively weak case.").

18 *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

19 When a case could be decided in either party's favor, summary judgment should not be available. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

20 *See id.* at 255.

21 *Id.* at 249 (noting that judge should not weigh evidence when deciding summary judgment).

22 *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); Hunt v. Cromartie, 526 U.S. 541, 552-53 (1999) (noting the inappropriateness of making credibility determinations at summary judgment stage).

23 *See* Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green*: The High Court Muddies The Evidentiary Waters In Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 433-34 (1994) (noting the need to leave credibility determinations to juries in employment discrimination cases).

24 *See* Sheriff v. Midwest Health Partners, P.C., 619 F.3d 923, 930-31 (8th Cir. 2010) (discussing sufficiency of evidence in sexual harassment case); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 753 (2007) (discussing possible improper use of summary judgment in employment cases).

factfinders make inferences that the judge is unwilling to make should be disposed of without being tried to a jury.[25] This may result from twisting the suggestion that summary judgment is appropriate in cases where no reasonable jury could properly find for one of the parties to mean that summary judgment is appropriate whenever a judge believes that a case is so weak that a reasonable jury will likely find for a particular party. Given that federal judges may analyze cases differently than juries, summary judgment would seem particularly problematic in some such cases.[26] What appears to be a relatively weak case to a federal judge may not be a weak case when presented to a jury.

An approach to summary judgment that allows judges to analyze inferential evidence at the summary judgment stage may have an outsized effect in the employment discrimination area. Employment discrimination cases often require that factfinders make inferences, in part, because discrimination is often not explicit.[27] Inferences based on circumstantial evidence may be just as powerful as conclusions based on direct evidence.[28] However, if courts weigh evidence and conclude that circumstantial evidence tends to be weaker than direct evidence, they may dispose of too many cases on summary judgment. A court that decides that a case it believes to be weak should leave the system may be more likely to end a meritorious case in the employment discrimination area than it would be in other areas of the law where inferences may be less likely to be at the core of a case.

The structure of many Title VII cases may make them particularly susceptible to summary judgment in courts skeptical of inferential proof of discrimination. In *McDonnell Douglas v. Green*[29], the Supreme Court provided the basic three-part structure of a typical Title VII case to address issues related to inferential evidence in Title VII cases.[30] The familiar three-part structure begins with a plaintiff-

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25 Chambers, *supra* note 15, at 111-14 (discussing quantum of evidence courts have required that non-movant produce to avoid summary judgment).

26 *See* Theresa M. Beiner, *Let The Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002).

27 For articles discussing unconscious discrimination, see Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).

28 *See* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (ruling that either direct or circumstantial evidence could be sufficient to support a discrimination verdict for plaintiff).

29 411 U.S. 792 (1973).

30 For a detailed discussion of the *McDonnell Douglas* three-part test, see Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1 (1996).

employee proving a prima face case that provides a factual basis from which a factfinder can infer discrimination. That step is followed by an articulation of non-discriminatory reasons by the defendant-employer that provides a basis for the factfinder to decline to infer or to reject discrimination as a cause of the adverse employment action. The pretext stage is the final part of the test. During that stage, the employee can present evidence that would allow the factfinder to infer that discrimination, not the reasons proffered by the employer, is the real reason for the adverse job action. Pretext assumes that if the employer has no reason for the employment action, a factfinder can infer that discrimination caused the employment action.

The *McDonnell Douglas* test has undergone changes since its inception. Indeed, the test arguably is now nothing more than a structure that guarantees that the factfinder analyzes the precise role that discrimination played in the adverse employment decision.[31] However, the core of the test—the employee's presentation of evidence from which the factfinder may infer discrimination—has not changed. What arguably has changed is the skepticism of judges toward discrimination claims.

That skepticism has been on display since the Supreme Court decided *St. Mary's Honor Center v. Hicks*.[32] In that case, the Court decided that even after an employee has convinced a factfinder that the reasons an employer has given for its job action is false, a factfinder can still find for the employer based on vaguely stated non-discriminatory reasons.[33] At least since *Hicks*, and arguably well before, courts have felt free to question how much proof is necessary or sufficient to allow a factfinder to infer discrimination. Indeed, *Hicks* arguably ushered in an era in which courts are allowed to require that a plaintiff have very good evidence of discrimination before the court will allow a case to survive summary judgment.[34] When such skepticism meets a summary judgment standard that has been applied to eliminate weak but winnable cases, the result is fewer successful cas-

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31 *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000) (suggesting that the *McDonnell Douglas* burden shifting structure becomes irrelevant once the parties have presented their cases).

32 509 U.S. 502 (1993).

33 *See id.* at 542 (Souter, J., dissenting) (noting that the *Hicks* majority allowed a factfinder to credit a reason that had not been articulated by an employer to defeat a discrimination claim).

34 Indeed, some courts require substantial evidence before allowing a plaintiff to prevail. For a discussion of courts that ignore or dismiss significant evidence that ought to support an inference of discrimination, see Kerri Lynn Stone, *Taking In Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012).

es.[35] The result is a jurisprudence that limits winning cases to strong cases. When weak but winnable cases are declared to be losers before they can be argued to a jury, the discrimination underlying weak but winnable cases will tend to go unpunished. If that discrimination tends to harm female employees more than male employees, a sex-based achievement gap is no surprise.

## III. EXPLICIT LIMITATIONS ON TITLE VII'S COVERAGE

The Civil Rights Act of 1964 is a civil rights statute; Title VII is the employment discrimination portion of the statute. Consequently, Title VII addresses workplace discrimination that causes harm to an employee's employment. Title VII, inter alia, prohibits sex discrimination by an employer when that discrimination affects the TCP of an employee's employment.[36] Discriminatory workplace behavior that does not directly affect an employee's TCP of employment or compensation usually cannot be redressed by Title VII. Similarly, behavior that cannot be clearly defined as sex discrimination, but which may be related to sex, may be non-compensable. These explicit limitations embedded in Title VII reflect a coverage gap that may help explain the gender achievement gap.

Discrimination regarding activities that could be important to an employee's advancement may not be covered by Title VII. Advancement in the workplace may depend on access to activities that build workplace camaraderie, engender familiarity among staff, signal that an employee is a team player, and provide face time with an employer's decision-makers. Invitations to meals, trips with high-level managers, and other activities may be opportunities for employees to get to know managers in a manner that will become relevant when discretionary decisions regarding advancement are made. These "reindeer games," as Professor Theresa Beiner has called them, can become quite important to an employee's advancement.[37] They also are generally not covered under Title VII, even when the opportunities are provided discriminatorily.[38] Shutting women out of the reindeer games may not violate Title VII because not sharing those opportunities

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35 *See* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 301–02 (2006) (discussing grants of summary judgment in employment discrimination cases).

36 *See* 42 U.S.C. § 2000e-2.

37 *See, e.g.*, Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996).

38 When the reindeer games create a hostile work environment, they should be actionable. *See id.*; Tristin K. Green, *Discrimination In Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003).

equally with women may not qualify as sex discrimination with respect to an employee's TCP of employment. However, when those reindeer games become part of a decision-making process that limits an employee's advancement, non-compensable discrimination—the refusal to provide equal access to reindeer games—may harm an employee's advancement.[39] When the discriminatory limitation on participation in reindeer games falls more heavily on women, it can help perpetuate the achievement gap.

The coverage gap even extends to substantive discrimination. Title VII covers sex discrimination, i.e., behavior that occurs because of sex.[40] However, Title VII does not necessarily cover behavior that occurs because of some characteristic that is merely related to sex.[41] For example, pregnancy discrimination was deemed not covered by Title VII in the mid-1970s.[42] Title VII was amended in 1978 to make clear that pregnancy discrimination was to be considered sex discrimination.[43] Somewhat similarly, the debate about sexual orientation discrimination continues. Sexual orientation discrimination is related to sex discrimination. However, courts have determined that sexual orientation discrimination is not sex discrimination under Title VII.[44]

A focus on whether conduct is "pure" sex discrimination can be problematic when behavior is related to sex but can be thought not to be "pure" sex discrimination. For example, behavior that is not explicitly sexually discriminatory, but could have been influenced by sex, may not be considered sex discrimination under Title VII. If such behavior becomes a factor in a discretionary decision that harms an employee's TCP of employment, the employee may be without recourse. How some courts have addressed animus illustrates the point.

An employee who is disliked by an employer and is therefore passed over for a promotion may not have a claim under Title VII, if the animus is personal. Conversely, if the animus is fueled by the em-

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39 However, this could be deemed the use of discretion that damages women's advancement prospects rather than an attempt to do so. *See* Deborah Thompson Eisenberg, Wal-Mart Stores v. Dukes: *Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 258-59 (2012) (discussing discretionary promotions policy in *Wal-Mart v. Dukes* litigation).

40 42 U.S.C. § 2000e-2(a)(1).

41 However, Title VII can be interpreted to cover circumstances where considerations of sex are part of a larger employment decision. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (ruling that employment decision based on sex stereotyping can constitute sex discrimination under Title VII); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (ruling that employment rule that disqualifies women with school-age children from job that men with school-age children can hold is discriminatory).

42 *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

43 *See* Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k).

44 *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3rd Cir. 2009); Medina v. Income Support Div., New Mexico, 413 F.3d 1131 (10th Cir. 2005).

ployee's sex, it is sex discrimination.[45] Though making that distinction may be difficult, some courts seem to suggest that differentiating personal animus and discriminatory animus can be relatively easy.[46] In those courts, an employer/supervisor who displays animus toward a female employee and harms her TCP of employment as a result cannot be found liable under Title VII for those actions unless the animus is proven to be sex-based.[47] Proving to such courts that an individual employment decision hinged on sex-based animus may be difficult without significant additional evidence of sex-based animus. Unfortunately, judges who are skeptical of employment discrimination cases may dispose of cases that lack additional evidence on summary judgment even when a jury might infer that the animus is sex-based. Of course, if the animus really cannot be proven to be sex-based, a judgment for the employer may be proper under Title VII. Nonetheless, if women are more likely to be subject to generalized animus in the workplace, the inability to rectify that animus may help explain an achievement gap that Title VII does not and will not fix.

Title VII has been of great value to women and to the workplace in general. It covers a significant amount of workplace discrimination. However, it explicitly does not bar all workplace discrimination or all behavior that can limit or harm an employee's advancement in the workplace. If women remain more likely to be subject to unlawful discrimination and to lawful discrimination that is not addressed by Title VII, men will tend to progress in the workplace more quickly than women of the same skill. That can help explain and perpetuate the gender achievement gap in the workplace.

## IV. SUBSTANTIVE LIMITATIONS ON TITLE VII CAUSES OF ACTION

As the prior section suggests, Title VII's scope is limited by its explicit terms. However, in some instances, courts have interpreted Title VII in a manner that limits recovery even when its explicit terms might allow recovery. Two such areas are sexual harassment and retal-

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45 In an era of unconscious bias, the distinction between personal animus and discriminatory animus can be difficult to make. *See* Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, The Ego, And Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1187-88 (2008) (discussing unconscious racial animus).

46 *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993) (noting and sanctioning district court's distinction between personal animus and discriminatory animus).

47 *See, e.g.*, Morris v. Oldham Cnty. Fiscal Court, 201 F.3d 784, 791 (6th Cir. 2000) (discussing when personal animus does and does not equate to discriminatory animus); *see also* Sanches v. Carrollton-Farmers Branch Indep. Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 165-66 (5th Cir. 2011) (differentiating personal animus and sex-based animus).

iation.[48] In those areas, the limitations on recovery may limit the advancement of women and help preserve the achievement gap.

## A. Sexual Harassment

Title VII remedies a significant amount of sexual harassment.[49] However, sexual harassing conduct is non-compensable in two instances. First, sexually harassing conduct may not be considered serious enough to be actionable.[50] Second, sexually harassing conduct that is actionable sexual harassment may be subject to an affirmative defense that absolves the employer of responsibility.[51]

Two forms of actionable sexual harassment exist under Title VII: harassment that causes actual job detriment and harassment that does not cause actual job detriment.[52] Historically, the forms have been denoted "quid pro quo" and "hostile work environment" harassment, respectively.[53] Though those terms have fallen somewhat out of favor recently, they are used in this article for ease of reference.[54] Quid pro quo harassment is harassing conduct undertaken because of the employee's sex that explicitly alters an employee's TCP of employment; it is always compensable under Title VII. A prototypical quid pro quo claim can consist of the following: a demand for sexual favors by a supervisor, a subordinate's refusal of the demand, and the firing of the subordinate. Actual job detriment must occur and must be causally related to the harassing conduct.[55] For example, a supervisor's demand for sexual favors coupled with the subordinate's refusal of the demand is not considered quid pro quo harassment until the subordinate suffers actual job detriment.[56] Until actual job detriment occurs, the su-

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48 *See* Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591 (2000) (discussing limitations of sexual harassment law); Charles A. Sullivan, *Raising The Dead?: The Lilly Ledbetter Fair Pay Act*, 84 TUL. L. REV. 499, 537 n.164 (2010) [hereinafter *Raising the Dead?*].

49 For a discussion of the breadth of sexual harassment law, *see generally*, Chambers, *supra* note 48.

50 *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998) ("For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive."); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) ("Of course . . . not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (discussing limit of hostile work environment harassment).

51 *See Ellerth*, 524 U.S. at 765.

52 For a general discussion of hostile work environment harassment, see *id.* at 751-53.

53 *Id.* at 751.

54 Indeed, the *Ellerth* Court essentially abandoned the terms as it discussed the terms' genesis. *See id.* at 753.

55 *See* Chambers, *supra* note 48, at 1611-16 (discussing quid pro quo claim).

56 *See Ellerth*, 524 U.S. at 754.

pervisor's behavior will be analyzed as hostile work environment harassment.

Hostile work environment harassment is harassing conduct undertaken because of the employee's sex that constructively alters the terms, conditions or privileges of an employee's employment. To be actionable as hostile work environment harassment, the sexually harassing conduct must be severe or pervasive, objectively offensive to a reasonable person, subjectively offensive to the employee, and unwelcome.[57] The severe or pervasive requirement is based on the belief that relatively low-level or relatively infrequent sex-based harassment may not constructively alter the TCP of an employee's employment.[58] The objective offense requirement is an attempt to guarantee that a supposedly overly sensitive employee cannot claim harm when other reasonable employees would not. The subjective offense requirement is based on the notion that an employee who is not personally offended by the harassing conduct cannot have suffered a constructive alteration of the employee's TCP of employment. The unwelcomeness requirement exists to guarantee that the employee does not enjoy the harassing conduct, as courts posit could theoretically be the case when the harassing conduct merely suggests sexual attraction – rather than sexual animus – on the harasser's part.[59]

A significant amount of harassing conduct may occur before it is actionable.[60] Harassing conduct that falls short of hostile work environment harassment is not compensable under Title VII. Even if such behavior is not common in the workplace, leaving that behavior non-compensable when it does arise in the workplace is problematic. Allowing harassing conduct to go unaddressed can be harmful if that allows the workplace to become sexualized up to a point just short of a hostile work environment.[61] When such an environment is accepted and acceptable, the unwillingness to accede to harassing behavior that does not quite constitute actionable sexual harassment may mark an employee as a prude who is not sufficiently in tune with the workplace

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57 For general discussion of the requirements of an actionable hostile work environment claim, see Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 740-43 (2002) [hereinafter *(Un)Welcome Conduct*].

58 Indeed, the Supreme Court has noted that Title VII is not to become "a general civility code." *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

59 *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986) (discussing the relationship between supposedly provocative dress and welcomeness of harassing conduct); Chambers, *(Un)Welcome Conduct*, *supra* note 57, at 746.

60 *See* Chambers, *(Un)Welcome Conduct*, *supra* note 57, at 751-57 (discussing cases in which sexually harassing conduct was not deemed actionable).

61 *See* Chambers, *(Un)Welcome Conduct*, *supra* note 57, at 783-84.

to be promoted. If this situation tends to limit women more than men, it might help explain the achievement gap.

Unfortunately, not only does Title VII allow some sexually harassing behavior to be rendered non-actionable because it has yet to cause sufficient harm to an employee, Title VII allows some actionable sexual harassment to be rendered non-compensable based on the Supreme Court's installation of an affirmative defense.[62] The affirmative defense exists ostensibly to make sure that the employer is not held responsible for sexual harassment when it would supposedly be unfair to do so.[63] The Supreme Court created an affirmative defense that applies when a supervisor is responsible for harassing conduct that creates a hostile work environment.[64] The affirmative defense allows an employer to avoid liability if the employer reasonably attempted to prevent or remedy the harassing conduct and the employee unreasonably failed to address the harassment to minimize its effect.[65] The affirmative defense may be fair and defensible given that employers who attempt to prevent harassment may not be able to do so completely. Providing an opportunity for such employers to avoid liability when a supervisor breaks company policy and an employee unreasonably fails to complain about the harassment may be fair. Indeed, the affirmative defense provides employers the incentive to create serious complaint procedures that would trigger the affirmative defense. That is laudable if the complaint procedures create a culture of compliance that lessens the incidence of workplace harassment. However, even with such procedures in place, potentially harmful and non-compensable sexual harassment may exist. Indeed, the affirmative defense is not necessary until actionable hostile work environment harassment has occurred. Proof of the affirmative defense may demonstrate that the employee could have sought to remedy or avoid additional harassment once harassment occurred, but did not. However, it does not eliminate the existence of sexually harassing conduct in the workplace that may harm an employee's advancement.

The issue is even starker when the harassment is triggered by co-workers or other non-supervisory personnel. In that situation, the employer must be negligent in failing to prevent or address the har-

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62 *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

63 *See id.* at 764 (noting that the affirmative defense was crafted to support Title VII's goals of encouraging employers to be proactive in addressing harassment).

64 *See id.* at 765 (providing context for the affirmative defense).

65 *See id.* ("The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.").

assment to be liable.[66] Again, this is not necessarily a bad or unfair standard. However, it has the potential to leave significant harassment non-compensable. If such harassment tends to fall more heavily on female employees than male employees, that the harassment is non-compensable may help explain the achievement gap.

Similarly, courts limit employer liability for the unofficial backlash that an employee may receive from fellow employees after challenging workplace sexual harassment.[67] When fellow employees shun an employee who has complained, the employer may avoid responsibility for the behavior of the fellow employees. Given that Title VII addresses employer liability, this may be sensible. However, the result may tend to discourage employees from complaining about sexual harassment until it becomes intolerable. That may leave some tolerable harassment unaddressed.[68] Tolerable harassment can act as a headwind that female employees may disproportionately face. Similar issues arise when courts address retaliation under Title VII.

## B. Retaliation

Retaliation is different than most of the other issues this essay discusses because Title VII does not explicitly limit recovery to retaliation that affects an employee's TCP of employment. Title VII simply prohibits retaliation.[69] That would appear to allow courts to make every instance of retaliation compensable. However, courts have not done so.[70] Some retaliatory conduct that could be covered by Title VII's retaliation clause is not actionable. If that style of retaliation falls more heavily on women than men, it could help explain the achievement gap.

Title VII's retaliation provision prohibits discrimination by an employer against an employee who has formally participated in an action alleging unlawful employment practices or who has informally

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66 *See* Faragher v. City of Boca Raton, 524 U.S. 775, 799 (1998) (discussing negligence standard).

67 *See* Chambers, *(Un)Welcome Conduct*, *supra* note 57, at 785 (noting that reprisals may follow filing of harassment claim). Indeed, retaliation cases can begin with a reprisal stemming from the filing of a sexual harassment claim. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 58 (2006).

68 However, harassment need not necessarily cause serious emotional distress to be actionable. *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

69 *See* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.").

70 *See White*, 548 U.S. at 60-61 (discussing how trial and appellate courts had addressed and limited Title VII retaliation claims).

opposed an unlawful employment practice.[71] The retaliation provision does not require that the employer harm the employee's employment; it bars discrimination based on the employee's actions.[72] The discriminatory conduct is deemed retaliatory if there is a sufficient causal connection between the employee's involvement in the challenge to the unlawful employment practice and the subsequent discrimination or differential treatment.[73] Though Title VII's text does not limit the retaliation that is covered, courts have.

The Supreme Court set the limits of actionable retaliation in *Burlington Northern v. White*.[74] As the *White* Court noted, before *White*, courts had argued about the scope of the retaliation clause.[75] Some had ruled that actionable retaliation had to be limited to retaliation that concerned serious employment decisions. Other courts argued that retaliation had to be limited to retaliation that affected an employee's TCP of employment. Still other courts argued that retaliation should extend to any discrimination that might dissuade a reasonable employee from challenging the unlawful employment practice.[76] The *White* Court embraced a relatively broad view of the retaliation clause and ruled that the clause covered retaliation that would dissuade a reasonable employee from challenging the putative unlawful employment practice.[77]

Though the *White* Court's decision was a victory for those who contemplated a fairly broad vision of retaliation, the decision did not expand the retaliation clause to cover all retaliation. Retaliation that would not deter a reasonable employee from challenging the putative unlawful employment practice, but might cause harm to the employee's employment, is not covered. An employer can treat an employee who has challenged an unlawful employment practice badly, if the retaliation is insufficiently severe to deter the employee from challenging the unlawful employment practice. That may be a reasonable interpretation of Title VII. However, it leaves some harmful retaliation non-compensable.

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71 Courts arguably have broadened Title VII's coverage by deeming it to cover actions that employees reasonably believe to be unlawful employment practices. Others argue that courts have not broadened coverage sufficiently because they may use the reasonable belief standard to limit retaliation claims. For a discussion of reasonable belief, *see* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375 (2010).

72 *See* 42 U.S.C. § 2000e-3(a).

73 For a discussion of causation issues, *see* B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 456-59 (2008).

74 *See White*, 548 U.S. at 67-68.

75 *Id.* at 57.

76 *Id.* at 60-61 (discussing state of the law prior to the *White* decision).

77 *Id.*

As importantly, co-worker retaliation is not compensable unless it can be attributed to the employer. An employee who is shunned, insulted or treated badly by co-workers after challenging workplace discrimination may have no recompense for that retaliation.[78] The retaliation may be bad enough.[79] However, the employee may face additional fallout when advancement opportunities become available. If an employee's relationship with the employee's co-workers is considered relevant to a promotion, the employee's opportunities to advance may be affected by the initial decision to challenge the unlawful employment practice and the ensuing co-worker reaction. The employer cannot decline to promote the employee because of the employee's prior challenge to the unlawful employment practice, but can take co-worker opinion regarding the employee into account when making promotion decisions.[80] Of course, even if the employee claimed that the promotion decision amounted to retaliation by the employer, the employee would need to prove that the promotion denial was causally related to the prior challenge to the unlawful employment practice. That can be difficult to prove given that courts suggest that even a short time lag can destroy the causal link between the challenge to an unlawful employment practice and an employment decision that an employee claims is retaliatory.[81]

Retaliation and sexual harassment are covered by Title VII. However, both retaliation and sexual harassment have been interpreted more narrowly than Title VII requires. Though courts may be right to interpret Title VII fairly narrowly, narrow interpretations broaden the scope of workplace discrimination that is non-compensable. If non-compensable behavior tends to harm women's job prospects for advancement more than men's, the lack of coverage for that behavior can help to explain the persistent achievement gap between men and women in the workplace.

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78 *See* Johnson v. Weld Cnty., Colo., 594 F.3d 1202, 1216 (10th Cir. 2010); George, *supra* note 73, at 482-83.

79 Retaliatory shunning is not uncommon. *See, e.g., Johnson*, 594 F.3d at 1216; Brazoria Cnty., Tex. v. E.E.O.C., 391 F.3d 685, 691 (5th Cir. 2004).

80 Though the Supreme Court has determined that the ultimate decisionmaker need not be motivated by discrimination for its decision to be sufficiently influenced by another's discriminatory input to be actionable, *see* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192-93 (2011), the application of that principle from a USERRA case to a Title VII retaliation situation would likely be novel.

81 *See, e.g.*, Gonzalez-Droz v. Gonzalez-Colon, 660 F.3d 1, 17 (1st Cir. 2011) (noting that proximity in timing between retaliation and triggering action must be close to support inference of causation).

## V. CONCLUSION

The persistence of the achievement gap between men and women in the workplace may be explained, in part, by the continued prevalence of sex discrimination in the workplace. Title VII remedies much, but not all, sex discrimination in the workplace. Title VII's limited substantive coverage coupled with judicial interpretations that narrow its coverage help explain the gap. Those interpretations leave women vulnerable to sex discrimination that might slow their progress in the workplace. If the harm from workplace sex discrimination that is not covered by Title VII falls more heavily on women, women have a headwind, either slight or severe, in the workplace. If women and men provide work of equal quality, women will tend to advance more slowly because of the headwind. A resulting achievement gap is not surprising.

Unfortunately, larger problems may loom. The existing gap may not be able to be closed even by the best and most aggressive enforcement of the employment discrimination laws. Though Title VII may be expanded to cover additional forms of discrimination, Title VII is unlikely to be expanded to cover all workplace discrimination that could harm women's advancement in the workplace. Eliminating the behavior that leads to non-compensable workplace harm (or making sure that the harm is equally distributed to men and women) may be the only hope of closing the gap. Employers will need to address that issue on their own, assuming they want to solve it. However, employers have always been free to solve workplace problems on their own. That employers have not done so already might make some pessimistic about whether they will move in that direction fast enough in the near future to close the achievement gap.

This brief essay is not meant to be a comprehensive exploration of the reasons that the workplace achievement gap between men and women exists. For example, it does not discuss statutes other than Title VII. Indeed, it does not mention all of the discrimination that Title VII does not cover. It does not analyze the effects of Title VII's short statute of limitations and limited monetary recovery.[82] It does not consider how the EEOC may under-enforce Title VII. This essay merely notes that Title VII is not an employment discrimination cure-all. Simply, Title VII – a principal statute meant to address sex discrimination in the workplace – does not provide recompense for some forms of harmful workplace discrimination. That alone may help to explain the existence and persistence of an achievement gap.

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[82] *See* Sullivan, *Raising the Dead?*, *supra* note 48.