MCLE Self-Study:

Putting Intent in Its Place: A New Direction for Title VII

By Noah Zatz

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At its fiftieth anniversary, Title VII faces a fork in the road. One path is well-marked—the path of *Ledbetter*, *Wal-Mart*, and *Ricci*.[1] Along that path robust commitments to civil rights are choked off by the stranglehold of discriminatory intent. But what is the alternative? Piecemeal protests at particular results have failed to marshal a compelling competing theory of antidiscrimination law. I propose that we find new direction by taking as our compass the Americans with Disabilities Act of 1990 (ADA), Title VII's younger cousin.

The ADA's signature contribution is to characterize denial of reasonable accommodation ("nonaccommodation") as disability discrimination. Appreciating why that is can cast Title VII jurisprudence in a new light. It highlights the affirmative duties Title VII already imposes on employers, and it reveals how persistent legal puzzles might be solved with new tools.

The Common Injury in Disparate Treatment and Nonaccommodation

Conventionally, disparate treatment and nonaccommodation are thought to be radically different types of discrimination.[2] Where disparate treatment captures the wrong of discriminatory intent, nonaccommodation imposes liability without it. Moreover, to avoid nonaccommodation liability employers must engage in differential "special treatment."

In contrast, I argue that nonaccommodation and disparate treatment are joined at the hip. In particular, they target the same basic injury. To see why, we must first understand how equality is offended when employers deny reasonable accommodations. Absent a disability, a worker would get or keep her job without accommodation, but absent accommodation, a worker with a disability would lose that job. In this simple causal sense, the unaccommodated worker loses her job *because of her disability*. That harm, losing a job because of one's membership in a protected class, is no stranger to Title VII. The statutory text speaks to it directly, and disparate treatment claims provide one way—*but not the only way*—to identify that harm.

Specifics aside, my general suggestion is to *displace* discriminatory intent as the touchstone for "discrimination." Discriminatory intent is highly relevant, and for good reasons, but it is not fundamental. In contrast, progressive reformers typically seek to *expand* on discriminatory intent while still accepting a model of discrimination as a "process defect"[3] in how employers make decisions. That defect can be expanded from animus to stereotyping to implicit bias.[4] It can extend beyond decisions about individuals to decisions about policies and practices.[5] The net can widen what counts as protected status,[6] as the Pregnancy Discrimination Act of 1978 did by stipulating that acting based on pregnancy constitutes acting based on sex.[7]

The ADA offers an alternative to this search for a process defect. It recognizes that, absent an accommodation, someone will lose a job, or enjoy a lesser one, because of her disability.[8] Let's say that an employer requires its workers to use some machine, and I cannot use that machine because of a manual disability. Because of my disability, the employer will not hire me. That causal connection remains no matter how evenhandedly the employer applies its requirement and excludes others who, like me, cannot use the machine effectively but for reasons not traceable to disability; perhaps they do not understand how it works or are just a little clumsy. Even without disparate treatment, I suffer harm because of my disability. The ADA calls this discrimination if the employer can avoid inflicting this injury by making reasonable accommodations without undue hardship. The bare fact that I have some disability is insufficient to trigger the employer's duty to accommodate—*that* would be "special treatment" compared to other workers who would also benefit from, say, additional tools or extra time to complete a task. Instead, the duty only arises when the *reason why* I need accommodation is to break the causal chain between disability and harm.[9] Breaking that chain is what antidiscrimination law is all about.

Title VII's Blurred Boundary Between Disparate Treatment and Nonaccommodation

My invocation of the ADA runs afoul of the axiom that Title VII admits only claims of disparate treatment and disparate impact, not nonaccommodation (religion aside). Yet the statute says that unlawful discrimination occurs when

someone loses employment outright or suffers related harms "because of such individual's race, color, religion, sex, or national origin."[10] In a disparate treatment case where an employer takes adverse action based on an employee's race or sex, the employee obviously suffers harm at work because of her race or sex, but an employee denied accommodation can suffer this same harm even if the employer acts without discriminatory intent, no matter how broadly construed. The ADA's insight is that this common harm calls for employer redress, at least when an accommodation is reasonable and imposes no undue hardship.

Once we see how disparate treatment and nonaccommodation liability attack the same underlying problem, it becomes unsurprising that Title VII distinguishes between them less sharply than commonly supposed. Indeed, I assert that Title VII already recognizes some nonaccommodation claims, albeit not by name and in limited contexts.

Hostile work environment law provides the most robust example. The courts uniformly impose Title VII liability on employers that fail to prevent or remedy their employee's harassment by a third party, someone who is not the employer's agent.[11] The plaintiff must prove that the harassing customer, patient, or independent contractor acted because of the employee's sex, but that proof concerns only the third party's conduct. Yet the Title VII claim lies against the employer, *not* the third party. An employer cannot be held vicariously liable for a non-agent's conduct. Instead, the employer is held directly liable for its own acts and omissions, not for the harassing conduct but for its inadequate prevention or response.[12] Strikingly, no court has required—or even suggested—that the plaintiff show that it was *because of her sex* that the employer failed to prevent or remedy the hostile work environment. Title VII liability arises without any finding, or even any assertion, of disparate treatment by the employer.[13]

If the standard story were correct, courts in these third-party harasser cases should be kicking and screaming about imposing liability on employers that had no discriminatory intent. To explain how these cases can fit so smoothly into Title VII, I would look at it this way. In an ordinary disparate treatment case, the employer's "discriminatory intent" does double duty: it establishes that the plaintiff suffered harm because of her sex (or race, etc.) *and* that the employer was responsible. That responsibility flows from presuming that the decision-maker knew she was taking the plaintiff's sex into account and that the decision-maker easily could have avoided doing so. Given its utility in establishing both injury and responsibility, an employer's discriminatory intent sensibly plays an important role in antidiscrimination jurisprudence. Nonetheless, that role is functional, not essential. Where both functions can be performed through different means, a space opens up for other claims. Third-party harasser claims provide an example.

Third-party harasser claims separate these two functions that are bundled together in ordinary disparate treatment cases. With regard to the plaintiff's injury, *the harasser's* discriminatory intent establishes that the plaintiff suffers harm because of her sex. It cannot also establish *the employer*'s responsibility for that harm. Because of this limited role, courts focus simply on the causal relationship between the plaintiff's sex and the third party's conduct; responsibility-conferring concepts like "intent" become superfluous. One leading opinion vividly illustrated this point by reasoning that the plaintiff could have shown merely that she was harassed by a marauding macaw who invaded the workplace and "bit and scratched women but not men": "[t]he genesis of inequality matters not; what *does* matter is how the employer handles the problem."[14]

With regard to the second issue of employer responsibility, hostile work environment claims require a freestanding element apart from matters of discriminatory intent. When the harasser is a third party, the plaintiff must establish employer responsibility by proving that *the employer* was at least negligent in failing to prevent or remedy the harassment.

Thus, third-party harassment because of sex plus employer negligence regardless of sex yields the same outcome as disparate treatment: an employee who suffered workplace injury because of her sex and an employer who failed in its responsibility to avoid that result. To close the loop, notice that these two features also form the core of an ADA nonaccommodation claim: harm to the employee because of disability but without disparate treatment (job loss due to inability to meet the machine-use requirement) plus employer responsibility grounded in notice and failure to take reasonable preventive or corrective steps (denying reasonable accommodations that impose no undue hardship). Despite differences in terminology and degree, the substance is the same. Nor are third-party harasser cases outliers within Title VII in this regard, as I have argued in detail elsewhere.[15]

Title VII's Blurred Boundary Between Disparate Impact and Nonaccommodation

This template of employee injury and employer responsibility also illuminates disparate impact claims. The absence of discriminatory intent provides an obvious link to nonaccommodation. Indeed, not only do disparate impact claims proceed without the *employer's* discriminatory intent, but they do

not require discriminatory intent by anyone. The Court established this point early on by striking down minimum height and weight requirements, where the disparate impact arises out of physical sex differences.[16]

The common foundations of disparate impact and nonaccommodation are most apparent in race discrimination challenges to no-beard policies.[17] These policies have a disparate impact because pseudofolliculitis barbae (PFB), a skin disease triggered by close shaving, is widespread among Black men and virtually absent from other populations. Although styled as broad challenges to no-beard rules, these cases quickly narrow the issue to whether employers must make exceptions for Black men medically unable to shave due to PFB. In other words, they end up in exactly where a nonaccommodation claim would begin if PFB were considered a disability.[18]

By focusing on PFB exceptions, these cases defy the conventional wisdom that disparate impact claims provide across-the-board relief to all affected parties by installing a new, universal rule. Yet here we see highly individualized remedies focused on a subset of one racial group, yielding no relief to a white man who simply prefers to wear a beard. Moreover, this individualizing move fits uneasily with the conventional notion that disparate impact claims equalize employment outcomes between groups writ large.

Again, my ADA-inspired notion of discrimination's injury provides an intuitive answer to the puzzle. Not everyone harmed by a no-beard policy is harmed because of their race, just as not everyone excluded by the employer's machine-use requirement is excluded because of their disability. The civil rights issue pertains only to those employees who *are* harmed because of their race. In the no-beard case, we know what produces the disparate impact: a racially specific, individually identifiable medical condition. A medical exception for PFB should erase the disparate impact. Antidiscrimination principles provide no reason to protect other workers, Black or white, from the no-beard rule.

When we can identify individuals whose protected status leads to workplace harm, a nonaccommodation case arises. When those individual cases recur *en masse*, a disparate impact also arises.[19] For example, a practice that requires employees to hear will elicit charges of nonaccommodation of deaf individuals and a disparate impact on the deaf. Of course, liability will follow only if the employer is responsible. The disparate impact claim fails if the practice is "job-related . . . and consistent with business necessity."[20] That defense incorporates the same kind of balancing as the ADA's "reasonableness" requirement and "undue hardship" defense, notwithstanding differences in terminology and detail.[21]

These principles illuminate all disparate impact claims even though the no-beard cases stand at one end of a spectrum. Consider *Griggs v. Duke Power*,[22] the source of disparate impact analysis and the Court's first signed Title VII opinion. The case arose in 1960s North Carolina, where vast majorities lacked high school degrees. At 12%, a considerable minority of Black men possessed them, but nonetheless the 34% graduation rate for whites was far higher. In a society pervasively structured by racism, many whites who graduated would not have done so had they grown up Black, and many Blacks who did not graduate would have done so with white racial privilege. That is what the racial disparity implies: in many cases, race made a difference.

Imagine that within Duke Power's applicant pool we could tell which Blacks did not graduate because of their race and which did not graduate for the nonracial reasons that led most whites to drop out. Were that so, a remedy could target only those who lost employment opportunities because of their race, just like medical exceptions to a no-beard rule. Of course, in either case the employer could *also* erase the disparity—and the underlying injustice—by eliminating the rule for everyone. But the burdensomeness of that crude remedy—allowing *everyone* to wear beards—would provide no defense against a more targeted, equally effective, and less onerous intervention like a limited waiver or alternative selection device.

A *prima facie* case of disparate impact implies that race or sex makes a difference in whether many individuals get a job. But unlike a nonaccommodation claim or the no-beard cases, we typically cannot differentiate within the group to identify which individuals suffered this harm.[23] We can't turn back the clock in *Griggs* and figure out which Blacks were deterred or prevented from graduating by discriminatory schools; we know that many were, many weren't, and we can't tell them apart. Yet rather than simply shrugging our shoulders at the injustice and declaring it beyond remedy, disparate impact claims allow us to proceed by painting with a broader brush. Employers may try to defend the practice as a whole, and, if they fail, the law requires wholesale revisions that reduce the disparity. Nonetheless, to the extent we *can* narrow the focus to identify more precisely those harmed because of their race, the law both allows and requires plaintiffs to do so.[24] At the limit, this narrowing causes convergence with nonaccommodation, as in the no-beard cases. Similar cases arise out of the connections from sex to pregnancy to medical leave and light-duty restrictions[25] or from

national origin to limited English proficiency to noncompliance with English-only rules.[26]

Conclusion

I have cast a wide net in a small space. Many subtleties and difficult questions have been ignored. Nonetheless, I hope to have suggested how fruitful it could be to revisit employment discrimination law from a new angle, one that starts neither with accusations of a misbehaving employer nor with the broad canvas of society-wide inequality. Instead, I begin with the simple idea that individuals should not lose out at work because of their race, color, religion, sex, national origin, or disability.

This account of workers' injury must be complemented by one explaining how much responsibility employers bear in preventing that harm. Clearly there must be limits, as the ADA recognizes in several ways. At a minimum, though, we should acknowledge that *some* affirmative responsibility has always been integral to Title VII. Even in the simplest disparate treatment cases, employers must shoulder some burden to avoid discrimination. The mere fact that compliance has some cost provides no defense[27] even though cost minimization is a legitimate business goal, and even though at some point costs may grow large enough to support a defense. Title VII has never stood for civil rights on the cheap. Renewing its legacy requires us all to take affirmative steps toward equality at work.

ENDNOTES

1. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
2. *See, e.g.*, Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 Wm. & Mary L. Rev. 1197 (2003); Mark Kelman, *Market Discrimination and Groups*, 53 Stan. L. Rev. 833 (2001).
3. Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 354 (1987).
4. *See, e.g.,* Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006).
5. *See, e.g.*, Lawrence, *supra* note 3.
6. *See, e.g.*, Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 Geo. L.J. 1079 (2010) (arguing that hair texture distinctions are race-based to the same extent as skin color).
7. 42 U.S.C. § 2000e(k). *But cf. Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (holding that permissible disparate treatment based on length of service is "analytically distinct" from impermissible disparate treatment based on age); *see also Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (distinguishing alienage from national origin).
8. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, Colum. L. Rev. 1357 (2009).
9. *See* 42 U.S.C. § 12112(b)(5)(A) (requiring accommodation of "known physical or mental limitations"); Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 Berkeley J. Emp. & Lab. L. 323 (2006).
10. 42 U.S.C. § 2000e-2(a)(1).
11. *See* Zatz, *supra* note 8, at 1372-73 (collecting cases).
12. *See, e.g.*, *Swenson v. Potter*, 271 F.3d 1184, 1191–92 (9th Cir. 2001); *see also Vance v. Ball State Univ.* 133 S. Ct. 2434, 2441 (2013).
13. *See* Zatz, *supra* note 8, at 1378-80, 1400-02. Nor do the cases invoke or rely on disparate impact concepts to justify liability. *See id.* at 1384-86.
14. *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).
15. Zatz, *supra* note 8, at 1415-32 (discussing third-party cases outside the harassment context, the separation of injury and responsibility in subordinate bias cases, and Title VII treatment of pregnancy and religious practice).
16. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).
17. *See, e.g.*, *Bradley v. Pizzaco of Neb.*, 7 F.3d 795 (8th Cir. 1993); *EEOC v. Trailways*, 530 F. Supp. 54 (D. Colo. 1981).
18. *See generally* Christine Jolls, *Antidiscrimination and Accommodation,* 115 Harv. L. Rev. 642 (2001); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).
19. *See* Noah D. Zatz, *An Individualist Theory of Disparate Impact* (m.s. Feb. 19, 2014) (on file with the *California Labor & Employment Law Review*).
20. 42 U.S.C. § 2000e-2(k)(1)(A).
21. *See* Jolls, *supra* note 18; *Fitzpatrick*, 2 F.3d at 1126-27.
22. 401 U.S. 424 (1971).
23. *See* Zatz, *supra* note 19.
24. *See Connecticut v. Teal*, 457 U.S. 440 (1982); 42 U.S.C. § 2000e-2(k)(1)(B).

25. *Compare, e.g.*, *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810 (5th Cir. 1996) *with Stout v. Baxter Healthcare Corp.*, 282 F.3d 856 (5th Cir. 2002). *Cf.* Cal. Gov't Code § 12945(a)(3)(A) (requiring reasonable accommodation of pregnancy-related medical limitations).
26. *See, e.g.*, *E.E.O.C. v. Synchro-Start Prods., Inc.*, 29 F. Supp. 2d 911, 912 (N.D. Ill. 1999).
27. *See City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 716 (1978); Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va. L. Rev. 825 (2003); Jolls, *supra* note 18.

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