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ARTICLE

DISCRIMINATION IN OUR MIDST: LAW SCHOOLS' POTENTIAL LIABILITY FOR EMPLOYMENT PRACTICES

Ann C. McGinley¹

I. INTRODUCTION: JOB SEGREGATION IN LEGAL ACADEMIA

Every day we enter restaurants, grocery stores, professional offices, and universities where inequality is obvious, but we hardly notice it. Managers of restaurants and grocery stores are men, while the workers are predominantly women. Professionals and professors are ordinarily men, while their nurses, secretaries, and administrative assistants are women. Even where there are some women in the higher level jobs, usually the lowest paying jobs are occupied almost exclusively by white women and persons of color. These inequalities are the norm.

Defenders of the status quo argue that the criteria for advancement in organizations are race- and gender-neutral: a good education, hard work, and a desire to succeed. But this formula for success is too facile. There is no question that ambitious, hard-working women are often left behind.²

1. Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas; J.D. University of Pennsylvania, 1982. I thank Dean Richard Morgan and the faculty at the William S. Boyd School of Law for their support. Special thanks go to Terry Pollman who encouraged me to write this article and provided the much-needed statistics. This article was funded by the James E. Rogers Research Fund. Patty Roberts, my hard-working, competent, research assistant, did a superb job.

2. According to the most recent census data for full time workers during 2002, women earned 77% of wages earned by men, which matches the all-time high reached in 2001. See US Census Bureau Press Briefing on 2002 Income and Poverty Estimates (September 26, 2003), available at <http://www.census.gov/hhes/income/income02/prs03asc.html> (last visited June 17, 2004). See also ROBERT W. CONNELL, MASCULINITIES 226 (1995) (noting that men still make a median income that is

Feminist scholars agree that segregation of women in the workplace is an important cause of differential employment opportunities and salaries.³ Some economists and employment law experts argue that women make choices resulting in this segregation and that these choices steer women into the low paying jobs.⁴ The choices cited include women's lower investment in their education and in preparation for more highly paid, highly

197% of women's median income); JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 67-68 (2000) (documenting studies on lawyers, managers and academics demonstrating that women are still dramatically underrepresented in the upper echelons of male professions; for example, in 1990 women were nearly half of the recruits to prestigious law firms in New York, but men comprised 87% of the partners; median income of men ten years out of law school is 40% higher than that of women at the same position in their careers; in 1990 the top ranking partners in businesses on Wall Street were 99% male; only two women were CEOs of Fortune 1000 companies by 1994; in 1990, women one year out of business school with MBAs from top business schools earned 12% less than men who graduated with them and this differential increased over time; in academia, women represented only 31% of full time faculty in higher education in 1995 and held fewer than 15% of tenured academic posts – women are tenured at a rate of 42% and men at the rate of 72%); Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 579, 597-98 (2001) (noting the existence of a sizable pay gap between men and women that is not likely to be eliminated in this generation, and suggesting that empirical research demonstrates that pay inequities are, at least in part, the result of unconscious discriminatory processes that favor men at work, rather than rational markets).

3. See William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 761, 779 (Jan. 1986) (noting that job segregation is the principal source of gender differences in labor market outcomes). See also JUDITH LORBER, *PARADOXES OF GENDER* 195-213 (1994) (demonstrating the extreme gender segregation in the paid U.S. workforce – 60 or 70% of men or women workers would have to change occupations to desegregate them – and how gender segregation causes the devaluation of work that women do); Naomi Cassirer & Barbara Reskin, *High Hopes: Organizational Position, Employment Experiences, and Women's and Men's Promotion Aspirations*, 27 WORK & OCCUPATIONS 438, 440 (2000) (citing to strong empirical support for the propositions that segregation concentrates the sexes in different and unequal jobs, that predominantly female jobs have "shorter promotion ladders" than jobs occupied mostly by men, that women are less likely than men to advance on the job, that predominately female jobs tend toward the lower tiers of organizations, and that women are less likely than men to supervise others).

4. See, e.g., Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 1086-89 (1995) (attributing the glass ceiling and the gender gap to women's choices resulting from their biological differences from men in temperament, including women's unwillingness to take risks and their less aggressive and competitive natures); Richard A. Epstein, *Liberty, Patriarchy and Feminism*, 1999 U. CHI. LEGAL F. 89, 106-11 (1999) (explaining that women's tendency toward and devotion to childrearing influences their educational and career choices and limits them to those that are conducive to caring for a family).

valued jobs.⁵ But women who occupy these positions do not necessarily choose to earn less money for highly stressful, less stimulating jobs.⁶ Rather, feminists argue that women are channeled into these positions because their employers shape their preferences and their needs.⁷ These positions exploit women, particularly women of color, by taking advantage of the women's personal and other responsibilities to create a lower-paid, hard-working group at the bottom of organizations.

While managers make some decisions consciously to discriminate against women in the workplace because of their sex, a large part of women's inequality exists because of invisible structural barriers, as well as decision making and practices that reflect unconscious stereotypes and gender schemas that accord greater value to masculine traits.⁸

Two scholars have written about the "dirty little secret" in legal academia that the law school, generally a bastion of liber-

5. See generally POSNER, *ECONOMIC ANALYSIS OF LAW* 337 (4th ed. 1992). See also KINGSLEY R. BROWNE, *BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY* (2002) (arguing that biology accounts for differences in temperament and behavior that result in the glass ceiling and the gender gap in wages).

6. See Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1894-98 (2000) (arguing women do not choose to be segregated into lower-paying, lower-status jobs); Cassirer & Reskin, *supra* note 3, at 458 (demonstrating in empirical study that women have lower promotion aspirations than men primarily because of segregation across organizations, with women in less favorable positions for promotion than men, and because of the unequal promotion histories experienced by women); Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1472-79 (2001) (demonstrating, through the work of Pierre Bourdieu's "reflexive sociology," that the concept of women's choice to become the marginalized caregiver is inaccurate: instead, our "choice" is constrained by structures such as institutional arrangements, perceptions, and identities); see also Cass R. Sunstein, *Introduction*, in *BEHAVIORAL LAW AND ECONOMICS* 1 (Cass R. Sunstein ed., 2000) (noting that human preferences are constructed, not elicited from social situations); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1811-12, 1816, 1821-28, 1832-33 (1990) (describing the deeper processes through which employers channel women into certain positions including discriminatory recruiting, discriminatory structures of incentives and social relationships, and lower prospects of mobility and reward for traditionally female jobs) [hereinafter Schultz, *Telling Stories About Women and Work*].

7. See WILLIAMS, *supra* note 2, at 67-68; Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998) (recognizing a "competence-centered paradigm" based on men's desire to maintain favored lines of work as masculine as a source of motivation for harassment of women in the workplace).

8. See generally Ann C. McGinley, *Masculinities at Work*, 63 ORE. L. REV. 359 (2004); *!Viva la Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000)[hereinafter *!Viva la Evolucion!*].

alism and feminist theory, operates by segregating women faculty into low paying positions.⁹ A prime example of this phenomenon is the location of legal writing faculty in the organizational hierarchy of most law schools. Professors Levine and Stanchi note that women occupy approximately 26% of tenured or tenure eligible faculty positions in law schools surveyed, whereas women comprise 70% of legal writing faculty.¹⁰ Legal writing faculties, which some have characterized as the “pink ghetto,”¹¹ are overwhelmingly female, work under worse conditions, and earn significantly less pay than their predominantly male counterparts who work in the tenured or tenure eligible positions.¹²

While there may be complicated reasons for women's concentration at the bottom of the law school faculty hierarchy, the fact is that law school administrators and faculty have looked the other way, ignoring a situation that many find uncomfortable and inequitable.¹³ The concentration of women in the lower levels of law faculty hierarchies makes law schools vulnerable ethically and practically.¹⁴ As an ethical matter, for many feminists in legal academia and for those who support feminist causes, it is difficult to justify the differential between the work conditions and salaries of legal writing and other contract faculty and tenure eligible faculty. Arguments exist that the market justifies these conditions, noting that legal writing faculty are paid what they

9. See Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. OF WOMEN & L. 551 (2001); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 1 (2001).

10. See Levine & Stanchi, *supra* note 9, at 580.

11. See Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000).

12. See Levine & Stanchi, *supra* note 9, at 577.

13. Of course, there is much good news concerning women's advancement in legal academia, see, e.g., Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475 (2003). Nevertheless women, in particular, women of color, remain underrepresented in the positions of the highest status and salary, and find themselves clustered in the lower paid, lower status positions in law schools. *Id.* at 475-76. Moreover, women faculty do a large, disproportionate share of the more menial tasks in law schools, including the more time-consuming, less rewarding administrative jobs, committee positions, etc. This “housework” takes inordinate time, is often less rewarding, and detracts from many women's time and ability to do research, a responsibility that is more interesting, more rewarding, and more highly valued in law schools. See *id.* at 482.

14. While this article concentrates on legal writing faculty, many of the same conditions exist for clinicians and librarians in law schools. See Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 75 UMKC L. REV. ____ (forthcoming 2005).

are worth.¹⁵ Proponents of a market approach would argue that legal writing faculty have the option of securing other positions if they so choose. But the limited choices, some self-imposed, some law school-imposed, some society-imposed, come into stark relief when we analyze the situation of women lawyers who teach in law schools, primarily in positions of low status, low pay and little esteem.

This article asks the legal academic community to consider these conditions in light of established Title VII¹⁶ doctrine which forbids discrimination because of sex.¹⁷ Part II analyzes existing

15. For an interesting criticism of the market theory of legal writing pay and conditions, see Durako, *supra* note 11, at 584 (noting the selective use of market-based arguments to devalue the teaching of legal writing to justify lower salaries, but failure to use the same arguments for doctrinal faculty hired onto the tenure track).

16. Title VII, in its relevant part, states:

- (a) It shall be an unlawful employment practice for an employer —
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

17. While the article does not focus primarily on the Equal Pay Act of 1963, it demonstrates that under certain conditions the status quo at law schools violates the Act. See *infra* notes 31-33 and accompanying text. The Equal Pay Act, in its relevant part, states:

- (d) Prohibition of sex discrimination.
 - (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (2000).

empirical information concerning the employment conditions of legal writing faculty within the legal academy.

Part III offers a hypothetical about the fictitious National Law School, whose labor relationships mimic those of many real law schools in a number of ways. Based on the facts in this hypothetical, Part III further analyzes the different possible causes of action, either systemic or individual, that employees could reasonably win against the National Law School. Although many readers may be surprised that conditions similar to those in their own law schools may expose the law schools to liability for sex discrimination, it is important for administrators, professors and students to recognize the potential liability law schools face if the status quo continues.

My purpose is neither to condemn the academy nor to impugn the motives of any institution or individuals. Rather, the analysis serves as a warning. By continuing to engage in the system that exists at most law schools, law schools are in danger of costly, divisive litigation. It is in the best interests of law schools, the legal profession, law faculty and law students to avoid this confrontation.

Part IV offers some modest proposals for altering this potentially explosive situation. Finally, this article concludes that many, if not most, law schools operate a segregated system that may expose them to liability for sex discrimination under Title VII. It proposes that law schools eliminate illegal structures, practices and relationships. This response is practical and ethical. Besides avoiding potential liability, it permits law schools to fulfill their responsibility to their employees, their students, lawyers and the community at large to create legal and ethical egalitarian models of employment within the law schools.

II. EMPIRICAL DATA ABOUT LAW SCHOOLS AND WOMEN FACULTY

Studies and articles examining tenured, tenure-track and contract faculty in law schools have exposed the inequalities that women face when compared with their male counterparts.¹⁸

18. See, e.g., Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (noting the results of an empirical studying finding that even with the presence of affirmative action programs law schools tend to marginalize women on their faculties) [*Sex, Race, and Credentials*]; Deborah Jones Merritt and Barbara F. Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC.

Professors Merritt and Reskin found that women were more likely to enter the tenure track at the Assistant Professor level, while their equally qualified male counterparts were far more likely to obtain an initial appointment at the Full or Associate Professor level.¹⁹ They also found that women are clustered in teaching “female” courses such as Family Law, and less frequently teach the more prestigious courses, such as Constitutional Law.²⁰ Even though women possessed the same academic credentials and work experience as their male counterparts, women were far more likely than men to teach low-status “skills courses,” including legal writing, trial or appellate advocacy, and clinical offerings.²¹ Because women start their teaching careers on the lowest rung of the tenure ladder and bear a disproportionate responsibility for teaching lower-status courses, they face a longer “climb” than men.²² Even where men and women started as equals, men were more likely to move up the promotion ladder more rapidly. By 1998, white men were twice as likely as white women who started teaching with them to hold a Chair; white men were three and a half times more likely than women-of-color to hold Chairs.²³

A recent empirical study based on the results of 1999 and 2000 surveys of legal writing directors demonstrates that although women predominate in the teaching of legal writing and as directors of legal writing programs,²⁴ women directors earn significantly less than men directors with the same experience and responsibilities.²⁵ Moreover, perhaps even more surprising, legal writing faculty who teach under women directors earn significantly less than legal writing faculty, both male and female, who teach under male directors.²⁶ Besides higher pay, men who

489, 490 (2003) (finding women during 1986 and 1991 were more likely to take non-tenure-track jobs than men, and when men did take these positions they moved more rapidly than women out of these jobs and onto the tenure track) [*New Directions*]; Durako, *supra* note 11; Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000); Angel, *supra* note 14, at 3-5; Richard K. Neumann, Jr. *Women in Legal Education: A Statistical Update*, 75 UMKC L. REV. ___ (forthcoming 2005).

19. See *Sex, Race, and Credentials*, *supra* note 18, at 274-75.

20. *Id.* at 275.

21. *Id.* at 261-63.

22. *Id.* at 289.

23. See *New Directions*, *supra* note 18, at 491.

24. See Durako, *supra* note 11, at 562-63.

25. See *id.* at 568-72.

26. See *id.* at 573.

direct legal writing programs enjoy improved status; for example, they are more likely to teach more advanced, upper level courses than women directors and are more likely to engage in faculty governance through committee membership and voting.²⁷

An empirical study performed by Professors Jan Levine and Kathryn Stanchi and their colleagues at the James E. Beasley School of Law of Temple University offered the first comparison of salaries of legal writing faculty with the salaries of tenured and tenure-track faculty.²⁸ Levine and Stanchi's study compares the salaries of legal writing faculty with those of tenured and tenure-track faculty, adjusting for regional cost of living. It demonstrates that in adjusted dollars in 1998 legal writing teachers earned, on average, 57% of the median salaries of assistant, tenure-track professors of doctrinal subjects, 51% of the median salaries of associate professors, and 40% of the median salaries of full professors.²⁹

Data from the 2004 ALWD/LWI Survey of Directors of Legal Writing Programs are consistent with earlier empirical research.³⁰ In the 2003-2004 academic year, women directors with workloads³¹ and experience at the institution³² comparable to those of men directors had lower status, less job security, and lower salaries than their male counterparts; legal writing faculty (male or female) working under women directors earned on av-

27. *See id.* at 574-77.

28. *See generally* Levine & Stanchi, *supra* note 9.

29. *See id.* at 577.

30. *See* 2004 ALWD/LWI Survey Report – Appendix A: Comparison of Responses from Female and Male Directors (on file with the author) [hereinafter 2004 ALWD/ALI Survey Report]. I want to thank Kristin B. Gerdy, Director, Rex E. Lee Advocacy Program, J. Reuben Clark Law School, Brigham Young University, for providing this information to me before the information was released to the legal writing faculty and directors at the ALWD conference in July 2004.

31. *See id.* On average, women directors supervised 5.37 full time, 4.61 part time and 16.65 adjunct legal writing teachers; men directors supervised 5.61 full time, 4.75 part time and 12.54 adjunct legal writing teachers during the 2003-2004 school year.

32. *See id.* The survey asked the question relating the number of years directing the writing program at the institution to the salaries of the writing directors. For every category except that of 11-15 years experience, women directors earned considerably less than the men directors. For 0-6 years of experience, on average, the women earned 98% of the men (\$80,246 vs. \$81,571); for 6-10 years of experience, the women, on average, earned 78% of the men (\$86,767 vs. \$111,500); for 16 or more years of experience, the women, on average, earned 89% of the men (\$99, 815 vs. \$111,638). Only one man answered the survey who fit into the 11-15 year category. His salary was considerably lower than the average of the women directors who answered the survey (\$74,250 vs. \$87,170).

erage considerably less than those who worked under male directors.³³ The 2004 survey results demonstrate that while 27% of women directors who responded to the survey are tenured and 12% are on the tenure track (a total of 39%), 37% of men directors are tenured with 7% on the tenure track (a total of 44%). In contrast, 47% of women directors occupied a contract (non-tenured and non-tenure track) status while only 27% of the men directors were on contract status. While the average base salary of female directors on a twelve month contract was \$90,382, an increase from the \$82,119 recorded in 2003, this number still lags behind the average twelve month base salary of male directors, which is \$94,500. The disparity between female and male directors' base salaries is even greater for those paid on a nine month basis. Female directors paid on a nine month basis earned an average of \$82,834, only 81% of the average base salary of \$102,278 paid to the male directors. This pay differential increases with the additional compensation paid for teaching courses other than legal writing. Women directors were less likely to teach courses other than legal writing than the male directors, but when they did, on average, they earned only 40% of the amount paid to men for additional teaching responsibilities.³⁴ A larger percentage of male directors than female directors were awarded paid sabbaticals and the more prestigious title of "Professor."³⁵

The favorable treatment that male legal writing directors receive in law schools is consistent with the treatment of men who occupy jobs in traditionally female professions. Research demonstrates that men who work in segregated professions that are

33. *See id.* Writing directors were asked to give the base salary for legal writing faculty members working under their supervision from the lowest salary to the highest salary paid. The average salary in the low range for legal writing faculty working under women directors was \$48,478, compared with those working under men directors whose average in the low range was \$52,616. In the high range, the average salary of legal writing teachers working under women directors was \$58,287; the average salary of legal writing teachers working under men directors was \$63,775.

34. The average female director earned \$6,325 while the average male director earned \$16,000 for additional teaching responsibilities. The lowest amount a woman earned for additional teaching responsibilities was \$1,500, compared to \$16,000 earned by the men; the highest amount earned by a woman director is \$12,000, compared to \$16,000 earned by the men respondents. The male statistics, however, were based on only two responses. *See supra* note 30, 2004 ALWD/ALI Survey Report.

35. *See id.* Thirty-eight percent of men respondents, but only 35% of women had paid sabbaticals. Forty-one percent of men and 34% of women carried the title of "Professor."

mostly female tend to receive higher salaries and promotions more quickly than women in the same positions.³⁶

These findings are troubling, especially considering that Title VII, which prohibits sex discrimination in employment, was enacted over forty years ago³⁷ and for over twenty years women law students have occupied between one-third and one-half of the positions in law schools.³⁸ While some studies show that in the more elite law schools women students whose qualifications equal those of men when they enter law school do not thrive as men do in law school,³⁹ women students do well in many law schools and women represented 33.4 % of those candidates who registered for the American Association of Law Schools' Faculty Recruitment conference in 2001-2002.⁴⁰ This information com-

36. See, e.g., David J. Maume, Jr., *Glass Ceilings and Glass Elevators: Occupational Segregation and Race and Sex Differences in Managerial Promotions*, 26 WORK & OCCUPATIONS 483 (1999) (finding in empirical study that white men in female dominated professions tend to get promoted out of the female dominated jobs much faster than white women, black women or black men).

37. Title VII was passed on July 2, 1964, and its provisions against unlawful discrimination became effective one year later, in July 1965. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 241, 266. Title VII originally excluded from its coverage States or political subdivisions thereof, so it did not apply to state institutions such as public universities and colleges. *Id.* § 701(b), 78 Stat. 241, 253. However, Title VII was amended in 1972 to apply to state institutions, including public universities and colleges. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103.

38. See Judith Resnick, *A Continuous Body: Ongoing Conversations About Women and Legal Education*, 53 J. LEGAL EDUC. 564, 566 n.9 (2003) (noting that women students now constitute between 40 and 60 percent of law students).

39. See, e.g., Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League School*, 143 U. PA. L. REV. 1, 3 (1994) (finding at the University of Pennsylvania Law School that despite identical entry-level credentials men were three times more likely than women to be in the top 10% of their class by the end of their first year in law school and that the performance differential was maintained over the next three years of law school); Sari Bashi & Maryana Iskander, *Methodology Matters*, 53 J. LEGAL EDUC. 505, 505-06 (2003) (noting a study at Yale Law School which showed "that despite nearly identical pre-law school credentials female students were underrepresented among participants in class discussions and among students who form professionally beneficial relationships with faculty"); Allison L. Bowers, *Women at The University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 121-22 (2000) (explaining that in a 13 year study at the University of Texas Law School (UT) six basic conclusions emerged: 1) women enter the school with the same credentials as men; 2) the average man at UT performs better than the average woman, especially during the first year; 3) the gap between male and female performance widens as the focus shifts to top performers; 4) the largest gap in performance is law review membership; 5) the gap is not narrowing as more women enter law school; and 6) the gap is not narrowing with time).

40. The Association of American Law Schools (AALS) is an organization composed of member law schools. One of the services AALS provides to its member law schools is Faculty Recruitment Services, which involves an annual recruiting

bined with Merritt and Reskin's results demonstrate that even taking as legitimate the most questionable requirements for the job, qualified women are available for higher status positions on law faculties, but are still segregated into the lower paid, lower status jobs.⁴¹ The reverse must be equally true. Men who are well-qualified for teaching legal writing must also be available. While it is unclear whether the legal writing jobs are lower paid and lower status because they are predominantly occupied by women or whether women are hired into these jobs because the jobs themselves are of lower status,⁴² or whether both of these propositions are true, years after the application of the Civil Rights Act to educational institutions, law schools have created, a segregated, unequal society in which women are clustered in the lower status, lower paying jobs, and men occupy the more prestigious, more highly paid positions.

Even though law schools may use gender-neutral policies and criteria in hiring faculty, the system that produces this result is flawed. The next Part analyzes a factual situation in a hypothetical law school and demonstrates that many of the practices

conference at which law schools can interview candidates in the Faculty Appointments Register for faculty positions. The Faculty Appointments Register (FAR) is a collection of information about the candidates interested in teaching at law schools. See ASSOCIATION OF AMERICAN LAW SCHOOLS, *Faculty Recruitment Services*, at <http://www.aals.org/FRS/index.html> (last visited Mar. 4, 2005) (on file with UCLA WOMEN'S L.J.). Of those who reported gender, women comprised 33.4% of the candidates in the 2001-2002 FAR. See ASSOCIATION OF AMERICAN LAW SCHOOLS, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions 2001-2002* (2000), at <http://www.aals.org/statistics/2002statspage6.html> (last visited Mar. 4, 2005) (on file with UCLA WOMEN'S L.J.). The percentage of women candidates in the FAR has been relatively stable: 37.2% in 1995-1996 (the highest point), 33.4% in 1996-1997, 36.7% in 1997-1998, 33.9% in 1998-1999, 33.5% in 1999-2000, and 30.0% in 2000-2001 (the lowest point). See ASSOCIATION OF AMERICAN LAW SCHOOLS, *6 Year Comparison: Faculty Appointments Register Candidates - by Gender* (2004), at <http://www.aals.org/statistics/T6A.htm>. See also Resnick, *supra* note 38, at 568 (noting that the number of women hired as new teachers in 1998 was 40% of the total hires of new law teachers and represented a decline from 1992 when women represented one-half of new hires).

41. See also Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 75 UMKC L. REV. ____ (forthcoming 2005) (documenting the most recent statistics on women's place in law schools as students, professional employees and professors).

42. See Durako, *supra* note 11, at 577-80. See also Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 363 (2001) (arguing that disrespect shown to legal writing as a discipline causes students to disrespect the course and its faculty).

used by law schools to recruit and hire faculty are illegal under Title VII.

III. GENDER TROUBLES AT THE NATIONAL LAW SCHOOL

In order to illustrate how Title VII law could potentially apply to the employment conditions in law schools across the country, I offer a hypothetical situation that draws loosely from my experience as a faculty member in three different law schools, articles written and stories told by women law faculty across the country concerning the employment conditions of women faculty in law schools, and fact patterns of cases brought under Title VII. I then apply Title VII law to the hypothetical, demonstrating that a law school with some or many of the employment conditions in the hypothetical is at potential risk for costly and time-consuming litigation.

A. *A Hypothetical Situation*

The National Law School⁴³ (NLS) is a private non-profit, free standing law school that is situated in Des Moines, Iowa. NLS is fully accredited by the American Bar Association (ABA) and a member of the Association of American Law Schools (AALS). NLS is ranked as approximately number thirty in the nation among law schools.⁴⁴ NLS employs faculty on three different types of employment status: tenure track, tenured, and year-to-year contract.

Faculty on the tenure track spend six years teaching as untenured faculty members before consideration for tenure. During the six year probationary period, the tenure-track faculty are evaluated annually by the tenured faculty and the Dean on their teaching, scholarship and service to the community and to the law school. Although their contracts during this period are for one year only, there is a strong presumption of annual renewal until the time that they will be considered for tenure. At the end of this period, the tenured faculty examines the record of the tenure candidate, with the help of outside reviews, to determine whether the person has achieved in accordance with law school standards in teaching, scholarship and service. If two thirds of

43. While some of the facts in this problem are similar to the situation in some law schools, NLS does not represent any particular law school.

44. This ranking is done by U.S. News & World Report. The validity of the ranking process is questioned by many but most are afraid to challenge the increasingly popular methodology of ranking law schools.

the faculty vote for the candidate's tenure and the Dean agrees with the faculty, the Dean recommends tenure to the Board of Directors of the law school. The Board of Directors' positive vote grants tenure. As of 2004, the vast majority of candidates for tenure have been awarded tenure. As of 2004, not one of the tenured faculty members has been terminated.

The final status is that of "contract faculty." The contract faculty are offered a one year contract, renewable year after year, at the Dean's pleasure. While the tenured and tenure-track faculty have input into the Dean's decision whether to renew a member of the contract faculty, the sole responsibility is placed in the Dean's office. Over the period between 1993 and 2003, five of the fifty contract faculty who have come up for renewal have not had their contracts renewed.

Tenure-track faculty members are hired with the expectation that they will achieve tenure. They are required to teach classes, publish original articles in law reviews and other journals, and to perform service for the law school and the community. Contract faculty are hired with the expectation that their contracts will be renewed from year to year. They teach courses in legal research, writing and analysis, pre-trial litigation, trial advocacy, the clinic, and occasional courses in areas in which they are interested, such as Health Law and Environmental Law. Moreover, contract faculty are heavily engaged in law school service, especially as coaches of Moot Court and Mock Trial teams.

Tenure-track faculty members earn in their first year of teaching approximately \$85,000 (on a nine month contract). This number rises to approximately \$100,000 by the time they are considered for tenure. Tenured faculty's salaries range from approximately \$100,000 to \$175,000, depending on their length of service after tenure, service and scholarly productivity. They are also granted a stipend of \$10,000 each summer if they produce scholarship or teach a summer school course.

Contract faculty members earn approximately \$50,000 in their first year (nine months). This number rises approximately \$1,000 each year. While they are not required to publish articles or to teach in the summer, the school provides a stipend during the summer if they choose to write an article or teach a summer school course (\$5,000).⁴⁵

45. The fringe benefits for tenure-track, tenured and contract faculty are the same.

At NLS, there are one hundred faculty members. Sixty are tenured. Ten are on the tenure track. Thirty are contract faculty. There are 2,000 students at NLS. The school is funded by grants from a charitable foundation and by tuition. Of the sixty tenured faculty members, six are women. Of the ten faculty members on the tenure track, two are women. Of the thirty contract faculty members, twenty-seven are women.

The qualifications for appointment to faculty positions vary with the position. The school has not hired any tenured faculty members from other schools over the past ten years. To be hired as a faculty member on the tenure track, ordinarily the candidate must be a graduate of one of the top twenty law schools in the nation, have a prestigious clerkship, graduate in the top 10% of his or her law school class, and have a "scholarly agenda" – interest in publishing important legal scholarship. NLS ordinarily hires from a national pool of candidates who submit their applications to the AALS. AALS publishes the applications in the Faculty Appointments Register (FAR). Interested law schools contact the candidates and interview them at the Faculty Recruiting Conference (FRC) that takes place in Washington, D.C., every year. NLS typically sends two or three faculty members to interview candidates and invites selected candidates back to campus for a full day of interviews. The faculty then votes on their applications.

Hiring as a member of the contract faculty is somewhat less competitive. NLS looks for persons who have graduated high in their classes from good law schools, but does not require a clerkship. Moreover, contract faculty applicants are not expected to have a scholarly agenda. Instead, they should be personable, able to relate to students who are under stress, approachable, and willing to work hard.⁴⁶ NLS recruits contract faculty through the AALS process, just as it recruits to hire the tenure-track faculty, but it also interviews an occasional lawyer from Des Moines or nearby for a contract faculty position. Of the

46. In an informal study, Professor Maureen Arrigo sent out questionnaires to legal writing directors to ask what qualifications were desirable in legal writing faculty. Respondents mentioned many of the same credentials attributed to tenure-track and tenured faculty such as graduation from a prestigious law school, high grades, and clerkships. They also mentioned a number of additional qualifications that are not ordinarily expected of tenure-track and tenured faculty. These qualifications include: sense of humor, good people skills, good ability to work collaboratively, good listening skills, empathy, enthusiasm, accessibility, niceness, caring, patience and creativity. See Arrigo, *supra* note 18, at 157.

thirty contract faculty members, ten were hired locally. All of the local hires were women who graduated at the top of the class at NLS.

Over the past six years, the pool of persons who submitted their applications to the AALS for consideration for faculty (either tenure-track or contract) positions at law schools is 50% male and 50% female. Fifty percent of all law school graduates across the country is female. The same percentage of men and women meet the requirements of being in the top 10% of their classes at the top fifty law schools. For the top twenty law schools, there is a slight discrepancy. Women constitute approximately 45% to the men's 55% in the top 10%. Partially because law professors in the top twenty schools are predominantly male and federal judges and Supreme Court justices (state and federal) are predominantly male, only 30% of all clerks in these courts over the past six years have been female.⁴⁷

Rule 5.0 in the faculty handbook states:

No person hired as a contract faculty member shall be appointed to the tenure track, unless a contract faculty member first works at another law school as a tenure-track or tenured faculty member and returns to NLS.

The faculty passed this rule in 1999 because it was concerned that the contract faculty would use the relationships they establish with the tenure-track and tenured faculty to do an "end run" around the process and requirements for the tenure-track positions. The minutes reflect that at least one faculty member stated in the meeting that the school might lose its place among the top thirty law schools nationally if it were to convert faculty from the contract faculty status to tenure track. A number of faculty members were concerned that hiring contract faculty members onto the tenure track would also tend to diminish the importance of scholarship because contract faculty were more interested in teaching than in publishing. Another faculty member mentioned that because the hiring requirements for positions as contract

47. The National Association for Law Placement (NALP) worked in conjunction with the American Bar Association to conduct a study of judicial clerkships as opportunities for law graduates. Data was collected for a five year period (1994-1998). The results of the study show that for the last four of the five years women comprised a majority of the law clerk population. However, there was a disproportionately high percentage of women serving as local and state clerks and a greater percentage of men than women as federal clerks. See *Courting Clerkships: The NALP Judicial Clerkship Study*, NALP Research, at <http://www.nalp.org/nalpresearch/clrksumm.htm> (last visited June 18, 2004).

faculty were different from those of tenure-track faculty, it would be inadvisable to permit a contract faculty member to “worm her way into a tenure-track position by being nice to the tenured and tenure-track faculty members.” Finally, one faculty member noted that “to be a stand-up tenure-track teacher is totally different. You have to be tough and demanding. You cannot tolerate wimps. To be a contract faculty member teaching students legal writing requires a “soft touch.”

Rule 6.0 in the faculty handbook states:

NLS does not appoint to the tenure track or as tenured faculty any person who has graduated from NLS unless he or she has been on the tenure track or has received tenure at another law school or has earned an LLM from a school ranked in the top twenty law schools.

The faculty passed this rule in 1997 after concern over the pressure imposed on faculty by alumni to hire graduates of the law school into tenure-track positions. The faculty minutes show that a number of the faculty expressed a concern about having a “local” or “parochial” law school instead of maintaining a national reputation if the school were to hire its own graduates as tenure-track faculty members. The faculty has made only one exception to this rule for Stephen King, an exceptional student who graduated fifth in his class in 2000. The minutes of the meeting in which the faculty approved King’s hiring noted that faculty agreed that Stephen was a “true intellectual” who had published one very provocative article on Intellectual Property Law.

In September 2002, Danielle Katz, a faculty member on a contract who had taught legal research and writing for six years found out that the Appointments Committee had decided to search for a tenure-track faculty member to teach and publish articles in the area of Business Organizations. Danielle, a 1994 graduate who was tenth in her class at NLS, clerked for the Iowa Court of Appeals and then practiced law with a very prestigious law firm in Washington, D.C., doing business transactions and commercial law. In 1997, because Danielle wanted to return to Des Moines, she applied for a position as a contract faculty member to teach legal research and writing at NLS. She was hired after an interview with the Appointments Committee, a full day of interviews with the faculty, including a presentation on her scholarship, and a faculty vote. This is the same hiring process NLS uses for tenure-track faculty. Since 1997, Danielle has been a star. She has received excellent teaching evaluations, has

taught a number of courses, and has published three articles in respected law reviews.

But Danielle has suffered some troubles. Beginning shortly after her arrival, Professor Rob Seitz, a nationally recognized constitutional law scholar, pursued Danielle, trying to convince her to go out with him. It all began in January 1998 when Danielle, who was working with her students on a constitutional law problem, approached Rob to ask him whether he could review the problem she had created for the students. Rob reviewed the problem willingly, but after doing so, he closed his office door and attempted to put his hand on Danielle's bare knee. Danielle removed his hand and told Rob she had to go.

Rob did not get the hint. He continued to pursue Danielle throughout the Spring and Fall of 1998, calling her at home to discuss constitutional law, asking her to the movies, and brushing up against her in the hallway when she passed him at school. Whenever he spoke to her in the faculty lounge, Rob stood too close to Danielle. Danielle responded by trying to avoid Rob, declining his invitations politely, and recoiling when he came too close to her. Even though Danielle acted fairly coolly, she was shaken, afraid to complain pursuant to the NLS sexual harassment policy⁴⁸ because she did not want to upset Rob. One Sunday during the Fall of 1998, when Danielle was in her office working, Rob opened her office door and said, "At last, I find you alone and you can't get away." Rob locked Danielle's office door and began to approach her, telling her that he was "right for her." Danielle told Rob to "back off," but he refused. He approached her and began kissing her. Danielle grabbed her key chain with the pepper spray and threatened to use it. Rob backed off, ran out of the room, and never spoke to Danielle again until November 20, 2003 (see below). Danielle never told anyone at work about the incidents with Rob, but she had many nightmares and visited a psychiatrist for medication because of her fears of being accosted alone in a dark room.

48. The sexual harassment policy that was in effect at NLS from 1996 to 2004 states:

If any faculty or student experiences harassment because of his or her sex, sexual orientation, or gender, that person should report the incident immediately to the Dean, the Associate Dean for Academic Affairs or the Dean of Students.

This policy was included in the handbook given out to both faculty and students when they arrived at the law school.

On September 30, 2002, Danielle approached the Chair of the Appointments Committee, Sanders Jackson, to tell him that she intended to apply for the open tenure-track position in Business Organizations. Sanders gave her a copy of Rule 6.0 which states that NLS does not hire its own graduates and told her, "Don't bother." When she told him that she had received very good class evaluations in the Business Organizations course, he responded, "I think you are better suited for legal research and writing because you are so good with the students, especially the women students." Danielle reminded Sanders that NLS had made an exception to Rule 6.0 by hiring Stephen King, an NLS graduate, to teach on the tenure track. Sanders responded, "You know that Stephen is a brilliant writer and researcher. You are a hard worker, but he is clearly an intellectual." Danielle wondered aloud whether the difference was Stephen's sex. Sanders got red in the face and told Danielle, "Get off of it, Danielle. I have a wife who bugs me with this stuff."

That afternoon, Danielle went to the office of her female mentor, Professor Jan Shank. Jan told Danielle, "I wouldn't try it if I were you. You should apply elsewhere for a tenure-track position and then, once you have some experience, come back and apply for a job on the tenure track here." Danielle reminded Jan that Danielle had recently married a man who could not leave the Des Moines area because of his business. Jan told Danielle, "Maybe if you write two or three more articles, they will be convinced that you belong in the big leagues." Jan also said, "I think it would be foolish of you to try for this job. It would just poison things on the faculty and ruin your fine reputation as someone who gets along with everyone."

On October 10, 2002, Danielle tried a third faculty member, Ben Stillet, the Associate Dean for Academic Affairs. Ben told Danielle it was really important to the school to continue working on its national reputation. Danielle asked him why hiring her would harm the school's national reputation. Ben said, "If it gets out that we hire our legal writing faculty on the tenure track, they will be beating down the doors. Anyway, you don't meet our standards. You haven't clerked for a prestigious court, and you did not attend a law school in the top twenty. And, we don't hire our own graduates. I would advise a fresh start at another law school. I would give you a great recommendation to any school that interviews you at the AALS Faculty Recruiting Conference." Ben told Danielle how to send her application to the

AALS, and explained the process to her. Danielle told Ben that she thought he was treating her in a discriminatory fashion because of her sex and that she had a right to apply for the position as a Business Organizations professor at NLS. She handed him her résumé and subsequently registered her application with the AALS. Ben never spoke to her about her application again that year.

During the 2002-2003 school year, the school did a national search for a tenure-track professor in Business Organizations and was unable to find a suitable match by March 15, 2003. NLS gave up the search, intending to resume searching during the next school year. Other faculty members never acknowledged that Danielle had given Ben a résumé. In fact, many of the tenured and tenure-track faculty who used to be friendly toward Danielle began to shun her, looking the other way when she walked down the hall, avoiding eye contact at meetings and declining her invitations to lunch. Danielle asked her mentor, Jan, what had gone wrong. Jan told Danielle, "I told you not to make waves. You have spoiled your reputation. Now you are considered a whiner."

Danielle approached the Dean, Katherine Kool, on August 20, 2003, and told her that she wanted to apply for the Business Organizations vacancy. The Dean brushed her off, telling her how important her role as mentor to the students was. Danielle told the Dean that she believed that she was qualified for the job and that the school was discriminating against her because of her sex. Dean Kool disagreed, "How can you say that? Haven't we been good to you? We have permitted you to teach Business Organizations and we have given you stipends. What more do you want?" Danielle said, "I want a tenure-track job. I deserve one." Dean Kool became stone cold and said, "Look, don't press me. Why don't you apply elsewhere?"

Once again in September 2003, Danielle sent her application to the AALS and submitted her résumé directly to NLS, this time to the Chair of the Appointments Committee, Sanders Jackson. Sanders wrote a letter to Danielle dated November 15, 2003, stating that the Committee had decided not to interview her because she "did not possess the requisite skills or qualifications for the job." A member of the committee, Rob Seitz, Danielle's nemesis from a few years earlier, called Danielle on November 20 to tell her that she did not get an interview because Dean Kool told the Committee that Danielle "wasn't a team

player.” Rob chuckled and said, “that’s what bitches get” and hung up.

Danielle filed a charge with the EEOC in February 2004, alleging violations of Title VII, failure to hire on the tenure track because of her sex, sexual harassment and retaliation. The EEOC issued a right to sue letter, informing Danielle that it had found “no probable cause” but notifying her of her right to sue in federal court.

B. *Potential Sources of Liability at National Law School*

There are a number of possible sources of liability under Title VII in this case.⁴⁹ Title VII forbids disparate treatment, which is intentional discrimination based on a protected characteristic. Plaintiffs prove systemic disparate treatment by demonstrating that a policy facially discriminates against a protected group.⁵⁰ If the policy is not facially discriminatory, plaintiffs may prove systemic disparate treatment by demonstrating that the defendant adopted a facially neutral policy with the intent of discriminating against a protected group, or by demonstrating through the use of statistical evidence, combined with anecdotal evidence, that discrimination is the employer’s normal operating procedure.⁵¹ This methodology is ordinarily called a “pattern and practice” case⁵² and can be brought by the EEOC or a class of plaintiffs.⁵³ In systemic disparate treatment cases, plaintiffs present statistics in order to create an inference of discriminatory intent.⁵⁴

Plaintiffs may also prove individual cases of disparate treatment. In the individual case, the plaintiff attempts to show that the defendant exercised an adverse employment action against the plaintiff because of the plaintiff’s membership in a protected

49. For a more complete description of the different types of behavior prohibited under Title VII and the methods for proving discrimination along with examples, see *!Viva la Evolucion!*, *supra* note 8.

50. See, e.g., *Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978) (striking down the city’s requirement that women make larger contributions from their paychecks to the pension fund because women as a group live longer than men).

51. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339, 342 (1977) (finding that statistical and anecdotal evidence supported claims that racial minorities were being discriminated against and were not hired as or promoted to the position of line driver, but were employed only in less desirable jobs).

52. *Id.* at 335.

53. 42 U.S.C. § 2000e-5 (2005).

54. See, e.g., *Int’l Bd. of Teamsters*, 431 U.S. at 339-40 (stating that statistics serve an important role when the existence of discrimination is at issue).

class.⁵⁵ Plaintiffs prove individual disparate treatment by use of a number of constructs. First, although direct evidence of discriminatory intent has become rare because of the defendants' increasing sophistication, if it exists, the plaintiff may use direct evidence to prove individual disparate treatment.⁵⁶ Second, a plaintiff may prove discrimination by inference, using the approach established in *McDonnell Douglas v. Green*,⁵⁷ and most recently interpreted by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*⁵⁸ Finally, a plaintiff may prove illegal discrimination using the mixed motives methodology that was codified by the 1991 Amendments to the Civil Rights Act⁵⁹ and most recently interpreted in the unanimous Supreme Court decision, *Desert Palace, Inc. v. Costa*.⁶⁰ This method acknowledges that an employer may simultaneously have more than one reason for its employment decisions, some of which are discriminatory, and others permissible. Under the mixed motives method, if a plaintiff proves, by direct or circumstantial evidence or a combi-

55. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (noting that liability for individual disparate treatment depends on whether the protected trait actually motivated the employer's employment action) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

56. See McGinley, *supra* note 49, at 448 (explaining direct proof of disparate treatment and providing an example).

57. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (providing that a prima facie case of racial discrimination requires that a complainant demonstrate: 1) that he belongs to a racial minority; 2) that he applied and was qualified for a job for which the employer was seeking applicants; 3) that he was rejected despite his qualifications; and 4) that the position remained open and the employer continued to seek applicants from persons with complainant's qualifications).

58. See *Reeves*, 530 U.S. at 142 (applying the *McDonnell Douglas* test to a claim for discrimination in violation of the Age Discrimination in Employment Act).

59. Title VII, in its relevant part, states:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 U.S.C. § 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (2000).

60. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003) (holding that the district court did not err in giving the mixed-motives instruction, and that female employee presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that her gender was a motivating factor for adverse employment decisions, even though other factors may also have motivated the decisions).

nation of both,⁶¹ that her membership in the protected class is a motivating factor in the adverse employment decision, the defendant is liable.⁶² The defendant may limit the plaintiff's remedies, however, by demonstrating by a preponderance of the evidence that it would have made the same decision even absent the illegal motivation because at the time of the employment decision it was also motivated by a legal reason.⁶³

Although it uses a separate proof methodology, harassment because of a protected characteristic is also a form of disparate treatment. Illegal sexual harassment occurs if the employer or supervisor makes sex a *quid pro quo* for job advancement or to avoid an adverse job action.⁶⁴ Even in the absence of a *quid pro quo*, the employer may be liable for a hostile work environment created by supervisors,⁶⁵ coworkers,⁶⁶ or customers.⁶⁷ While the

61. *See id.* at 99-100 (explaining that because Title VII is silent on the issue of what type of evidence is required to demonstrate mixed motives discrimination, the conventional rule of civil litigation applies and employees may rely on both direct and circumstantial evidence to meet their burden).

62. *See* 42 U.S.C. § 2000e-2(m) (2005) (declaring as unlawful any employment practice in which race, color, sex, or national origin is a motivating factor). This statute amended the formula set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 259 (1989) (holding a defendant could avoid liability by proving, by a preponderance of the evidence, that it would have made the same decision even if it had not taken plaintiff's gender into account).

63. Title VII, in its relevant part, provides:

- (B) On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) [42 U.S.C. § 2000e-2(m)]; and
 - (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B) (2000).

64. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (defining *quid pro quo* cases as those sexual harassment cases based on threats of retaliation where the threats were carried out and distinguishing *quid pro quo* cases from those involving hostile work environments).

65. *See id.* at 765 (holding that "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee").

66. An employer will be liable for harassment by coworkers if the employer knew or should have known about the illegal harassment and failed to take appropriate steps to remedy the situation. *See e.g.*, *Feingold v. N. Y.*, 366 F.3d 138 (2d Cir. 2004) (finding employer liability for co-worker harassment, because plaintiff produced sufficient evidence that both his immediate supervisor at the DMV and the

standards for employer liability differ depending on who creates the harassing environment,⁶⁸ an environment is illegally harassing if it is unwelcome,⁶⁹ the harassing behavior is both subjectively and objectively severe or pervasive,⁷⁰ and if the harassment occurs because of the victim's sex.⁷¹

Besides intentional discrimination on an individual or systemic level, Title VII also prohibits the use of neutral policies or practices that create a disparate impact on persons who are members of the protected class, unless the employer meets its burden of persuading the fact finder by a preponderance of the evidence that the policy is related to the job in question and consistent with business necessity.⁷² Even if the employer meets this bur-

supervisor for the entire Traffic Violations Bureau were aware that he was suffering a hostile work environment and took no action to disapprove of or to remedy the situation); *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994) (reversing summary judgment for the employer and finding employer liable for sexual harassment of a female employee by her male co-workers, because the employer knew about the sexual harassment and failed to take appropriate remedial action); *Intlekofer v. Turnage*, 973 F.2d 773, 779 (9th Cir. 1992) (holding that the Veterans Administration could be held liable for a claim of sexual harassment by a co-worker, because it failed to take steps reasonably calculated to end the harassment).

67. A number of courts have held that employers are liable for the harassment by customers if the employer knew or should have known about the customers' harassment and failed to take appropriate remedial action. See e.g., *Lockard v. Pizza Hut Inc.*, 162 F.3d 1062, 1074, 1077 (10th Cir. 1998) (finding the employer liable and upholding a jury verdict in favor of plaintiff waitress for sexual harassment from customers, because her employer required her to wait on the customers even though she had informed the employer she felt uncomfortable doing so); *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 854 (1st Cir. 1998) (affirming a jury verdict for plaintiff, because plaintiff's employer not only acquiesced in a customer's sexual advances towards plaintiff but explicitly told her to give in to those demands); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) (reversing summary judgment in favor of for-profit residential home and finding employer could be liable for sexual assaults on the plaintiff by a resident if the plaintiff could show that the employer response was not adequate).

68. See *Burlington Indus., Inc.*, 524 U.S. at 760-61 (applying an agency relation standard that employer liability for the discriminatory actions of a supervisor against a subordinate does not require that the employer knew or should have known of the supervisor's actions and allowing the employer an affirmative defense that the employer took reasonable care and that plaintiff failed to take advantage of corrective opportunities only if no tangible employment action was taken against the plaintiff); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (applying *Burlington Indus., Inc.* holding to supervisors whose authority was "virtually unchecked" and who directly controlled and supervised plaintiff's daily activities).

69. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

70. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

71. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80 (1998).

72. Title VII, in its relevant part, provides:

(k) Burden of proof in disparate impact cases.

den, if the plaintiff then proves that the defendant refused to adopt a less discriminatory alternative, the defendant will be liable.⁷³

Title VII also forbids retaliation against an employee by an employer because the employee has opposed an illegal practice under the Act or has participated in a legal process under Title VII.⁷⁴ An employer's liability under the opposition clause may depend on the standard used. While most of the circuits have adopted a requirement that the plaintiff have a reasonable good faith belief that the employer's practices were unlawful, the Su-

(1) (A) An unlawful employment practice based on disparate impact is established under this title only if—

- (i) 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; or (ii) the complaining party [demonstrates] . . . an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1) (2000).

73. *See id.*; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (explaining that if a complainant shows that other tests or selection devices would serve the legitimate interests of the employer and would not produce a similar undesirable racial effect then the complainant has produced evidence the employer was using its tests as a pretext for discrimination). *Compare* Allen v. Chicago, 351 F.3d 306, 314 (7th Cir. 2003) (finding that employees failed to produce evidence of a less discriminatory but equally valid method for increased merit promotions in the police department), *with* Bryant v. Chicago, 200 F.3d 1092, 1094 (7th Cir. 2000) (affirming the District Court's finding that the plaintiffs had produced evidence that the City's police department had a less discriminatory but equally valid method of promotions available).

74. Title VII, in its relevant part, provides:

- (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§ 2000e-2000e-17].

42 U.S.C. § 2000e-3(a) (2000).

preme Court has recently raised a question about whether this standard is too lenient.⁷⁵

With this short description of Title VII law in mind, the next subpart analyzes the possible liability of NLS for its practices.

1. Liability for Systemic Disparate Treatment

The women on the contract faculty at National Law School may have a cause of action against their employer for systemic disparate treatment. The plaintiffs will make two arguments. First, they will argue that the policies, although facially neutral, were enacted in order to prevent women from being hired as tenure-track faculty at the school. Second, they will argue that the statistics, along with anecdotal evidence of sex discrimination, demonstrate that sex discrimination was the normal operation of the business.

The Supreme Court in *International Brotherhood of Teamsters v. United States*,⁷⁶ *Hazelwood School District v. United States*,⁷⁷ and *Bazemore v. Friday*⁷⁸ dealt with the question of the sufficiency of evidence to prove intentional discrimination by systemic means. Even though Title VII does not require that the work force mirror the general population, evidence of long-lasting and gross disparity between the composition of the work force and the general population may be significant in establishing a prima facie case of discrimination.⁷⁹

In *Teamsters*, the United States Attorney General sued a nationwide common carrier and a union representing a large group of the company's employees alleging that the defendants had engaged in a pattern and practice of race discrimination against blacks and Hispanics by failing to hire them into or promote them to the better-paid over-the-road driver positions.⁸⁰ The lower court held that the government had met its burden of proving illegal discrimination against the hauling company by

75. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001) (noting the Ninth Circuit used a reasonable good faith belief standard but declining to rule on that interpretation); see also EEOC Compliance Manual § 8-II(B)(3)(b), available at <http://www.eeoc.gov/policy/docs/retal.html> (last visited Jul. 16, 2004) (providing "a person is protected against retaliation for opposing perceived discrimination if s/he had a reasonable and good faith belief that the opposed practices were unlawful").

76. *Int'l Bd. of Teamsters*, 431 U.S. 324 (1977).

77. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

78. *Bazemore v. Friday*, 478 U.S. 385 (1986).

79. *Int'l Bd. of Teamsters*, 431 U.S. at 340.

80. *Id.* at 329.

presenting evidence of a statistical disparity between the general population of blacks in the communities where the company operated and in the workforce.⁸¹ The Government bolstered its argument with anecdotal evidence of testimony of individuals who recounted over forty specific instances of discrimination.⁸² The Supreme Court upheld the lower court's finding of discrimination against the company concluding that the fact finder could infer an intent to discriminate from statistical proof, especially when it is bolstered by anecdotes of individual instances of discriminatory treatment.⁸³

Employers may defend against pattern and practice cases by challenging the plaintiff's choice of statistical pool.⁸⁴ In *Hazelwood*, the United States Attorney General filed a racial discrimination suit against Hazelwood School District, located in a suburb of St. Louis, Missouri, alleging it had engaged in a pattern or practice of discriminating against black applicants for teaching positions.⁸⁵ The Attorney General presented statistical evidence that while 15.4% of the teachers in St. Louis County and the city of St. Louis were black only 1.4% - 1.8% of the Hazelwood school district's teachers were black.⁸⁶ However, the school district argued that because the city of St. Louis had taken special steps to maintain a 50% black teaching staff, inclusion of that area's statistics in the relevant job market skewed the results.⁸⁷ The percentage of black teachers in St. Louis County alone was 5.7%, rather than 15.4%.⁸⁸ The Supreme Court vacated the judgment of the lower court and remanded the matter for consideration of what appropriately constitutes the relevant job market and whether to include the city of St. Louis in the statistical analysis.⁸⁹

In this case, the question is whether the anecdotal and statistical evidence are sufficient to demonstrate that discrimination because of sex is the normal operating procedure at NLS. While *Teamsters* and *Hazelwood* seem to say that statistics are sufficient to prove intentional discrimination without the admission of any

81. *Id.* at 337.

82. *Id.* at 338.

83. *Id.* at 339.

84. *See, e.g., Hazelwood Sch. Dist.*, 433 U.S. 229 (1977).

85. *Id.* at 301.

86. *Id.* at 305.

87. *Id.* at 310-11.

88. *Id.* at 311.

89. *Id.* at 313.

anecdotal evidence,⁹⁰ in both cases anecdotal evidence existed to bolster the statistical evidence. For example, in *Teamsters*, there was evidence that a black man who wanted to become an over-the-road driver was told that there would be problems on the road “with different people, Caucasian, et cetera,” and that the company was “not ready” to hire a black in that position.⁹¹ In *Hazelwood*, when the school district recruited for faculty positions, all of the institutions visited were predominately white and the district “did not seriously recruit” at either of the two predominantly black institutions in Missouri.⁹² Moreover, the standards for teacher selection included subjective standards that were biased toward the hiring of white women into teaching positions.⁹³ In *EEOC v. Sears, Roebuck & Co.*,⁹⁴ the EEOC failed to present anecdotal evidence to support its statistical proof that women were employed less than men in commission sales positions, and the Seventh Circuit permitted the defendants to use a “lack of interest” argument to rebut the very strong statistics in the plaintiffs’ favor.⁹⁵

While in *Teamsters* the Court emphasized that there were no persons of color in the over-the-road trucking positions, the so-called “inexorable zero,” subsequent cases have made clear that there does not have to be an “inexorable zero” for the plaintiffs to prevail. Instead, the EEOC has suggested the use of the 80% rule which states that a fact finder may draw an inference of intentional discrimination if the members of the protected class represent less than 80% of the number that would be expected when compared to their percent of the pool of qualified persons for the job.⁹⁶ One of the more difficult questions is determining

90. *Int'l Bd. of Teamsters*, 431 U.S. at 339 (noting that statistics have been repeatedly approved for proving prima facie racial discrimination in jury selection cases, and that they are equally competent in proving employment discrimination); *Hazelwood Sch. Dist.*, 433 U.S. at 307-08 (explaining that where gross statistical disparities can be shown statistics alone could constitute proof of prima facie pattern and practice discrimination).

91. *Int'l Bd. of Teamsters*, 431 U.S. at 338 n.19.

92. *Hazelwood Sch. Dist.*, 433 U.S. at 302-03.

93. *See id.* at 302 (stating that intangibles such as “personality, disposition, appearance, poise, voice, articulation, and ability to deal with people” counted heavily towards hiring).

94. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988).

95. *Id.* at 322 (holding the district court did not clearly err in finding women were not as interested in commission sales positions as men and noting the EEOC might have presented evidence of a representative group of women who preferred a commission position and were rebuffed but did not).

96. *See* 29 C.F.R. § 1607.4(D) (1978).

who comprises the pool of qualified candidates. There are a number of ways of limiting the pool: particularly, geographically, and by qualifications. In *Hazelwood*, the Court held that in determining the comparison pool the courts should consider the percentage of persons who are qualified for the job recruited from a particular geographical area. Generally, courts will consider the geographical area from which the employer recruits and hires for the positions in question, but limiting to this geographical area may distort the pool if the employer has selected that particular geographical area in order to avoid hiring persons from the protected class. Certainly, however, the courts will consider at least the area from which the employer recruits. If the employer advertised in the *Wall Street Journal* for the position, it will likely consider a national pool of qualified persons. If the employer advertises and hires only locally for the position, the court will likely look at the local pool of qualified persons as the comparison pool.

As to qualified persons, while *Teamsters* looked at the general population in the area from which the employer hires, in *Hazelwood* the Court made clear that in skilled jobs the comparison pool must encompass not the general population within the geographical area but the persons who possess the required skills within the geographical area. In *Hazelwood*, the Court held that the lower court should consider the persons in the proper geographical area who have the requisite background, degrees, and other qualifications to be hired as a teacher. There is some debate in *Hazelwood* and *Teamsters* about whether the Court should consider only the pool of qualified applicants, rather than persons in the area, whether they applied for a position or not.⁹⁷ Most courts state that the applicant pool may be more accurate because it truly shows which persons were available for hiring by the employer.⁹⁸ The applicant pool, however, may distort the numbers in a workplace where it has become common knowl-

97. See, e.g., *Hazelwood Sch. Dist.*, 433 U.S. at 309 n.13 (suggesting that data showing the actual percentage of white versus black applicants would provide stronger proof of racial discrimination in hiring).

98. See *id.* (explaining when a job requires special skills that comparisons between the work force and the general population may not be as probative as comparisons to the pool of qualified candidates); see also *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482-83 (9th Cir. 1983) (noting that if special skills are required for a job the proxy pool must be that of the local labor force possessing the requisite skills); *Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 67-68 (D.C. Cir. 1982) (stating that when a job requires special qualifications that statistical proof must consider only those with those qualifications).

edge that the employer either does not hire or discourages hiring members of a particular protected group.⁹⁹ Where this knowledge exists, the members of the protected group may have been discouraged from applying because of the reputation of the employer.¹⁰⁰

In NLS's case, NLS hires both its contract and its tenure-track faculty through the AALS Faculty Recruitment process. For contract positions, it also hires locally. There are two ways the plaintiffs can challenge the NLS hiring. They can look first at the statistics to see if there is a statistically significant difference between the men and women hired at NLS who are qualified under the NLS standards and in accordance with NLS policies. Second, the plaintiffs can consider whether the standards and/or policies themselves which are facially gender-neutral were imposed intentionally to discriminate against women. The plaintiffs will prove intentional discrimination by using anecdotal evidence that exists, combined with inferences, if any, created by the statistics.

a. Statistical Evidence

At NLS, women represent 90% of contract faculty, 10% of tenured faculty members and 20% of those who are tenure-track faculty members. Using the qualifications that are "ordinarily" imposed at NLS, candidates must graduate from a school ranked in the top twenty, must have a prestigious clerkship, have ranked in the top 10% of the law school class, and have a scholarly agenda.

Over the past six years (the tenure-track period), the pool of persons who have applied through AALS is 50% female, but only 45% of persons graduating in the top 10% of their class from the top twenty schools and only 30% of persons with the required clerkships are female. Assuming that the women with clerkships is a subset of the women graduating in the top 10% of

99. See *Int'l Bd. of Teamsters*, 431 U.S. at 372 (acknowledging there may be more victims than the application statistics demonstrate, because the class of victims includes those individuals who did not apply for line driver positions, because of the company's reputation against hiring minorities into those positions).

100. See *id.* at 365 (stating a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection"); see also *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1290 n.6 (11th Cir. 2000) (providing anecdotal evidence of testimony from women who were deterred from applying because of the restaurant's reputation for hiring only male servers).

their classes from the top twenty law schools, under the facially gender-neutral NLS standards the school should expect to have hired 30% women onto the tenure track over the past six years. Because NLS has only two out of ten tenure-track faculty who are women and the expectation would be that there would be three women on the tenure track, there is some statistical difference. But this difference may be insufficient to prove intentional discrimination. Eighty percent of the expected number of three women tenure-track faculty members is 2.4, only slightly higher than the two women that the school has hired.¹⁰¹ The courts would likely not allow this minuscule difference of one person (or even less than one person) to be the basis for making the school liable for discriminatory hiring onto the tenure track over the last six years.¹⁰² For the tenured faculty, we do not have sufficient information to determine whether there was discrimination when these faculty members were hired because the information from the hiring goes back only six years. By definition, the tenured faculty members were hired more than six years earlier since there is a six year track to tenure. It would be useful to discover the hiring statistics of this group of faculty to determine whether these statistics would bolster the women's argument. If the percentages of female faculty hired onto the tenure track has historically been significantly lower than the availability of women law professor applicants, this statistic would help the plaintiffs' case.

While the statistics concerning the hiring onto tenure track alone may be insufficient to create an inference of intentional systemic sex discrimination, the statistic that 90% of the contract positions are held by women, compared to the 20% of the tenure-track positions, along with anecdotal evidence of stereotypical concerns, may be sufficient to create a genuine issue of material fact as to whether the defendant intentionally discriminated in a systemic fashion.

101. See *supra* note 96 for the EEOC 80% rule.

102. Courts may find disparate impact analysis inapplicable if the sample is too small to yield any statistically significant results. See MICHAEL J. ZIMMER ET. AL. EDS., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 368-69 (6th ed. 2003) [hereinafter ZIMMER]; see also *Mems v. City of St. Paul*, 224 F.3d 735, 740 (8th Cir. 2000) (finding a sample of three to seven was too small to be statistically significant); *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991) (finding nine employees too few to be statistically significant); *Fudge v. City of Providence Fire Dept.*, 766 F.2d 650, 658-59 (1st Cir. 1985) (finding the sample of the individuals tested in 1974 only too small to be statistically significant).

b. *Anecdotal Evidence*

i. Hiring Standards

There is at least some evidence from which a fact finder can infer the faculty's intent to discriminate against women in either establishing or applying the hiring standards. For example, although the standards for the tenure-track faculty ordinarily require that a person graduate from a top twenty law school, the school violated these standards when it hired Stephen King, one of its own graduates. King did not graduate from a school in the top twenty. It is unclear whether he fulfilled the other requirements, such as a clerkship, and it does not appear that he had a job on the tenure track of another law school, a requirement under Rule 5.0. Thus, when NLS hired King it violated its own academic standards and policy not to hire graduates in order to benefit a male candidate. These violations raise questions about the legitimacy of the standards that the school has set and how seriously it takes them. They also raise questions about the motive for creating these standards and whether the school enacted Rule 5.0 because of sex.

The second question regarding the hiring standards raises issues of stereotyping. The Supreme Court first articulated the stereotyping doctrine in *Price Waterhouse v. Hopkins*.¹⁰³ Ann Hopkins, a successful accountant at the defendant firm, was denied partnership because the partners perceived her to be too masculine and aggressive.¹⁰⁴ Her mentor explained to her that she could improve her chances of election to partnership if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry."¹⁰⁵ The Court explained that Title VII forbids stereotyping that would place women in a double bind in a competitive work environment:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." . . . An employer who objects to aggressiveness in women but

103. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

104. *Price Waterhouse*, 490 U.S. at 235, 250.

105. *Id.* at 272 (O'Connor J., concurring) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.¹⁰⁶

The Court concluded that the evidence of sex stereotyping tainting the decision making process in *Price Waterhouse* was sufficient to prove that sex was a motivating factor in the refusal to promote Hopkins. Justice O'Connor concurred, decrying the use of stereotyping in employment and treating it as if it were direct evidence of conscious discriminatory intent:

It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decision makers exited the room, she was told by one of those privy to the decision-making process that her gender was a major reason for the rejection of her partnership bid.¹⁰⁷

Thus, under *Price Waterhouse*, adverse decision making resulting from an employee's failure to adhere to sex stereotypes is discrimination because of sex. At NLS, the "qualifications" for the contract faculty describe many personal qualities associated with women. For example, while the contract faculty members are not expected to write scholarship, they must be "personable, able to relate to students who are under stress, approachable, and willing to work hard."¹⁰⁸ While not one of these qualities is facially discriminatory and there is nothing illegal about making these qualities important for a job, in using this definition the school hired women into 90% of these positions, even though the numbers of men and women graduating from law school are equal, and the applicant pool for all jobs – contract and tenure-track – is 50% male and 50% female. It therefore appears that NLS may have applied stereotyping when selecting its contract faculty, and as we will see below, selecting its tenure-track faculty, steering female applicants into the lower paid contract positions.

106. *Id.* at 251 (citations omitted). *See also* Bellaver v. Quanex, Corp., 200 F.3d 485 (7th Cir. 2000) (reversing district court's grant of summary judgment because a reasonable jury could conclude that the defendant discharged the plaintiff because of sex stereotyping where there was evidence that she was aggressive but that men who were aggressive were not discharged).

107. *Price Waterhouse*, 490 U.S. at 272 (O'Connor, J., concurring).

108. For a list of preferable qualities of legal writing faculty by writing directors, see Arrigo, *supra* note 18, at 157.

ii. Hiring Policies

The policies against hiring contract faculty and NLS graduates who have not burnished their résumés are both facially neutral, but the evidence permits the inference that the faculty could have enacted them in order to discriminate against women intentionally. Even if the evidence of intentional discriminatory enactment of the policy is insufficient, there may be sufficient evidence to prove that the faculty has applied these policies in a discriminatory fashion.¹⁰⁹

1) Refusal to Hire Contract Faculty on Tenure Track

The faculty has stated concerns that contract faculty members who were hired using different (i.e. lower) standards could use their positions to perform an “end run” around the process and that hiring contract faculty on the tenure track may diminish the importance of scholarship. While these concerns may be legitimate non-discriminatory reasons for enacting Rule 6.0, there were a number of comments at the faculty meeting when this rule passed that suggest the existence of gender stereotyping among the decision makers. For example, one faculty member commented that a contract faculty might “worm *her* way into a position by being *nice*.” Certainly, this particular faculty member had women, rather than men, contract faculty in mind when making this point. This stereotyping is similar to that existing in *Price Waterhouse v. Hopkins* where the Court held that partners’ comments regarding a female partnership candidate reflected the existence of sex stereotyping.¹¹⁰ In *Price Waterhouse*, the evidence was stronger because the partnership counted a vote from a partner who had repeatedly and openly proclaimed that he would not seriously consider women for partnership and that women were not even capable of functioning as senior managers.¹¹¹ Furthermore, Anne Hopkins was advised to dress more femininely and wear lipstick and makeup in order to be a more attractive candidate for partnership, advice that created a direct link between stereotyping and her failure to make partner.¹¹²

109. I will address below whether these policies have a disparate impact on women. Here, I am limiting the discussion to the question of whether they are intentionally discriminatory in their enactment or their application.

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

111. *Id.* at 236.

112. *Id.* at 235.

Nonetheless, the evidence here is not insubstantial. There is at least one member of the faculty who has made clear that s/he is thinking of contract faculty as women. Under *Price Waterhouse*, there is a question of whether NLS should have permitted this faculty member to vote on tenure-track positions, or at least on the hiring decisions concerning women's applications for tenure-track positions. Moreover, at NLS a second member of the faculty reinforced the sex stereotyping argument. He or she argued "to be a stand-up tenure-track teacher is totally different. You have to be *tough* and *demanding*. You can not tolerate *wimps*. To be a contract faculty member teaching students legal writing requires a 'soft touch'."¹¹³ This comment describes the job of tenure-track faculty in more stereotypically masculine terms such as "tough" and "demanding," and by contrast, sees contract faculty as stereotypically feminine.¹¹⁴ Combined with the other evidence, these comments may be sufficient to create a triable issue of fact concerning whether sex was a motivating factor in establishing the rule forbidding contract faculty from being hired directly onto the tenure track.

2) Refusal to Hire National Law School Graduates

Policy 6.0 which prohibits the hiring of NLS graduates onto the tenure track unless the graduate has been on the tenure track of another law school or has earned an LLM from a top twenty law school is also facially neutral. The school's actions, however, have raised questions concerning the faculty's intent in enacting this provision. These actions include: 1) passing the policy; 2) not applying the policy to contract positions; 3) making an exception to the policy for a male graduate; 4) refusing to make an exception to the policy for a female graduate who is apparently equally qualified to the male; 5) filling at least one-third of its lower paid, less prestigious contract positions with women NLS graduates; 6) filling the contract positions with 90% women; and 7) enacting Rule 5.0, which bans the direct hiring of contract faculty into tenure-track positions, a policy that effectively bars a large number of women faculty from moving into the tenure eligible positions.

113. (Emphasis added).

114. There is some question concerning whether the intent of individual members of a committee or collegial body should be imputed to the intent of the employer. For an interesting discussion of this issue, see ZIMMER, *supra* note 102, at 175-77.

Furthermore, the hiring requirements for the contract positions emphasize stereotypically feminine traits and pursuant to these requirements the faculty hired 90% women into these jobs. The plaintiffs therefore can argue that there is an inference that these stereotypical views affected the hiring process for contract positions, and in turn, the hiring process for tenure-track positions. While an awareness that a particular policy will create a disparate effect on women or other members of a protected class may be insufficient to prove intent to discriminate,¹¹⁵ the fact that twenty-seven out of thirty positions for contract faculty are held by women may, along with the above evidence, raise an inference as to the faculty's motive for passing this policy or its intent in executing the policy. This evidence, combined with the anecdotal evidence regarding Danielle Katz' treatment¹¹⁶ in contrast to the treatment of Stephen King, may be sufficient to create a genuine issue of material fact concerning whether the policies and standards were created in order to discriminate against women and/or are applied in a discriminatory fashion. Comments of Dean Kool, Jan Shank and Ben Stillet bolster Danielle's argument that the faculty considers women more suited for the lower paying, less prestigious jobs of contract faculty. When Danielle approached Dean Kool about Danielle's job prospects as a tenure-track applicant, Dean Kool responded that Danielle was a valued mentor to the students, implying that Danielle was more suited for a "mentoring" position than a more prestigious tenure-track position. After Danielle applied for the tenure-track position and her friends and mentors on the tenure track began to shun her, Jan Shank told Danielle that she was now considered a "whiner," a term frequently associated with women, rather than men, who speak their minds.¹¹⁷ When Danielle told Ben Stillet that she wished to apply for the Business Organizations positions, Ben responded that Danielle was "more suited" to legal writing because she is "so good with the students,

115. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) (upholding a Massachusetts' veterans' preference in state employment law under an Equal Protection challenge because the law was not enacted with the purpose to discriminate against women because of their sex).

116. I discuss Danielle Katz' treatment more fully below in the section on individual disparate treatment.

117. *See, e.g., Fine v. Ryan Int'l Airlines*, 305 F.3d 746, 752 (7th Cir. 2002) (noting that calling a woman pilot a "whiner" because she opposes practices that are illegal is stereotyping because of sex); *Reinard v. Ashcroft*, 2003 U.S. Dist. LEXIS 23693 at *15-16 (E.D. Pa., April 21, 2003)(holding evidence that plaintiff was called "bat-tleax," "whiner," and "white bitch" was sufficient to prove sexual stereotyping).

especially the women students." Ben also treated the possibility of discrimination against Danielle because of her sex in a dismissive fashion, telling her that he has a "wife who bugs me with this stuff." These comments by key decision makers at the institution constitute powerful evidence of sex stereotyping in decision making with reference to Danielle and to the policies and standards that have led to an institution whose hierarchy is top heavy with men and bottom heavy with women.

The defendants' response to this evidence is *EEOC v. Sears, Roebuck & Co.*¹¹⁸ In *Sears*, the plaintiffs alleged that the defendant had engaged in a pattern and practice of discrimination against female salespersons at Sears. The evidence demonstrated that women predominated in the non-commissioned sales jobs at Sears, while men held the majority of the commissioned sales positions.¹¹⁹ This disparity led to much greater pay and benefits for the men. While the statistics in favor of the women's case were very strong, the Seventh Circuit Court of Appeals held that the defendant's generalized evidence of lack of women's interest in commissioned sales jobs was sufficient to rebut the plaintiffs' statistical prima facie case.¹²⁰

Citing *Sears*, NLS will argue that women chose to work in the lower paid positions at a higher rate than men did. Because these positions are nine month positions requiring no scholarship, NLS will argue, the jobs accommodate intelligent women lawyers who are raising a family at the same time. While the contract faculty may work as hard as the tenure-track faculty during the school year, NLS will argue, the contract faculty may choose not to work in the summer and do not have to spend inordinate time researching. NLS will contend that there is no convincing statistical evidence that the tenure-track positions were illegally allocated to men and, while the evidence suggests that NLS hires women at a much higher rate than men into the con-

118. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988) (affirming judgment in favor of employer on gender discrimination because the EEOC failed to present sufficient evidence to rebut employer's evidence that women were underrepresented in commission sales positions because women lacked interest in securing such employment).

119. *Id.* at 361, 363-64 (noting huge statistical disparities favoring men in commission sales positions, such as that women comprised only 1.7% of full-time commission sales hires in 1973 and between 5.3% and 10.5% thereafter and that women represented 9.9% of full-time commission sales hires nationwide in 1973, 17.6% in 1974, and a range of 30.7% to 40.5% from 1974-1980).

120. *Id.* at 360.

tract positions, this higher rate is likely indicative of the differential between the interests of men and women. While the hypothetical indicates that the percentages of men and women completing AALS applications for both tenure-track and contract positions is equal, NLS will argue that the plaintiffs have presented no evidence demonstrating that the men in the pool of FAR registrants were as interested as women in the pool in the contract positions. Furthermore, NLS will argue that the plaintiffs have not presented evidence that local male graduates applied for, but were denied, positions as contract faculty members.

If the courts apply the reasoning of the Seventh Circuit, the defendant will prevail on this argument if it can present expert evidence concerning the lack of interest of women to work as tenure-track faculty members.¹²¹ There is, however, considerable criticism of this opinion¹²² and a question as to whether other courts of appeals would follow its reasoning.¹²³ Moreover, the plaintiffs in this case would be wise, in light of *Sears*, to offer anecdotal evidence demonstrating that the faculty had stereotyped the contract positions as “women’s jobs,” and other evidence of sex discrimination and stereotyping. In this case, there is some evidence of stereotyping of the contract positions as being “women’s jobs,” as well as the refusal to consider a competent woman who is on the contract faculty adequate for a position on the tenure track. This evidence, which includes statements that the job requires a “soft touch,” and comments to Danielle Katz that she does well as a legal writing teacher, “especially with the women students” is strong anecdotal evidence of sex discrimination that, when combined with the statistical evidence, may be sufficient to overcome the defendant’s expert testimony about lack of interest. Moreover, the plaintiffs would be well-advised to present the testimony of other women contract faculty members who are interested in and/or have applied for tenure-track appointments at NLS.

121. *Id.* at 322 (accepting district court’s finding that defendant provided sufficient evidence for concluding women were not as interested in commission sales positions).

122. *See, e.g.,* Schultz, *Telling Stories About Women and Work*, *supra* note 6, at 1753 (noting that few cases have received more attention or provoked more controversy than the 7th Circuit’s opinion in *EEOC v. Sears, Roebuck, & Co.*, 839 F.2d 302 (7th Cir. 1988)).

123. *See e.g.,* *EEOC v. Gen. Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 581 (9th Cir. 1989) (rejecting the approach of the majority in *Sears* as placing a heavy and perhaps insurmountable burden on the plaintiff with regard to establishing the probativeness of proffered statistical data).

In sum, while it would be difficult to prove a cause of action for systemic disparate treatment based on the hiring statistics onto the tenure track alone, there may be sufficient anecdotal evidence when combined with the statistics concerning the hiring process into the contract positions that would support a cause of action for systemic disparate treatment.

2. Liability for Disparate Impact on Women Faculty and Applicants

To prove disparate impact, the plaintiffs do not have to prove discriminatory intent. Rather, the plaintiffs must prove that a specific policy or practice of the defendant has a disparate adverse effect on a protected class.¹²⁴ If the plaintiff proves that it is impossible to separate a specific policy or practice from the entire process, the plaintiff may prove a disparate impact by showing that the aggregated policies create a disparate impact.¹²⁵ If the plaintiffs prove that the defendant's practice(s), policies, or the aggregated process created a disparate impact on a protected group, the burden of production and persuasion shifts to the defendant to prove that the policy is related to the job in question and consistent with business necessity.¹²⁶ Once the defendant meets its burden of persuasion, the burdens of production and persuasion shift back to the plaintiffs to prove an alternative employment practice exists that has a less discriminatory effect on the protected class and that is equally effective.¹²⁷

At NLS there are two neutral policies as well as a number of neutral standards for hiring onto the tenure track, some of which

124. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (explaining that in Title VII Congress intended to remove artificial, arbitrary, and unnecessary barriers to employment when those barriers operate invidiously to permit discrimination on the basis of an impermissible classification).

125. 42 U.S.C. § 2000e-2(k)(1) (2000).

126. *Id.*

127. *Id.* This is the three-part methodology the courts continue to use even after the passage of the 1991 Act, even though the language of the act makes it appear that the plaintiff can prove a disparate impact merely by showing an alternative policy. See *e.g.*, *Allen v. Chicago*, 351 F.3d 306, 312 (7th Cir. 2003) (placing ultimate burden on plaintiff to show that a proposed alternative is available, equally viable, and less discriminatory); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 (2d Cir. 2001) (explaining that in the "third stage" of a disparate impact claim the burden of persuasion shifts back to the plaintiffs to prove "the availability of an alternative policy or practice that would satisfy the business necessity, but would do so without producing the disparate effect"); *Anderson v. Zubieta*, 180 F.3d 329, 338-39 (D.C. Cir. 1999) (describing the burden-shifting framework in disparate impact cases as a three-step process).

may have a disparate impact on the hiring of women into tenure-track jobs, either alone or as a group. First, the requirement that the tenure-track applicants have prestigious clerkships has a disparate impact on women because only 30% of the persons with these qualifications are women while 70% are men. This is true even though women fall into the category of very well qualified applicants for these jobs. Fifty percent of the applicants are women and fifty percent of the persons in the top 10% of the class of the top 50 law schools are women. Besides the clerkship requirement, the requirement that tenure-track faculty be in the top 10% of the top twenty law schools will also have a disparate effect on women because women represent only 45% of persons in this category.¹²⁸ Assuming that the 30% is a subset of the 45%, there is a 70/30 differential apparently caused by the clerkship requirement. Thus, it appears that the prestigious clerkship requirement may be largely responsible for the low percentage of women hired onto the tenure track over the past six years.

Because the contract faculty is 90% female and only 10% male, Rule 5.0 which bans the direct movement of contract faculty into tenure-track positions clearly has a disparate impact on women.¹²⁹ Furthermore, the plaintiffs can argue that women who take contract jobs are less likely to be mobile because they have families and will therefore have less of an opportunity to “burnish” their résumés by getting a job somewhere else first. Plaintiffs would likely need to bolster this argument with proof of the veracity of this assumption, using testimony from the women who occupy the positions and/or expert testimony from social

128. These percentages are fictitious. It is true, however, that studies have shown that women who enter the more prestigious law schools as equals do not perform as well as the men. See Guinier, *supra* note 39, at 3; Bashi & Iskander, *supra* note 39, at 505-06; Bowers, *supra* note 39, at 121-22.

129. According to the standard in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989), the plaintiffs would have to prove that the women who are denied movement into the tenure-track jobs because they are contract faculty members are otherwise qualified for the job. While it is likely that not all women or men in contract positions possess the interest or ability to do the research and scholarship required of tenure-track faculty at NLS, the research demonstrates that many of the women who occupy the positions as contract faculty would be qualified to write and publish excellent scholarship if given the support. In fact, many contract faculty members across the country are doing just that. See Terrill Pollman & Linda Edwards, *Scholarship Project: Publications by Teachers of Legal Writing and Rhetoric*, at <http://www.legalwritingscholarship.org> (last visited Mar. 5, 2005) (on file with UCLA WOMEN'S L.J.) (collecting information concerning published writings by teachers of legal writing and rhetoric).

scientists demonstrating that women still tend to be more anchored to the locations where their spouses' jobs exist.¹³⁰

Rule 6.0, which bans the direct hiring of NLS's graduates, may also have a disparate impact, but this is less clear. From this hypothetical, we do not know how many of NLS's graduates have applied for or would apply for positions. Furthermore, we do not know how many of them would be qualified for the positions. But the plaintiffs can argue that this policy has a greater disparate impact on women graduates who are otherwise qualified for the job because they are likely to be less able to leave the Des Moines area to seek a job elsewhere than their male competitors. Research demonstrates that women are generally less mobile than their husbands.¹³¹

The defendant will respond that all of the standards and policies are related to the job in question and consistent with business necessity. The defendant will argue that in order to continue to rank at number thirty or to move up in the rankings, NLS must have a very good reputation. A faculty builds this reputation by hiring persons with the most respected credentials. Moreover, candidates with these credentials are more interested in scholarship, have a better legal education, and are better teachers in the doctrinal courses.

NLS will make similar arguments concerning Rule 6.0, the policy of not hiring contract faculty onto the tenure track. NLS will argue that the hiring of contract faculty onto the tenure track could lead to the slippery slope of hiring faculty based on relationships rather than credentials. Hiring from a broad spectrum of schools is preferable and persons who have practiced elsewhere will be better law faculty in scholarship and teaching.

130. See, e.g., Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder: An Empirical Perspective*, 10 UCLA WOMEN'S L.J. 241, 245 (2000) (finding in academia women are less geographically mobile than their male peers due to family and household commitments).

131. See ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 266 (1989) (finding half of the surveyed women plan to put their husband's job first and two thirds of men plan to put their own job first); see also Browne, *supra* note 4, at 1071 (describing as a "fact of life in modern America" that men are more willing to relocate to further their careers); Deborah J. Merritt et al., *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395, 419 (noting that among applicants for law teaching positions, women were approximately twice as likely to impose major geographic constraints on their searches); Cynthia Deitch & Susan W. Sanderson, *Geographic Constraints on Married Women's Careers*, 14 WORK & OCCUPATIONS 616, 622 (1987) (noting in a study of dual-career marriages that far more women relocated for their husbands' careers than vice versa).

The plaintiffs will respond that the defendant has not met its burden of persuasion. While having a prestigious clerkship and ranking in the top 10% of the top twenty schools may be job related, NLS has not shown that these criteria are consistent with the business necessity of the law school.¹³² The plaintiffs' argument is strong because NLS has hired Stephen King, who clearly did not graduate from a school ranked in the top twenty and who apparently did not have a prestigious clerkship. The plaintiffs may be able to prove that there are other successful law professors at NLS who do not meet these standards. This evidence tends to refute the defendant's argument that these hiring standards are "consistent with business necessity." In fact, NLS's only possible responses are that these criteria are rough indicators of future success as law professors and that hiring faculty with these indicators improves the reputation of the law school. While courts generally hesitate to determine how businesses should be run, in this case, because the defendant is a law school, the courts are arguably better qualified to consider whether the defendant has met its burden of proving that its hiring standards are consistent with business necessity.

Moreover, the plaintiffs can make a fairly convincing argument that a law school's search to improve its reputation, if based on the prestige of the law school attended by faculty, the class rank of the faculty, and the prestige of the clerkship served by faculty, while facially neutral, creates a disparate impact on qualified women which can not be justified by business necessity. At least a number of studies demonstrate that women attending the most prestigious law schools with equal credentials to the men attending the schools do not achieve in the same way as the men do; many women law students do not form the important personal relationships that their male colleagues form with male faculty who help smooth the way of the male students into prestigious clerkships.¹³³

The plaintiffs will also argue that the defendant has not demonstrated that the policies of refusing to hire contract faculty and NLS graduates into tenure-track positions unless their résumés are either job related or consistent with business necessity. The hiring of Stephen King, an NLS graduate, will bolster the plaintiffs' arguments.

132. In fact, the defendant has not even shown that the ranking performed by U.S. News & World Report is accurate.

133. See Bashi & Iskander, *supra* note 39, at 505-06.

Furthermore, even assuming that the defendant has sufficient evidence to prove that its policies and hiring standards are job related and consistent with business necessity, the plaintiffs will likely prove that there are less discriminatory alternatives to these policies that are equally effective in achieving NLS' goals.¹³⁴ Instead of applying absolute hiring standards and no-hiring policies, the plaintiffs will argue that NLS should consider each individual's education, experience and achievements. This argument is especially strong when it comes to Rule 6.0, which forbids the hiring of contract faculty directly onto the tenure track. In fact, faculty voting on appointments have a greater opportunity to observe the work habits, scholarly interests, teaching, and service of an applicant who is a member of the contract faculty than of an applicant who has never worked at the law school. While the contract faculty as a whole may be less interested in scholarship than the tenured and tenure-track faculty as a whole, this generalization is not necessarily an accurate description of all members of the contract faculty. NLS will respond that it is too inefficient and difficult to make these individual determinations and that the rule shields the institution against difficult, inefficient decision making. Moreover, NLS will argue that the hiring standards and policies preserve the institution's reputation by protecting it against insular hiring. There is little validity to the first argument because the institution must make time-consuming individual evaluations of all other tenure-track applicants. Thus, it appears that an interest in efficiency does not justify the standards and policies.

There may be some validity to the "self-protection" argument, but this argument appears to admit that the justification for the standards and policies is to avoid making the "hard

134. Title VII, in its relevant part, provides:

- (k) Burden of proof in disparate impact cases.
- (1) (A) An unlawful employment practice based on disparate impact is established under this title only if—
 - (i) 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; or (ii) the complaining party [demonstrates] . . . an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1) (2000).

choices.” This justification raises the question of whether the voting faculty is united concerning the mission of the school. Policies and practices that have a disparate effect on members of protected classes that would otherwise be illegal should not be justified by an institution’s failure to trust its members. This failure to trust may be either a conscious or an unconscious fear that an individual assessment of contract faculty applicants for tenure-track positions will result in hiring more women. Or, it may reflect a concern on the part of some powerful male faculty members that the failure to have self-protection policies will deprive that group of male faculty of their more powerful voices in individual cases.¹³⁵

3. Liability to Danielle Katz as an Individual For Sex Discrimination

a. McDonnell Douglas/Reeves

Danielle has filed a charge with the EEOC alleging sex discrimination, sexual harassment, and retaliation. As to her sex discrimination claim, Danielle will use the familiar *McDonnell Douglas*¹³⁶ approach. She can prove that she is a woman, that she applied for a position on the tenure track, and that she was rejected. There will be a dispute as to whether she can make out a prima facie case given her qualifications, which do not meet the “ordinary” qualifications requiring a federal or state supreme court clerkship and the requirement that one have graduated from a school ranked in the top twenty law schools. Nonetheless, Danielle graduated 10th in a class of over 600 students (well above the top 5%), and a man, Stephen King, who graduated fifth in her class was hired into a tenure-track appointment even though he did not meet these requirements. Moreover, while King has published one article, Danielle has published three arti-

135. While in this hypothetical women and men are equally represented in the FAR, this equal representation is not actually accurate. Because women represent approximately 50% of law school graduates and presumably approximately one-half of qualified persons for law school teaching positions, but only 33% of the FAR registrants, an argument could be made that using the FAR registry as an exclusive means of recruiting faculty is a policy or practice that has a disparate impact on women in hiring for law school faculty positions. While it is likely that law schools can prove that use of the Faculty Recruitment process of the AALS is job related and consistent with business necessity, it may be more difficult to prove that resorting to this process exclusively to hire tenured or tenure-track faculty members is consistent with business necessity. For a discussion of this issue, see *infra* note 171 and accompanying text.

136. See *supra* note 57 and accompanying text.

cles, evidence demonstrating that she has a scholarly agenda at least equal to King's. Furthermore, Danielle has taught Business Organizations, the very course NLS seeks to fill, and she has received very good evaluations. There is at least a question of fact as to whether Danielle is sufficiently qualified for purposes of making out a prima facie case of sex discrimination.

Once the plaintiff makes out a prima facie case, the defendant has the burden to produce evidence of a legitimate, non-discriminatory reason for the adverse employment decision. Here, the defendant will assert that Danielle did not meet its hiring standards because she did not have a degree from a school in the top twenty law schools and lacked a prestigious clerkship. NLS will further assert that Rules 5.0 and 6.0 prohibit Danielle's candidacy because she is an NLS graduate, a member of the contract faculty at NLS, has not taught elsewhere on the tenure track, and has not earned an LLM degree. This evidence of defendant's reasons for its failure to hire Danielle meets NLS' burden of producing a legitimate non-discriminatory reason for its employment decision.¹³⁷

The burden of production shifts to the plaintiff and merges with the plaintiff's ultimate burden of proving that the defendant's proffered legitimate non-discriminatory reasons for its failure to hire Danielle are pretexts for sex discrimination. Danielle will argue that NLS's hiring of Stephen King, a male graduate of NLS who neither graduated from a top twenty school nor had a prestigious clerkship, raises genuine issues of material fact concerning NLS's intent in establishing and/or enforcing its hiring standards and faculty rules 5.0 and 6.0. Furthermore, Danielle will offer evidence of NLS' hiring statistics: the evidence that contract faculty are predominantly female and are paid less for lower status positions, and the percent of women graduating from the top twenty schools who are women (45%) compared to the percent of women tenured or tenure-track faculty at NLS

137. While it may seem obvious gender neutral rules such as Rules 5.0 and 6.0 that have a discriminatory impact on women should not be considered "legitimate, non-discriminatory reasons" sufficient to shift the burden of production back to the plaintiff in a case governed by the *McDonnell Douglas* methodology, the Supreme Court disagrees. In *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003), the Supreme Court overturned a Ninth Circuit decision that held that a neutral policy causing a disparate impact on persons with disabilities could not serve as a "legitimate non-discriminatory reason" for an employment decision in a case of intentional discrimination brought under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (2002).

(approximately 20-25%). Finally, Danielle will offer the evidence of stereotyping through comments that NLS faculty made at the time it enacted its policies and, later, to Danielle individually when she expressed an interest in a tenure-track position.

Examples of stereotyping comments made at faculty meetings include the concern that contract faculty are more interested in teaching than in scholarship, the fear that a contract faculty member might try to “worm her way into a tenure-track position by being nice to the tenured and tenure-track faculty members,” and the characterization of legal writing teaching as requiring a “soft touch” in contrast to doctrinal teaching, which requires a person who is “tough” and “demanding” and not a “wimp.” These comments tend to be gendered in that they attribute to legal writing teaching traditional feminine characteristics, such as supportiveness, softness, less intellectual interest, and contentment, but attribute to doctrinal teaching traditional masculine characteristics, such as intellectual vigor and toughness. Similar comments made to Danielle demonstrate stereotyping based on sex. For example, Sanders Jackson told Danielle not to bother to apply for the tenure-track position, noting she was “better suited” for legal writing and research because she was so good with the students, “especially the women students.” Sanders also stated that Stephen King was “clearly an intellectual,” while characterizing Danielle as a “hard worker.” When Danielle challenged Sanders Jackson, questioning whether the difference between her and King was sex, Jackson said, “Get off of it, Danielle. I’ve got a wife who bugs me with this stuff.” Comments of her mentor, Jan Shank, also evidence stereotyping. While Danielle had already published three articles, Jan told Danielle to write two or three more articles in order to convince her colleagues that Danielle was ready for the “big leagues.” Danielle will contrast this comment with the treatment of Stephen King, who published only one article. Furthermore, Shank said that if Danielle pushes for a job it would “ruin [her] fine reputation as someone who gets along with everyone.” This reputation appears to fit with the stereotype of the woman who gets along but does not challenge inequalities or make others uncomfortable.

Danielle can also show that NLS’ adherence to its policies is pretext for sex discrimination by testifying about the telephone conversation with Rob Seitz and the history of sexual harassment she had with Seitz. Seitz told Danielle that the Dean had

quashed her application, and he called her a "bitch." Seitz's comments to Danielle raise an inference that Seitz, who was a member of the Appointments Committee, may have influenced the decision not to interview Danielle because she did not succumb to his sexual advances.

The combination of this statistical and anecdotal evidence is sufficient to raise a genuine issue of fact concerning whether the defendant's legitimate non-discriminatory reasons are pretext for sex discrimination.¹³⁸

b. *Mixed Motives Analysis*

In 1991, Congress amended the 1964 Civil Rights Act to permit an employee to prove a violation of Title VII by demonstrating that a protected characteristic was a motivating factor in the adverse employment action, even though other reasons might have existed at the time of the employment action.¹³⁹ In *Desert Palace, Inc. v. Costa*,¹⁴⁰ the Supreme Court held that under the 1991 Civil Rights Act the plaintiff may prove that the illegal criterion is a "motivating factor" by using circumstantial evidence, direct evidence, or a combination of the two. Once a plaintiff proves that the illegal criterion was a "motivating factor" in the employment decision, a violation of Title VII is established.¹⁴¹

138. One issue NLS would raise is the question of whether Danielle made a timely filing with the EEOC. Assuming that Iowa is a jurisdiction with a state agency that is responsible for enforcing state anti-discrimination laws, Danielle will have 300 days to file a charge from the date of a discrete act. See 42 U.S.C. § 2000e-5(e)(1) (2000); see also *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 119 (2002) (a complainant has 300 days to file a charge from an incident which is a discrete act). Whether Danielle could get damages for NLS' failure to hire her the year before is unclear. The defendant would argue that it was clear in March 2003 that it had ceased its search for that year and she should have filed within 300 days of that date for the first refusal to hire her onto the tenure track. She was on the faculty, and while we don't know for sure if she knew about the process, it appears she did. However, Danielle can argue she was never notified, and therefore no discrete act took place until November 20, 2003.

139. 42 U.S.C. § 2000e-2(m) (2000); see also *supra* note 59 and accompanying text.

140. *Desert Palace*, 539 U.S. 90 (2003).

141. Title VII, in its relevant part, states:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 U.S.C. § 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (2000).

The defendant, however, has the opportunity to limit the plaintiff's remedies by proving by a preponderance of the evidence that it "would have taken the same action in the absence of the impermissible motivating factor."¹⁴² If the defendant makes this proof, the court may award declaratory and injunctive relief (other than hiring, promotion or reinstatement), and attorney's fees and costs, but may not award damages or other monetary relief such as backpay.¹⁴³

The combination of statistical and anecdotal evidence in Danielle's favor is quite strong and may well be sufficient to withstand the defendants' motion for summary judgment. Assuming that it is sufficient, a reasonable fact finder would be permitted to find the defendant liable. If the defendant's liability is established, NLS would then have the burden of persuading the fact finder that it would have taken the same action even absent its discriminatory motive. NLS can attempt to meet its burden by presenting evidence of other candidates in the FAR who have superior credentials to those of Danielle, or, perhaps, after *Raytheon v. Hernandez*,¹⁴⁴ by proving that it would have followed Rules 5.0 and 6.0. If the defendant can convince the jury that these rules were not enacted with a purpose to discriminate because of a person's sex, *Raytheon* may permit the defendant to argue that the rules are gender neutral and thereby serve as a

142. 42 U.S.C. § 2000e-5(g) (2000).

143. Title VII, in relevant part, provides:

- (2) (A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 U.S.C. § 2000e-3(a)].
- (B) On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m) [42 U.S.C. § 2000e-2(m)]; and(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Id. § 2000e-5(g)(2).

144. See case cited *supra* note 137 and accompanying text.

defense to a disparate treatment case. If NLS succeeds in proving that it would have made the same decision absent the illegal criterion, Danielle will be able to recover attorneys' fees and costs attributable to proving her mixed motives case and declaratory and injunctive relief, excluding reinstatement into the position of a tenure-track faculty member. If NLS fails to prove that it would have made the same decision absent sex discrimination, the court could award to Danielle the entire panoply of remedies available under Title VII, including damages, backpay and front pay, attorney's fees, costs, declaratory and injunctive relief.¹⁴⁵

c. *Sexual Harassment*

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment because of an individual's race, color, religion, sex, or national origin. The express language of the Act does not mention harassment.¹⁴⁶ Nonetheless, the courts began to recognize that racial harassment created a cause of action, based on an intimidating, hostile or offensive working environment if that environment alters the terms and conditions of the plaintiff's employment. Following the lower courts, the Equal Employment Opportunity Commission (EEOC) issued guidelines in 1980 for Title VII liability in sexual harassment cases. The guidelines distinguished between harassment that is directly linked to an economic quid pro quo and harassment that alters the terms and conditions of employment because it creates an abusive environment based on a person's sex. In either case, the guidelines state, the conduct constitutes actionable sexual harassment under Title VII if it has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."¹⁴⁷ After the guidelines were issued, lower courts uniformly held that a cause of action existed under Title VII for a hostile work environment based on sexual harassment.¹⁴⁸

In 1986, in *Meritor Savings Bank v. Vinson*,¹⁴⁹ the Supreme Court confirmed that sexual harassment creating a hostile work-

145. See 42 U.S.C. § 1981a(b) (2000) (compensatory and punitive damages); *Id.* § 2000e-5(g) (2000) (injunctive relief, declaratory relief, orders of affirmative action including reinstatement or hiring, backpay, and attorney's fees and costs).

146. 42 U.S.C. § 2000e-2(a) (2000).

147. See 29 C.F.R. § 1604.11(a)(3).

148. *E.g.*, *Katz v. Dole*, 709 F.2d 251, 254-255 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

149. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

ing environment sufficiently severe or pervasive to alter a person's work environment constitutes sex discrimination under Title VII. In *Harris v. Forklift Systems, Inc.*,¹⁵⁰ the Court held that a plaintiff need not demonstrate severe psychological damage to state a cause of action for a hostile work environment. Rather, a plaintiff proves a violation of Title VII when she shows that the harassment is sufficiently severe or pervasive by objective¹⁵¹ and subjective measures.¹⁵² In *Oncale v. Sundowner Offshore Services, Inc.*,¹⁵³ the Court held that Title VII creates a

150. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

151. There is a split among the circuits concerning whether the objective standard is the "reasonable woman" standard or the "reasonable person" standard. In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the Ninth Circuit adopted the "reasonable woman" standard, noting that use of a "reasonable person" standard might reinforce the "prevailing level of discrimination." *Id.* at 878. The court preferred to analyze whether a work environment is hostile from a victim's perspective, a view that would require an analysis of the different perspectives of men and women. *Id.* See also *Gray v. Genlyte Group, Inc.*, 289 F.3d 128 (1st Cir. 2002), *reh'g and reh'g en banc, denied* 306 F.3d 1151 (1st Cir. 2002) (applying the "reasonable woman" standard in a case applying Massachusetts law). Other courts refused to adopt the "reasonable woman" standard, noting that a sex-based standard would reinforce stereotypes about women. See, e.g., *Richardson v. N.Y. State Dep't of Correctional Services*, 180 F.3d 426 (2d Cir. 1999).

Although the Supreme Court has not addressed the issue directly, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) the Court defined an objectively hostile work environment as one that "a reasonable person would find hostile or abusive." *Id.* at 21. It declined to address the question of the validity of recently proposed EEOC regulations that specifically adopted both a "reasonable person" standard and a "victim's perspective" standard. *Id.* at 23 (citing 58 Fed. Reg. 51 266 (proposed 29 C.F.R. § 1609.19(c)) (1993)). The EEOC proposed regulation which was later withdrawn, see 59 Fed. Reg. 51 396, stated, "[t]he reasonable person standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability."

Harris does not settle the question of whether the reasonable woman standard is still good law. *Oncale*, which was decided after *Harris*, notes that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998); see *id.* at 22-23. This standard is consistent with the reasonable woman standard because it requires the fact finder to consider the plaintiff's position. One aspect of this position is to consider the gender of the alleged victim. The Ninth Circuit continues to use the "reasonable woman" standard. See, e.g., *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158 (9th Cir. 2003) (using the "reasonable woman" standard). For an interesting view of the "reasonable woman" standard, see Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797 (2000), which argues that a reasonable woman standard does not go far enough; it is necessary to examine the facts from an analysis which makes male privilege visible in order to come to the proper conclusion.

152. *Harris*, 510 U.S. at 21 (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 65, 67 (1986)).

153. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

cause of action for sexual harassment where the harassers and the victim are of the same sex if the environment discriminates "because of sex."¹⁵⁴

An employer may be liable for sexual harassment of an employee by the employee's supervisors, co-workers, or the customers of the employer.¹⁵⁵ The standard for liability of the employer depends on the status of the harasser or harassers. If the harasser is a supervisor with immediate or successive authority over the employee, the employer will be vicariously liable for the supervisor's actions. Whether the employer may raise a defense to vicarious liability depends on whether the harasser takes a tangible employment action against the employee. If the harasser is a supervisor and takes a tangible employment action against the employee, the employer will be strictly and vicariously liable to the employee. Under these conditions, the employer may not assert a defense.¹⁵⁶ If the same supervisor creates a hostile work environment but does not take a tangible employment action, the employer is vicariously liable to the harassed employee unless it proves the affirmative defense that: 1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and 2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise."¹⁵⁷ If the harasser is a co-worker or customer, the courts employ a negligence standard holding the employer liable for the actions of the co-worker or customer if the plaintiff proves that the employer knew or had reason to know of the harassment and did not take corrective measures.¹⁵⁸

In this case, Danielle will argue that NLS is vicariously liable for the actions of Rob Seitz, her supervisor. Danielle will allege

154. *Oncale*, 523 U.S. at 80.

155. See *supra* notes 65-67 and accompanying text.

156. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) (holding that no affirmative defense is available when a supervisor's harassment culminates in a tangible employment action); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding same as *Faragher*); see also *Pa. State Police v. Suders*, 124 S.Ct. 2342 (2004) (affirming *Faragher* and *Ellerth* and holding that if the employee is constructively discharged, the employer may assert the affirmative defense unless the constructive discharge occurred as part of a supervisor's "official act").

157. *Ellerth*, 524 U.S. at 765.

158. See *id.* at 759 (noting that negligence sets a minimum standard for employer liability under Title VII); *Faragher*, 524 U.S. at 789 (indicating that employer's knowledge of harassment combined with inaction might constitute "demonstrable negligence"); see also *supra* notes 66, 67.

that Seitz took a tangible job action against her. She will argue that because she failed to have sex with him, he influenced the committee to deny her the right to interview for a tenure-track position.¹⁵⁹ The defendant will argue that vicarious liability is the improper standard to apply in this case because Rob Seitz is not Danielle's supervisor. It will point to the relationship that the tenured faculty members have with the contract faculty. Although the tenured faculty has the right to give input into the reappointment decisions concerning contract faculty, it does not make the ultimate decision. Thus, the employer will argue that Seitz is a co-worker of Danielle Katz and NLS should be liable only if she can prove that it knew or had reason to know of the harassment, but failed to take corrective action. Danielle will respond that although Seitz may not have had clear supervisory authority over her employment and reappointment, he acted with the power of the employer as a member of the Appointments Committee, and he used this power to deny her an opportunity to be hired because of her sex. Thus, Danielle will argue, Seitz fulfilled the role of a "supervisor" under the reasoning of *Ellerth* and *Faragher* because he used his power and position with the employer to impose a tangible job action on her because of her refusal to have sex with him.¹⁶⁰

159. Of course, Danielle will be required to demonstrate that Rob's behavior constituted harassment. To do so, Danielle must show that his behavior was unwelcome, severe or pervasive and because of sex. Given the fact pattern, Danielle should have little trouble showing that Rob's behavior meets these requirements. While originally Danielle agreed to have coffee with Rob, his behavior escalated beyond comments about muscular legged children to brushing up against her and finally, fondling her in her office. Danielle unequivocally showed that the behavior was unwelcome when she threatened to use the pepper spray against Rob. Certainly a jury could conclude that the combination of acts by Rob in 1998 were sufficiently severe or pervasive to alter the terms and conditions of the workplace of a reasonable woman. Perhaps the defense will argue, however, that Danielle was undaunted by Rob's behavior, as demonstrated by her failure to report it. There is no evidence that she told anyone despite the presence of a policy. Thus the defense can argue that as a matter of law the behavior did not alter the terms and conditions of her employment subjectively. Danielle can respond using *Harris*, which does not require a finding that the plaintiff was unable to do her job. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Assuming Danielle gets over this hurdle, it would be difficult for the defendants to argue that Rob's behavior was not because of her sex. Defendants will of course try to argue that the comment by Rob in 2003 is not a part of the hostile working environment that he created earlier. Therefore, defendants will argue, the state of limitations has passed. See *infra* note 161.

160. See *Ellerth*, 524 U.S. at 762 (reasoning that tangible employment actions fall within the "special province of the supervisor" and that through an agency relationship the supervisor has been empowered by the company to make such decisions); *Faragher*, 524 U.S. at 791 (stating "[t]he supervisor directs and controls the conduct

NLS will respond that although there was a tangible job action, that action was taken by the entire Appointments Committee and therefore Danielle cannot prove that Rob Seitz caused the committee to refuse to hire her because of her sex. This issue appears to create a question of fact concerning the relationship Seitz had with the rest of the committee and the power he exercised over the committee, if any. If the fact finder decides that Seitz exercised his power to block Danielle's job possibilities at NLS, the court should instruct the fact finder to hold the employer vicariously liable.

If the fact finder finds that Seitz either did not have the power to influence the committee or did not exercise the power, the court should instruct the fact finder to hold that even if Rob Seitz was a supervisor for purposes of *Ellerth* and *Faragher* analysis because of his powerful position with reference to the plaintiff, he did not cause the tangible job action. Under this circumstance, the employer may still be liable for Rob's creation of a hostile work environment if the plaintiff can prove that the statute of limitations had not run on Rob's earlier harassing behavior toward Danielle.¹⁶¹ In this situation, however, the employer would have the opportunity to make out the affirmative defense. The employer would attempt to make out its defense that it had made reasonable efforts to prevent and correct harassment by promulgating a policy and by communicating it to the employees. It will argue that the plaintiff unreasonably failed to report to the employer the behavior of Rob Seitz. Danielle will respond that her failure to report Seitz' behavior to the employer was reasonable because he was a very powerful member of the faculty and she feared retaliation. Under most of the cases as

of the employees, and the manner of doing so may inure to the employer's benefit or detriment, including subjecting the employer to Title VII liability").

161. In order for Rob's earlier acts to be part of a timely hostile work environment claim brought today, under *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), Danielle must prove that the hostile work environment was one and the same environment. The plaintiff can argue here that although 5 years passed between Rob's acts and his call to her in 2003, Rob's acts created one hostile work environment because they were acts by the same actor and directed at the same victim. According to *Morgan*, only one act in furtherance of the hostile work environment must fall within the 300 day period before filing with the EEOC in order to recover for hostile work environment. *Id.* at 117. Here, the recent act is the phone call and comment, "that's what bitches get." The defendant will argue that Rob's comment was so divorced in time and situation from the earlier acts that it is not part of the same hostile work environment. If the defendant's argument is successful, the plaintiff may not recover for the earlier environment, but she may use Rob's prior acts as evidence supporting her subsequent claim.

they now stand, however, this response would likely be inadequate to salvage Danielle's hostile work environment case based on Seitz' behavior.¹⁶²

A third possible avenue for NLS's liability for Rob's actions is through a negligence standard. If the court concludes that Rob and the other faculty were not Danielle's supervisors, Danielle will argue that NLS is liable for sexual and gender harassment¹⁶³ she suffered at NLS. Danielle will allege the incidences in 1998 with Seitz which continued into 2004 with Seitz's comment, "that's what bitches get" constituted sexual harassment and that the employer either knew or should have known about it and failed to take corrective action. If evidence exists to demonstrate that Seitz has harassed other women faculty and/or students, Danielle may successfully argue that she has created a question of fact concerning the defendant's knowledge. As to the gender harassment that Danielle alleges, she will use all of the evidence of comments made to her concerning stereotyping and note that she complained about many of these comments during her employment. Danielle will argue that this atmosphere, combined with the sexual harassment of Rob, created a hostile working environment because of her sex and that the employer should be liable for the environment because it had knowledge or constructive knowledge of the atmosphere.

d. Retaliation

Title VII makes it unlawful to discriminate against an employee or former employee¹⁶⁴ because the person has opposed unlawful practice(s) under Title VII or has participated in an action, by filing a charge, assisting, testifying or participating in a

162. For purposes of applying the *Faragher/Ellerth* defense, courts have found that "a generalized fear of retaliation does not excuse a failure to report sexual harassment." See, e.g., *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1026 (10th Cir. 2001); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999).

163. Many courts distinguish sexual and gender harassment based on the type of harassment suffered. Sexual harassment is harassment using sexual means. Gender harassment is a broader type of harassment that occurs because of a person's gender. It may not include any sexual touching or comments, or even comments based on a person's gender. Rather, it may include harassing behavior that is caused by the victim's sex. This is an emerging area of the law. See *Schultz*, *supra* note 7, at 1689-90, 1720-21 (arguing that disaggregating sexual and gender harassment is not true to Title VII's original idea of forbidding differential treatment because of sex).

164. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that a former employee is an employee for purposes of the retaliation provision).

proceeding or a hearing in a Title VII suit.¹⁶⁵ Because there is nothing in the fact pattern to support an allegation that NLS retaliated against Danielle for filing her charge with the EEOC, Danielle's cause of action is based on her opposition to unlawful practices during her tenure at NLS. While the language of the retaliation provisions protects opposition to "unlawful practices," the EEOC and the courts have agreed that the employer's behavior need not constitute an unlawful practice for a retaliation claim to exist.¹⁶⁶ Rather, the employee must have a reasonable good faith belief that the practice he or she is opposing is unlawful under Title VII.

The Supreme Court recently declined to decide if this is the proper standard.¹⁶⁷ This declination raises question about whether a reasonable good faith belief is sufficient to trigger a claim for retaliation. In *Breeden*, the plaintiff complained to her supervisors about her coworkers' laughter and comments about a personnel file of an applicant who had made a lewd remark in his former employment.¹⁶⁸ The Supreme Court concluded that the isolated coworkers' comments and laughter were insufficient for the plaintiff to form a good faith, reasonable belief that their behavior violated the law.¹⁶⁹ Thus, even if her employer transferred her because of her complaints about her coworker's

165. Title VII, in its relevant part, states:

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 [42 U.S.C. § 2000e], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [42 U.S.C. § 2000e].

42 U.S.C. § 2000e-3(a) (2000).

166. The EEOC Compliance Manual provides:

A person is protected against retaliation for opposing perceived discrimination if s/he had a reasonable and good faith belief that the opposed practices were unlawful. Thus, it is well settled that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful.

EEOC Compliance Manual § 8-II(B)(3)(b), available at <http://www.eeoc.gov/policy/docs/retal.html> (last visited July 16, 2004); *id.* at n.21 (noting that this standard has been adopted by every circuit that has considered the issue); *see, e.g.*, *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997); *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994).

167. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (holding that no reasonable jury could conclude that the plaintiff had a reasonable good faith belief that the defendant's actions constituted retaliation).

168. *Id.* at 269-70.

169. *Id.* at 271.

behavior, the transfer could not constitute retaliation because the plaintiff's complaints were not protected conduct.¹⁷⁰

In NLS's case, the plaintiff complained to a number of persons about sex discrimination at the workplace. She raised questions to Jackson Sanders, the Chair of the Appointments Committee, about the differential treatment of her and of Stephen King and asked whether the reason for the differential treatment could be related to her sex. Sanders responded by becoming visibly angry with her suggestion that sex may be involved and told her to "get off it. My wife bugs me with this stuff." Soon thereafter, Danielle once again complained that she was being treated differently because of her sex, this time to the Associate Dean, Ben Stillet. Stillet responded by encouraging her to apply elsewhere. She then told him she thought he was treating her in a discriminatory fashion because of her sex and she had a right to apply for the tenure-track job. At that time, she gave him a résumé. At about the same time, other faculty who were tenured or on tenure track began to shun Danielle, looking the other way, avoiding eye contact at meetings, and declining her invitations to lunch. Jan told Danielle that she had "spoiled her reputation." Now, Jan explains, faculty consider Danielle a "whiner." Subsequently, Danielle told the Dean that she thought she was being discriminated against because of her sex. On November 20, 2003, Rob called her to tell her that the reason she did not get an interview was because the Dean told the Committee that "Danielle wasn't a team player." Rob said, "That's what bitches get."

Given the pervasiveness of the sex stereotyping comments and the refusal to interview and hire Danielle after she complained to a number of important decision makers, including the Dean of the law school, there appears to be a genuine issue of material fact whether Danielle had a reasonable good faith belief that her treatment was a consequence of illegal sex discrimination and whether Danielle's complaints caused the Dean and others to recommend against considering Danielle as a potential candidate for the position on the tenure track. The stereotyping and differential treatment of Danielle from Stephen King go well beyond the alleged harassment of the plaintiff in *Breeden*. Moreover, the telephone conversation with Rob Seitz links Danielle's complaints to the Dean's recommendation that Danielle not re-

170. *Id.* at 273.

ceive consideration as a candidate. This evidence should be sufficient for Danielle to withstand NLS's motion for summary judgment of her retaliation claim.¹⁷¹

IV. MODEST PROPOSALS FOR AVOIDING LIABILITY

NLS's predicament demonstrates the vulnerability of many law schools to the possibility of a lawsuit alleging sex discrimination in violation of Title VII. While economic circumstances and contractual commitments may not permit immediate change in many institutions, law schools should begin to address the problem. Reform will not only avoid litigation; it will also permit law schools to serve as an example to corporations, law firms and other entities. Furthermore, it will allow female students, who represent almost half of law school graduates, to expect law firms and corporations where they work to permit them to fulfill their full potential as lawyers and as citizens.

Particularly because a large number of women lawyers and the concomitant hiring and marginalization of women lawyers in law schools are relatively new circumstances, the ghettoization of women lawyers in law schools should not be an intractable problem. Unlike secretaries and nurses in business and health care who have not had the education and training of their male bosses, many women lawyers who teach in legal writing programs have equivalent education, training and qualifications to those of the men who teach on the tenure track. The barriers to these women are, as Danielle's case demonstrates, often artificial.

There are a number of approaches that can be implemented simultaneously. First, law schools should work to equalize the positions of contract and tenure-track faculty. This equalization should raise the status and salaries of contract faculties in the law schools.¹⁷² One possible means of equalizing contract faculty is

171. Danielle's charge of retaliation based on NLS's refusal to hire her after her second application is timely. There is a question about whether her claim of retaliation based on NLS's failure to hire her after her first application is timely. NLS will argue that Danielle's claim of retaliation based on her first application is not. NLS will argue that Danielle was aware of the hiring process and should have filed a charge within 300 days after the school decided to close its 2002-03 search on March 15, 2003. Danielle will respond that she was never notified that she would not be hired and therefore her filing in February 2004 after the formal rejection by letter in November 2003 was timely not only for the September 2003 application but also for the earlier application in October 2002.

172. Of course, an alternative is to hire all law faculty on the tenure track. The opposition voiced to this alternative is that jobs such as legal writing are very repetitive and time-consuming and do not permit enough time for the faculty member to

to pay them extra for the additional time-consuming service-related activities in which they engage. For example, a contract faculty member who coaches moot court or mock trial teams should receive extra compensation. Contract faculty who teach additional classes should also be compensated. In fact, creating a law school wide workload policy that recognizes the value and time consumed by performing "housework" will benefit both contract and tenure-track female faculty, as well as those male faculty who bear an inordinate service workload. The workload policy should give release time to tenure-track and tenured faculty members who are burdened by service obligations to the law school, while granting additional compensation to contract faculty for extra services rendered.

Second, after equalizing the positions to the extent possible, law schools should abolish the faculty policies and/or practices that create artificial barriers for women who seek tenure-track positions. Law schools should abolish rules that prohibit, or even strongly discourage, hiring their own graduates and the hiring of well-qualified contract faculty into tenure-track positions. They should consider carefully and seriously the qualities and qualifications necessary to a law faculty member on the tenure track and be prepared to justify their hiring preferences and standards. They should also consider carefully the qualities and qualifications necessary to a law faculty member who is hired into a contract position, consciously challenging the gendered assumptions resting in many of the presumed qualifications.

This does not mean that all law faculty in contract positions or graduates of a law school would meet the qualifications to be hired into tenure-track positions, but individuals who have graduated from the law school and individual members of contract

do scholarship. One response is to require all faculty to teach legal writing and to do scholarship. Some schools, such as Washington & Lee, have adopted such a policy. Many would argue that this policy is a mistake because it will detract from the time that scholars have while requiring those who are good teachers to write scholarship that is not particularly valuable. Others will argue that many legal writing faculty who have acquired specialized expertise and talent for teaching legal writing and research may not be interested in scholarship; we may lose these valuable faculty if we were to impose a scholarship requirement on them. There are two possible solutions: one is to change the requirements for tenure or to offer a specialized form of tenure for legal writing or other contract faculty. The other is to grant long-term contracts to legal writing faculty who have demonstrated accomplishments in teaching, service and some scholarship. Whatever approach a school takes, however, it is important to improve the status of the legal writing faculty and to hire more men into the endeavor.

faculty should have the opportunity to compete with others in the market who apply for tenure-track positions. While absolute policies and rules take pressure off of the faculty when making decisions, as we have seen, these policies operate to create a disparate impact on women that is often illegal. Law faculty must be willing to consider each candidate as an individual, mindful of the stereotypes that accompany attitudes toward a school's graduates and toward contract faculty. If the concern is an individual's potential to do scholarship, law schools should permit actual published scholarship to substitute for a prestigious clerkship or a degree from a top twenty law school. In other words, we should have the confidence in our own abilities to judge an applicant's work rather than look to other indicators of excellence.

A third step is to adopt an affirmative action policy that assures the hiring of more men into contract positions and more women into tenure-track positions. Such a policy would require the conscious consideration of gender as a "plus factor" when hiring into these positions. The purpose of the affirmative action policy would be to counteract subconscious discrimination¹⁷³ that acts as an artificial barrier to women law professors.¹⁷⁴ The Supreme Court has held that plaintiffs may use disparate impact theory to attack subjective employment practices that discriminate against persons of color because of subconscious discrimination. An affirmative action policy whose purpose is to prevent subconscious discrimination should survive an affirmative action challenge if properly implemented. The Court has held that a valid affirmative action policy is a proper defense under Title VII to a claim that an employer considers race or gender in hiring and or promotion.¹⁷⁵ In a private law school, an affirmative ac-

173. See Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1010 (1997) (arguing that voluntary affirmative action plans play a vital role in combating discrimination that results from invisible privilege and unconscious bias).

174. Professors Merritt and Reskin found that even when law professors believe they are giving a benefit to women in law school hiring, they were often still discriminating against the women, especially women of color. See *Sex, Race, and Credentials*, *supra* note 18, at 290 (stating that affirmative action programs allowed women to gain positions at prestigious institutions but did not address persistent sex bias in teaching, thereby proving harmful to white women, and especially harmful to women of color).

175. See *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 626 (1987) (explaining that an affirmative action plan provides an employer's nondiscriminatory rationale for an employment decision based on race or sex); *United*

tion policy is valid if there is a manifest imbalance in the hiring and/or promotion of male and female faculty into the tenure-track and contract positions, the policy does not unnecessarily trammel upon the interests of men, and the policy is temporary.¹⁷⁶ A plaintiff challenging such a policy would have the burden of proving that the policy is not valid.¹⁷⁷ In public law schools where the equal protection clause may limit taking gender and race into account, affirmative action policies should be upheld if the school can demonstrate that the plan is narrowly tailored to further a compelling governmental interest.¹⁷⁸ The Supreme Court's recent decision in *Grutter v. Bollinger*¹⁷⁹ held that diversity in student bodies is a compelling governmental interest. While *Grutter* did not deal with a hiring situation, this opinion lends support to the conclusion that a carefully considered narrowly tailored affirmative action plan whose purpose would be to avoid ghettoization of women faculty caused by conscious and unconscious factors may survive strict scrutiny.¹⁸⁰

V. CONCLUSION: SETTING EGALITARIAN MODELS FOR LAW STUDENTS AND LAWYERS

While it would certainly be easier for legal administrators and academics to continue to ignore the gendered nature of work in law schools, such avoidance of potentially illegal structures, rules and relationships within law schools will neither solve the problem of illegal segregation of faculty nor help law schools avoid litigation. Furthermore, legal education has traditionally had the responsibility of leading the way among lawyers, espousing ethical principles that lawyers should follow. By our willingness to ignore the structural and economic forces that cause law schools to discriminate against women, we implicitly offer to our graduates and the legal profession the message that sex discrimination in employment is permissible. This message and the potential legal liability of law schools perpetuating the disparities between women and men should create an incentive among legal academics to work toward solving the problem of the inequities existing in most law schools.

Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208-09 (1979) (upholding the employer's adoption and use of a voluntary affirmative action plan).

176. See *Johnson*, 480 U.S. at 630 (citing the test used in *Weber*, 443 U.S. at 208).

177. *Johnson*, 480 U.S. at 626.

178. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

179. See *id.*

180. See *id.*

