Fifteen Percent or Less: A Title VII Analysis of Racial Discrimination in Restaurant Tipping

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ABSTRACT: At least three studies have demonstrated a racial disparity in the amount of money cab drivers and restaurant servers receive in tips. The facially neutral policy of basing restaurant servers' income largely on the tips they receive produces a discriminatory outcome by paying white servers more than nonwhite servers. Such a discriminatory outcome is the hallmark of a Title VII disparate impact case, but there are a number of potential challenges that may impede the successful pursuit of such a case. These include the availability of a disparate impact claim to challenge wage discrimination, the difficulty of defining a challengeable employment practice, and the sufficiency of the statistical support for the claim. Notwithstanding these challenges, this Note argues that there is a reasonable chance of success for such a case and that restaurants should adopt one of the three proposed alternatives to avoid liability: pooling tips, using a fixed percentage gratuity, or eliminating tipping altogether.

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I. INTRODUCTION

Title VII of the Civil Rights Act of 1964 provides protections against workplace discrimination based on five protected statuses, one of which is race.[1] Throughout its history, the Supreme Court has seen fit to expand the protections of the Civil Rights Act in some areas and restrict it in others. When Congress determined that Court decisions were too restrictive, it passed the Civil Rights Act of 1991 to codify positive aspects of previous decisions.[2]

1. Civil Rights Act of 1964, Pub. L. No. 88–352, § 703, 78 Stat. 241.
2. Civil Rights Act of 1991, Pub. L. No. 102–166, § 2, 105 Stat. 1071.

Currently, a Title VII plaintiff can bring a claim under a disparate treatment theory—alleging discriminatory intent, or a disparate impact theory—alleging that a facially neutral practice has a discriminatory outcome.[3]

In a Title VII disparate impact case, the plaintiff–employee must demonstrate that an employment practice creates a discriminatory impact.[4] Then, the burden of proof shifts to the defendant–employer to demonstrate that the employment practice is job related and consistent with business necessity.[5] Finally, the burden shifts back to the plaintiff to prove that there is a reasonable and less discriminatory alternative practice that the defendant refuses to adopt.[6]

In order to bring a Title VII disparate impact case challenging race-based discrimination in restaurant tipping, a plaintiff must overcome a number of hurdles. One issue is that a plaintiff must get a court to recognize that she can bring a disparate impact claim to challenge wage discrimination.[7] Additionally, a plaintiff must overcome the difficulties stemming from the fact that Title VII does not clearly define employment practices. Finally, a plaintiff must convince the court that they have sufficient statistics to establish a viable disparate impact claim under Title VII.

This Note argues that paying servers the tipping minimum wage and relying on tips to make up the majority of their compensation is illegal workplace wage discrimination under a Title VII disparate impact analysis because there is a racial disparity in the amount white and nonwhite servers receive in tips. Part II summarizes the history of Title VII employment discrimination law from the passage of the Civil Rights Act of 1964 through today, including the two models under which a case can be brought. Part III begins with an analysis of the studies that demonstrate the existence of racial disparity in tipped worker income. Part III concludes by addressing a number of potential difficulties with bringing such a discrimination case, including the availability of a disparate impact theory for wage discrimination and issues with defining an employment practice. Part IV examines the challenges restaurant employees face in bringing a disparate impact claim and proposes three alternative practices to the current tipping model that would eliminate the discrimination: pooling tips, using a fixed percentage gratuity, and eliminating tipping altogether.

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3. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."); Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986–87 (1988) (same).

4. *Watson*, 487 U.S. at 986–87.

5. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

6. *Watson*, 487 U.S. at 998; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

7. *See* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 GEO. J. GENDER & L. 159, 181 (2011).

II. HISTORY OF TITLE VII EMPLOYMENT DISCRIMINATION

Title VII of the Civil Rights Act of 1964 ("1964 Act") established a federal law banning employment discrimination.[8] Following developments in case law that curtailed the scope of Title VII, Congress enacted the Civil Rights Act of 1991 ("1991 Act") to amend the 1964 Act, codifying some of the case law addressing Title VII while overriding some court interpretations.[9] Title VII establishes two methods by which an individual can prosecute a discrimination claim: (1) disparate treatment, where employees or job applicants are treated differently because of a protected status; and (2) disparate impact, where a facially neutral practice produces an unintended discriminatory result.[10]

A. THE CIVIL RIGHTS ACT OF 1964

In 1964, Congress passed the Civil Rights Act of 1964, a wide-reaching law that addressed a variety of areas of society with a history of discrimination, including voting rights, public accommodation, and public education.[11] Congress enacted Title VII of the 1964 Act to address discrimination in various employment contexts.[12] Title VII specifically prohibits an employer from refusing to hire, firing, or discriminating against an individual "because of such individual's race, color, religion, sex, or national origin."[13] Title VII further prohibits an employer from "limit[ing], segregat[ing], or classify[ing] his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[14]

Congress included these equal employment opportunity provisions in an attempt to improve employment equality by prohibiting the forms of discrimination that prevented protected minorities (especially African-Americans) from fully participating in the workplace.[15] At the time of the passage of the 1964 Act, African-Americans primarily worked in unskilled or

8. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.

9. Civil Rights Act of 1991, Pub. L. No. 102–166, § 2, 105 Stat. 1071.

10. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009); *Watson*, 487 U.S. at 986–87.

11. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.

12. *Id.* §§ 701–16.

13. *Id.* § 703(a)(1).

14. *Id.* § 703(a)(2). Race, color, religion, sex and national origin are the only five protected statuses under the Civil Rights Act of 1964. *See* Mark R. Bandsuch, *Dressing Up Title VII's Analysis of Workplace Appearance Policies*, 40 COLUM. HUM. RTS. L. REV. 287, 291 (2009) (discussing the immutability of the protected classes defined in Title VII).

15. Ann K. Wooster, Annotation, *Title VII Race or National Origin Discrimination in Employment—Supreme Court Cases*, 182 A.L.R. Fed. 61, 77–78 (2002) ("Congress' primary concern in enacting the prohibition against racial discrimination in Title VII was with the plight of the Negro in the economy.").

semi-skilled jobs, which were being phased out with the increasing automation of the workplace.[16] In order to carry out the primary goal of the 1964 Act—"the integration of African-Americans into the mainstream of American society"[17]—African-Americans needed the opportunity to move into fields that were not previously available to them.[18] This was the foremost "problem that Title VII's prohibition against racial discrimination in employment was [intended to address]."[19]

In the years following the passage of the 1964 Act, the scope and power of the employment protections of Title VII waxed and waned.[20] For example, in *Griggs v. Duke Power Co.*, the Supreme Court expanded the scope of Title VII protections by creating the disparate impact test, acknowledging that plaintiffs could successfully bring a suit for employment discrimination by demonstrating that a facially neutral employment practice produced a discriminatory result.[21] On the other hand, in *Wards Cove Packing Co. v. Atonio*, the Supreme Court lowered employers' burden of proof to justify an apparently discriminatory employment action.[22] In response to the Supreme Court's decisions in *Griggs* and *Wards Cove*, which weakened discrimination protections, Congress enacted the 1991 Act to clarify employment discrimination protection under federal law.[23]

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16. *Id.* at 78.

17. *Id.*

18. *Id.*

19. United Steelworkers of Am. v. Weber, 443 U.S. 193, 202–04 (1979) (describing the legislative intent behind the creation of the Civil Rights Act of 1964).

20. Henry L. Chambers, Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1162–63 (2014) (discussing the trends in Supreme Court Title VII jurisprudence between the passage of the Civil Rights Act of 1964 and the Civil Rights Act of 1991).

21. *Id.* at 1162 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431–33 (1971)).

22. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657–59 (1989); *see also* Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 427 (2012) (discussing the Supreme Court's particularly limited interpretation of the justification that employers need in order to persist in an employment practice that produces a disparate impact). Prior to *Wards Cove*, the burden of proof was "business necessity." *Griggs*, 401 U.S. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). *Wards Cove* lowered the burden to "business justification." *Wards Cove*, 490 U.S. at 659 ("[T]he dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.").

23. Civil Rights Act of 1991, Pub. L. No. 102–166, § 2, 105 Stat. 1071 ("The Congress finds that . . . (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio . . . has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment."); H.R. REP. NO. 102-40, at 1 (1991), *reprinted in* 1991 2 U.S.C.C.A.N. 694, 694 ("[T]he Civil Rights Act of 1991 . . . has two primary purposes. The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections . . . ."); *see also* Zimmer, *supra* note 22, at 428.

B. THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991 made a number of changes to the 1964 Act with regard to employment discrimination.[24] Responding to *Wards Cove*, the Civil Rights Act of 1991 converted the common law disparate impact theory into a statutory rule.[25] The changes made in the 1991 Act set the employer's burden of proof for defending an employment practice in a disparate impact case somewhere between the *Griggs* rule—that a disputed practice must be "job related" and a "business necessity"[26]—and the *Wards Cove* rule—that a disputed practice must "serve[], in a significant way, the legitimate employment goals of the employer."[27] Under the Civil Rights Act of 1991, a plaintiff will succeed in a disparate impact case only if the employer "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" or if the employer "refuses to adopt [a nondiscriminatory] alternative employment practice."[28]

C. TWO DIFFERENT EMPLOYMENT DISCRIMINATION MODELS

Under Title VII, an employee may demonstrate illegal workplace discrimination under two separate theories: disparate treatment and disparate impact.[29] Disparate treatment occurs when an employer makes an employment decision because of someone's protected status (race, color, religion, sex, or national origin).[30] Disparate impact, on the other hand, is an employment practice that is neutral on its face but produces a discriminatory outcome.[31]

For both of these models, courts today use a three-part test—established in *McDonnell Douglas Corp. v. Green*—to analyze employment discrimination

24. *See* Chambers, *supra* note 20, at 1162; Zimmer, *supra* note 22, at 428. The substantive changes to employment discrimination law included the addition of jury trials and punitive damages to the prosecution of discrimination lawsuits. Chambers, *supra* note 20, at 1162.

25. Zimmer, *supra* note 22, at 428.

26. *Griggs*, 401 U.S. at 429, 431.

27. *Wards Cove*, 490 U.S. at 659; *see also* Zimmer, *supra* note 22, at 428 n.87.

28. 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (2012).

29. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009); Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986–87 (1988); *Griggs*, 401 U.S. at 431 (describing both disparate treatment and disparate impact discrimination under Title VII).

30. *Watson*, 487 U.S. at 985–86.

31. *Ricci*, 557 U.S. at 577–78.

claims where there is no "direct evidence"[32] of discrimination.[33] This test can be described as "prima facie case, affirmative defense, and rebuttal."[34] Under this model, the plaintiff must first prove a prima facie case of discrimination, involving either direct intent to discriminate or unintended discriminatory consequences.[35] Once the plaintiff meets that burden, the burden shifts to the employer, who must prove that the employment actions did not violate the requirements set out in the applicable sections of the U.S. Code that codify prohibited employment practices under Title VII.[36] Finally, if the employer does prove an excusable motive for the employment decision, the burden shifts back to the plaintiff to show that the alleged motive is a pretext

32. Direct evidence in employment discrimination cases is difficult to define, but it generally falls into one of three schools of thought: classic, animus plus, and animus. Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 662–63 (2000) (citing Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 582 (1st Cir. 1999)). The classic position "hold[s] that [direct evidence] signifies evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence." *Fernandes*, 199 F.3d at 582. The animus plus position holds that direct evidence is "evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision." *Id.* Finally, the animus position holds that "as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision." *Id.* Given the inherent uncertainties that these multiple stances create, the definition of direct evidence is convoluted and subject to interpretation. Belton, *supra*, at 663. Despite this uncertainty, examples of direct evidence would certainly include written or oral statements detailing discriminatory intent in an employment practice. *See* Lori A. Tetreault, Annotation, *What Constitutes Direct Evidence of Age Discrimination in Action Under Age Discrimination in Employment Act (29 U.S.C.A. §§ 621 et seq.)—Post-*Price Waterhouse *Cases*, 155 A.L.R. Fed. 283, 283 (1999) (listing examples of written and oral statements that constitute direct evidence of discriminatory animus). Indirect evidence, on the other hand, is circumstantial and includes "derogatory stray remarks [and] statistical evidence." *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1586 (1996).

33. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (citations omitted) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))); Bandsuch, *supra* note 14, at 297; Wooster, *supra* note 15 (describing the *McDonnell Douglas* test for analyzing Title VII discrimination cases); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

34. Bandsuch, supra note 14, at 297.

35. *Watson*, 487 U.S. at 986–87.

36. *See* 42 U.S.C. § 2000e-2(h) (2012) (noting that employers can base pay differences on "a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin"); *see also id.* § 2000e-2(a), (k) (detailing unlawful employment practices and the burden of proof for disparate impact cases); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983) (discussing the "rebuttable 'presumption that the employer unlawfully discriminated against' [the plaintiff]" which is created when the plaintiff successfully establishes a prima facie case for unlawful employment discrimination (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981))).

(in disparate treatment cases),[37] or that there is a legitimate alternative practice that the employer refuses to use (in disparate impact cases).[38] The Supreme Court has stated that this test is not meant to be rigidly applied, but it does provide a clear and logical framework for analyzing the shifting burdens of proof in workplace discrimination claims.[39]

1. Disparate Treatment Employment Discrimination

Disparate treatment cases are the easiest form of employment discrimination to understand.[40] For these kinds of cases, plaintiffs must show that the challenged employment decision was based on their membership in a protected class.[41] In the hiring or promotion context, for example, the plaintiff generally needs to show "that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to the plaintiff's."[42] In order for a plaintiff to succeed, she must prove that the employer intentionally discriminated against her in the employment action.[43]

Once the plaintiff has established a prima facie case for unlawful discrimination, the next step in the *McDonnell Douglas* framework gives the employer an opportunity to demonstrate that the reasons for the employment decision were not discriminatory.[44] Finally, the plaintiff may rebut the

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37. *Watson*, 487 U.S. at 986 (describing the steps required for a disparate treatment analysis).

38. Ricci v. DeStefano, 557 U.S. 557, 578 (2009) ("Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.").

39. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

40. *Watson*, 487 U.S. at 986 (noting "'disparate treatment' cases . . . involve 'the most easily understood type of discrimination'" (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977))).

41. *Watson*, 487 U.S. at 985–86.

42. *Id.*; *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 n.6 (1981) (discussing one clear example fact pattern that might establish disparate treatment for the purposes of a Title VII employment discrimination lawsuit).

43. *Watson*, 487 U.S. at 985–86; *see also* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff." (quoting *Burdine*, 450 U.S. at 253)).

44. *Watson*, 487 U.S. at 986 (discussing what an employer must show in order to rebut the presumption created by the plaintiff's establishment of a prima facie case); *Aikens*, 460 U.S. at 714 ("To rebut this presumption, 'the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.'" (quoting *Burdine*, 450 U.S. at 255)); *Furnco*, 438 U.S. at 578 ("To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973))).

employer's evidence with her own evidence that the "legitimate, nondiscriminatory reason" for the decision was a pretext for discrimination.[45]

2. Disparate Impact Employment Discrimination

The other theory that a plaintiff may advance in a workplace discrimination suit is disparate impact.[46] Under a disparate impact theory, a plaintiff does not need to demonstrate that discriminatory intent motivated the employer's actions.[47] Instead, the plaintiff must prove that an employment practice neutral on its face nonetheless has a discriminatory outcome.[48] Because there is no need to demonstrate intent, the evidence presented in a disparate impact case is quite different than in a disparate treatment case.[49] In particular, disparate impact cases tend to "focus[] on statistical disparities, rather than specific incidents, and on competing explanations for those disparities."[50]

Applying the *McDonnell Douglas* test to disparate impact claims, the first step is to determine if the plaintiff has established a prima facie case for discrimination.[51] In a disparate impact case, "the plaintiff's burden in establishing a prima facie case goes beyond" showing a mere statistical deviation in representation caused by the employer's business decision.[52] Instead,

> [t]he plaintiff must . . . identify[] the specific employment practice [she] is challeng[ing and then] offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.[53]

The level of statistical proof required for establishing cause is not a fixed figure; rather, the plaintiff must show a substantial difference in the workforce caused by this employment practice.[54] Additionally, neither courts nor

45. *Furnco*, 438 U.S. at 578.

46. *See Watson*, 487 U.S. at 986–87.

47. *Id.*

48. *Id.*

49. *Id.* at 987.

50. *Id.*

51. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

52. *Watson*, 487 U.S. at 994.

53. *Id.* Exclusion from hiring and exclusion from promotion opportunities are just two of the possible discriminatory outcomes that the challenged employment practice creates. This is not an exhaustive list of discriminatory outcomes.

54. *Id.* at 994–95; *see also* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (noting "a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact"); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 584 (1979) (requiring "statistical evidence showing that an employment practice has the effect of denying the members of one race equal

employers are required to assume that the plaintiff's statistics are reliable or that they show what the plaintiff asserts.[55]

In a disparate impact employment discrimination case, the second prong of the *McDonnell Douglas* test allows the employer to rebut the presumption of discriminatory impact by demonstrating that the practice is "job related for the position in question and consistent with business necessity."[56] This is the compromise position Congress took in the Civil Rights Act of 1991 regarding what employers must show to rebut the presumption of discrimination.[57] If the employer can demonstrate that the employment practice is both "job related" and a "business necessity," the burden of proof shifts back to the plaintiff.[58] Under the third prong of the *McDonnell Douglas* test, it becomes the plaintiff's duty to demonstrate that the employer could have used a less discriminatory practice but refused to do so.[59]

III. CHALLENGING ELEMENTS OF A DISPARATE IMPACT WAGE DISCRIMINATION CASE

The studies that show a race-based disparity in the amount of tips that minority workers receive make it possible to raise a Title VII claim against such a discriminatory outcome.[60] Before analyzing the likely outcome of such a suit, a number of potential pitfalls must be addressed. First, a court must determine whether a suit based on wage disparities can be brought under a Title VII disparate impact theory.[61] Second, there are a number of difficulties in defining a challengeable employment practice.[62] Finally, the court must

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access to employment opportunities"); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (finding "a plaintiff need only show that the . . . standards in question select applicants for hire in a significantly discriminatory pattern"); Washington v. Davis, 426 U.S. 229, 246–47 (1976) (stating "when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenges, discriminatory purpose need not be proved"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (holding an employer's burden of rebuttal arises only after the plaintiff "has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants"); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (prohibiting employer from using "requirements operat[ing] to disqualify Negroes at a substantially higher rate than white applicants").

55. *Watson*, 487 U.S. at 996. Such statistics are open to attacks regarding small sample size and improper statistical techniques, including unqualified individuals in the sample pool, etc. *Id.* The employer can even bring in their own statistics if they feel that the plaintiff's study is so flawed as to be unusable. *Id.*

56. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *see also McDonnell Douglas Corp.*, 411 U.S. at 802–03.

57. *See supra* notes 24–28 and accompanying text.

58. *See supra* note 26–28 and accompanying text; *see also Watson*, 487 U.S. at 986.

59. *See Watson*, 487 U.S. at 998; *Albemarle Paper Co.*, 422 U.S. at 425 ("[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" (quoting *McDonnell Douglas Corp.*, 411 U.S. at 801)).

60. *See infra* notes 67–70 and accompanying text.

61. *See infra* Part III.B.

62. *See infra* Part III.C.

examine the findings of the studies that show a race disparity to determine if they show sufficient evidence of a discriminatory outcome to justify a disparate impact case under Title VII.[63]

A. *Studies Demonstrating Racial Disparity in Restaurant Tipping*

In order to pursue a Title VII disparate impact case, a plaintiff must show evidence that a facially neutral employment practice has a racially discriminatory impact.[64] The evidence in disparate impact cases tends to consist of studies that demonstrate a statistically significant disparity linked to the challenged employment practice.[65] These studies are essential for a successful disparate impact claim because they establish the prima facie case for discrimination.

At least three studies have examined the existence of racial discrimination in tipping.[66] The first study examined it in the context of the race of taxi cab drivers,[67] and the remaining two studies examined it in the context of the race of restaurant servers.[68] All three found that there is a statistically significant, race-linked discrepancy between the tips paid to white and nonwhite tip workers.[69] Though the exact causes of this disparity are not known, each successive study adds to our understanding of the forces at play.

1. Racial Disparity in Taxi Drivers' Tips

The first study ("Ayres study") of racial disparities in tipping examined tipping practices in taxi cabs in the Northeast.[70] As a part of the study, the authors "collected tipping data from 1066 surveys completed by twelve . . . taxicab drivers."[71] The cab drivers sampled included "six black men, four white men, and two 'other minority' men."[72] The surveys, completed immediately after dropping a passenger off, included, among other things, the race of the driver, the race of the customer, the amount of the fare, and

63. *See infra* Part III.A.

64. *See Watson*, 487 U.S. at 986–87.

65. *Id.* at 987.

66. *See, e.g.*, Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613 (2005) (examining racial discrimination in taxicab tipping); Zachary W. Brewster & Michael Lynn, *Black–White Earnings Gap Among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping*, 84 SOC. INQUIRY 545 (2014) (examining the discriminatory impact of disparities in restaurant tipping); Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, 38 J. APPLIED SOC. PSYCHOL. 1045 (2008) (examining racial disparities in restaurant tipping).

67. *See generally* Ayres et al., *supra* note 66.

68. *See generally* Brewster & Lynn, *supra* note 66; Lynn et al., *supra* note 66.

69. Ayres et al., *supra* note 66, at 1663; Brewster & Lynn, *supra* note 66; Lynn et al., *supra* note 66.

70. Ayres et al., *supra* note 66, at 1616.

71. *Id.* at 1623.

72. *Id.* "Other minority" included one "Arab" and one "Asian." *Id.* at 1623 n.33.

the amount of the tip.[73] "Overall, the average tip was $1.22, and the average tip as a percentage of fare was 15.8%."[74] The encounters were intentionally nearly evenly balanced between white and nonwhite drivers.[75]

The data in Table 1 shows that black drivers received only two-thirds as much as white drivers in tips on average and other minority drivers received only half as much as white drivers.[76] Also, both black and other minority drivers were "stiffed" (received no tip at all) around twice as often as white drivers.[77] Table 2 shows data on the interaction between customer and driver race.[78] The data demonstrates that not only did white customers tip nonwhite drivers less than white drivers, but nearly all nonwhite passenger groups tipped black drivers less than white drivers.[79]

For the two major races considered by this study, "there seem to be largely independent passenger- and driver-race effects."[80] It is important to note that these statistics are raw, derived from a small sample size, and not controlled for driver effects and other non-racial factors.[81] Controlling for non-racial factors, "black drivers [were] tipped 9.1 percentage points less than white drivers (and that this result is statistically significant at the 1% level)."[82]

73. *Id.* at 1624 ("The amount tipped was calculated as the difference between the amount due (the fare) and the total amount paid by the passenger to the driver.").

74. *Id.* at 1626.

75. *Id.* at 1626 n.44. Over 500 of the surveys were completed by black drivers, 450 were completed by white drivers, and the remaining surveys were completed by the "other minority" drivers. *Id.* at 1626, 1628.

76. *See infra* Table 1.

77. *See infra* Table 1.

78. Ayres et al., *supra* note 66, at 1629–30.

79. *See infra* Table 2.

80. Ayres et al., *supra* note 66, at 1629.

81. *Id.* at 1631.

82. *Id.*

Table 1: Average Tips, Tip Percentage, and Stiffing Rate by Driver Race—Ayres[83]

Driver Race	**Mean Tip**	**Mean Tip Percentage**	**Race Disparity Ratios[84]**		**Stiffing Rate**	**Race Disparity Ratios**
			Tip	Tip Percentage		
White	$1.54	20.3%	—	—	15.7%	—
Black	$1.02	12.6%	0.66	0.62	28.3%	1.80
Other	$0.76	12.4%	0.50	0.61	36.4%	2.31

Table 2: Average Tipping Percentage by Passenger & Driver Race—Ayres[85]

Passenger Race	**Driver Race**	**Mean Tip Percentage**	**Race Disparity Ratios**
White	White	26.7%	—
	Black	17.9%	0.67
	Other	13.2%	0.49
Black	White	11.0%	—
	Black	7.4%	0.67
	Other	13.1%	1.19
Hispanic	White	17.5%	—
	Black	7.1%	0.41
	Other	11.3%	0.65
Asian	White	16.1%	—
	Black	18.1%	1.12
	Other	12.3%	0.77
Other	White	14.8%	—
	Black	11.0%	0.74
	Other	1.8%	0.12

2. Racial Disparity in Tipping at a Southern Restaurant

The second study ("Lynn study") of racial disparities in tipping focused on server tipping in restaurants.[86] In particular, the authors sought to determine if the Ayres findings with regards to taxi cabs were applicable in restaurant settings as well.[87] This study was limited in scope, taking place at

83. *Id.* at 1627 tbls.2 & 3.

84. *Id.* at 1627 n.45 ("Disparity [ratios] here and in all subsequent tables is defined as the given statistic divided by the *White* statistic.").

85. *Id.* at 1630 tbl.6 (omitting information on number of observations).

86. Lynn et al., *supra* note 66, at 1046.

87. *Id.*

one restaurant in the South during lunch over a period of three days.[88] During that time, researchers approached diners at the beginning of the meal and asked them to complete a survey at the end of the meal.[89] The survey included demographic questions about the customers, information about their server, and the size of the bill and the tip, among other things.[90] This resulted in a total of 140 usable surveys for analysis.[91]

Table 3 shows the data collected by this study with regard to the average amount of tips servers received based on the size of the group of diners and the race of the server.[92] To begin with, this study clearly shows that the black servers received a lower percentage of their customer's bill in tips than white servers.[93] Additionally, the tips were higher for both races with smaller groups than with larger ones.[94] Finally, the disparity between white and black servers was greater with larger groups than with smaller ones (4.8% difference as opposed to 3.2%).[95]

The most significant result from this data is the fact that, according to this study, "both Black and White consumers tipped White restaurant servers more than they did Black restaurant servers."[96] This is similar to the results from the Ayres study, suggesting that the race effect on tipping is at least somewhat applicable across geographic regions and employment contexts.[97] Importantly, researchers only conducted this study at a single restaurant without a widely varied sample.[98]

88. *Id.* at 1049.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See infra* Table 3.

93. *See infra* Table 3.

94. *See infra* Table 3.

95. *See infra* Table 3; *see also* Lynn et al., *supra* note 66, at 1054 ("Thus, as expected, the server race effect was stronger the larger the size of the dining party.").

96. Lynn et al., *supra* note 66, at 1054.

97. *Id.* at 1055; *see also* Ayres et al., *supra* note 66, at 1629–30.

98. Lynn et al., *supra* note 66, at 1049.

Table 3: Average Tip as a Percentage of the Bill by Group Size & Server Race —Lynn[99]

Group Size	White Server	Black Server
1–2	20.7%	17.5%
3 or More	19.4%	14.6%

3. Racial Disparity in Tipping at a Midwestern Restaurant

A new study ("Brewster study") expands upon the findings of both the Ayres and Lynn studies by analyzing restaurant tipping in a large Midwestern city.[100] This study aimed to replicate the results of the previous studies by analyzing 394 restaurant tipping interactions.[101] Researchers surveyed respondents after their meals, requesting information similar to that collected for the previous studies.[102] In addition, this study sought to improve metrics for service quality in order to better control for non-race related differences in tipping amounts.[103]

This study reaffirms the findings from previous studies: "customers who were served by a black waiter/waitress tended to leave smaller tips as a percentage of their bill compared to those who were served by a white waiter/waitress."[104] The evidence of the race-based disparity was not as statistically significant as the previous studies, but there was still a significant difference.[105] After putting the data through statistical regressions to examine possible non-race correlations, the only significant non-race effect was the customers' rating of the service quality.[106]

Another key result of this study is that the difference between the tips received by white and black servers cannot be explained away as a byproduct

99. Data are drawn from Lynn et al., *supra* note 66, at 1054. Additional findings not contained in this table include a number of non-racial, non-group size factors that had some impact on the size of the tip as a percentage of the bill. *Id.* In particular, "tips in this study were affected by service quality, bill size, dining frequency, food-service experience, and customer race." *Id.* "Tip percentages decreased with bill size . . . and increased with service quality[,] . . . dining frequency[,] . . . and food-service experience." *Id.* In addition, "Blacks tipped less than did Whites . . . . [and] there was a marginally significant" relationship between tip size and gender of customer and server. *Id.* Finally, "tips were larger when the server and customer were of opposite sexes than when they were the same sex." *Id.*

100. Brewster & Lynn, *supra* note 66, at 549.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 553.

105. *Id.*

106. *Id.* at 557.

of higher quality service from white servers.[107] Taken in conjunction with the previous studies, it seems apparent that "restaurant consumers are discriminating against black servers by tipping them less and that the causal mechanism is not interracial differences in the way servers deliver service."[108] In spite of these studies and their increasingly complex efforts to uncover the causes behind this racial discrimination, "[t]he causal mechanisms underlying this black tip penalty nevertheless remains elusive . . . ."[109]

B. PAY DISPARITY AS EMPLOYMENT DISCRIMINATION

Congress has passed a number of laws that afford employees protection from wage discrimination in the workplace, including the Equal Pay Act of 1963,[110] Title VII of the Civil Rights Act of 1964,[111] and the Lily Ledbetter Fair Pay Act of 2009.[112] Congress passed the Equal Pay Act to protect women from sex-based wage discrimination,[113] Title VII primarily to protect African-Americans from workplace discrimination in general,[114] and the Fair Pay Act to address concerns about the time available to file wage discrimination cases.[115] In a case involving sex-based wage disparities, the differences between Title VII disparate impact theory and the Equal Pay Act are particularly important.[116] These differences are not as applicable when discussing race-based wage disparities. However, a court might rely on them to provide guidance for how to manage a disparate impact Title VII claim for wage discrimination because there are far fewer Title VII cases that address wage disparities and there is a very close relationship between the two statutes.

1. The Equal Pay Act of 1963

Prior to the passage of the Civil Rights Act of 1964, Congress passed the Equal Pay Act of 1963.[117] Section 2 of the Act identified "the existence in industries engaged in commerce [and] in the production of goods for commerce of wage differentials based on sex"[118] and stated that the purpose of the Equal Pay Act was to correct this discrimination.[119] Specifically, the

107. *Id.* at 553 ("[C]ustomers with a black server tended to report that their waiter/waitress exhibited significantly higher levels of subtle service-enhancing behaviors . . . and to have provided overall better service quality . . . compared with those who were served by a white server.").

108. *Id.* at 560.

109. *Id.* at 565.

110. Equal Pay Act of 1963, Pub. L. No. 88–38, 77 Stat. 56.

111. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.

112. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5.

113. *See infra* notes 117–22 and accompanying text.

114. *See supra* notes 11–19 and accompanying text.

115. *See infra* notes 149–53 and accompanying text.

116. *See infra* notes 161–65 and accompanying text.

117. Equal Pay Act of 1963, Pub. L. No. 88–38, 77 Stat. 56.

118. *Id.* § 2(a).

119. *Id.* § 2(b).

Equal Pay Act prohibited an employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex."[120] The Equal Pay Act's scope only covers "work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."[121] Under the Equal Pay Act, a wage differential is only permissible if it is based on: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) . . . any other factor other than sex."[122]

While the Equal Pay Act only targeted wage discrimination based on sex,[123] the protections provided by Title VII are more comprehensive in both the groups of people protected and the forms of employment discrimination that are prohibited, including discrimination in compensation.[124] Accordingly, a plaintiff can bring a wage discrimination case under the Equal Pay Act (as long as the complainant is claiming sex-based discrimination) or under Title VII.[125] While these laws are similar in intent, the way different courts implement them varies.[126] It is important to understand the differences between them as well as the impact the Equal Pay Act has on how courts analyze Title VII claims for wage disparity.[127]

As an initial matter, once sex discrimination was included in Title VII of the Civil Rights Act of 1964, Congress included the "Bennett Amendment" to the 1964 Act to coordinate the Equal Pay Act with the Civil Rights Act of 1964.[128] This amendment passed with little discussion or controversy.[129] The Bennett Amendment provides that "[i]t shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act]."[130] Given this language, courts hearing pay discrimination cases must understand both the Equal Pay Act and Title VII, and the ways they

120. *Id.* § 3.

121. *Id.*

122. *Id.*

123. *See id.* § 2.

124. Civil Rights Act of 1964, Pub. L. No. 88–352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (2012)).

125. Porter & Vartanian, *supra* note 7, at 179 (discussing the fact that Title VII and Equal Pay Act are possible remedies for wage discrimination).

126. *Id.* (discussing the differences in the way Title VII and Equal Pay Act cases are brought and prosecuted for wage discrimination claims).

127. *Id.* at 179–83.

128. *Id.* at 179–80 (citing Cty. of Wash. v. Gunther, 452 U.S. 161, 173 (1981)).

129. *Gunther*, 452 U.S. at 173–74 (outlining the discussion that took place in the Senate with regard to the passage of the amendment to the Civil Rights Act of 1964, which ensured that the Equal Pay Act would not interfere with or be superseded by Title VII).

130. 42 U.S.C. § 2000e-2(h) (2012).

differ, in order to understand the burdens placed on each party and the defenses available to them.[131]

One key difference between the two is that, unlike those bringing Equal Pay Act cases, a Title VII plaintiff does not need to identify an employee of the opposite gender doing the same work requiring the same amount of effort, skill and responsibility.[132] Additionally, Title VII has two possible theories, only one of which—disparate treatment—requires a showing of discriminatory intent on the part of the employer.[133] The Equal Pay Act, on the other hand, is a strict liability statute and therefore a plaintiff does not need to prove such discriminatory intent.[134] Finally, the way the burden of proof shifts is quite different for the two types of cases.[135]

Unlike the shifting burdens of the *McDonnell Douglas* approach to Title VII cases,[136] Equal Pay Act cases use a relatively simple two-step approach.[137] Similar to Title VII cases,[138] an Equal Pay Act plaintiff must first establish a prima facie case demonstrating discrimination in the workplace (i.e., gender-based wage disparity between equally situated parties).[139] The second step of Equal Pay Act cases is also similar to Title VII cases in that the burden of proof shifts from the employee to the employer to show that unlawful motives did not drive its actions.[140] A large difference between these two types of cases,

131. *See* Porter & Vartanian, *supra* note 7, at 179–82 (discussing the interaction between the Equal Pay Act and Title VII).

132. 42 U.S.C. § 2000e-2(h); *see also* 29 U.S.C. § 206(d) (2012); Porter & Vartanian, *supra* note 7, at 179.

133. Porter & Vartanian, *supra* note 7, at 180–81.

134. *Id.* at 181.

135. *Id.* at 181–82.

136. *See supra* notes 32–39 and accompanying text.

137. *See, e.g.*, Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000) (outlining the framework for analyzing Equal Pay Act cases in comparison to Title VII and Age Discrimination in Employment Act cases); Porter & Vartanian, *supra* note 7, at 182 (comparing the burdens of proof for both the Equal Pay Act and Title VII).

138. *See supra* note 35 and accompanying text (detailing the first step of the *McDonnell Douglas* test for Title VII cases).

139. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) ("In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'") (quoting 29 U.S.C. § 206(d)(1))); *Stanziale*, 200 F.3d at 107 ("The plaintiff must first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing 'equal work'—work of substantially equal skill, effort and responsibility, under similar working conditions."); EEOC v. Del. Dep't of Health & Soc. Servs., 865 F.2d 1408, 1413–14 (3d Cir. 1989) ("A plaintiff establishes a *prima facie* case by showing that employees of opposite sex were paid differently for performing 'equal work'; that is, work of substantially equal skill, effort and responsibility, under similar working conditions.").

140. *See* Porter & Vartanian, *supra* note 7, at 182 (comparing the second prong of Equal Pay Act and Title VII cases, the affirmative defense prong).

however, is the level of the employer's burden.[141] While a Title VII employer simply needs to allege an acceptable motivation for the disputed employment action or practice,[142] an Equal Pay Act employer must prove that one of the acceptable affirmative defenses available under the Act[143] caused the wage disparity.[144] The third step of the *McDonnell Douglas* Title VII analysis, the rebuttal step,[145] is not present in Equal Pay Act cases.[146] In Equal Pay Act cases, if the employer fails to prove one of the four affirmative defenses[147] after the plaintiff has established a prima facie case, the plaintiff has won his or her case.[148]

2. The Lilly Ledbetter Fair Pay Act of 2009

In addition to the Equal Pay Act, the Civil Rights Act of 1964, and the Civil Rights Act of 1991, another relevant piece of legislation in employment discrimination cases is the Lilly Ledbetter Fair Pay Act of 2009 ("Fair Pay Act").[149] In *Ledbetter v. Goodyear Tire & Rubber Co.*, the United States Supreme Court held that a Title VII plaintiff complaining about wage discrimination must bring a claim within the statutorily defined period of time—180 days[150]—of the employment practice or decision that resulted in the wage discrimination.[151] This decision severely limited the statutory protections from employment discrimination that Congress previously enacted.[152]

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141. *Id.*

142. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 257 (1981) ("[T]o satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.").

143. *See supra* text accompanying note 122.

144. *Stanziale*, 200 F.3d at 107–08 ("We read . . . the statute as requiring that the employer submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity.").

145. *See supra* note 45 and accompanying text.

146. Porter & Vartanian, *supra* note 7, at 182 (citing Jeffery K. Brown, Note, *Crossing the Line: The Second, Sixth, Ninth, and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other than Sex" Defense*, 13 HOFSTRA LAB. L.J. 181, 198 (1995)).

147. *See supra* note 122 and accompanying text (listing the four affirmative defenses—seniority, merit, measuring earnings by quantity or quality, or any "factor other than sex.").

148. Porter & Vartanian, *supra* note 7, at 182 (explaining the Equal Pay Act is a strict liability statute and as such, there is no need to prove the employer's intention or the availability of less discriminatory alternatives, which are the rebuttal options available under Title VII).

149. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5.

150. 42 U.S.C. § 2000e-5(e)(1) (2012).

151. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642–43 (2007) ("We apply the statute as written, and this means that any unlawful employment practice, including those involving compensation, must be presented to the EEOC within the period prescribed by statute.").

152. Lilly Ledbetter Fair Pay Act of 2009 § 2(1) ("The Supreme Court in Ledbetter v. Goodyear . . . significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.").

Congress passed the Lilly Ledbetter Fair Pay Act of 2009 as a direct response to this ruling.[153]

While the Act made a number of changes to a variety of antidiscrimination laws, the relevant portion is section 3, which reads in part:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of [Title VII], when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[154]

Many cases in the district and circuit courts have addressed this amendment to the enforcement provisions of the U.S. Code where Title VII is codified.[155] A majority of the circuits have held that the effect of the Fair Pay Act "was solely to reverse the United States Supreme Court's decision in [*Goodyear*] . . . and thus reinstate the law regarding the timeliness of pay discrimination claims as it was before [*Goodyear*]."[156] Until the Supreme Court rules on the effect of the Fair Pay Act, this majority view will likely persist.[157] Another contentious aspect of Fair Pay Act interpretation is what forms of

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Congress further noted that: "The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended." *Id.* § 2(2).

153. *See* Daniel A. Klein, Annotation, *Construction and Application of Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 125 Stat. 5 (2009)*, 58 A.L.R. Fed. 2d 201, § 2 (2011) (discussing the connection between the Supreme Court's ruling in *Goodyear* and the passage of the Lilly Ledbetter Fair Pay Act of 2009).

154. Lilly Ledbetter Fair Pay Act of 2009 § 3.

155. *See* Klein, *supra* note 153, § 4 (discussing various circuits that have addressed the scope and effect of the Lilly Ledbetter Fair Pay Act of 2009).

156. *Id.* The Second, Third, Fifth, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits have all ruled this way on Fair Pay Act cases in the past. *Id.* (citing Chennareddy v. Dodaro, No. 87–3538, 2010 WL 3025164 (D.C. Cir. July 22, 2010); Noel v. Boeing Co., 622 F.3d 266 (3d Cir. 2010); Miller v. Kempthorne, 357 F. App'x 384 (2d Cir. 2009); Lerman v. City of Fort Lauderdale, Fla., 346 F. App'x 500 (11th Cir. 2009); Mansourian v. Bd. of Regents of the Univ. of Cal. at Davis, No. CIV. S 03–2591, 2011 WL 1897428 (E.D. Cal. May 18, 2011); Tryals v. Altairstrickland, LP, No. H–08–3653, 2010 WL 743917 (S.D. Tex. Feb. 26, 2010); Almond v. Unified Sch. Dist. No. 501, 749 F. Supp. 2d 1196 (D. Kan. 2010); EEOC v. CRST Van Expedited, Inc., 615 F. Supp. 2d 867 (N.D. Iowa 2009)).

157. *See* Megan Coluccio, Comment, Fait Accompli*?: Where the Supreme Court and Equal Pay Meet a Narrow Legislative Override Under the Lilly Ledbetter Fair Pay Act*, 34 SEATTLE U. L. REV. 235, 266–71 (2010) (advising a narrowly construed interpretation of the Fair Pay Act to avoid negative complications from the passage of the Act); Carolyn E. Sorock, Note, *Closing the Gap Legislatively: Consequences of the Lilly Ledbetter Fair Pay Act*, 85 CHI.-KENT L. REV. 1199, 1214–16 (2010) (discussing narrow interpretations available to courts that would preserve the intention of the bill, preventing another *Goodyear* type case, without overly broadening the application of the Act).

employment discrimination are prohibited by the Act.[158] Though a clear picture of the final interpretation of "discriminatory compensation decision or other practice" has not yet emerged,[159] it clearly applies to cases where the discrimination claim is based on a discrepancy in the amount of money an employee takes home as wages.[160]

3. Disparate Impact Under Title VII

Aside from the Equal Pay Act of 1963 and the Lilly Ledbetter Fair Pay Act of 2009, plaintiffs can also use Title VII to bring wage discrimination claims.[161] While a plaintiff can clearly bring wage discrimination claims under a disparate treatment theory,[162] the availability of a disparate impact claim for wage discrimination is unclear.[163] The concerns are centered on two different issues: the classification of wage decisions as an "employment practice,"[164] and the interaction between Title VII and the affirmative defenses available under the Equal Pay Act.[165]

With regard to the interaction between Equal Pay Act and Title VII disparate impact claims, courts are specifically concerned with the Bennett Amendment, which incorporates the Equal Pay Act affirmative defenses into Title VII. A broad interpretation of the language of the Amendment[166] "would preclude a finding of violation in a case of gender based pay discrimination, unless the practice would have violated the Equal Pay Act as well, including the restrictive condition of 'equal work.'"[167] A narrower interpretation of the Amendment would limit the integration of the two acts, only incorporating the affirmative defenses available under the Equal Pay Act into Title VII cases.[168] Though the Supreme Court has apparently opted for the narrower

158. *See generally* Klein, *supra* note 153 (detailing many forms of compensation discrimination, including but not limited to, failure to hire, failure to increase pay, denial of tenure, and failure to promote).

159. Lilly Ledbetter Fair Pay Act of 2009 § 3. *See generally* Klein, *supra* note 153 (outlining the various possible compensation decisions that are in dispute under the Fair Pay Act).

160. Sorock, *supra* note 157, at 1215 ("Even under its strictest interpretation, the [Fair Pay Act] makes it impossible for there to be another *Ledbetter* decision.").

161. Porter & Vartanian, *supra* note 7, at 179–80.

162. *Id.* at 181.

163. *Id.* at 181 & n.196 (citing Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 607–10 (2001)); Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 827 (2010).

164. *See infra* Part III.C.

165. Rabin-Margalioth, *supra* note 163, at 827.

166. The relevant portion of the Bennett Amendment reads: "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the [Equal Pay Act]." 42 U.S.C. § 2000e-2(h) (2012).

167. Rabin-Margalioth, *supra* note 163, at 827.

168. *Id.*

interpretation,[169] this still presents some challenges to disparate impact Title VII cases.[170]

In *Equal Opportunity Employment Commission v. J.C. Penney Co.* the Sixth Circuit held that "the Bennett Amendment cannot constitute a blanket bar to all claims of wage discrimination based on disparate impact because the 'factor other than sex' defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."[171] Instead, "the legitimate business reason standard is the appropriate benchmark against which to measure the 'factor other than sex' defense."[172] The Seventh Circuit takes the opposite position, holding that "[t]he factor [other than sex] need not be 'related to the requirements of the particular position in question,' nor must it even be business-related."[173] This conflict is well-established and neither side appears open to changing their position.[174]

Notwithstanding the question of the proper interpretation of the Bennett Amendment, the language of the Amendment explicitly only applies to sex-based wage discrimination and makes no reference to the other protected statuses.[175] As discussed above, while the Equal Pay Act is not directly applicable to a Title VII race-based disparate impact wage discrimination claim, the close relationship between the two statutes means that the Supreme Court, if it determines that a plaintiff can bring such a claim, may choose to take Equal Pay Act jurisprudence into account. It is, after all, a far more established area of the law when it comes to non-disparate treatment wage discrimination claims.

C. EMPLOYMENT PRACTICES

Griggs v. Duke Power Co. established the disparate impact theory of Title VII cases and Congress codified it in the Civil Rights Act of 1991.[176] A key component for establishing a disparate impact case is demonstrating that

169. Cty. of Wash. v. Gunther, 452 U.S. 161, 168 (1981) ("The language of the Bennett Amendment suggests an intention to incorporate only the affirmative defenses of the Equal Pay Act into Title VII.").

170. Rabin-Margalioth, *supra* note 163, at 828 ("The Court intimated but did not decide whether the ["a factor other than sex"] defense undermines *Griggs*-type disparate impact analysis under the EPA, and by the Bennett Amendment, under Title VII as well. The Court did not conclusively decide this issue in *Gunther*." (citations omitted)).

171. Equal Opportunity Emp't Comm'n v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988).

172. *Id.*

173. Dey v. Colt Const. & Dev. Co., 28 F.3d 1446, 1462 (7th Cir. 1994) (quoting Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989)).

174. *See* Wernsing v. Dep't of Human Servs., Ill., 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the eighth) and those that require an 'acceptable business reason' is established, and we are not even slightly tempted to change sides.").

175. 42 U.S.C. § 2000e-2(h) (2012).

176. *See generally* Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codifying the disparate impact theory); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing the disparate impact theory).

there is "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[177] A plaintiff must address two distinct issues with regard to employment practices when using the disparate impact theory to challenge race-based wage discrimination in tipping. First, a plaintiff must establish a particular, narrow practice that she can challenge.[178] Depending on the employment practice in question, the plaintiff may also have to prove the impact that the employer's delegation of decision-making authority has on the disparate impact claim.[179]

Cases in the district courts, circuit courts, and in the Supreme Court have discussed the importance of identifying a discrete and particularized employment practice linked to the disparate impact that the plaintiff challenges.[180] Additionally, where many different employment practices, taken as a whole, produce a disparate impact, a plaintiff must show that either individual elements produce their own disparate impact[181] or that the elements of the decision-making process are so intertwined as to be inseparable and must, therefore, be analyzed as a single employment practice.[182]

In the context of compensation, it is particularly difficult to identify a particular employment practice as discriminatory.[183] In particular, courts have noted that when employers base compensation on market factors, a plaintiff will have a very hard time pointing to a specific employment practice that he

177. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

178. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555–56 (2011) (requiring a showing of a specific employment practice).

179. *See id.* at 2554.

180. *See id.* at 2555–56 ("[R]espondents have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together."); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656–57 (1989) ("Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. . . . [A] plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."); Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 994 (1988) ("The plaintiff must begin by identifying the specific employment practice that is challenged."); Am. Fed'n of State, Cty., & Mun. Emps., AFL–CIO (AFSCME) v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985) ("Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process.").

181. Chambers, *supra* note 20, at 1175 ("The Court also noted that the plaintiffs had to explain which specific employment practice caused the disparate impact. Plaintiffs could not rely on the disparate impact that resulted from an entire employment process in which several discrete rules were embedded.").

182. 42 U.S.C. § 2000e-2(k)(1)(B)(i) ("[Plaintiffs must] demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.").

183. *AFSCME*, 770 F.2d at 1406.

or she can challenge under a disparate impact theory.[184] These cases primarily refer to situations where the individuals claiming discrimination received salaries that were set by employers, not by a statutory minimum.[185] By way of contrast, the tipping minimum wage is set by federal or state statute, currently standing at $2.13 per hour.[186]

Apart from the question of whether wage determination can be considered an employment practice, courts also hesitate to classify delegations of decision-making authority[187] as an employment practice.[188] In this case, the issue is whether or not a court will hold a restaurant responsible for setting the wage when it is the customers, not the restaurant owner, who decides how much to pay the waiter. The Supreme Court has, however, held that such delegations can be an employment practice that causes a disparate impact in some circumstances.[189] In *Watson v. Fort Worth Bank & Trust*, for example, the Court said that "[i]f an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."[190] In dicta in *Wal-Mart Stores, Inc. v. Dukes*, the Court noted that the *Watson* court "*conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*. '[T]he plaintiff must begin by identifying the specific employment practice that is challenged.'"[191] It should be noted, however, that the *Watson* language the Court cited comes from a description of how Title VII disparate impact cases proceed, not from

184. *Id.* ("A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by *Dothard* and *Griggs*; such a compensation system . . . does not constitute a single practice that suffices to support a claim under disparate impact theory.").

185. *Compare* Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 986 (2011) ("The official view of the compensation market today is that employers and employees negotiate at arm's length to determine the appropriate wage level for a job and that the invisible hand of the market produces efficient arrangements."), *with* 29 U.S.C. § 203(m) (2012) (defining wages for tipped employees), *and* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2013), http://www.dol.gov/whd/regs/compliance/whdfs15.pdf (outlining various facts related to tipping and the tipping minimum wage).

186. *See* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, *supra* note 185, at 1.

187. An example of this delegation would be if upper-level management allowed middle-level managers to make hiring, promotion, or compensation decisions.

188. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011) ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters. . . . It is also a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.'" (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990 (1988))).

189. *Watson*, 487 U.S. at 990–91.

190. *Id.*

191. *Wal-Mart*, 131 S. Ct. at 2555 (quoting *Watson*, 487 U.S. at 994).

the portion of the opinion discussing the concept that delegation of decision-making authority does not necessarily exempt an employer from discrimination liability.[192]

IV. ANALYZING A TITLE VII CLAIM FOR RESTAURANT WORKERS

Given the statistics cited in the abovementioned studies, nonwhite restaurant employees may seek to address the race-based wage discrimination by filing a Title VII disparate impact suit. In order to successfully pursue such a claim, these employees would need to overcome a number of hurdles, but the obstacles are not insurmountable. When they convince a court that their employer has discriminated against them based on race, the burden shifts to the employer to assert an appropriate justification for the employment practice. If the employer shows such a justification, the burden shifts back to the plaintiffs to prove that the employer refuses to adopt a reasonable, less discriminatory, policy. Examples of such policies include tip pooling, fixed percentage gratuity, and eliminating tipping entirely.

A. AVAILABILITY OF TITLE VII FOR TIPPING WAGE DISCRIMINATION

The racial disparity in the amount of tips that restaurant servers receive is an important potential issue for employers because it can give rise to a successful Title VII disparate impact suit by nonwhite waiters and waitresses. This is a particularly concerning issue for chain restaurants, which hire thousands of servers, many of whom are racial minorities and therefore may be able to join a class action suit challenging the racially discriminatory practice. In order to bring a successful claim, these nonwhite servers need to present all of the elements of a disparate impact claim. These plaintiffs must establish a facially neutral employment practice that causes a disparate impact based on race. If the employers can establish a business justification, the plaintiffs will further need to demonstrate that the employers refuse to adopt a reasonable nondiscriminatory alternative practice.

As a part of the first prong, these plaintiffs must identify a facially neutral employment practice that produces racially discriminatory results.[193] In this case, the employment practice is the fact that employers choose to pay their servers the tipping minimum wage, expecting them to make up that difference in tips. In the past, courts have refused to categorize salary determination as an employment practice because the market forces are too varied and unpredictable to analyze effectively.[194] Unlike these complex multivariate compensation decisions, this compensation practice is not subjected to market forces because it is operating under a statutory minimum

192. *Watson*, 487 U.S. at 990–91, 994.

193. *See id.* at 986–87.

194. *See* Am. Fed'n of State, Cty., & Mun. Emps., AFL–CIO (AFSCME) v. Washington, 770 F.2d 1401, 1406 (9th Cir. 1985).

salary. Restaurant workers, unlike, for example, nurses, bank tellers, or clerical workers,[195] are not in a position to bargain for salary but are forced to take the tipping minimum wage supplemented by their tips.[196] This wage environment therefore removes the complexity that courts cite as the primary complication in viewing wage determination as an employment practice.[197] Basing compensation primarily on tips is, therefore, an employment practice that plaintiffs can challenge with a disparate impact claim.

Employers will further argue that they are not responsible for the compensation decision and its impact because, instead of retaining it for themselves or another employee, they give that power to the customers. In the case of restaurant tipping, the employer delegates the compensation decision-making authority in large part to the customers.[198] While employer delegation of authority is sometimes enough to prevent the establishment of a challengeable employment practice, this delegation is automatically sufficient.[199] In the case of tipped-worker compensation, this "undisciplined system of subjective decision making" produces the discriminatory impact with regard to the amount of money nonwhite servers receive in comparison with white servers.[200] Under the *Watson* test, as articulated in *Wal-Mart*, this undisciplined delegation of authority allows a court to apply a disparate impact theory to wage discrimination cases for minority waiters and waitresses.[201] Given these facts, a court will likely find that basing employee

195. These are fields where courts have held compensation decisions are too complex to analyze as a discrete employment practice.

196. *See* SYLVIA A. ALLEGRETTO & DAVID COOPER, ECON. POLICY INST., TWENTY-THREE YEARS AND STILL WAITING FOR CHANGE: WHY IT'S TIME TO GIVE TIPPED WORKERS THE REGULAR MINIMUM WAGE 8 tbl.1 (2014), http://s2.epi.org/files/2014/EPI-CWED-BP379.pdf (noting that 32.2% of tipped workers live in states with the federally mandated tipped minimum wage and a further 49.4% live in states where the tipped minimum wage is lower than the regular state minimum wage but is higher than $2.13); SYLVIA A. ALLEGRETTO & KAI FILION, ECON. POLICY INST., WAITING FOR CHANGE: THE $2.13 FEDERAL SUBMINIMUM WAGE 6 (2011), http://s1.epi.org/files/page/-/BriefingPaper297.pdf ("We single out waiters because they make up more than 60% of all tipped workers and because most waiters are tipped workers."); RAJESH D. NAYAK & PAUL K. SONN, NAT'L EMP'T LAW PROJECT, RESTORING THE MINIMUM WAGE FOR AMERICA'S TIPPED WORKERS 3 (2009), http://nelp.3cdn.net/bff44d5fafbd9d2175_vem6ivjjb.pdf ("The largest numbers [of tipped workers] are employed in food service where workers such as waitresses, waiters, bussers, and food delivery workers rely on tips."); *see also PayScale's Restaurant Report: The Agony and Ecstasy of Food Service Workers*, PAYSCALE, http://www.payscale.com/data-packages/tipping-chart-2013 (last visited Mar. 14, 2016) (finding that, on average, waiters and waitresses derive 62% ($8.20 of $13.20) of their income from tips and that the median hourly wage is $5.00).

197. *AFSCME*, 770 F.2d at 1406 ("A compensation system that is responsive to supply and demand and other market forces . . . does not constitute a single practice that suffices to support a claim under disparate impact theory.").

198. *Restaurant Report Key Stats*, PAYSCALE, http://www.payscale.com/data-packages/restaurant-report/full-data (last visited Mar. 14, 2016) (noting that waiters and waitresses receive nearly two-thirds of their income from tips, not from their employer directly).

199. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990–91 (1988).

200. *Id.* at 990; *see also supra* Part III.C.

201. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554–55 (2011); *Watson*, 487 U.S. at 990–91.

compensation on racially discriminatory tipping is a challengeable employment practice for a disparate impact case.[202]

When that court finds that basing employee compensation on a tipping system with known discriminatory outcomes is an employment practice under the terms of Title VII, the plaintiffs will need to prove that this practice *did* cause a discriminatory outcome.[203] Using the Ayres, Lynn, and Brewster studies, plaintiffs may be able to convince a court that these statistics establish a prima facie case sufficient to meet the burden of the first prong of the *McDonnell Douglas* test for disparate impact cases.[204] A court might require, on the other hand, evidence that this pattern is present in their particular store, but given the vagueness of the level and type of statistical evidence required, this is unclear. The second prong of the test allows employers to demonstrate that the employment practice in question, basing server compensation on tips, is "job related for the position in question and consistent with business necessity."[205] If the employer can establish these things, the burden then shifts back to the plaintiff to demonstrate the availability of a reasonable, nondiscriminatory alternative to the challenged employment practice that the employer refuses to adopt.[206]

B. REASONABLE ALTERNATIVE PRACTICES

Given the probable success of a Title VII disparate impact claim, employers must look for alternative nondiscriminatory practices to adopt. There are three possible compensation practices that employers could adopt that would be consistent with Title VII: (1) pooling tips; (2) using a fixed percentage gratuity; and (3) eliminating tipping altogether. This final alternative, eliminating tipping, is the best choice because it does away with the possibility for discrimination altogether and it provides substantial benefits to employers, employees, and customers.

The first alternative, pooling tips, is a practice that is in wide use already.[207] There are a number of regulations that employers must follow to make tip pooling valid.[208] In spite of the many regulations associated with a tip pool, pooling is a popular alternative to individual tipping for a number of reasons—independent of the discriminatory outcome associated with

202. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2554–55.

203. *See supra* notes 53–55 and accompanying text.

204. *See supra* notes 53–55 and accompanying text; *see also supra* Part III.C.

205. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *see also supra* notes 56–58 and accompanying text.

206. *See supra* note 59 and accompanying text.

207. *See* WAGE & HOUR DIV., U.S. DEP'T OF LABOR, *supra* note 185, at 1 ("The requirement that an employee must retain all tips does not preclude a valid tip pooling or sharing arrangement among employees who customarily and regularly receive tips, such as waiters [and] waitresses . . . .").

208. *See id.* ("A valid tip pool may not include employees who do not customarily and regularly receive[] tips, such as dishwashers, cooks, chefs, and janitors.").

regular tipping compensation.[209] For servers, these include increased camaraderie amongst servers, reducing animosity stemming from server sections or large groups, and positive responses from customers who inquire about the practice.[210] Employers benefit from this practice because it requires little work from them and eliminates the discrimination that results from individual tipping because it ensures that all employees receive equal compensation from the tip money that comes in. On the other hand, this presents challenges for employers and employees alike. Pooling tips requires someone to administer and divide the tip pool and there is a high possibility of fraud, including non-eligible persons participating in the tip pool and servers underreporting cash tips.[211]

The second alternative, using a fixed percentage gratuity, is an expansion and alteration of an already existing practice. Prior to January 1, 2014, many restaurants applied a fixed percentage gratuity to the bill for large parties, often eight or more people.[212] Under a newly implemented IRS rule, these fixed, non-voluntary gratuities are classified not as tips, but as service charges.[213] As such, instead of the money going to the server at the end of the night—as a tip—these service charges must be processed as a part of the restaurant's payroll system—like wages—having the requisite taxes removed.[214] If restaurants were to expand this practice to all parties, not just large ones, it would remove the discriminatory component of individual tipping. It may not be a popular option with customers, however, as many people already dislike the practice for large groups and would likely resist it being expanded to everyone. Additionally, since the money from these service charges is treated essentially the same as wages, this is essentially a half-measure towards eliminating tips.

The third alternative, eliminating tipping altogether, is an increasingly popular option with restaurant owners, servers, and customers alike.[215]

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209. Amy Sung, *Tips for Gratuities*, FSR MAG. (July 2013), http://www.fsrmagazine.com/human-resources/tips-gratuities.

210. *Id.*

211. *Id.*

212. Julie Jargon, *IRS Rule Leads Restaurants to Rethink Automatic Tips: Gratuities Added for Large Groups Will Be Taxed as Service Charges*, WALL STREET J. (Sept. 4, 2013, 7:02 PM), http://www.wsj.com/articles/SB10001424127887323893004579055224175110910.

213. *Id.*; *see also Publication 115, Tips, Gratuities, and Service Charges*, CAL. ST. BOARD EQUALIZATION (May 2015), http://www.boe.ca.gov/formspubs/pub115.

214. Jargon, *supra* note 212.

215. Bryce Covert, *Meet the Philadelphia Restaurateurs Who Will Ban Tipping and Pay $13 an Hour Plus Benefits*, THINKPROGRESS (Oct. 2, 2014, 9:56 AM), http://www.thinkprogress.org/economy/2014/10/02/3574990/girard-tips-wage-benefits [hereinafter Covert, *Philadelphia Restaurateurs*] (describing Girard Brasserie and Bruncherie, a Philadelphia restaurant that was preparing to open and was planning to pay their servers an hourly wage and health care benefits instead of requiring them to work for tips); Bryce Covert, *Restaurateur to Introduce Salaries, Stable Schedules, and Health Insurance for Employees*, THINKPROGRESS (Jan. 13, 2015, 3:37 PM), http://thinkprogress.org/economy/2015/01/13/3611213/restaurant-no-tips-health-care (describing Bar

Employers like this option because they can attract better, more qualified, and more reliable wait-staff to work in their restaurant, reducing long-term training costs and improving the overall quality of the service at their restaurant.[216] Servers like this option as well because it ensures that they will not suffer from a bad night or a bad week in which they receive small tips or even no tips at all.[217] Customers enjoy this option because it is easier for them to simply pay the amount billed without having to calculate an appropriate tip.[218] Some customers dislike this option, however, believing that this will lead to sub-standard service.[219] This option would be especially beneficial for employers in higher-end restaurants where the quality of the servers can be a big draw for customers, but the benefits of simplicity, fair wages, and customer goodwill are applicable across the board. Because of the benefits for all parties, this is the practice that employers should adopt as a preventative measure to block the dangers of a Title VII disparate impact claim for race-based wage discrimination.

V. CONCLUSION

Studies showing a racial disparity in the amount that restaurant servers receive in tips provide the backbone for a Title VII disparate impact case challenging the standard individual tipping practice employed by most restaurants. The various elements of a disparate impact case—a discrete employment practice, a discriminatory outcome, and available nondiscriminatory alternatives—are all present in this situation. There may be difficult or controversial elements of the case, but overall, there is a substantial chance that a court facing this question would hold that this practice is unlawful under Title VII.

Given this fact, it would be beneficial for restaurant owners, particularly the owners of large chains that employ hundreds of tip-working waiters and waitresses, to consider altering their pay structure for servers. Any of the three proposed alternatives—tip pooling, fixed gratuity, or eliminating tipping—would be viable nondiscriminatory options. While each of these options has benefits notwithstanding the fact that they also protect an employer from racial employment discrimination cases, the best practice with the most

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Marco, an established Pittsburgh restaurant that is moving away from tips and towards paying their employees a living wage and providing a stable schedule and health care benefits); Alexander C. Kaufman, *Why This Trendy NYC Restaurant Banned Tips*, HUFFINGTON POST (Feb. 27, 2015, 3:06 PM), http://www.huffingtonpost.com/2015/02/27/dirt-candy-tips_n_6760302.html (describing Dirt Candy, a restaurant that eliminated tipping as a part of its grand reopening).

216. Covert, *Philadelphia Restaurateurs*, *supra* note 215.

217. *Id.*

218. Kaufman, *supra* note 215.

219. *See* Tom Geoghegan, *To Tip or Not to Tip . . . or Should It Be Banned?*, BBC NEWS (June 14, 2013), http://www.bbc.com/news/magazine-22846846.

benefits—and the momentum of current trends—eliminating tipping altogether is the best policy for employers to adopt.