# The Role of Negligence Duty Analysis in Employment Discrimination Cases

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## I. INTRODUCTION

The tortification of employment discrimination law has been thoroughly documented and theorized.[1] In a concurring opinion in the 1989 decision *Price*

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[1] *See, e.g.*, Anita Bernstein, *Treating Sexual Harrassment with Respect*, 111 HARV. L. REV. 445, 510 (1997); William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 AM. U. L. REV. 447, 456–78 (2013); Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 1–4; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–34 (2012).

*Waterhouse v. Hopkins*,[2] Justice O'Connor first referred to Title VII of the Civil Rights Act as a "statutory employment 'tort.'"[3] Since then, the Supreme Court and federal courts generally have reified Justice O'Connor's words, gradually altering the legal perception of employment discrimination legislation from its intended nature as a set of civil rights statutes aimed at ridding the nation of a pernicious social problem to a narrowly tailored provision of compensation for private wrongs.[4] Courts have done so, in part, by importing doctrine from the common law of torts—particularly in the realm of factual causation and scope of liability—to interpret and fill supposed gaps in the statutes.[5]

This Article asserts that courts' embrace of tort concepts runs even deeper than they have expressly stated—that courts have drawn not only upon the concepts of causation and scope of liability (proximate cause), but also engaged the question of whether employers owe a duty not to take allegedly discriminatory actions. Central to the notion of wrongfulness in common-law negligence jurisprudence, duty serves as a limitation on liability grounded in the concept of obligation as well as policy and institutional concerns. Courts' duty-like reasoning in employment discrimination cases has operated similarly, limiting liability pursuant to obligational reasoning and for a variety of policy reasons—in particular, a concern for the rights of employers to hire and fire employees at will.

This Article leaves to others a broadly normative critique of this practice, but rather urges that use of duty reasoning is problematic for two torts-internal reasons. First, the nature of wrongfulness in employment discrimination cases is not analogous to negligence or, indeed, to any tort. It is therefore improper for courts to apply tort conceptions of wrongfulness to answer questions of liability in employment discrimination cases.

Second, if employment discrimination claims are, as the Supreme Court has referred to them, statutory torts, then drawing upon common-law duty reasoning is improper, as it is an incorrect application of the law of statutory torts. In statutory tort claims, the concepts of duty and breach are defined wholly by the statute—there is no room to decline to impose a duty due to common-law policy concerns. Thus, for example, it is improper for courts to second-guess or water down the statutory non-discrimination duties owed by employers due to the employment-at-will principle. Employment discrimination statutes were created to end discriminatory practices in the workplace. They were therefore an express, purposeful limitation on the

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[2] Price Waterhouse v. Hopkins, 490 U.S. 228, 261 (1989) (O'Connor, J., concurring in the judgment).

[3] *Id.* at 264.

[4] Corbett, *supra* note 1, at 456–59; Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 188, 196–97 (1993).

[5] Corbett, *supra* note 1, at 461.

employment-at-will principle. These facts are more properly the source of courts' reasoning in interpreting and applying employment discrimination statutes.

## II. DUTY REASONING IN EMPLOYMENT DISCRIMINATION CASES

### A. *The Nature of Duty in Tort Law*

Before investigating courts' use of duty reasoning in employment discrimination cases, it is necessary first to understand the nature of the duty concept in torts. As most readers of this Article no doubt recall, "breach of duty" is the element of the negligence action pursuant to which a jury decides whether the defendant acted wrongfully, defined as "unreasonably."[6] But there is an a priori matter to which courts must attend: Assuming that the defendant acted unreasonably, should the court impose a legal obligation to have acted reasonably? As the only element of negligence decided in the first instance by the court rather than the jury, duty serves a gatekeeping function.[7] It is the element by which courts decide which broad, categorical types of negligence claims should reach a jury and potentially win at trial, and which should not.

Central to the concept of duty is the notion of obligation—the question: under what circumstances ought one owe an obligation to others to act reasonably? For example, the Supreme Court of North Carolina, in *Nelson v. Freeland*,[8] was faced with whether to impose a duty of reasonable care on a homeowner to protect a guest from the risk posed by a stick left inadvertently by the homeowner on the front porch—the guest tripped over the stick and was seriously injured.[9] At the heart of the court's decision was the deceptively simple question of whether a homeowner ought to feel an obligation under such circumstances: What are the expectations of the parties? Should a homeowner's freedom to keep her property as she wishes make room for the care of others? Should the reason for the guest's visit affect their relative obligations regarding safety? At their root, these are moral questions, involving moral reasoning and an inquiry into prevailing social norms.

Although the duty concept is informed by moral norms, however, it is not coextensive with them. One might owe a moral obligation to care for one's parents as they age, for example, but one owes no legal duty to do so. Likewise, although one would usually owe a tort duty not to harm a person

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[6] *See, e.g.*, David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1676 (2007).

[7] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 (2010); David Owen, *Duty Rules*, 54 VAND. L. REV. 767, 768 (2001) ("[D]uty provides the front door to recovery for the principal cause of action in the law of torts: . . . [E]very negligence claim must pass through the duty portal that bounds the scope of tort recovery for accidental harm.").

[8] Nelson v. Freeland, 507 S.E.2d 882 (N.C. 1998).

[9] *Id.* at 882–83.

even for the purpose of protecting the well being of another, one might owe an opposite moral duty. The distinction between moral and legal obligations is explained, at least in part, by the fact that the duty concept involves considerations other than moral reasoning and social norms. The court's decision in *Nelson*, for instance, turned also upon concerns about the variability of jury decisions, the comparative simplicity of alternative legal doctrines, the predictability of doctrine for future actors, and the effect of the decision on the cost of homeowners' insurance.[10] Thus, although duty is an investigation into the relative obligations of the actors in normative and moral terms, it also encompasses concerns external to the particular actors.

Indeed, an overwhelming majority of courts describe duty as a multi-dimensional policy determination.[11] As Dean Prosser, Reporter for the *Restatement (Second) of Torts*, once wrote, "'[D]uty' . . . is only an expression of the sum total of those considerations of policy which lead the law to say that the [particular] plaintiff is entitled to protection."[12] Courts are less consistent in defining the relevant policy factors. A recent catalogue of courts' fundamental duty analyses revealed forty-two different factors, embodied in twenty-two distinct multi-factor tests.[13] A sampling of these factors includes:

> "the foreseeability of harm,"
> "the nature of the activity in which the defendant engaged,"
> "the nature of the plaintiff's injured interest,"
> "the social utility of the defendant's conduct,"
> "the defendant's ability to exercise due care,"
> "the consequences on society of imposing the burden on the defendant,"
> "the expectations of the parties and of society under the circumstances,"
> "the goal of preventing future injuries by deterring conduct in which the defendant engaged,"
> "the desire to avoid an increase in litigation,"
> "the convenience of administration of the resulting rule,"
> "whether the imposition of a duty would open the way to fraudulent claims," and
> "the desire for a reliable, predictable, and consistent body of law."[14]

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[10] *Id.* at 888–90.

[11] Forty-three of fifty state courts describe the essence of duty in this way. W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf: *Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1884 (2011).

[12] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 358 (5th ed. 1984).

[13] Cardi, *supra* note 11, at 1883–84.

[14] *Id.*

If one were to group these and other duty factors, the "essence" of the duty inquiry might be boiled down to five general considerations: (1) foreseeability, (2) community notions of obligation, (3) a broad sense of social policy, (4) a commitment to the rule of law, and (5) a concern for courts' and juries' administrative capability and convenience.

As must be the case with any open-ended policy determination, courts' weighing of these considerations has expanded and contracted with society's feelings toward the value of tort liability generally and with regard to particular types of claims. *Nelson*, again, provides a useful example.[15] In early English and American culture, property rights were perhaps the most carefully guarded rights under the law.[16] One manifestation of this was that a landowner owed only a narrow set of negligence duties to visitors—duties curtailed to protect the landowner's freedom to do as he (and eventually she) pleased.[17] As the relative importance of property rights waned, and as the Industrial Revolution required a more capacious concern for personal safety, many courts began to relax the strict confines placed on landowner liability, imposing—as did the *Nelson* court—a broader duty of reasonable care toward visitors on one's land.[18]

Similarly, for many years, courts held to a firm no-duty rule with regard to claims for negligent infliction of emotional distress.[19] The reasons for this blanket denial of liability were many, including concerns about the potential flood of cases and the difficulty of sorting real from frivolous or false claims.[20] Beginning in the early twentieth century, courts began to relax this no-duty rule,[21] if fitfully, as societal attitudes toward mental illness changed and as the psychological profession became more able to sort real from malingered

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[15] *See* Nelson v. Freeland, 507 S.E.2d 882, 892 (N.C. 1998).

[16] Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136–37.

[17] *See* John Ketchum, Note, *Missouri Declines an Invitation to Join the Twentieth Century: Preservation of the Licensee-Invitee Distinction in* Carter v. Kinney, 64 UMKC L. REV. 393, 395 (1995).

[18] *Nelson*, 507 S.E.2d at 892 (abandoning the traditional limited duty to licensees in favor of a general duty of reasonable care toward non-trespassers).

[19] DAN B. DOBBS, THE LAW OF TORTS §§ 303, 308, at 825–826, 835–36 (2000). In one sense, actions seeking damages for pure emotional distress may be traced as far back as medieval England. Early examples include assault, false imprisonment, alienation of affections, criminal conversation, and defamation. These actions were not analogous to the modern negligent infliction of emotional distress claim, for they sought emotional distress damages not for interference with the plaintiff's interest in emotional wellbeing, but for interference with some correlative concern. *See* Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 362–64 (2006).

[20] *See, e.g.*, Mitchell v. Rochester Ry. Co., 45 N.E. 354, 354 (N.Y. 1896) ("If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation . . . .").

[21] DOBBS, *supra* note 19, § 308, at 836–37.

injuries.[22] Nonetheless, because courts remain concerned by their own and juries' relative inability to administer such claims, courts have kept the reigns tight by creating nuanced, restrictive duty rules.[23]

Perhaps the most stark example of duty's policy-driven variability is the drastic swings in the law of products liability. For many years, the duty not to sell defective and dangerous products was the standard negligence duty of reasonable care.[24] With the sharp rise in consumerism in the 1950s, however, and with the increasing complexity of consumer products, courts in the 1960s abandoned the negligence duty as the sole avenue of recovery, imposing instead a standard of strict liability—that is, a duty of compensation rather than a duty of reasonable care.[25] With the conservative judicial backlash in the 1980s, however, courts gradually eroded the strict liability standard, interpreting the doctrine in a way that largely—except in the most egregious manufacturing defect cases—reinstated the negligence standard.[26]

As these examples illustrate, the duty concept in tort law has served as the primary doctrinal manifestation of shifting sentiments toward particular types of claims. Duty is about obligation, and obligation rests on social norms. And duty is also about policy, encompassing both external teleological ends (e.g., the desire to avoid frivolous claims or the increasing the cost of homeowners' insurance) and considerations of administrative expediency (e.g., concerns about a potential flood of litigation or about sorting juries' ability to apply landowner duties properly). In the next section, I assert that courts' reasoning in employment discrimination cases—although expressly couched in the language of causation, scope of liability, and statutory interpretation—closely resembles the stuff of negligence duty, representing a further tortification of employment discrimination law.

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[22] *See, e.g.*, Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965) (upholding woman's negligent infliction of emotional distress claim where she was nearly struck by a careening car, and justifying the holding in part by discounting the evidentiary challenges and the potential flood of litigation).

[23] *See, e.g.*, Colbert v. Moomba Sports, Inc., 135 P.3d 485, 490 n.7 (Wash. Ct. App. 2006).

[24] *See* Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 44 (1955) ("[T]oday the ordinary tests of duty, negligence and liability are applied widely to the man who supplies a chattel for the use of another.").

[25] *See* David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 966–67 (2007) (during the "1960s and 1970s, the doctrine of strict products liability in tort . . . spread across the nation.").

[26] *See id.* at 979 ("With the increasing social and governmental conservatism begun in the 1980s, judicial and legislative enthusiasm for section 402A's 'pro-consumer' doctrine was in serious decline.").

## B. *The Role of Duty Reasoning in Employment Discrimination Cases*

### 1. *Mixed-Motives Cases*

Employment discrimination statutes typically provide remedial relief to employees who have been subject to qualifying employment actions taken "because of" the protected characteristic. Thus, for example, Title VII of the Civil Rights Act of 1964[27] makes it actionable 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, . . . or (2) to limit, segregate, or classify his employees or applicants . . . because of such individual[s'] race, color, religion, sex, or national origin.[28]

One of the recurring issues raised in employment discrimination cases has been whether an employer, who has taken an adverse action against an employee for both legitimate and discriminatory reasons—a so-called mixed-motives scenario—has done so "because of" discrimination.[29] In a torts case, this question is one of causation—did discrimination cause the adverse action? The classic analogy is the two fires scenario: *A* sets a fire to the north of *C*'s house; *B* independently sets a fire to the south of *C*'s house; both fires reach *C*'s house simultaneously, destroying it; either fire alone would have destroyed the house. The fundamental causation rule in tort law is the "but-for test"—asking but for the defendant's tortious conduct, would the plaintiff's injury have occurred?[30] If not, then the defendant's conduct caused the injury.[31] If it would have occurred even absent the defendant's conduct, then the conduct did not cause the injury.[32] The but-for test does not establish causation in the two fires scenario, of course, because the house would have been destroyed even had either fire not been set. Similarly, if the evidence shows that even absent a discriminatory motivation, permissible reasons would have led the employer to take the same employment action, then discrimination was not a but-for cause.

Tort law is clear, however, that in a two-fires scenario, both arsonists caused the damage, despite the fact that neither is a but-for cause.[33] The rule is simply stated thus: where causation is "overdetermined"—that is, where there

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[27] Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

[28] 42 U.S.C. § 2000e-2 (2012).

[29] *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (plurality opinion).

[30] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. b (2010).

[31] *Id.*

[32] *Id.*

[33] *Id.* § 27 cmt. b.

are multiple acts, each alone sufficient to cause the plaintiff's harm—each actor is a substantial factor and thus a factual cause of the injury.[34] Issues of causation often pose difficult, almost meta-physical questions—the overdetermined cause scenario is one of them. Theorists have posed philosophical defenses of the substantial factor rule.[35] The rule also seems justified by the pragmatic intuition that courts cannot possibly allow one sufficient causal actor to escape liability due to the serendipitous fact that there exists another. Regardless of the reason, courts are virtually unanimous in adopting the substantial factor rule.[36]

The Supreme Court first took up the question of overdetermined cause in the employment discrimination context in the 1989 mixed-motives case of *Price Waterhouse v. Hopkins*.[37] Each author of the plurality and dissenting opinions described the issue as one of causation, and each expressly reached to tort law for an answer.[38] None, however, faithfully followed tort law's causation doctrine and adopted the substantial factor rule.[39] Consistent with a substantial factor approach, the Court held that when a plaintiff establishes that discrimination was a "substantial" or "motivating" factor in an employment decision, the decision was indeed taken because of discrimination even where a legitimate reason also existed[40]—however, the employer may yet avoid liability by proving that it would have taken the same action for the permissible reason alone.[41] This decision essentially limited causation in mixed-motives cases to the but-for rule, albeit shifting the burden to the defendant to prove the existence of a legitimate, independently sufficient reason for the employment action. Again, despite the Court's conscious recognition that it was facing a causation question, and despite expressly drawing upon the law of torts, its decision was wholly and inexplicably inconsistent with tort causation doctrine.

The Court did offer some explanation for its decision, although not in the language of causation. Rather, it defended its novel position by explaining that the goals of Title VII must be balanced against "employer prerogatives"[42]:

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[34] *Id.*

[35] The best explanations may be found in: H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 155 (1st ed. 1959); Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1447–50 (2003).

[36] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. a (2010).

[37] Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (plurality opinion).

[38] *Id.* at 241, 263–64 (O'Connor, J., concurring in the judgment), 282–83 (Kennedy, J., dissenting).

[39] *Id.* at 241. Strangely, the plurality endorsed the reasoning of the substantial factor rule for overdetermined cause in torts cases, but then inexplicably adopted a contrary rule. *Id.*

[40] *Id.* at 244–45, 258.

[41] *Id.* at 242, 244–45, 258.

[42] *Price Waterhouse*, 490 U.S. at 239 ("Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of

> To say that an employer may not take gender into account is not, however, the end of the matter . . . . The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.[43]

The Court's use of the concept of employer freedom is discussed in depth in the next section. At this point, let it suffice to introduce the idea that although the bulk of the Court's various opinions described the mixed-motives dilemma as one of tort-like causation, neither the Court's ultimate holding nor its reasoning tracks causal concepts. Instead, the Court's reasoning looks much more like negligence duty analysis—questioning an employer's obligation not to discriminate and supplanting the statute's aims with the Court's own ideas regarding policy in the workplace. To flesh out this idea further, it is useful to examine the downstream development of mixed-motives doctrine.

Soon after *Price Waterhouse*, Congress overruled the case with an amendment to § 703(m) of Title VII, contained in The Civil Rights Act of 1991.[44] While embracing the Court's definition of "because of" in mixed-motive cases, the amendment rejected (in part) the Court's burden-shifting mechanism, allowing the plaintiff to prevail and obtain some types of remedies even where the defendant establishes that it would have taken the same employment action for permissible reasons.[45]

Since *Price Waterhouse* and the 1991 amendments, however, the makeup of the Court has changed, and perhaps too society's perceptions of workplace discrimination. The new Court has revisited the causation question in two recent cases. In *Gross v. FBL Financial Services, Inc*.,[46] the Court examined the meaning of "because of" in a mixed-motives case brought under the Age Discrimination in Employment Act (ADEA). Similar to Title VII, the ADEA provides that "[i]t shall be unlawful for an employer [to take an adverse employment action] because of such individual's age."[47] Despite its holding in *Price Waterhouse* and the subsequent amendments to Title VII, despite the similarity of the two statutes and their near-simultaneous enactment, and despite its previous holdings that Title VII's language applies "with equal force in the context of age discrimination, for the substantive provisions of the

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choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.").

[43] *Id.* at 242.

[44] Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. (2012)).

[45] 42 U.S.C. § 2000e-5(g)(2) (2012). The plaintiff in such case is limited, however, to recovering "declaratory relief, injunctive relief . . ., and [limited] attorney's fees and costs" and cannot recover damages or obtain reinstatement. *Id.* § 2000e-5(g)(2)(B).

[46] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 169 (2009).

[47] 29 U.S.C. § 623(a)(1) (2012).

ADEA 'were derived *in haec verba* from Title VII,'"[48] the Court—in an opinion penned by Justice Thomas—held that in the ADEA context, "because of" requires proof of but-for causation.[49] It held thus after consulting dictionary definitions of "because."[50] It explained that because Congress did not amend the ADEA as it had Title VII in 1991, Congress must have intended the "because of" language to operate differently in the ADEA than in Title VII.[51] And it distinguished *Price Waterhouse* as only applying to Title VII claims.[52]

Four years later, in *University of Texas Southwestern Medical Center v. Nassar*,[53] the Court returned to Title VII, examining the meaning of "because of" in a mixed-motives case alleging retaliatory discrimination—that is, an allegation that the defendant took an adverse employment action in retaliation against the plaintiff's complaints about religious and race discrimination.[54] In line with its steady tortification of employment discrimination jurisprudence, the Court's opinion—authored by Justice Kennedy, who wrote the dissent in *Price Waterhouse*—began its reasoning by stating that "[c]ausation in fact . . . is a standard requirement of any tort claim. . . . This includes federal statutory claims of workplace discrimination."[55] The Court then pointed out that the but-for rule applies in torts cases "in the usual course," noting only in a string-cite parenthetical the existence of a different rule governing overdetermined cause cases.[56] The Court then held that although both *Price Waterhouse* and Congress determined that "because of" does not mean "but-for" in Title VII characteristic-based discrimination claims, the term does mean "but-for" in Title VII retaliation claims.[57] To reach this intuitively bizarre result, the Court relied on its decision in *Gross* and underwent virtual contortions of statutory construction—reasoning correctly eviscerated by Justice Ginsburg's dissent.[58] The Court also expounded on the reasons underlying its interpretation of the relevant provisions—stating that its holding was of "central importance to the fair and responsible allocation of resources in the judicial and litigation systems," and that to hold otherwise would increase the growing number of employment discrimination claims, "contribute to the filing of frivolous claims," and "siphon resources from

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[48] Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (quoting Lorillard v. Pons, 434 U.S. 575, 584 (1978)).

[49] *Gross*, 557 U.S. at 176.

[50] *Id.*

[51] *Id.* at 172–73.

[52] *Id.* at 177.

[53] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

[54] *Id.* at 2523–24.

[55] *Id.* at 2524–25.

[56] *Id.* at 2525.

[57] *Id.* at 2534.

[58] *Nassar*, 133 S. Ct. at 2539–45 (Ginsburg, J., dissenting). Notably, Justice Ginsburg's dissent also correctly applies the substantial factor rule from tort law. *Id.* at 2546.

efforts by employer, administrative agencies, and courts to combat workplace harassment."[59]

The opinions in *Price Waterhouse*[60] and *Nassar*[61] describe the interpretation of "because of" in mixed-motives cases as a question of causation. They also expressly draw from—and even rely on—tort law to answer the causation question. Yet neither applies the causation rules from tort law correctly. It cannot be that the Justices do not understand tort doctrine—indeed, they cite the substantial factor rule, but then proceed to ignore it.[62] The majority opinions do not even truly engage in causation-related reasoning—reasoning, according to causal expert Jane Stapleton, "that compares the actual world of a particular phenomenon with a hypothetical world and thereby determines, in the context of that comparison, the role that a specified factor played, if any, in the existence of the actual phenomenon."[63] The opinions do not ask whether discrimination played a role in the employment phenomenon at issue—they merely ask whether a defendant with mixed motives ought to be held liable.[64]

Nor is the Court merely engaging in statutory interpretation and construction. The statutory reasoning in both *Gross* and *Nassar*, in particular, is so transparently flawed that it must not be what is driving the Court's holding.[65] So what is really going on in these cases? In my view, the Court (or at least a majority of the Justices) does not see these cases as presenting a causation issue at all—or if it does, the Court is nonetheless choosing a different lens for its analysis. Rather, the Court is engaging in what, at its core, is a tort duty analysis. Recall that the duty inquiry in a tort case poses this question: Assuming that the defendant acted unreasonably, should the court impose an obligation to have acted reasonably? The question I see the Court asking in mixed-motives cases is: Assuming that the employer acted in a discriminatory way, should the court impose an obligation to have acted otherwise? More specifically, the Court is examining whether an employer owes an obligation to avoid taking an adverse employment action, even with discriminatory motivations, where it also has legitimate reasons to take the same action.

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[59] *Id.* at 2531–32.

[60] *Price Waterhouse*, 490 U.S. at 228 (plurality opinion).

[61] *Nassar*, 133 S. Ct. at 2517.

[62] *See Nassar*, 133 S. Ct. at 2526; *Price Waterhouse*, 490 U.S. at 249.

[63] Jane Stapleton, *Choosing What We Mean by "Causation" in the Law*, 73 MO. L. REV. 433, 433 (2008).

[64] *See Price Waterhouse*, 490 U.S. at 237; *Nassar*, 133 S. Ct. at 2533. It is notable that the dissenting opinions in *Nassar* and *Gross* do engage in causation-type reasoning. *See id.* at 2546 (Ginsburg, J., dissenting); Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2353–58 (2009) (Stevens, J., dissenting).

[65] A full discussion of the statutory reasoning in these cases would prove to be a distraction from the primary point of this paper. The dissents in *Gross* and *Nassar* do more than an adequate job of revealing the absurdity of the majority opinions. *Nassar*, 133 S. Ct. at 2546 (Ginsburg, J., dissenting); *Gross*, 129 S. Ct. at 2352 (Stevens, J., dissenting).

The language about preserving employer freedom, quoted above from *Price Waterhouse*, speaks to this very question.[66] The Court there reasoned that the freedom of an employer to make employment decisions at will—and the Court's desire to protect that freedom—leads necessarily to the conclusion that an employer has no obligation (and that the Court should impose no obligation) to avoid taking adverse action for legitimate reasons, even where discriminatory reasons coincide. This obligational reasoning mirrors state courts' concerns for landowner freedom expressed through limited duty rules in landowner liability cases.[67]

The Court is also asking whether there are policy reasons not to impose such an obligation—another mode of inquiry central to tort duty reasoning. Recall that the *Nassar* Court defended its decision to define "because of" as "but-for" by explaining that a more permissive causation requirement might contribute to a flood of litigation, an increase in frivolous claims, and a dearth of administrative resources to combat other forms of discrimination.[68] Such concerns are quintessential factors of common-law duty analysis—evident, for example, in state courts' consideration of claims for negligent infliction of emotional distress.[69]

In sum, although the Court claims in mixed-motives cases that it is engaging in causation and interpretive analysis, its reasoning from a torts perspective tracks more closely the language and concepts of duty. Working within the Court's own schema for employment discrimination claims, this use of duty analysis is problematic. But before turning to this point, I offer a more pervasive example of duty reasoning in courts' employment discrimination decisions.

### 2. *Employment at Will*

Just as it influenced the Court's reasoning in *Price Waterhouse*,[70] a concern for employer freedom—manifesting in the common-law, employee-at-will principle—plays a significant role in courts' application of employment discrimination statutes. The employment-at-will principle prescribes that absent a contractual agreement otherwise, an employer may discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of a legal wrong."[71] This rule held complete sway

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[66] *Price Waterhouse*, 490 U.S. at 339 (plurality opinion); *see supra* note 42 and accompanying text.

[67] *See supra* notes 16–18 and accompanying text.

[68] *Nassar*, 133 S. Ct. at 2531–32; *see supra* note 59 and accompanying text.

[69] *See* Falzone v. Busch, 214 A.2d 12, 16 (N.J. 1965); *see also supra* note 22 and accompanying text.

[70] *Price Waterhouse*, 490 U.S. at 239.

[71] Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1031 (Ariz. 1985) (citation omitted), *superseded by statute*, ARIZ. REV. STAT. ANN. § 23-1501, *as recognized in*

over the American workplace for at least a century and likely much longer.[72] During the 1960s, however, criticism of the rule emerged,[73] and both Congress and the states began to place express limitations on employment at will, especially in the context of discrimination.

Today, a plethora of exceptions to the employment-at-will doctrine have emerged, both pursuant to statute[74] and the common law.[75] This has led some to decry the de facto death of employment at will.[76] As Richard Epstein explains,

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Breeser v. Menta Grp., Inc., NFP, No. 2:10–CV–01592–PHX–JAT, 2011 WL 1465523 at *5 (D. Ariz. Apr. 18, 2011).

[72] *See infra* notes 77–82 and accompanying text.

[73] *See, e.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967) (urging judicial modification of employment at will because the rule, "which forces the non-union employee to rely on the whim of his employer for preservation of his livelihood, is what most tends to make him a docile follower of his employer's every wish.").

[74] *See, e.g.*, National Labor Relations Act of 1935, 29 U.S.C. §§ 151–169 (2012) (prohibiting employers from firing or disciplining employees for union activity as well as for a range of peaceful protests by two or more employees, including complaints, grievances, petitions, strikes, and other activity that the employer even reasonably perceives to be contrary to its economic interests); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012) (prohibiting employer discrimination against employees or applicants due to age); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012) (prohibiting employer discrimination against employees with disabilities and requiring employers to make "reasonable accommodations" to employees with disabilities).

[75] The common law of "wrongful discharge" currently embraces three general exceptions to the employment at will rule. In most states, wrongfully-terminated plaintiffs may now file suit against their employers under doctrines of implied covenant of good faith or implied contract, and under certain public policy exceptions to the at-will rule. *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.2, at 2–3 (2d ed. 1987). The public policy cases fall largely into three categories: discharges based on an employee's having exercised a clear legal right, *see, e.g.*, Hansome v. Nw. Cooperage Co., 679 S.W.2d 273, 276 (Mo. 1984) (creating a cause of action for an employee fired for lawfully receiving medical treatment under workers' compensation); discharges based on an employee having fulfilled a clear public duty, *see, e.g.*, Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (finding cause of action for employee fired for having served jury duty); and discharges based on an employee's refusal to violate the law, *see, e.g.*, Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (holding that firing an employee for refusal to commit perjury was contrary to public policy and actionable in tort). Many states have also extended the public policy exception to cases involving retaliation for employee "whistle blowing," *see, e.g.*, Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (holding that public policy prohibits employee discharge resulting from a refusal to commit an illegal act), and to discharge based on certain types of discrimination.

[76] RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 147–48 (1992) (arguing that anti-discrimination labor laws necessarily impose a "for cause" regime).

> [o]nce it is said, for example, that workers cannot be dismissed for certain illicit motives, then the choices are dismissal for no reason, for good reason, or for bad reasons not covered by the statute, such as eye color. Courts will rightly be skeptical of any defense of a Title VII claim that says dismissal occurred for no reason at all. . . . [I]n the typical case the best line of defense is to show that a refusal to hire or a decision to fire was made for a good cause . . . .[77]

Some employment discrimination decisions evidence Epstein's reasoning, turning on whether the defendant employer had good cause to fire the plaintiff. A closer look at the case law, however, reveals that not only is employment at will alive in employment discrimination cases, its backdrop is often outcome determinative, regardless of the clear mandate of the statutes. A more accurate picture of the case law is that there rumbles a tension between the statutorily-expressed desire to eradicate certain types of workplace discrimination and the entrenched common law principle of employment at will. Courts rarely discuss this tension expressly; rather, lines are drawn in the context of the definition of a protected class, the nature of available defenses, the burden and scope of proof, and a host of other discrete doctrinal and statutory-interpretive issues.[78] At its core, though, this is a struggle about an employer's obligation, public policy in the workplace, and courts' institutional capacity to arbitrate employment disputes—in the lingua of torts, it is a debate about the scope of an employer's duty not to discriminate.

In the following subsections, I offer a brief synopsis of the background and justification for employment at will. I then offer several examples of the employment-at-will principle's influence in employment discrimination cases, illustrating its commonality with tort duty analysis.

### a. *The Development of and Justifications for the Employment-at-Will Principle*

When America was a colony, the practice in England was to construe indefinite-term employment contracts to constitute one-year hiring terms.[79] There is debate among historians about when this practice shifted in America to a presumption of employment at will.[80] Deborah Ballam offers the most

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[77] *Id.*

[78] See *infra* Part II.B.2.b for examples of courts incorporating employment at will principles into employment discrimination decisions.

[79] Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L.J. 85, 91 (1982); *see* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (Bell ed. 1771) ("If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year . . . ."); Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment at Will*, 30 AM. BUS. L.J. 441, 444–45 (1992).

[80] One fashionable explanation for the birth of employment at will is that the rule was spontaneously created by Horace G. Wood's 1877 treatise on the law of master and servant. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272

comprehensive evidence that with the exception of a short period in Massachusetts, employment at will was the default practice throughout colonial America.[81]

Regardless of its origins, under the pressures of nineteenth-century industrialization the at-will employment practice became a legal presumption. First, courts began to construe indefinite terms in employment agreements to have created an employment-at-will relationship.[82] Then, any ambiguity in

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(Albany, N.Y., John D. Parsons, Jr. 1877) ("[A] general or indefinite hiring is *prima facie* a hiring at will."). Historians have offered a variety of theories on the rule's origins, however. *Compare* HENRY H. PERRITT, JR., 1 EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.4, at 10–15 (3d ed. 1992) (arguing that the doctrine arose during the Industrial Revolution), *with* Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733, 734 (1991) (arguing that "master and servant law in general, and the issue of presumed duration of employment in particular," were still in flux when Horace G. Wood formalized the rule in 1977). *See also* Jacoby, *supra* note 79, at 85 (arguing that in the early 1900s, American courts implemented "a strict presumption of terminability at will for all employees . . . due to the relative weakness of trade unionism and status distinctions in the United States."); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment-at-Will*, 59 MO. L. REV. 679, 757 (1994) (arguing that the doctrine pre-dated Wood's treatise).

[81] *See* Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75, 87–88 (1995) [hereinafter Ballam, *Revisited*] (examining the labor history and common law of New York); Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 91 (1996) (same with regard to Georgia, Illinois, Montana, Texas, and California); Deborah A. Ballam, *The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality?*, 33 AM. BUS. L.J. 1, 5 (1995) (same with regard to New York, Pennsylvania, Massachusetts, and Maryland). Professor Ballam suggests an economic explanation for the early departure from the English approach. Ballam, *Revisited*, *supra*, at 105. Ballam points out that while England had long suffered a labor surplus and land shortage, colonial America was characterized by the reverse. *Id.* Thus, Ballam argues, while the annual-hiring rule mutually benefitted employers and laborers in England, it made little sense in the colonies. *Id.* at 105–06. Discharged employees in America easily found replacement work, and the abundance of land made property ownership a legitimate alternative. *Id.* at 106. American employers also disfavored a term-employment requirement. *Id.* Due to the high wages characteristic of a labor-scarce market, employers were hesitant to make long-term employment commitments unless they were for lower-cost indentured servants or slaves. *Id.* Thus, according to Ballam, the American courts' early use of employment at will as the default rule in employment contract interpretation served the interests of both employer and employee. *Id.* at 105–06.

[82] *See, e.g.*, Howard v. E. Tenn., V. & G. Ry. Co., 8 So. 868, 869 (Ala. 1891) ("[I]n the absence of some agreement or peculiar circumstances connected with the engagement, to take it out of the general rule, unless some time is fixed during which the employment is to continue, either party may terminate the contract at will."); Kan. Pac. Ry. Co. v. Roberson, 3 Colo. 142, 146 (1876) (construing vague contractual reference to term of employment as sustaining only an at-will employment relationship); Wood, *supra* note 80, at 272 ("With us the rule is . . . that a general or indefinite hiring is *prima facie* a hiring at

term-employment contracts began to open the door to an at-will presumption.[83]

The metamorphosis of the principle continued throughout the first two decades of the twentieth century, as employment at will gradually merged with the concept of freedom of contract. The United States Supreme Court even, for a time, elevated an employer's freedom to hire and fire employees at will to the level of a constitutionally protected property right, immune to legislative attempts to protect laborers from opportunistic capitalists.[84] The line between the discrete rule of employment at will and the new-found policy of leaving businesses free from legal restraint became blurred by the tide of laissez-faire.[85] Courts began to cite the employment-at-will principle not only as a default mechanism in the face of a vague contractual agreement, but as a strong presumption against any legislative or judicial imposition on employer decisionmaking. It is this form of employment at will that remains active in employment discrimination decisions today.

### b. *Employment at Will in Employment Discrimination Cases*

#### i. *Employment at Will in the Development of Disparate Treatment*

Title VII makes it unlawful for employers to make adverse employment decisions because of one of the protected characteristics of an applicant or

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will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.").

[83] Courts began to refuse to infer term contracts solely from salary payment periods. *E.g.*, Copp v. Colo. Coal & Iron Co., 46 N.Y.S. 542, 543 (City Ct. 1897). Expired year-term agreements became at-will employment relationships. Ballam, *Revisited*, *supra* note 81, at 103. Promises of indefinite employment were no longer enforceable unless the employee had given "special consideration" in exchange for the promise. *E.g.*, Adolph v. Cookware Co., 278 N.W. 687, 689 (Mich. 1938); *see* Annotation, *Duration of Contract Purporting To Be for Permanent Employment*, 35 A.L.R. 1432, 1432 (1925) (describing the majority rule to be that in the absence of "good consideration additional to the services contracted to be rendered" or "additional express or implied stipulation as to the duration of the employment," a purportedly permanent contract should be construed as "an indefinite general hiring terminable at the will of either party."). The intent of the parties in such situations became a dead issue.

[84] *See, e.g.*, Adair v. United States, 208 U.S. 161, 175 (1908) (holding the statute that forbade discharge of an employee for union membership unconstitutional as an "arbitrary interference" with employers' personal liberty and property rights as guaranteed by the Fifth Amendment); Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 936–56 (1989) (tracing the development of employers' property rights in business decisionmaking); Blades, *supra* note 73, at 1416 ("[T]he United States Supreme Court elevated the employer's absolute right of discharge to a constitutionally protected property right.").

[85] *See* Walter Nelles & Samuel Mermin, *Holmes and Labor Law*, 13 N.Y.U. L.Q. REV. 517, 533–34 (1936) (noting that the policy of leaving business free from legal hindrance was frequently confused with the economic principle of laissez-faire).

employee.[86] Beyond this, however, Title VII provides little guidance as to the form an action must take under the statute or what a plaintiff must prove in order to establish a violation.[87] Consequently, the courts have developed two general causes of action available under Title VII: disparate treatment and disparate impact. Although the employment-at-will principle has influenced the development of both actions, I limit discussion here to disparate treatment claims.[88]

In a disparate treatment action, the plaintiff must prove that her employer intentionally treated her less favorably than other employees because of her race, color, sex, religion, or national origin.[89] Although the surest path to a successful disparate treatment claim is to present direct evidence of discriminatory intent, it is rare for a victim of employment discrimination to find such a "smoking gun." Because employers are keen to the threat of Title VII, they are often careful to wipe away any trace of wrongdoing.[90] Without some type of objective manifestation of employer malignity, discriminatory intent is virtually impossible to prove.[91] Realizing this, the Supreme Court, in *McDonnell Douglas Corp. v. Green* developed a burden-shifting framework by which courts may analyze a plaintiff's proof of discriminatory intent by circumstantial evidence.[92]

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[86] 42 U.S.C. §§ 2000e–2000e-17 (2012).

[87] Whereas Congress left development of a plaintiff's suit to the courts, they specified many forms of employer behavior for which Title VII was not to provide a remedy. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (2012) (exempting religious associations from Title VII actions); *id.* § 2000e-2(f) (denying the protection of Title VII to members of the Communist Party); *id.* § 2000e-2(j) (providing that an employer may not be made to give employees the "preferential treatment" of a quota system).

[88] Citing an early draft of this paper, Karen Engle and Chad Derum sketched this development in an excellent article. Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1190–92 (2003).

[89] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). There also exists a cause of action for "systemic disparate treatment" in which a plaintiff must show that an employer engaged in a pattern or practice of intentional discrimination that resulted in a lower representation of members of a protected group than would have been the case had the employer not unlawfully discriminated. *See id.* at 336 n.16 (delineating requirements for the systemic disparate treatment cause of action).

[90] Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1451 (1996).

[91] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (observing the difficulty in proving employer's intent); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670 (1996) ("The fundamental problem with the existing 'bad motive' exceptions to employment at will is the inherent difficulty of proving that bad motive . . . on the part of an employer who . . . creates and controls virtually all of the relevant documents and employs most of the potential witnesses.").

[92] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The *McDonnell Douglas* analysis was later clarified and reaffirmed. Tex. Dep't of Cmty. Affairs v.

Under the *McDonnell Douglas* framework, a plaintiff sets out a prima facie case of disparate treatment by proving the following: (1) the plaintiff is a member of a protected class;[93] (2) the plaintiff applied and was qualified for the job at issue or, if the suit is for discriminatory firing or demotion, had met minimum standards of job performance; (3) the employer nevertheless made an employment decision adverse to the plaintiff; and (4) the position was filled by a person with qualifications similar to those of the plaintiff, or the job remained open and the employer continued to search for similarly qualified candidates.[94] Once the plaintiff makes out a prima facie case, a rebuttable presumption of discrimination arises, and the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions.[95] If the employer satisfies this burden, the plaintiff must offer proof that the employer's articulated reason is pretextual.[96] "Pretextual," according to the *McDonnell Douglas* line of cases, was interpreted to mean that the plaintiff could prevail either by proving that the defendant's articulated reason was not true or that even if true, it was not the employer's true motivation for the employment decision.[97] In this analysis, the "ultimate burden" of persuasion "remains at all times with the plaintiff."[98]

In creating the *McDonnell Douglas* framework, the Court, in effect, recognized that absent a credible articulation of a legitimate, nondiscriminatory reason, an employer's adverse treatment of a member of a protected group more likely than not arose from discriminatory intent.[99] This assumption, although potentially overinclusive, was justified by the overarching purpose of Title VII: to end workplace discrimination.[100] As

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Burdine, 450 U.S. 248, 254 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577–78 (1978).

[93] Anyone might satisfy this first prong of the *McDonnell Douglas* analysis, for anyone might potentially suffer discrimination as a result of their race, sex, etc. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 273 (1976) (stating that the force of Title VII is "not limited to discrimination against members of any particular race.").

[94] *McDonnell Douglas*, 411 U.S. at 802 (setting out prima facie case in action for failure to hire or promote). The *McDonnell Douglas* Court noted that the exact form of the framework would vary according to the nature of the claim (for example, whether for failure to hire or discriminatory firing). *Id.* at 802 n.13.

[95] *Id.* at 802; *Burdine*, 450 U.S. at 255 (setting forth in detail the defendant's burden of production).

[96] *McDonnell Douglas*, 411 U.S. at 804.

[97] Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 219 (1993).

[98] *Burdine*, 450 U.S. at 253.

[99] Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997–98 (1994); William R. Corbett, *The "Fall" of* Summers*, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 351 (1996).

[100] Robert Brookins, Hicks*, Lies, and Ideology: The Wages of Sin Is Now Exculpation*, 28 CREIGHTON L. REV. 939, 983–84 (1995).

Justice Souter would later point out, the *McDonnell Douglas* framework acts merely to force the defendant to define the scope of the plaintiff's ultimate burden.[101] Without this shift, and in light of the difficulty in attaining direct evidence of discriminatory intent, plaintiffs would have to imagine, then disprove, all potential nondiscriminatory reasons by which the employer might have been motivated.

Over time, the Court has drawn back from its protective assumption in *McDonnell Douglas*, reinfusing disparate treatment with employment at will.[102] The first evidence of this move may be found in the 1978 decision of *Furnco Construction Corp. v. Waters*.[103] In *Furnco*, the plaintiffs were African-American bricklayers who, although fully qualified, had not been hired by the defendant employer's superintendent because it was his practice only to hire persons "whom he knew to be experienced and competent" or who came recommended.[104] The Supreme Court accepted the employer's explanation, ignoring the obvious fact that such a requirement likely removed all minority applicants from consideration, and might have even been a pretext for doing so.[105] The Court explained that to satisfy the second stage of the *McDonnell Douglas* analysis, an employer need only offer "some legitimate, nondiscriminatory reason," not necessarily one that has no adverse effect on members of a protected class.[106] In justifying this reinterpretation of the burden-shifting framework, the Court pronounced that judges are not competent to restructure employers' business practices, "and unless mandated to do so by Congress they should not attempt it."[107] The message of *Furnco* was clear: courts must not invade the province of employer prerogatives, even to achieve the statute's goal of ending workplace discrimination.[108] From a tort lawyer's perspective, such reasoning parallels courts' analysis of duty in negligence cases. Before explaining this further in Part II.B.2.b.iii below, I offer a few further illustrations from the disparate treatment case law.

The line of reasoning begun in *Furnco* was taken to a stronger conclusion in *St. Mary's Honor Center v. Hicks*.[109] The plaintiff, a black correctional officer, was fired after a verbal exchange with his new immediate

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[101] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 525 (1993) (Souter, J., dissenting).

[102] *See generally* Corbett, *supra* note 99 (presenting a very competent analysis of the Supreme Court's imposition of employment at will on the disparate treatment mechanism).

[103] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 582 (1978); *see* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 71 (1990) (pointing to *Furnco* as the beginning of the Court's "general disinclination to restructure private business practices").

[104] *Furnco*, 438 U.S. at 570.

[105] *Id.* at 578.

[106] *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

[107] *Id.*

[108] Corbett, *supra* note 99, at 334. The term "employer's prerogatives" was to become a standard flag for the Court's assertion of the employment at will doctrine. *E.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion).

[109] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

supervisor.[110] Previous to the appointment of this supervisor, Mr. Hicks had had an unblemished employment record.[111] The district court concluded that the employer's articulated legitimate reasons for firing Mr. Hicks were pretextual, as several white shift commanders had committed more egregious violations than Hicks for which they had received more lenient punishment.[112] Nevertheless, the district court held for the defendant employer on the basis that the plaintiff "ha[d] not proven that the crusade [to terminate Hicks] was racially rather than personally motivated."[113] Although the Eighth Circuit reversed,[114] the Supreme Court sustained the district court's ruling on the grounds that not only must the plaintiff prove the employer's reasons to be pretextual, the plaintiff must also show that the reasons are a "pretext for discrimination."[115] By thus reintroducing the requirement of proof of discriminatory intent, the Supreme Court effectively gutted the *McDonnell Douglas* framework and abandoned the assumption that an employer who needs to fabricate a nondiscriminatory reason for his actions must also have acted with discriminatory intent.[116] When the employer's liability depends upon proof of discriminatory intent, "'no reason' or even a demonstrably false" reason is sufficient for the employer to avoid liability.[117] The Court's reasoning thus stems from the very heart of the employment-at-will doctrine. Indeed, the *Hicks* Court narrowed Title VII's exception to employment at will to such an extent that employer racism may escape legal detection merely by masquerading as "personal animosity"[118]—this despite the fact that even

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[110] *Id.* at 504–05.

[111] *Id.*

[112] *Id.* at 508.

[113] *Id.*

[114] Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492–93 (8th Cir. 1992).

[115] *Hicks*, 509 U.S. at 516. The disagreement between the Eighth Circuit and the Supreme Court was representative of the interpretive clash between "pretext-only" and "pretext-plus" among the lower courts leading up to *Hicks*. *See* Brookins, *supra* note 100, at 946 (detailing the split in the lower courts).

[116] *Hicks*, 509 U.S. at 540 (Souter, J., dissenting). In fact, the most accurate reading of *Hicks* is that if the plaintiff can prove that the employer's reasons are pretextual, although the plaintiff does not win as a matter of law, the fact finder may yet infer discriminatory intent. EEOC: ENFORCEMENT GUIDANCE ON *ST. MARY'S HONOR CTR. V. HICKS*, *reprinted in* 70 Daily Lab. Rep. (BNA) F–2 (Apr. 13, 1994); Corbett, *supra* note 100, at 345–46, 348.

[117] Estlund, *supra* note 91, at 1671.

[118] The fate of Mr. Hicks on remand provides an apt example of the practical effects wrought by the Supreme Court's design. On remand before the district court, Hicks's employer changed its reason for discharging Hicks from "alleged rules violations" to "personal animosity," Hicks v. St. Mary's Honor Ctr., 90 F.3d 285, 290 (8th Cir. 1996), an explanation that the district court had offered *sua sponte* in its original *Hicks* opinion. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1251–52 (E.D. Mo. 1991). In light of this change, the parties agreed, rather than hold a rehearing, to permit the plaintiff to take new depositions of the plaintiff's supervisors. *Hicks*, 90 F.3d at 289. In these depositions, both supervisors testified that they had not felt any personal animosity toward Mr. Hicks, belying the employer's new defense. *Id.* at 290. Despite this testimony, the district court

earnest claims of personal dislike and poor work performance may, at their heart, be racially motivated.[119]

Although the rule in *Hicks* was at least ostensibly weakened in *Reeves v. Sanderson Plumbing*,[120] courts both before and after *Reeves* have in practice cited a reluctance to review employers' "business judgment." For example, in *Brekke v. City of Blackduck*,[121] a federal district court in Minnesota held that although the plaintiff had succeeded in proving that the defendant's reason for firing her was false, she had failed as a matter of law to offer strong enough evidence that gender discrimination was the true reason, stating: "[W]e remain mindful that 'the employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination."[122] Indeed,

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held that because "[t]here is no suspicion of mendacity here," racial motivation cannot be inferred from the supervisors' personal animosity. *Id.* If this reasoning seems to make little sense, that is because it does, in fact, make very little sense. Indeed, the district court's findings can only be explained by an almost fanatical refusal to infer discrimination even from the most obvious, if circumstantial, evidence.

[119] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1239 (1995) (arguing that the discriminatory intent requirement is fundamentally flawed because our decisions are made as a result of a series of categorizations that can result in bias without the invidious motivation presumed by the law); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (demonstrating that subconscious racist and sexist stereotypes can affect conscious processing of information); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 903 (1993) (finding through psychological surveys that although the vast majority of subjects agreed with racial and sexual equality in the workplace, many subjects exhibited a high degree of adherence to discriminatory stereotypes); *see also* Randall A. Gordon et al., *The Effect of Applicant Age, Job Level, and Accountability on Perceptions of Female Job Applicants*, 123 J. PSYCH. 59, 66–67 (1989) (revealing that persons with a greater responsibility for decisionmaking tend to rely more heavily on stereotypes than those who do not bear the sole responsibility for such decisions).

[120] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000) (stating that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially because the employer is in the best position to put forth the actual reason for its decision."). Lower courts appear still to be deciding what to make of *Reeves*. *See, e.g.*, Vadie v. Miss. State Univ., 218 F.3d 365, 373 n.23 (5th Cir. 2000) (indicating that *Reeves* did not fundamentally alter the "pretext-plus" analysis set out in *Hicks*).

[121] Brekke v. City of Blackduck, 984 F. Supp. 1209, 1229–30 (D. Minn. 1997).

[122] *Id.* (quoting Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995)); *see also* Nash v. Consol. City of Jacksonville, 895 F. Supp. 1536, 1555 (M.D. Fla. 1995) (stating in its conclusions of law that "Title VII does not vest federal courts with the power to sit as review boards for every personnel decision"); Verniero v. Air Force Acad. Sch. Dist., 705 F.2d 388, 390 (10th Cir. 1983) ("[I]t is not the duty of a court nor is it within the expertise of the courts to attempt to decide whether the business judgment of the employer was right or wrong."). Cases citing such reasoning even after *Reeves* include:

such opinions often couple statements of deference to employers with explicit references to the employment-at-will doctrine.[123]

There are also more subtle means by which courts use the spirit of the employment-at-will principle to effect summary judgment in disparate treatment cases. One way is to manipulate the scope of the term "similarly situated," as did the Eleventh Circuit in *Nix v. WLCY Radio/Rahall Communications*.[124] After *Hicks* and *Reeves*, the most probative means of proving "pretext for discrimination" (other than by direct evidence) is to demonstrate that an employee outside the plaintiff's protected category engaged in similar conduct without the negative employment consequences suffered by the plaintiff.[125] The Eleventh Circuit's decision in *Nix* adopted an exceedingly narrow interpretation of the "similarly situated" component of this mode of proof. *Nix* required the plaintiff to show "'that the misconduct for which [he] was discharged was *nearly identical* to that engaged in by [an employee outside the protected class] whom [the employer] retained.'"[126] As interpreted by subsequent cases in multiple circuits, the *Nix* rule is narrow indeed, requiring that in order to be similarly situated to the plaintiff, other employees must have reported to the same supervisor, been subjected to the same standards for performance evaluation and discipline, and engaged in the same conduct as the plaintiff, "without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it."[127] The rigor of these demands gives courts ample opportunity to escape the plaintiff's analogy and find for the defendant as a matter of law. The thrust of the *Nix* approach is clear: courts wish to refrain from treading on employers' freedom to hire and fire as they please, even when this restraint frustrates the goals of Title VII. In fact, courts often bolster their reliance on *Nix* by explicit reference to the employment-at-will principle or the necessity of judicial noninterference.[128]

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Denney v. City of Albany, 247 F.3d 1172, 1188 (11th Cir. 2001); Hennick v. Schwans Sales Enters., Inc., 168 F. Supp. 2d 938, 955–56 (N.D. Iowa 2001).

[123] *E.g.*, Danzl v. N. St. Paul-Maplewood-Oakdale Indep. Sch. Dist. No. 622, 706 F.2d 813, 819 (8th Cir. 1983) (Schatz, J., concurring); *Nash*, 895 F. Supp. at 1555; Woodbury v. Sears, Roebuck & Co., 901 F. Supp. 1560, 1565 (M.D. Fla. 1995).

[124] Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1186–87 (11th Cir. 1984).

[125] Francis v. Runyon, 928 F. Supp. 195, 202–03 (E.D.N.Y. 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)); *see* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–84 (1976) (setting forth this method of proof).

[126] *Nix*, 738 F.2d at 1185 (quoting in part Davin v. Delta Air Lines, Inc., 678 F.2d 567, 570 (5th Cir. 1982)) (emphasis added); Jones v. Gerwens, 677 F. Supp. 1151, 1152 (S.D. Fla. 1988) (citing *Nix*, 738 F.2d at 1185).

[127] Gilman v. Runyon, 865 F. Supp. 188, 192 (S.D.N.Y. 1994) (citing Mazzella v. RCA Global Commc'ns, Inc., 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986)).

[128] *See Nix*, 738 F.2d at 1187; *Francis*, 928 F. Supp. at 203; *Gilman*, 865 F. Supp. at 193.

### ii. *Employment at Will in Mixed-Motives Cases*

Recall from Part II.B.1 above that the employment-at-will principle played an important role in the development of mixed-motives doctrine. Although Congress, with the 1991 amendments to Title VII, ordered courts to allow viable mixed-motives claims, in practice courts have found other ways to dismiss such cases. Consider, for example, *Smith v. F.W. Morse & Co*.[129] The plaintiff, Kathy Smith, had risen through the ranks of the defendant company for more than a decade to attain the executive position of materials manager.[130] At about the time Smith assumed her new duties, she informed her supervisor that she had become pregnant and would need a six week maternity leave.[131] The company had no formal maternity leave policy, but Smith's supervisor nonetheless agreed.[132] While Smith was on leave, Smith's supervisor approached first Smith, then members of Smith's friends and family, as to whether Smith desired more children.[133] Rumors began to circulate at work that Smith would not be returning to work.[134] Smith was discharged before she returned from her leave on the grounds that the business had functioned well in her absence, making her continued employment superfluous.[135]

In light of these facts, one might expect the *Morse* court to find at least that there was a triable issue of fact on the plaintiff's mixed-motives claim. Indeed, the court recognized settled precedent to the effect that under Title VII, an employer may not discharge an employee based on the sole fact of her pregnancy.[136] Nevertheless, the court upheld the district court's grant of summary judgment to the employer, finding no reversible error in the trial court's refusal to infer an intent to discriminate.[137]

So-called after-acquired evidence mixed-motives cases provide perhaps an even starker example of courts' subversion of the anti-discrimination principle to that of employment at will. In its 1988 decision in *Summers v. State Farm Mutual Automobile Insurance Co*., the Tenth Circuit held that if evidence of employee misconduct discovered in the course of the employee's discrimination suit would have resulted in discharge of the plaintiff had the

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[129] Smith v. F.W. Morse & Co., 76 F.3d 413 (1st Cir. 1996).

[130] *Id.* at 418. This position consolidated the positions of three managers who had been let go as the result of a recent merger. *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 419.

[134] *Id.*

[135] *Smith*, 76 F.3d at 419.

[136] *Id.* at 424 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983)). The court also recognized that if the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654) (2012), had been applicable, a different set of rules would apply. *Smith*, 76 F.3d at 424 n.8.

[137] *Id.* at 425.

employer previously known of the misconduct, then the employee's suit must be dismissed as a matter of law.[138] Subsequent to the *Summers* decision, a majority of the federal circuit courts adopted the *Summers* reasoning in deciding after-acquired evidence cases, although there had previously existed a split among the circuits.[139] The issue became ripe for resolution by the Supreme Court; hence, the Court granted certiorari in *McKennon v. Nashville Banner Publishing Co.*[140]

At the age of sixty-two, plaintiff McKennon was fired from her job of thirty years, allegedly as part of a necessary work force reduction plan.[141] She sued under the Age Discrimination in Employment Act of 1967 (ADEA),[142] an act incorporating substantially the same legal precedent as Title VII. During litigation, the defendant employer learned that shortly before her discharge, McKennon had copied and removed several confidential company documents in response to her suspicion that the company may soon discharge her.[143] McKennon stated in deposition that this violation of her job responsibilities had been an effort to "protect" herself against anticipated wrongful discharge.[144] Two days following defendant's discovery of McKennon's actions, the employer issued a second discharge letter to McKennon stating that if it had previously known of her actions, it would have fired her for those reasons alone.[145] The employer then filed a motion for summary judgment under the *Summers* doctrine,[146] which was the rule in the Sixth Circuit at that time.[147] The district court granted the defendant's motion,[148] and the court of appeals affirmed dismissal of the case.[149]

In a unanimous opinion, the Supreme Court reversed the Sixth Circuit.[150] The Court held that allowing after-acquired evidence to preclude all relief to plaintiffs who have established disparate treatment under the ADEA or Title VII would undercut the twin goals of these statutes—to compensate the

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[138] Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 709 (10th Cir. 1988).

[139] Corbett, *supra* note 99, at 363. Professor Corbett does an excellent job explaining the role of employment at will in the development of after-acquired evidence cases through the Supreme Court's 1995 decision of *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). *See id.* at 374–82.

[140] *McKennon*, 513 U.S. at 355–56.

[141] *Id.* at 354.

[142] 29 U.S.C. §§ 621–634 (1994).

[143] *McKennon*, 513 U.S. at 355.

[144] *Id.*

[145] *Id.*

[146] McKennon v. Nashville Banner Publ'g Co., 797 F. Supp. 604, 606 (M.D. Tenn. 1992).

[147] *See* Johnson v. Honeywell Info. Sys., 955 F.2d 409, 415 (6th Cir. 1992) (adopting the *Summers* rule).

[148] *McKennon*, 797 F. Supp. at 605.

[149] McKennon v. Nashville Banner Publ'g Co., 9 F.3d 539, 543 (6th Cir. 1993).

[150] *McKennon*, 513 U.S. at 363.

victims of discrimination and to eliminate discrimination in the workplace.[151] However, the Court then invoked the language of *Price Waterhouse* to hold that the balance between management prerogatives and the statutory rights of victims of discrimination required that the plaintiff's remedies be limited if the employer can prove that the plaintiff's conduct was so severe that the employer would have terminated the plaintiff for that reason alone, had it known of the plaintiff's conduct at the time of discharge.[152] If the employer satisfies its burden of proof, the Court reasoned, the plaintiff should be barred from the remedies of reinstatement and front pay, and the plaintiff's back pay will be reduced to the amount incurred between the date of discharge and the date of discovery of the plaintiff's misconduct.[153]

At first blush, the *McKennon* decision seems to be a retreat from the employment-at-will principle. However, as Professor Corbett has posited, "*McKennon* is, perhaps, the most definitive subordination of federal employment discrimination law to the employment-at-will doctrine to date."[154] Unlike in *Furnco*[155] and *Hicks*,[156] Christine McKennon's employer, for purposes of summary judgment, admitted to having discriminated against her in violation of federal statutory anti-discrimination law.[157] Despite this admitted statutory violation, the Court invoked the language of employment at will to decide that the interests of the statute must yield to the common-law "rights" of employers.[158] After-acquired evidence cases are not rare.[159] Most appear in the form of résumé or application fraud, in which job applicants exaggerate education credentials or work experience in order to enhance their

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[151] *Id.* at 358 (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)).

[152] *Id.* at 361.

[153] *Id.* at 361–362. The Court tempered the limitation on remedies by allowing lower courts to "consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party." *Id.* at 362. Although the Court recognized that the *McKennon* decision might encourage employers to "as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act," the Court felt that the employee's interests were amply protected by the right to claim attorney's fees and to invoke the protection of Rule 11 of the Federal Rules of Civil Procedure. *Id.* at 363.

[154] Corbett, *supra* note 99, at 359.

[155] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 573 (1978).

[156] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508 (1993).

[157] *McKennon*, 513 U.S. at 355.

[158] *Id.* at 361. This part of the *McKennon* opinion is replete with the telltale language of employment at will: "legitimate interests of the employer," "employer's legitimate concerns," significant other prerogatives and discretions in the course of hiring, promoting, and discharging of their employees," "employers' freedom of choice," "lawful prerogatives of the employer," and "employer's rights and prerogatives." *Id.*; *see* Corbett, *supra* note 99, at 374–75.

[159] *See* Rebecca Hanne White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 53 n.13 (1993).

chances of getting hired.[160] Because the remedies left standing after *McKennon* provide little economic payoff to plaintiffs, the case effectively barred most such cases from success in deference to employment at will.[161]

### iii. *Employment at Will as No-Duty*

As evidenced by the foregoing discussion, the doctrine of disparate treatment and its application to deny liability in employment discrimination cases reflects courts' desire to protect employer prerogatives and a self-described incompetence to moderate or make inferences from employers' business decisions. This reasoning mirrors state courts' duty analysis in negligence cases. In asking the duty-framed question—assuming that the employer acted in a discriminatory way, should the court impose an obligation to have acted otherwise?—courts have frequently answered thus: Even where the employer acted in a discriminatory way, the employment-at-will principle counsels against the imposition of an obligation to have acted otherwise. Or, as some courts have put it: The court is not competent to question the employer's business decision,[162] or to infer discrimination from the employer's actions,[163] and therefore the court ought not impose a duty pursuant to which a jury might find liability.[164]

One category of tort cases in which courts have used similar reasoning is landowner cases, as described above. Because courts were hesitant to second-guess landowners' decisions about how to manage their land, courts imposed strict limits on landowners' duties, contingent on the status of the visitor. Two other categories of tort cases serve as examples of courts' feeling of incompetence or unwillingness to judge the obligations of employers: cases involving the duties of parents and of governmental entities.

Beginning at least with the 1891 Mississippi case of *Hewellette v. George*,[165] courts granted parents immunity, in the form of no-duty rulings, from suits brought by their children. Since the 1950s, however, most states have either completely abrogated blanket no-duty rules or have adopted limited duty rules crafted to maintain "parental discretion."[166] In doing so,

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[160] *Id.* at 53 n.13.

[161] *See* Estlund, *supra* note 911, at 1673–74 ("[T]he relatively limited economic damages that most plaintiffs can hope to recover[] make it difficult for middle- and lower-income plaintiffs to find a lawyer," making it especially difficult in the face of after-acquired evidence). This is not to excuse, of course, the practice of application fraud—but the social evil caused by the practice can hardly be compared to that of intentional discrimination.

[162] Brekke v. City of Blackduck, 984 F. Supp. 1209, 1229–30 (D. Minn. 1997).

[163] Smith v. F.W. Morse & Co., 76 F.3d 413, 425 (1st Cir. 1996).

[164] *Id.*; *Brekke*, 984 F. Supp. at 1229–30.

[165] Hewellette v. George, 9 So. 885, 886–87 (Miss. 1891) (holding for the mother in a suit brought by her minor daughter for wrongful commitment to an insane asylum).

[166] For a complete history of the rise and decline of parental immunity, see Frederick W. Grimm, Recent Development, *Tort—Parental Immunity*—Merrick v. Sutterlin*, 93 Wn.*

many courts cite the 1963 Wisconsin case of *Goller v. White*.[167] The *Goller* court retained parental immunity in only two situations: "(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."[168] Other courts have limited the parent-child duty by adopting a "reasonable parent" standard.[169] In either instance, courts are refusing to impose a general duty of reasonable care due to a sense that they are not competent to, or ought not, prescribe specific standards of conduct for parents. This might be traced to a belief in fundamental parental rights and freedoms, a lack of consistent societal norms regarding parenting decisions (or regarding liability for a failure to adhere to such norms), or a recognition of courts' and juries' institutional limitations in delineating parental standards. This reasoning is directly analogous to that found in employment discrimination cases, in which courts cite a reluctance or inability to delineate standards of conduct for employers' business decisions.

A second torts analog may be found in the "discretionary function" branch of sovereign immunity.[170] In 1946, Congress passed the Federal Tort Claims Act, permitting tort claims to be brought against the government for harms caused by government employees.[171] The Tort Claims Act retained several exceptions to liability, however, including an immunity from: "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[172] A majority of courts also apply the "discretionary function" test when considering the duties of state and local government entities.[173]

The most common rationale for this approach is the separation of powers—that courts must "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy

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*2d 411, 610 P.2d 891 (1980)*, 56 WASH. L. REV. 319, 319–27 (1981); William E. McCurdy, Book Note, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1072–82 (1930); Brian A. Wamble, Note, *Parental Immunity: Tennessee Joins the National Trend Toward Modification*, 25 U. MEM. L. REV. 235, 242–45 (1994).

[167] Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963).

[168] *Id.*

[169] *See, e.g.*, Gibson v. Gibson, 479 P.2d 648, 653 (1971) ( "[A]lthough a parent has the prerogative and the duty to exercise authority over his minor child, this prerogative must be exercised within reasonable limits. The standard to be applied is the traditional one of reasonableness, but viewed in light of the parental role.").

[170] For a discussion of the history of sovereign immunity, see Reginald Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167, 169 (1952).

[171] Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended in scattered sections of 28 U.S.C. (2012)).

[172] 28 U.S.C. § 2680(a) (2012).

[173] *See* DOBBS, *supra* note 19, § 270, at 720–21.

through the medium of an action in tort."[174] Put differently, the goal is to protect the ability of government entities to make policy decisions in the best interests of society without fear of liability to those whom such decisions might incidentally, even if negligently, harm. This type of reasoning too may be found throughout employment discrimination case law. Recall, for example, a similar statement by the court in *Brekke v. City of Blackduck*: "[W]e remain mindful that 'the employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers . . . ."[175]

A related justification for limited governmental duties is that practically speaking, it is impossible for a government entity to make policy decisions without affecting at least some people negatively, perhaps harmfully. Because it is impossible to avoid causing some kind of harm, the government must knowingly make decisions that will benefit some of its citizens and harm others. Society itself has not reached a distributional consensus as to who should be harmed by the government's decisions and who should benefit; thus, courts reason that the government has no obligation—or at least, courts cannot or ought not impose an obligation—to decide policy in a specific way. As with parental "discretionary duties," this reasoning tracks that of courts that decline to question employers' decisions in employment discrimination cases.

In addition to deference and obligational reasoning, courts offer yet another justification for limited governmental duties—that it would be impracticable for the government to compensate its citizens for each harm that the government's policy choices might negligently cause. Thus, courts decline to impose a duty of care because the state has a legitimate interest in protecting against "an unanticipated depletion of public funds and the resultant reduction in public services."[176] This policy reasoning also finds analog in the employment discrimination context. The *Nassar* Court, for example, declined to impose an obligation on the defendant employer in part because the resulting increase in liability would have a perverse effect and "siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment."[177]

In sum, federal courts in employment discrimination cases are engaging in the very same types of analysis as do state courts in tort negligence duty cases. The opinions do not reference negligence duty doctrine directly, although their general analogy of employment discrimination statutes to torts has grown stronger, particularly in recent years. Although federal courts cast this duty-like reasoning as statutory interpretation, gap-filling, or factual or proximate

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[174] United States v. Varig Airlines, 467 U.S. 797, 814 (1984).

[175] Brekke v. City of Blackduck, 984 F. Supp. 1209, 1229–30 (D. Minn. 1997).

[176] *In re* Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1465, 1466 (D. Colo. 1989); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982); Lee v. Colo. Dep't of Health, 718 P.2d 221, 227–28 (Colo. 1986).

[177] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531–32 (2013).

causation, the core of their analyses rests on principles of obligation, public policy, and wrongdoing. In my view, this use of duty analysis is problematic at a normative level; however, this Article does not offer a broadly-normative critique. Rather, Part III makes arguments internal to tort law that courts' use of duty analysis in employment discrimination cases should be proscribed.

## III. COURTS' DUTY ANALYSIS IN EMPLOYMENT DISCRIMINATION CASES IS IMPROPER

### A. *The Nature of Wrongfulness in Employment Discrimination Claims Is Not Analogous to Torts*

Duty in tort law operates at the center of the principle of wrongfulness, which in turn rests at the very heart of tort law. Unreasonable behavior is not wrongful if one owes no duty to act reasonably in the first place. For example, practicing blindfolded archery might be unreasonable and might be wrongful in most contexts. If one is practicing blindfolded archery while ensconced in one's million-acre estate, however, such behavior might not be wrongful and no duty of care owed—either because (depending on the jurisdiction) it creates no foreseeable injury to others or because a landowner's right to do what she wants with her land trumps the risk created.[178] The doctrinal analysis of tort duties, however, is specific to the particular tort at issue. More importantly, courts only (at least expressly) engage in duty analysis in negligence cases, not in the context of intentional torts or strict liability. Thus, it would be proper for federal courts to import tort duty analysis only if the nature of wrongfulness in employment discrimination cases is commensurate with that in tort law, and even then perhaps only if it is analogous to negligence, specifically. In this section, I assert that it is neither.

The Supreme Court's increasing characterization of employment discrimination as a tort has expressly extended to claims about the nature of wrongfulness in the statutes. In *Staub v. Proctor Hospital*, for example, the Court considered a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for so-called cat's paw liability—a claim in which the decisionmaker acted without personal bias, but unknowingly used information supplied by lower-level employees who were influenced by bias.[179] Oddly (from a tort lawyer's perspective), the Court grounded its analysis in the concept of proximate cause.[180] In doing so, however, Justice Scalia's majority opinion discussed at length the nature of

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[178] Several jurisdictions have followed the Restatement (Third) of Torts in proscribing foreseeability determinations as a part of the duty analysis. *See, e.g.*, Rodriguez v. Del Sol Shopping Ctr. Assocs., 326 P.3d 465, 474 (N.M. 2014).

[179] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1190 (2011).

[180] *Id.* at 1194.

wrongdoing set out in the statute.[181] There are a number of glaring faults with Justice Scalia's opinion, many ably elucidated in an article by Professor Charles Sullivan.[182] Nonetheless, even taking the opinion on its face, it serves to highlight some of the differences between the nature of wrongfulness in employment discrimination statutes and that of torts.

Beginning with "the premise that when Congress creates a federal tort it adopts the background of general tort law," the *Staub* opinion explains that "[i]ntentional torts such as this, 'as distinguished from negligent or reckless torts, . . . generally require that the actor intend the *consequences* of an act, not simply the act itself.'"[183] *Staub* thus tracks most prior decisions in describing employment discrimination claims as intentional torts. This characterization makes intuitive sense; torts that proscribe certain specific actions—for example causing harmful physical contact with another—are typically (with perhaps the exception of abnormally dangerous activities) considered to be intentional torts—torts that require the plaintiff to prove that the defendant intended the act defined as wrongful. This is not necessarily so in the context of employment discrimination statutes, however. Nothing in the statutes requires proof of "intent" to take an unlawful employment action because of bias. Under the plain language of the statute, so long as the employer took the proscribed action because of the proscribed motive, that suffices to trigger liability—ostensibly, a negligent or even an unintentional action might suffice. Although courts have not interpreted employment discrimination statutes thus, this peculiarity causes one to question whether the statutes mirror common-law tort actions.

Next, the quote above suggests that USERRA (which tracks, in all relevant respects, other employment discrimination statutes) requires intent not only to commit the biased act, but also the resulting consequences. In the context of *Staub*, this means that the biased employees must have intended not only to take the biased action—filing a poor performance review, a non-actionable wrong—but also that the review result in an "unlawful employment practice"—that the employee be fired. If this is indeed required by the statute,[184] this does not capture the nature of wrongdoing in intentional torts. The majority rule, and that of the current draft *Restatement (Third) of Torts: Intentional Torts to Persons*,[185] is that intentional torts such as battery require proof only of "single intent"—intent to commit the act—rather than "dual intent"—intent both to commit the act and its consequences.[186] For example, in the context of battery, courts require only proof of intent to "cause a contact

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[181] *Id.* at 1190–93.

[182] *See* Sullivan, *supra* note 1, at 1440–46.

[183] *Staub*, 131 S. Ct. at 1191 (alteration in original) (quoting Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998)) (internal quotation marks omitted).

[184] Nothing in the statute expressly requires intent.

[185] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 cmt. f (Discussion Draft 2014).

[186] *Id.*

with the person of [another]."[187] A majority of courts do not require proof of an intent to cause both the contact and the resulting bodily harm or offense.[188]

Finally, Justice Scalia's opinion points out that employment discrimination statutes require proof not only of intent, but also of motive.[189] Thus, Title VII provides that "it shall be an unlawful employment practice" to take certain adverse employment actions "*because of* such individual's [protected characteristic]."[190] Put differently, whether the action was intentional or not, the plaintiff must prove that the *reason* for the defendant's action was discrimination—defined by some courts as "animus"[191] or "discriminatory purpose."[192] By contrast, intentional torts do not typically require proof of motive. Consider again the tort of battery—intent, as defined by courts in this context, means that the defendant purposefully initiated contact or acted with the knowledge with substantial certainty that contact would result.[193] If battery required motive as well, a court might require proof, for example, that the defendant acted with the motive of humiliating the plaintiff or of breaking the plaintiff's nose. Although such a motive might be relevant for the assignment of punitive damages, it is not an element of the tort, or of intentional torts generally.

Differing approaches to intent and motive distinguish the nature of wrongfulness in employment discrimination cases from that in intentional torts. Might instead employment discrimination statutes incorporate notions of wrongfulness found in the tort of negligence? The expedient answer is no—courts have expressly declined to embrace negligent discrimination as a basis for liability.[194] This is not the entire story, however.[195] In disparate impact claims, for example, a plaintiff prevails by showing that although an employer practice was not intended to discriminate, the practice had a disproportionately large negative impact on a class of people according to a protected characteristic.[196] This requirement, alone, might qualify as strict liability;

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[187] *Id.* § 101(1)(a).

[188] *Id.* § 101 cmt. f.

[189] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1190–91 (2011). In fact, the majority opinion repeatedly conflates intent and motive, using the terms in nebulous and potentially overlapping ways. *See* Sullivan, *supra* note 1, at 1440.

[190] *See* 42 U.S.C. § 2000e–2(a) (2012) (emphasis added).

[191] *E.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 637 (2007).

[192] *E.g.*, Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

[193] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 cmt. e (Discussion Draft 2014).

[194] *See, e.g.*, Jalal v. Columbia Univ., 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII, however, provides no remedy for negligent discrimination . . . .").

[195] *See generally* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (offering a useful discussion of how Title VII arguably embraces a negligence standard); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009) (same).

[196] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

however, an employer may rebut such a finding by showing that the practice was job-related and necessary for the success of the business.[197] In practice, this business necessity defense looks very much like a reasonableness standard—in judging that a practice is "necessary" for the success of a business, the implication is that the practice is therefore reasonable. Indeed, even the determination of whether a practice is "necessary" might be made by the factfinder according to a reasonableness scale: At what point on the usefulness spectrum does a practice become necessary? Perhaps when it is reasonable. A disparate impact plaintiff might also succeed by showing that the employer could have adopted practices that had a less discriminatory impact, but opted not to do so.[198] Such cases fit even more squarely in the negligence rubric because the employer is "held liable for its failure to take reasonable care to prevent disparate results."[199]

Sexual harassment claims also have the look of negligence. In order to succeed in a harassment claim, a plaintiff must prove that the actions were "sufficiently severe or pervasive" to create a hostile work environment[200]—this standard creates what approximates an unreasonableness threshold. Furthermore, courts are clear that negligence on the part of an employer for failing to supervise co-employee harassment suffices for liability.[201] Finally, and perhaps more directly, a defendant should not succeed in a harassment case by convincing the court or jury that he did not intend to harass his female employees or to create a hostile work environment as he made sexual comments, touched them inappropriately, and made gendered jokes by the water cooler. The fact that he intended his acts, which only negligently result in harassment, seems to be all that is required in such cases.

If one is left at the end of this discussion with the impression that the concept of wrongfulness in employment discrimination cases is varied and complex, then this section has done its job. Indeed, wrongfulness in such cases is not only varied and complex, it is unique to the employment discrimination context. Thus, although wrongfulness in employment discrimination cases looks analogous to tortious wrongs in some respects, its similarity is not sufficient to justify the importing of negligence duty analysis into employment discrimination doctrine.

### B. *If Employment Discrimination Claims Are Statutory Torts, They Ought to Be Analyzed as Such*

If discrimination claims are statutory torts as the Supreme Court has expressly claimed, and if courts are indeed engaging in common-law tort duty

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[197] *Id.*
[198] 42 U.S.C. § 2000e-2(k)(1)(A)(ii).
[199] Sperino, *supra* note 1, at 40.
[200] Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
[201] Zatz, *supra* note 195, at 1382.

analysis, such practice is improper under the law governing statutory torts. A statutory tort is one in which a legislative body has (1) imposed a duty to do or refrain from doing an action and (2) either expressly or impliedly enlisted courts to provide a civil remedy to those injured by a violation of the statute.[202] In a statutory tort cause of action, both duty and breach are defined wholly by the statute. Put in terms of common-law negligence, the duty is whatever the statute says it is, and breach is determined not according to a reasonableness standard, but by whether or not the defendant violated the terms of the statute. Thus, in a statutory tort action, the court has no latitude to determine whether or not to impose a duty, or even to define the contours of that duty—the duty is supplied *in toto* by the statute. As the *Restatement (Third) of Torts* explains: "In considering a suit brought against the violator by a victim of the violation, the responsibility of the court is to enforce the liability right expressly created by the statute."[203]

Applying this basic doctrine to employment discrimination law, it is logical to conclude that if the relevant statutes create statutory torts, then an employer's duty is supplied wholly by those statutes. Common-law duty reasoning is not only irrelevant; it flouts the express wishes of the legislature as well as the jurisprudence of statutory torts. Courts' response to this argument (were they to recognize it) would likely be that their duty-like analysis is merely serving the purpose of statutory interpretation and gap-filling—it is not duty analysis for its own sake. Indeed, such reasoning is echoed by, and might even have been the purpose of, Justice Scalia's statement in *Staub* that "when Congress creates a federal tort it adopts the background of general tort law."[204] By invoking this particular tool from the statutory interpretive canon, Scalia was able to side-step the plain text of USERRA and read in a proximate cause limitation that was nowhere present in the statute.

There are two problems with the practice of engaging in common-law duty reasoning in the guise of statutory interpretation. The first is that it is not the type of analysis courts perform when interpreting the terms of statutory torts, or even when trying to determine whether a statute impliedly creates a statutory tort. Thus, as a matter of purely internal doctrinal process, reasoning such as that in *Staub* deviates from the common-law practice of statutory tort cases. For an example of a typical analysis of a statutory tort, consider the case of *Uhr v. East Greenbush Central School District*.[205] In that case, the Court of

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[202] *See, e.g.*, Scovill *ex rel.* Hubbard v. City of Astoria, 921 P.2d 1312, 1317 (Or. 1996) (examining whether there existed "a legislative intent to impose on the police a statutory duty to act on behalf of a publicly intoxicated person who is a danger to self and . . . that failure to act as mandated was contemplated by the legislature to give rise to a potential liability in tort . . . .").

[203] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. b (2010).

[204] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191 (2011).

[205] *See generally* Uhr v. E. Greenbush Cent. Sch. Dist., 720 N.E.2d 886 (N.Y. 1999).

Appeals of New York considered whether a statute that mandated scoliosis testing in public schools created a statutory tort for the benefit of victims whose scoliosis remained untreated as a result of a school's failure to comply with the statute.[206] In considering whether the statute implied a private right of action (impliedly created a statutory tort), the court analyzed whether the plaintiff was one of the class for whose benefit the statute was enacted, whether recognition of a statutory tort would promote the legislative purpose, and whether recognition of such an action would be consistent with the statute's scheme.[207] Each of these interpretive tools calls upon the intent of the statute itself and the legislature that passed it—each is an internal method of interpretation, not relying on reasoning external to the statute. The court did not engage in common-law duty analysis despite the fact that the scoliosis statute was doubtless passed with the legislature's awareness of—as the Supreme Court stated in *Staub*—the "background of general tort law."[208]

Similarly, in *Lewellin v. Huber*, the court interpreted and applied the terms of a dog-owners liability statute as part of its analysis of the plaintiff's private enforcement action for damages resulting from an overly playful dog.[209] The court began its analysis by stating that the phrase to be interpreted "must be understood within its statutory context."[210] The court then interpreted the meaning of the terms "attacked and injured" by reference to the significance of the fact that the statute imposed strict liability, and by using a common text-internal interpretive tool to conclude that because the verbs were used in tandem, the legislature must have intended "injured" to refer to a dog's affirmative but "nonattacking" injurious behavior.[211] These interpretive methods do not leave the confines of the statute and the intent of its enactors—rather, such tools seek to effect the legislature's purpose. Federal courts have not adhered to this practice in the employment discrimination context.[212]

The second, and related, problem with courts engaging in common-law duty reasoning when interpreting employment discrimination statutes is that it

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[206] *Id.* at 891.

[207] *Id.* at 888.

[208] *See Staub*, 131 S. Ct. at 1191; *see also supra* note 204 and accompanying text.

[209] Lewellin v. Huber, 465 N.W.2d 62, 63–64 (Minn. 1991).

[210] *Id.* at 64.

[211] *Id.*

[212] Professor William Murphy believes that the Court made a deliberate shift in its interpretive canon to curb statutes such as Title VII:

> At one time, it was an accepted canon of statutory construction (canonized by the Supreme Court) that remedial social legislation should be hospitably and generously construed to effectuate its purpose. Beginning in about 1976, this canon of construction was largely abandoned by the Supreme Court in discrimination law, and in subsequent years, culminating in 1989, the Court produced a series of decisions in which it rejected the view of law that favored employees and adopted a view that favored employers.

William P. Murphy, *Meandering Musings About Discrimination Law*, 10 LAB. LAW. 649, 653 (1994).

enables courts to second-guess or even scuttle altogether the express purpose of the statutes. As evidenced by the cases described in Part II above, courts have consistently drawn on duty reasoning to curb liability in situations in which Congress clearly contemplated the opposite, although perhaps having failed to anticipate a particular detail of implementation. In fact, Congress has repeatedly been forced to amend employment discrimination statutes, and particularly Title VII,[213] to correct courts' attempts to undermine its purpose "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[214]

In the negligence context, duty is the appropriate vehicle for courts to effectuate policy-based curbs on (or expansions in) liability. Tort liability exists at the instance and continuing pleasure of the common law. A statutory tort, on the other hand, is not a tort at all. It is only, in some ways, analogous to a tort—and in the matter of wrongfulness and duty, as explained in Part III.A. above, it is not particularly analogous at all. A statutory tort is nothing but an order from a legislative body to the courts that they must provide liability. When interpreting a statute's mandate, courts ought not reach for principles gleaned from common-law duty, such as the employment-at-will principle, but must instead attempt to effectuate the will of Congress. Although there is some language in Title VII's legislative history that "management prerogatives . . . [ought to] be left undisturbed to the greatest extent possible,"[215] the overwhelming goal of employment statutes is to eradicate discrimination and make its victims whole.[216] Indeed, the statute aims expressly to limit management prerogatives in service of its goals.

## IV. CONCLUSION

The tortification of employment discrimination law is not inherently improper. Where a statute does not answer questions that arise in its application to particular cases, courts understandably (although not by necessity) look to analogous case law. Drawing from tort conceptions of factual causation is one thing; however, drawing from the policy-driven reasoning of negligence duties is quite another. In this Article, I have attempted to show that this is precisely what courts are doing, if yet tacitly. This practice is improper from a torts-internal perspective. The doctrine governing statutory torts does not permit common-law duty reasoning to

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[213] *See id.* at 653–54.

[214] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

[215] United Steelworkers v. Weber, 443 U.S. 193, 206 (1979) (alteration in original) (quoting H.R. REP. NO. 88-914, at 29 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2516). Ironically, it was in the course of defending employer-initiated affirmative action plans that Justice Brennan explained that in reaching an acceptable compromise over Title VII, conservative legislators had included this language in the House Report. *Id.*

[216] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–20 (1975).

invade the process of effectuating the statute's purpose. I write in hopes that should federal courts continue to draw upon the law of torts, they will begin to get tort law right.