

EMPLOYER LIABILITY FOR NON-EMPLOYEE DISCRIMINATION

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EMPLOYER LIABILITY FOR NON-EMPLOYEE DISCRIMINATION

DALLAN F. FLAKE*

Abstract: Discrimination against employees by customers, vendors, and other third parties is a serious issue that will likely become even more pressing in the near future. Increased workplace interactions between employees and non-employees, coupled with the societal shift toward subtle, covert, and sometimes even unconscious discrimination, mean non-employee discrimination is likely to become more pervasive—even as it becomes harder to detect. As this perfect storm brews, it is worth considering how judicial treatment of non-employee discrimination can be improved. I argue that one of the most important changes needed is for the law to cease treating discrimination by non-employees and discrimination by fellow employees as one and the same. These forms of discrimination should be analytically distinct because employers generally cannot exercise the same degree of control over non-employees as they can over their own employees. The law can best account for this crucial distinction by holding employers to a reasonableness standard for non-employee discrimination. Under this standard, employers would be liable for the discriminatory actions of third parties if: (1) they knew or should reasonably have known about the discrimination and (2) failed to act reasonably in response to the discrimination. This approach apportions liability more commensurately with the level of control employers can realistically exercise over non-employees, while still incentivizing employers to aggressively monitor and address non-employee discrimination.

INTRODUCTION

Despite the fact that Title VII of the Civil Rights Act of 1964 expressly forbids only employers (and, by extension, employees) from discriminating against employees,¹ courts have long interpreted the statute as also prohibit-

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¹ See 42 U.S.C. § 2000e-2(a)(1) (2012) (it is “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, condi-

ing employers from allowing third parties to discriminate against employees.² Employers who fail to adequately protect their employees from non-employee discrimination face serious repercussions. For example, a Kansas City-area jury recently awarded over \$2.5 million to an AutoZone cashier, who claimed the auto parts retailer failed to take action after customers inappropriately touched her, asked her about her “cup size,” and made sexual advances toward her on multiple occasions.³ Likewise, retail supermarket chain Fred Meyer paid out nearly half a million dollars to settle a group of female employees’ claims that a customer “continually made lewd comments to [them], in addition to grabbing [them], cornering them, touching their breasts, and pulling one employee onto his lap.”⁴ Non-employee discrimination is not limited to incidents of harassment. For instance, Michigan-based Hurley Medical Center recently paid almost \$200,000 to three black nurses who were prohibited from caring for a white baby after the baby’s father showed a hospital supervisor his swastika tattoo and insisted that no black nurses treat his child.⁵

tions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”); *see also* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) (2012) (“It shall be unlawful for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”); Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311(a)-(c) (2012) (prohibiting employers from discriminating against uniformed service members); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111(2), 12112(a) (2012) (prohibiting “covered entities,” including employers, employment agencies, labor organizations, and joint labor-management committees, from discriminating “against a qualified individual on the basis of disability”).

² *See infra* notes 135–274 and accompanying text (discussing court opinions regarding employee discrimination by third parties).

³ *See* Diaz v. Autozoners, LLC, No. 1216-cv28445, 2014 WL 1193878, at *2 (Mo. Cir. Feb. 3, 2014); Abby Eden, *Damages Awarded to AutoZone Employee in Sexual Harassment Lawsuit*, FOX4KC.COM (Feb. 6, 2014, 9:54 PM), <http://fox4kc.com/2014/02/06/damages-awarded-to-autozone-employee-in-sexual-harassment-lawsuit/> [<https://perma.cc/B73G-GCRF>]. The appellate court upheld the verdict but reduced the size of the award to \$1,075,000. *See* Diaz v. Autozoners, LLC, 484 S.W.3d 64, 95 (Mo. Ct. App. 2015).

⁴ *See* Press Release, EEOC, Retailer Fred Meyer Settles Second EEOC Sexual Harassment Lawsuit (May 5, 2014), <https://www1.eeoc.gov/eeoc/newsroom/release/5-5-14a.cfm?renderforprint=1> [<https://perma.cc/5S7G-KCPB>]. In response to the settlement, harassment victim Victoria Settle commented, “I was terrorized at work and so stressed worrying about what would happen when this customer came into the store . . . All I ever wanted was for my employer to do something to stop him, and I hope that this settlement means Fred Meyer will not let anything like this happen again.” *Id.*

⁵ *See* Gary Ridley, *Hurley Settles Race Discrimination Complaint That Claimed Black Nurses Were Banned from Treating White Baby in Flint*, MLIVE (Sept. 27, 2013, 10:44 AM), http://www.mlive.com/news/flint/index.ssf/2013/09/hurley_settles_race_discrimina.html [<https://perma.cc/K2E6-F5UT>]; *see also* Press Release, EEOC, Hurley Medical Center Agrees to Settle EEOC Race Discrimination Case (Sept. 26, 2013), <https://www.eeoc.gov/eeoc/newsroom/release/9-26-13e.cfm> [<https://perma.cc/J5J8-XJB3>].

Employer liability for non-employee discrimination dates back at least four decades.⁶ Yet despite its persistence, this form of discrimination has received little attention from courts,⁷ the Equal Employment Opportunity Commission (“EEOC”),⁸ and legal scholars.⁹ This dearth of attention is not necessarily surprising, given the tendency in the law to treat discrimination by non-employees and discrimination by employees as one and the same. Indeed, courts have long assumed—without much analysis—that employers should be equally liable for discrimination that comes from employees and non-employees.¹⁰ Consequently, there has been little incentive to explore how these forms of discrimination differ and whether such differences call for different treatment under the law.¹¹

This Article seeks to shed much-needed light on non-employee discrimination. I argue that discrimination by non-employees differs from discrimination committed by employees in ways that matter for employer-liability purposes. The most glaring difference is that employers typically cannot exercise the same level of control over non-employees as they do over their own employees when it comes to employment discrimination.¹² Employers have a variety of tools at their disposal to prevent, detect, and address employee-on-employee discrimination. Indeed, many employers provide annual antidiscrimination training to employees, establish strict handbook policies and workplace rules against discrimination, and implement mandatory discrimination-reporting requirements. They also have the power to punish employees who violate such policies, whether through

⁶ The earliest reference to employer liability for non-employee discrimination appears to date back to 1971, when a California federal district court observed that “[i]f the employer were permitted to discriminate because other employees, his customers or third persons, were prejudiced against minorities, the effort to break the desperate ring of discrimination would soon fail.” *Johnson v. Pike Corp. of Am.*, 332 F. Supp. 490, 496 (C.D. Cal. 1971).

⁷ See *infra* notes 135–274 and accompanying text (analyzing judicial treatment of non-employee discrimination).

⁸ The EEOC has been uncharacteristically restrained in its guidance on non-employee discrimination. Its most detailed analysis of the issue consists of an informal discussion letter authored by its assistant legal counsel in 2012. Letter from Carol R. Miaskoff, Assistant Legal Counsel, EEOC, to Member of the Public (Oct. 1, 2012) https://www.eeoc.gov/eeoc/foia/letters/2012/title_vii_third-party_citizen_harassment.html [<https://perma.cc/36RQ-88UT>].

⁹ See generally, e.g., Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1 (2002); Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL’Y & L. 249 (2016); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009).

¹⁰ See *infra* notes 135–274 and accompanying text.

¹¹ See *infra* notes 135–274 and accompanying text.

¹² See John C. Schlinker & Matthew K. Payok, *The Customer Is Not Always Right*, MICH. BAR J., Jan. 2005, at 30, <https://www.michbar.org/file/barjournal/article/documents/pdf4article830.pdf>.

formal warnings, suspensions, demotions, or termination. By contrast, employers generally have much less control over non-employees' behavior toward employees.¹³ Aside from posting a code of conduct, which third parties may or may not read,¹⁴ and perhaps banning flagrant offenders from their premises, employers have comparatively few options for effectively combatting discrimination by non-employees. The fact that it is often harder to control non-employees' behavior should not absolve employers from liability for non-employee discrimination—but it should factor into the analysis. To this end, I propose replacing the extant framework, which fails to recognize any difference between employee and non-employee discrimination, with a new approach that ties an employer's liability to its actual or constructive knowledge of and response to non-employee discrimination. Under this two-pronged approach, an employer's liability would depend on (1) whether it knew or should have reasonably known about the non-employee discrimination and (2) whether it acted reasonably in response to the discrimination. This standard would apportion employer liability more commensurately with the level of control employers can realistically exercise over non-employees, while still incentivizing employers to monitor and address non-employee discrimination in a reasonable manner.

This Article begins by exploring why non-employee discrimination will likely become even more pervasive in the near future. In Part I, I attribute this trend to two key developments. First, as the United States continues to transition to a predominately service-based economy, the frequency of employee-non-employee interactions will only increase, thereby providing more opportunities for non-employees to discriminate.¹⁵ Moreover, in the service economy, third parties are increasingly inserting themselves in the traditional bilateral employer-employee relationship, whereby they both directly and indirectly influence an array of employing functions from hiring, promotion, and firing to compensation and job assignments.¹⁶ Second, as organizations become increasingly complex and interdependent, workplaces are becoming populated by a wide range of third parties, such as

¹³ *See id.*

¹⁴ *See, e.g.,* COLUMBUS METRO. LIBRARY, CUSTOMER CODE OF CONDUCT, <http://www.columbuslibrary.org/about/customer-code-conduct> [<https://perma.cc/KFH5-K2VG>] (prohibiting patrons from “[h]arassing customers or staff,” which it defines as “[d]eliberate repeated behavior that is intimidating, hostile, offensive, or adversely impacts staff work performance”).

¹⁵ *See infra* notes 30–70 and accompanying text. *See generally* Donald M. Fisk, *American Labor in the 20th Century*, COMPENSATION & WORKING CONDITIONS (Fall 2001), <https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf> [<https://perma.cc/KEG2-MK4Z>] (discussing the increasing percentage of workers in the service industry from 1900 to 2000).

¹⁶ *See* Einat Albin, *A Worker-Employer-Customer Triangle: The Case of Tips*, 40 *INDUS. L. J.* 181, 182 (2011); *infra* notes 31–46 and accompanying text.

vendors, suppliers, temporary employees, and independent contractors.¹⁷ In short, as the economy becomes more service driven and interdependent, interactions—and, consequently, discrimination—between non-employees and employees will likely increase.

In Part II, I consider the various ways in which non-employees discriminate against employees.¹⁸ In the past, non-employee discrimination was often conscious and either direct (such as when a customer sexually harassed a waitress) or indirect (such as when airlines hired only female flight attendants based on customer preference). But as antidiscrimination norms take deeper root in American society, discrimination is becoming more subtle, unintentional, and even unconscious. Indeed, it is becoming increasingly common for non-employees to unconsciously discriminate against employees, both directly, such as when restaurant diners unintentionally tip black servers less than white servers, and indirectly, such as when customers give implicitly biased feedback to employers that is then used to make employment decisions. In essence, a perfect storm is brewing in which non-employee discrimination is becoming more commonplace, yet harder to detect.

Part III examines how the courts analyze non-employee discrimination claims.¹⁹ Because the law does not distinguish between non-employee and employee discrimination, the courts apply the same analytical frameworks to both types of discrimination despite key differences between these two actors. Thus, in non-employee harassment cases, courts ask whether the employer had actual or constructive knowledge of the discrimination and, if so, whether it promptly acted to end the harassment.²⁰ In customer-preference-driven disparate treatment cases, courts consider whether the discrimination can be justified as a bona fide occupational qualification (“BFOQ”) that is reasonably necessary to the normal operation of the employer’s business.²¹ In customer-

¹⁷ See *infra* notes 48–70 and accompanying text.

¹⁸ See *infra* notes 71–134 and accompanying text.

¹⁹ See *infra* notes 135–247 and accompanying text.

²⁰ See *Medina-Rivera v. MVM, Inc.*, 713 F.3d 132, 137 (1st Cir. 2013) (“[B]ecause . . . employers must provide their personnel with a harassment-free workplace, they may be on the hook for a non-employee’s sexually-harassing behavior under certain conditions—one of which being that they knew or should have known about the harassment and yet failed to take prompt steps to stop it”); *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 531–32 (8th Cir. 2008) (an employer is liable for non-employee harassment if “the employer knew or should have known of the harassment and failed to take prompt and effective remedial action”); *infra* notes 138–204 and accompanying text.

²¹ See 29 U.S.C. § 623(f)(1) (“It shall not be unlawful for an employer . . . to [discriminate against an employee based on age] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business”); 42 U.S.C. § 2000e-2(e)(1) (“[I]t shall not be an unlawful employment practice for an employer [to discriminate] . . . on the basis of [an employee’s or applicant’s] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably neces-

preference-driven disparate impact cases, where employers create facially neutral policies based on customer preferences that disparately impact a protected group, the courts ask whether the policy is job related and consistent with business necessity.²² Thus, sometimes an employer is liable for non-employee discrimination only if it had actual or constructive knowledge of the discrimination,²³ but other times employer knowledge plays no role in the analysis.²⁴ Further, in some cases an employer can avoid liability by showing the discrimination was necessary to the operation of its business,²⁵ whereas in other cases business necessity carries no weight.²⁶ I contend that the application of these varying doctrines and frameworks to non-employee discrimination is unnecessarily confusing and has generated a fragmented and inconsistent case law.

I argue in Part IV that the existing judicial approach to non-employee discrimination is fundamentally unfair and can be improved by acknowledging that employers cannot monitor, deter, or remediate the discriminatory behavior of non-employees as effectively as they can their own employees.²⁷ If the law is going to continue holding employers solely liable for the discriminatory actions of non-employees, while essentially giving non-employees a free pass to discriminate, it is only fair that the liability standard account for employers' diminished control over non-employees. Replacing the existing hodgepodge of frameworks and doctrines with a reasonableness standard would not only strike a more equitable balance between employer liability and control but would also create a single, unified approach to non-employee discrimination that allows employers greater flexibility in how best to address the issue. Furthermore, a reasonableness standard would have the added benefit of being broad enough to apply to all forms of non-employee discrimination, including the harder-to-detect unconscious discrimination that is becoming more pervasive in modern society.

sary to the normal operation of that particular business or enterprise"); *infra* notes 205–271 and accompanying text.

²² See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (stating that an employer is not liable for facially neutral employment practices and policies that disparately impact a protected group if it can prove the policy is “job related for the position in question and consistent with business necessity”).

²³ See *infra* notes 138–201 and accompanying text (analyzing judicial treatment of harassment by non-employees).

²⁴ See *infra* notes 208–262 and accompanying text (analyzing judicial treatment of disparate impact cases).

²⁵ See *infra* notes 202–274 and accompanying text (analyzing judicial treatment of discriminatory preferences and requests by non-employees).

²⁶ See *infra* notes 138–201 and accompanying text.

²⁷ See *infra* notes 275–317 and accompanying text.

I. THE GROWTH OF NON-EMPLOYEE DISCRIMINATION

Employees are more vulnerable to discrimination by non-employees than ever before. This is due to the fact that in the modern workplace employees are more likely to interact regularly with non-employees, thus heightening the possibility of discrimination.²⁸ More frequent interactions between employees and non-employees result from two important developments. First, as the United States transitions from a manufacturing to a service-based economy, interactions between employees and customers have increased exponentially.²⁹ Second, as organizations become increasingly complex and interdependent, workplaces often house more than just a single organization's workers; vendors, suppliers, temporary employees, employees of other entities, independent contractors, and many others are also regularly present.³⁰ As workplace interactions between employees and non-employees increase, so too does the risk of non-employee discrimination.

A. *The Service Economy*

Service-sector employees have always been vulnerable to non-employee discrimination due to their frequent and intimate contact with customers and other non-employees.³¹ Although the service sector was relatively small for much of American history, during the twentieth century "the composition of the labor force shifted from industries dominated by primary production occupations . . . to those dominated by professional, technical and service workers."³² Between 1900 and 2000, the percentage of the labor force that worked on farms declined from 38% to less than 3%, whereas the percentage of workers in the service sector more than doubled from 31% to 78%.³³ The U.S. Department of Labor estimated that the service sector accounted for over 80% of all jobs as of 2014³⁴ and projected "service-

²⁸ See Fisk, *supra* note 15; *infra* notes 31–46 and accompanying text.

²⁹ See Fisk, *supra* note 15; *infra* notes 47–70 and accompanying text.

³⁰ See, e.g., Mike Ettling, *The Rise of the Contingent: Why You Should Connect with Everyone in Your Workforce*, SAP (Dec. 17, 2014), <https://blogs.sap.com/2014/12/17/the-rise-of-the-contingent-why-you-should-connect-with-everyone-in-your-workforce/> [<https://perma.cc/793V-ZP5G>] ("As we enter 2015, we can't help but notice that businesses are increasing their dependency on contingent labour . . .").

³¹ See Wang, *supra* note 9, at 268 (stating that "most of service workers' regular job-related interaction is with customers. Service workers often spend more time with, are in closer physical proximity to, and communicate more directly with customers than with managers or co-workers").

³² Fisk, *supra* note 15.

³³ *Id.*

³⁴ Press Release, Bureau of Labor Statistics of U.S. Dep't of Labor, Emp't Projections—2014–24 (Dec. 8, 2015), <http://www.bls.gov/news.release/pdf/ecopro.pdf> [<https://perma.cc/Y8FC-3L4V>].

providing sectors are projected to capture 94.6 percent of all jobs added between 2014 and 2024.”³⁵

Because the vast majority of American jobs are now service based, a significant portion of the labor force interfaces with customers, clients, and other members of the public on a regular basis.³⁶ As the number of service encounters between customers and employees increases, so too does the likelihood of employees experiencing non-employee discrimination.³⁷ Moreover, the potential for non-employee discrimination in an ever-expanding service sector is further bolstered by the fact that women and people of color—common targets of discrimination—are vastly overrepresented in service jobs.³⁸

The likely rise in non-employee discrimination stems not only from increased interactions between employees and non-employees but also the growing influence of third parties in employment relationships. In a society where customer satisfaction is increasingly considered a top priority,³⁹ customers wield tremendous influence over employers—not just in determining the types of goods and services offered but also in the relationships between employers and employees. Einat Albin argues that “changes in the labour market—such as globalisation, the disintegration of the firm, greater flexibility, the decrease of unionization, [and] the rise of service work [] . . . have widened the extent of third-party involvement” in the employment relationship.⁴⁰ In a service-based economy, it is increasingly common for customers to influence an array of employing functions once reserved almost exclusively to employers. This includes which employees get hired, fired, and promoted, the assignment of job tasks and responsibilities, and even how much money an employee earns through pay raises, tips, and other discretionary wages.⁴¹ The increased influence by third parties has

³⁵ *Id.* at 2.

³⁶ See Wang, *supra* note 9, at 268–69; Fisk, *supra* note 15.

³⁷ See Wang, *supra* note 9, at 268–69.

³⁸ See U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: 2016, TABLE 11 EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY, <http://www.bls.gov/cps/cpsaat11.pdf> [<https://perma.cc/25L9-PTPE>]. The Bureau of Labor Statistics reports that women hold 56.6% of service jobs (compared to 46.8% of all jobs), whereas people of color (Asians, Hispanics, Black or African American) hold 46.2% of service jobs (compared to 34.7% of all jobs). See *id.* at 1, 4.

³⁹ See NIGEL HILL ET AL., CUSTOMER SATISFACTION: THE CUSTOMER EXPERIENCE THROUGH THE CUSTOMER’S EYES 21–22 (2007) (explaining that “[c]ompanies with higher customer satisfaction produce better return[s] for shareholders”); PAUL SZWARC, RESEARCHING CUSTOMER SATISFACTION & LOYALTY: HOW TO FIND OUT WHAT PEOPLE REALLY THINK 162–64 (2005) (same).

⁴⁰ See Albin, *supra* note 16, at 182.

⁴¹ See *id.* at 186–89.

prompted Albin and others to suggest recasting the traditional binary employer-employee relationship as a “service triangle” comprised of the employer, employee, and customer.⁴² One scholar notes that “[w]ithin this triangle each party is dependent on each other, but the parties can have conflicting or complementary interests.”⁴³ In this sense, third parties become a second employer that, in some instances, may become even more important than the primary employer to the employee.⁴⁴ Albin explains that “[o]nce a worker is more dependent on a third party for earnings, she becomes less loyal to her employer and more biased towards the paying customer.”⁴⁵

For employment discrimination purposes, reconfiguring the traditional employer-employee relationship as a service triangle is problematic in the sense that employment discrimination liability extends only to employers, whereas customers face no repercussions under the law for either their direct or indirect discriminatory actions against employees. Whether the law can or should extend liability for employment discrimination to third parties is an important question, which is starting to generate some much needed scholarly attention.⁴⁶ This Article, however, focuses on the extent to which employers should be held liable for the discriminatory actions of non-employees in light of their growing influence over the terms and conditions of employment.

B. Growing Organizational Complexity

For much of history, the American workplace was fairly uncomplicated, as employees had more interactions with fellow employees than with non-employees while at work.⁴⁷ This was especially true of the manufactur-

⁴² See *id.* at 183–84; Sharon C. Bolton & Maeve Houlihan, *Bermuda Revisited? Management Power and Powerlessness in the Worker-Manager-Customer Triangle*, 37 WORK & OCCUPATIONS 378, 380–84 (2010); Ulla Forseth, *Gender Matters? Exploring How Gender Is Negotiated in Service Encounters*, 12 GENDER, WORK & ORG. 440, 442 (2005); Stephen Henry Lopez, *Workers, Managers and Customers: Triangles of Power in Work Communities*, 37 WORK & OCCUPATIONS 251, 255 (2010); Wang, *supra* note 9, at 254–62.

⁴³ Forseth, *supra* note 42, at 442.

⁴⁴ See Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1184 (2015).

⁴⁵ Albin, *supra* note 16, at 184.

⁴⁶ See *id.* at 184 n.12 (“There are, of course, other examples of the worker–employer–customer triangle worthy of further investigation. Such are situations of sexual harassment by customers; of customers who induce employers to discriminate against workers, etc.”); see also Einat Albin, *Labour Law in a Service World*, 73 MODERN L. REV. 959, 960 (2010) (noting that “in today’s Service World the market transaction of labour includes multiple players, the dominant ones being workers, employers and customers, and that labour law should be thought of accordingly”); Wang, *supra* note 9, at 285–92.

⁴⁷ See Fisk, *supra* note 15 (finding that at the beginning of the twentieth century, most of the labor force consisted of “primary production occupations, such as farmers and foresters”).

ing sector, which predominated for much of the past century.⁴⁸ Certainly some interactions with non-employees occurred—particularly in the service sector—but not nearly as often as they do today.⁴⁹ Moreover, with perhaps the exception of customers occasionally tipping service employees,⁵⁰ non-employees played a negligible role in determining the terms and conditions of an employee’s employment.⁵¹ Because workers typically faced discrimination from supervisors and coworkers rather than from non-employees, antidiscrimination laws that held employers liable for the discriminatory actions of persons in their employ arguably were adequate to protect employees from most workplace discrimination.

As the economy becomes more complex, the likelihood of employees interacting with non-employees in the workplace has drastically increased.⁵² Growing organizational complexity is a major reason for this development. Along with single-entity employers, there is now a dizzying network of parent companies, subsidiaries, wholly-owned subsidiaries, sister companies, associates, affiliates, divisions, branches, franchises, and joint ventures, to name just a few. This often results in employees of separate and distinct entities simultaneously occupying the same workspace, such that an employee’s “coworkers” may in fact be employed by a different employer altogether.⁵³ Consequently, whereas in the past customers were likely the most common, if not exclusive, perpetrators of non-employee discrimination, today it may be the case that much of the non-employee discrimination that employees experience stems from “coworkers” who are actually employed by other entities. For example, in *Torres-Negrón v. Merck & Co., Inc.*, Kathleen Torres worked as a sales representative for Merck-Puerto Rico (“Merck PR”).⁵⁴ Torres claimed her colleagues at fellow subsidiary Merck-Mexico made negative and harassing comments about her gender, citizenship, salary, and Puerto Rican accent while she was temporarily assigned to that location.⁵⁵ The First Circuit held that Merck-PR could be lia-

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ It is believed that tipping in the United States began in the late nineteenth century following the American Civil War, when wealthy Americans traveling abroad to Europe witnessed tipping and brought the aristocratic custom back with them to flaunt their elevated social status. See Paul Wachter, *Why Tip?*, N.Y. TIMES MAG. (Oct. 9, 2008), <http://www.nytimes.com/2008/10/12/magazine/12tipping-t.html> [<https://perma.cc/9NEU-TCXL>].

⁵¹ See Albin, *supra* note 16, at 186–89 (explaining that as the economy becomes more consumer driven, customers are increasingly taking part in employing functions once reserved almost exclusively to employers).

⁵² See Fisk, *supra* note 15.

⁵³ See, e.g., *Torres-Negrón v. Merck & Co.*, 488 F.3d 34, 40–43 (1st Cir. 2007).

⁵⁴ See *id.* at 36.

⁵⁵ *Id.* at 36–37.

ble for the Merck-Mexico employees' harassment because the two subsidiaries constituted a single employer under an integrated-enterprise test.⁵⁶ Even where the relationship between two entities is not as close, an employer may still be liable for non-employee discrimination. This was the case when two non-employee physicians sexually harassed a hospital employee in the operating room,⁵⁷ and in another instance, when a county deputy harassed a city police officer because of his Polish heritage while serving together on a community drug taskforce.⁵⁸

The question of who employs whom is further complicated by the proliferation of professional employer organizations, employee management companies, temporary employment and staffing agencies, joint-employment agreements, and work-sharing arrangements. Thus, it is entirely possible for one company to employ a supervisor, while another company employs her subordinates. This was the case in *Neal v. Manpower International, Inc.*, where Manpower, a temporary staffing agency, hired Shneirdre Neal to work as a production worker at a client's garage door manufacturing facility.⁵⁹ During this assignment, Neal's supervisor, who was employed by the client rather than Manpower, made a series of sexually suggestive comments to Neal.⁶⁰ The court concluded that even though the supervisor was not a Manpower employee, Manpower still could be held liable for the harassment.⁶¹

Greater employee-non-employee interaction in the workplace is also attributable to growth in outsourcing.⁶² As businesses become more specialized, they also become more interdependent.⁶³ In the modern economy, manufacturers outsource between seventy and eighty percent of the content of their finished products.⁶⁴ Larger companies commonly outsource everything from IT support to back office operations such as human resources, payroll, and accounting.⁶⁵ In fact, one economist predicts that "before too

⁵⁶ *Id.* at 40–43.

⁵⁷ See *Santos v. P.R. Children's Hosp.*, No. 11-1539, 2012 U.S. Dist. LEXIS 140731, at *2–4, *6–13 (D.P.R. Sept. 28, 2012).

⁵⁸ *Zasada v. City of Englewood*, No. 11-cv-02834-MSK-MJW, 2013 U.S. Dist. LEXIS 45550, at *4, *12 (D. Colo. Mar. 29, 2013).

⁵⁹ No. 3:00-cv-277/LAC, 2001 U.S. Dist. LEXIS 25805, at *8 (N.D. Fla. Sept. 17, 2001).

⁶⁰ *Id.* at *8–11.

⁶¹ *Id.* at *28–36.

⁶² See MICHAEL F. CORBETT, *THE OUTSOURCING REVOLUTION*, at xiii (2004).

⁶³ See Dorie Clark, *Dan Ariely on Why We're All a Little Dishonest—and What to Do About It*, FORBES (Oct. 29, 2013, 10:00 A.M.), <https://www.forbes.com/sites/dorieclark/2013/10/29/dan-ariely-on-why-were-all-a-little-dishonest-and-what-to-do-about-it/#55ccbc046579> [https://perma.cc/3U7J-3G9H].

⁶⁴ See Corbett, *supra* note 62, at xiii.

⁶⁵ See *id.*

long most organizations are going to be far more outsourced than they are ‘in-sourced,’” signifying a “fundamental restructuring of organizations that carries enormous implications for all of us—executives, managers, employees, customers, and investors alike.”⁶⁶ As a result of outsourcing, there may be greater interaction between employees and vendors, contractors, and suppliers. For example, in *Berry v. Delta Airlines, Inc.*, Delta employed Elise Berry as a customer service agent in its cargo facilities at Chicago O’Hare International Airport.⁶⁷ Delta outsourced its baggage handling services to a separate company, whose employees worked in the warehouse portion of Delta’s cargo facilities.⁶⁸ Berry, who sometimes had to enter the warehouse as part of her job, sued Delta after one of the outsourced employees inappropriately touched her and made sexual advances toward her.⁶⁹ The Seventh Circuit acknowledged Delta could be liable for the non-employee’s harassment but ultimately affirmed dismissal of Berry’s claims on other grounds.⁷⁰

In sum, non-employee discrimination will likely become even more prevalent as interactions between employees and non-employees increase due to the continued growth of the service sector, as well as the rise of multiemployer workplaces resulting from increasing organizational complexity and interdependence. Along with these increased interactions, non-employees are wielding greater influence over employment decisions, thereby generating even more opportunities for discrimination.

II. MANIFESTATIONS OF NON-EMPLOYEE DISCRIMINATION

When people envision non-employee discrimination, the scenario that perhaps most typically comes to mind is one in which a male customer sexually harasses a female employee. This type of non-employee discrimination is relatively straightforward because the discrimination is both conscious (i.e., the customer intends to harass the employee) and direct (i.e., the customer is the immediate source of the harassment). But not all non-employee discrimination is conscious and direct. Sometimes it is conscious but indirect, whereas other times the discrimination is altogether unconscious and may be either direct or indirect. Distinguishing between conscious versus unconscious, and direct versus indirect non-employee discrimination helps underscore the need for an employer liability standard that adequately accounts for the fact that

⁶⁶ See *id.* at xiv.

⁶⁷ 260 F.3d 803, 804 (7th Cir. 2001).

⁶⁸ *Id.*

⁶⁹ *Id.* at 804–05.

⁷⁰ See *id.* at 811–12, 814.

some forms of non-employee discrimination are easier than others for employers to prevent, detect, and remedy.

A. *Conscious Discrimination*

Virtually all reported judicial opinions concerning non-employee discrimination involve conscious, intentional discrimination. While this may be the most common type of non-employee discrimination, it may also be the case that this type of discrimination is frequently litigated because it is relatively easy to detect. Conscious non-employee discrimination can be either direct or indirect. The discrimination is direct if the non-employee herself takes an adverse action against the employee, whereas it is indirect if the non-employee makes a discriminatory request or expresses a discriminatory preference to an employer, who then takes the adverse action against an employee to appease the non-employee.⁷¹

1. Direct Discrimination

Direct, conscious discrimination occurs when a non-employee directly causes an employee to suffer an adverse employment action or, in the case of harassment, “alter[s] the conditions of the victim’s employment and [] create[s] an abusive working environment.”⁷² It is fairly difficult for a non-employee to directly cause an employee to suffer an adverse employment action because non-employees cannot independently hire, fire, promote, or otherwise directly determine an employee’s working conditions.⁷³ However, one notable exception is compensation, because in some cases customers can directly impact employees’ earnings through their provision of tips.⁷⁴ Although it is conceivable that some customers might consciously tip an employee less because of the employee’s race, sex, or other protected characteristic, research suggests discriminatory tipping is largely an unconscious phenomenon.⁷⁵

⁷¹ See *infra* notes 72–99 and accompanying text (discussing direct and indirect discrimination).

⁷² *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

⁷³ See U.S. EEOC, *Facts About Retaliation*, <https://www.eeoc.gov/laws/types/facts-retal.cfm> [<https://perma.cc/5KPK-CD75>].

⁷⁴ See Albin, *supra* note 16, at 184 (“Tips constitute an interesting case of a paying structure that directly impacts the precariousness of workers because it enhances the involvement of customers in that relationship.”).

⁷⁵ See Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 *YALE L.J.* 1613, 1653–54 (2005) (suggesting that both conscious and unconscious motivations play a role in whites and blacks tipping black taxicab drivers less than white drivers); Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, 38 *J. APPLIED SOC.*

Perhaps the most likely scenario in which a non-employee directly and consciously discriminates against an employee is through the creation of a hostile work environment. For example, in *EEOC v. GNLV Corp.*, the EEOC brought suit on behalf of Susie Fein, a blackjack dealer at the Golden Nugget in Las Vegas, Nevada.⁷⁶ Fein alleged that during her employment three patrons sexually harassed her by repeatedly calling her vulgar names, throwing their cards at her, touching her hair, kissing her on the lips, and slapping her hands.⁷⁷ Similarly, in *Galdamez v. Potter*, Arlene Galdamez filed a national origin discrimination lawsuit against her employer, the U.S. Postal Service, after she allegedly “endured offensive verbal comments from customers and community members, references in local newspapers to her accent and foreign birth, direct and indirect threats to her safety, and vandalism to her car” after she took over as postmaster and enacted several changes to bring the post office where she worked in line with Postal Service regulations.⁷⁸ In cases of non-employee harassment, courts hold employers liable if they knew or should have known about the harassment and failed to take reasonable steps to remedy it.⁷⁹

2. Indirect Discrimination

Indirect, conscious discrimination occurs when a non-employee makes a discriminatory request or states a discriminatory preference to an employer, and the employer thereafter takes adverse action to comply with the customer’s request or preference.⁸⁰ Such discrimination is more conceptually challenging than direct, conscious discrimination because neither the non-employee nor the employer is entirely at fault: The non-employee possesses discriminatory intent but does not take the adverse employment action and the employer commits the adverse employment action but may lack discriminatory intent.

In today’s fiercely competitive business environment, there is little doubt the customer is king. Research shows that highly satisfied customers

PSYCHOL. 1045, 1055–56 (2008) (concluding that implicit racial bias was the most “plausible explanation” for findings that both blacks and whites tipped black servers less than white servers).

⁷⁶ No. 2:06-cv-01225-RCJ-PAL, 2014 U.S. Dist. LEXIS 177439, at *3, *8 (D. Nev. Dec. 18, 2014).

⁷⁷ *Id.* at *8–10.

⁷⁸ See 415 F.3d 1015, 1018–19 (9th Cir. 2005).

⁷⁹ See *infra* notes 138–200 and accompanying text (analyzing judicial treatment of harassment by non-employees).

⁸⁰ See, e.g., *Williams v. G4S Secure Sol. (USA), Inc.*, No. ELH-10-3476, 2012 U.S. Dist. LEXIS 66249, at *4–6 (D. Md. May 11, 2012).

are more likely to purchase again,⁸¹ to spread positive word of mouth,⁸² and to accept price increases.⁸³ Increasing customer satisfaction also leads to greater revenues⁸⁴ and lower marketing costs.⁸⁵ Thus, it is hardly surprising that many businesses proclaim customer satisfaction to be their top priority,⁸⁶ such that they will do almost anything to satisfy, and hopefully retain, customers.⁸⁷ This includes catering to a host of customer preferences—stated or implied.

⁸¹ See Fatma Demirci Orel & Ali Kara, *Supermarket Self-Checkout Service Quality, Customer Satisfaction, and Loyalty: Empirical Evidence from an Emerging Market*, 21 J. RETAILING & CONSUMER SERVS. 118, 128–29 (2014) (service quality positively influences loyalty through the customer service path); David M. Syzmanski & David H. Henard, *Customer Satisfaction: A Meta-analysis of the Empirical Evidence*, 29 J. ACAD. MARKETING SCI. 16, 19 (2001).

⁸² See generally Eugene W. Anderson, *Customer Satisfaction and Word of Mouth*, 1 J. SERVICE RES. 1 (1998) (dissatisfied customers engage in greater word of mouth than satisfied ones); James G. Maxham III, *Service Recovery's Influence on Consumer Satisfaction, Positive Word-of-Mouth, and Purchase Intentions*, 54 J. BUS. RES. 11 (2001) (moderate to high service recovery efforts significantly increase post-failure levels of satisfaction, purchase intent, and positive word-of-mouth).

⁸³ See generally Eugene W. Anderson, *Customer Satisfaction and Price Tolerance*, 7 MARKETING LETTERS 19 (1996) (finding a negative association between the level of customer satisfaction and the degree of price tolerance exhibited by customers); Christian Homburg et al., *Customers' Reactions to Price Increases: Do Customer Satisfaction and Perceived Motive Fairness Matter?*, 33 J. ACAD. MARKETING SCI. 36 (2005) (as customer satisfaction increases, the negative impact of the magnitude of a price increase weakens); Frank Huber et al., *Customer Satisfaction as an Antecedent of Price Acceptance: Results of an Empirical Study*, 10 J. PRODUCT & BRAND MGMT. 160 (2001) (finding a positive correlation between customer satisfaction and price acceptance).

⁸⁴ See Thomas S. Gruca & Lopo L. Rego, *Customer Satisfaction, Cash Flow, and Shareholder Value*, 69 J. MARKETING 115, 115 (2005) (noting that “[customer] satisfaction creates shareholder value by increasing future cash flow growth and reducing its variability”).

⁸⁵ Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, HARVARD BUS. REV., Sep.–Oct. 1990, <https://hbr.org/1990/09/zero-defections-quality-comes-to-services> [<https://perma.cc/TD5D-FZEP>] (“As purchases rise, operating costs decline. . . . Also, as the company gains experience with its customers, it can serve them more efficiently.”).

⁸⁶ See, e.g., BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 111 (2013) (describing Amazon CEO Jeff Bezos as obsessed with delivering a flawless customer experience); AUTOMOTIVE SOL., <http://www.autorepairwhitehousetn.com/> [<https://perma.cc/73GX-EBA4>] (“Your Satisfaction is Our Highest Priority!”); *Contact Us*, MOELLER MANUF. & SUPPLY, INC., <http://www.moellermfg.com/contact> [<https://perma.cc/9LRG-SPH4>] (“Your satisfaction is our top priority and we’ll endeavor to maintain our status of 100% customer satisfaction.”).

⁸⁷ See, e.g., Tim Stelloh, *United CEO: Doctor Being Dragged Off Plane Was ‘Watershed Moment,’* NBC NEWS (Apr. 17, 2017, 8:20 PM), <http://www.nbcnews.com/business/travel/united-ceo-doctor-being-dragged-plane-was-watershed-moment-n747586> [<https://perma.cc/B4V3-S5NK>]. In response to public outcry over forcibly removing a passenger from an overbooked flight, United Airlines CEO Oscar Munoz vowed, “We are more determined than ever to put our customers at the center of everything we do. We are dedicated to setting the standard for customer service among U.S. airlines.” *Id.*

The employer's drive to please empowers customers to indirectly influence employment decisions through making discriminatory requests or stating discriminatory preferences to employers.⁸⁸ Customer requests and preferences can impact who an employer hires, promotes, and fires; job assignments; remuneration; and other terms and conditions of employment.⁸⁹ For example, in *Williams v. G4S Secure Solutions (USA), Inc.*, Rita Williams brought a sex discrimination suit against her former employer, a staffing company that provides security personnel to clients, after it removed her from a highly favorable assignment with a medical center because the client insisted on having only male security guards.⁹⁰ Similarly, in *Chaney v. Plainfield Healthcare Center*, Brenda Williams, a nurse aide, sued her employer for race discrimination after it prohibited her from treating certain nursing home residents who had requested not to be treated by black workers.⁹¹

Even when customers do not articulate an explicitly discriminatory request or preference, employers can often make inferences based on purchasing patterns, survey data, or anecdotal evidence. These inferences can motivate employers to take discriminatory actions in an effort to give customers what employers think they want. For example, in *Johnson v. Maestri-Murrell Property Management, LLC*, Kimberly Johnson sued her prospective employer for failing to hire her because of her race.⁹² Johnson alleged she was not considered for an assistant manager position at an apartment complex that primarily housed white Louisiana State University students because management assumed the students' parents would object to having a black assistant manager.⁹³ Similarly, in *Bradley v. Pizzaco of Nebraska, Inc.*, a pizza delivery driver alleged Domino's discriminated against him because of his race by refusing to allow him to grow a beard.⁹⁴ Bradley claimed he suffered from pseudofolliculitis barbae ("PFB"), a skin condition affecting approximately half of African-American males, many of whom cannot shave at all.⁹⁵ He further alleged that the no-beard policy unfairly discriminated against him and other African-American males suffering from PFB.⁹⁶ Although no cus-

⁸⁸ See Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. (forthcoming 2018) (manuscript at 19–21) (on file with author).

⁸⁹ See *id.*

⁹⁰ 2015 U.S. Dist. LEXIS 140368, at *4–5.

⁹¹ See 612 F.3d 908, 910 (7th Cir. 2010).

⁹² 487 F. App'x 134, 134 (5th Cir. 2012).

⁹³ *Id.* at 134–35.

⁹⁴ See 7 F.3d 795, 796 (8th Cir. 1993).

⁹⁵ *Id.*

⁹⁶ *Id.*

tomers had explicitly told Domino's that bearded employees made them uncomfortable, Domino's maintained a strict no-beard policy based on the results of a public opinion survey it commissioned that showed up to twenty percent of respondents would react negatively to a bearded delivery man.⁹⁷ In *Silver v. North Shore University Hospital*, a fifty-nine-year-old research scientist brought an age discrimination claim after his employer fired him because it feared various foundations would no longer give him research grants because of his age.⁹⁸ Like in non-employee harassment cases, the courts tend to have little sympathy for employers who cater to discriminatory customer preferences—explicit or implied.⁹⁹

B. Unconscious Discrimination

Although instances of conscious discrimination continue to occur far too often, researchers have found that overt discrimination may be declining as antidiscrimination norms become more deeply entrenched in American society.¹⁰⁰ Whether this trend continues under the Trump administration is

⁹⁷ *Id.* at 798.

⁹⁸ 490 F. Supp. 2d 354, 356–58 (S.D.N.Y. 2007).

⁹⁹ See *infra* notes 135–274 and accompanying text (analyzing judicial treatment of discriminatory preferences and requests by non-employees).

¹⁰⁰ See, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1, 4 (Mark P. Zanna ed., 2004) (“Because of current cultural values, most whites have strong convictions concerning fairness, justice, and racial equality. However, because of a range of normal cognitive, motivational, and sociocultural processes that promote intergroup biases, most whites also develop some negative feelings toward or beliefs about blacks, of which they are unaware or which they try to dissociate from their nonprejudiced self-images.”); Elizabeth A. Deitch et al., *Subtle Yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace*, 56 *HUM. REL.* 1299, 1301 (2003) (“Research, however, has shown that racism is not disappearing, but rather is being replaced by less overt forms, termed, for example, ‘modern racism,’ . . . ‘aversive racism’ . . . or ‘ambivalent racism . . .’”); John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *PSYCHOL. SCI.* 315, 318 (2000) (“[T]he development of contemporary forms of prejudice, such as aversive racism, may account—at least in part—for the persistence of racial disparities in society despite significant decreases in expressed racial prejudice and stereotypes.”); William J. Hall et al., *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, 105 *AM. J. PUB. HEALTH* e60, e61 (2015) (“Although overt discriminatory behavior in the United States may have declined in recent decades, covert discrimination and institutional bias are sustained by subtle, implicit attitudes that may influence provider behavior and treatment choices.”); Kristen P. Jones et al., *Not So Subtle: A Meta-Analytic Investigation of the Correlates of Subtle and Overt Discrimination*, 42 *J. MGMT.* 1588, 1589 (2016) (finding that workplace discrimination is becoming less overt and more subtle); Dana E. Mastro et al., *Exposure to Television Portrayals of Latinos: The Implications of Aversive Racism and Social Identity Theory*, 34 *HUMAN COMM’N RES.* 1, 19–20 (2008); Yolanda Flores Niemann & Nydia C. Sanchez, *Perceptions About the Role of Race in the Job Acquisition Process: At the Nexus of Attributional Ambiguity and Aversive Racism in Technology and Engineering Education*, *J. TECH. EDUC.*, Fall 2015, at 46–50; Adam R. Pearson et al., *The Nature of Contemporary Prejudice:*

yet to be determined.¹⁰¹ Samuel L. Gaertner and John F. Dovidio argue that as certain types of discrimination become less socially acceptable, many people “consciously, explicitly, and sincerely support egalitarian principles and believe themselves to be nonprejudiced” while simultaneously unconsciously “harbor[ing] negative feelings and beliefs about . . . historically disadvantaged groups.”¹⁰² They further contend that “[people] consciously recognize and endorse egalitarian values, and because they truly aspire to be nonprejudiced, they will *not* discriminate in situations with strong social norms when discrimination would be obvious to others and to themselves.”¹⁰³ Instead, “these feelings will eventually be expressed, but in subtle, indirect, and rationalizable ways,” such as “in situations in which normative structure is weak, when the guidelines for appropriate behavior are vague, or when the basis for social judgment is ambiguous.”¹⁰⁴ This new form of discrimination, which they dub “aversive racism,”¹⁰⁵ is a widespread phenomenon found in people of all ages,¹⁰⁶ races,¹⁰⁷ and education levels.¹⁰⁸ Because aversive discrimination manifests itself through extreme-

Insights from Aversive Racism, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 314, 321 (2009) (“[I]n contrast to the dramatic decline in overt expressions of prejudice, subtle forms of discrimination continue to exist, apparently largely unabated.”); Louis A. Penner et al., *Aversive Racism and Medical Interactions with Black Patients: A Field Study*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 436, 438 (2010).

¹⁰¹ See Alexis Okeowo, *Hate on the Rise After Trump’s Election*, NEW YORKER (Nov. 17, 2016), <http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election> [<https://perma.cc/DKE5-W4FT>] (detailing “a dramatic uptick in incidents of racist and xenophobic harassment across the country” since Donald Trump won the election).

¹⁰² Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 J. SOC. ISSUES 615, 618 (2005).

¹⁰³ *Id.* at 620.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See generally Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes*, 17 PSYCHOL. SCI. 53 (2006) (finding implicit pro-white/anti-black bias evident in white Americans as young as six years old).

¹⁰⁷ See Leslie Ashburn-Nardo et al., *Black Americans’ Implicit Racial Associations and Their Implications for Intergroup Judgment*, 21 SOC. COGNITION 61, 62 (2003) (stating that “whites who have consciously adopted egalitarian and non-prejudiced belief systems often continue to show evidence of activation and application of stereotypes . . . and more negative implicit attitudes in relation to blacks than to whites”). See generally Robert W. Livingston, *The Role of Perceived Negativity in the Moderation of African Americans’ Implicit and Explicit Racial Attitudes*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 405 (2002) (examining the the implicit racial attitudes of blacks); Laurie A. Rudman et al., *Minority Members’ Implicit Attitudes: Automatic Ingroup Bias as a Function of Group Status*, 20 SOC. COGNITION 294 (2002) (explaining that minorities who are relatively high in status show more implicit ingroup bias than minorities with relatively low status).

¹⁰⁸ See PEW RESEARCH CTR., EXPLORING RACIAL BIAS AMONG BIRACIAL AND SINGLE-RACE ADULTS: THE IAT 10–11 (2015), <http://www.pewsocialtrends.org/2015/08/19/exploring->

ly subtle, and often unintentional, discriminatory acts, it is often difficult for skilled social scientists, much less employers, to detect.¹⁰⁹

Employees are not immune from experiencing unconscious discrimination from customers and other non-employees. As with conscious discrimination, this unconscious discrimination can be both direct and indirect.

1. Direct Discrimination

A common manifestation of direct, unconscious discrimination is displayed within tipping behavior. Two key studies illustrate how customers' unconscious biases can lead them to tip employees of color less than white employees. One study analyzing more than one thousand tips to taxi cab drivers in New Haven, Connecticut, revealed that black cab drivers on average "were tipped approximately one-third less than white cab drivers"¹¹⁰ Black cab drivers were also eighty percent more likely than white drivers to receive no tip at all.¹¹¹ Although these findings are important in and of themselves, perhaps more remarkable is the fact that black passengers *also* discriminated against black drivers, on average tipping black drivers approximately one-third less than they tipped white drivers.¹¹² The researchers attributed their findings to both conscious and unconscious racism, speculating that a passenger's decision to leave no tip at all was consciously motivated, whereas deciding how much to tip was unconsciously motivated.¹¹³

Building off the taxi driver tipping study, a second study examined the effects of server race on restaurant customers' tipping practices.¹¹⁴ Analysis of data from 140 diners revealed that both white and black diners tipped black servers less than white servers, even after statistically controlling for customers' rating of service (which the taxi driver tipping study was unable

racial-bias-among-biracial-and-single-race-adults-the-iat/ [https://perma.cc/W2CS-GDWL] (finding that people with a college degree and people with less formal education expressed similar levels of implicit racial bias).

¹⁰⁹ See John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88, 90 (2002) (finding that people with unconscious prejudices "will discriminate, often unintentionally, when their behavior can be justified on the basis of some factor other than race"); Lynn, *supra* note 75, at 1055 ("People's conscious endorsement of egalitarian values means that they strive to avoid obvious discrimination, so implicit racial attitudes affect deliberative behaviors only when those behaviors can be attributed to other causes.").

¹¹⁰ See Ayres et al., *supra* note 75 at 1616.

¹¹¹ *Id.*

¹¹² See *id.*

¹¹³ *Id.* at 1653–55. The authors cautioned, however, that they were "pushing the data to the limits of their competence" in reaching this conclusion. *Id.* at 1655.

¹¹⁴ See Lynn, *supra* note 75, at 1046.

to test).¹¹⁵ Because the restaurant tipping study did not administer an implicit association test to the customers, they could not prove with certainty that implicit attitudes mediated the effects of server race on tipping but nevertheless concluded it was “the most plausible explanation for [their] findings, and it is consistent with what we know about implicit racial attitudes in the general population.”¹¹⁶ These findings led the authors of the study to question the legality of tipping, pointing out that in instances where tipping has an unintended disparate impact on employees of different races, employers could be held liable under Title VII absent proof that the tipping policy was job related and consistent with business necessity.¹¹⁷

2. Indirect Discrimination

Outside the tipping context, most unconscious discrimination by non-employees is likely to be indirect—typically manifesting itself when customers provide unintentionally biased feedback to employers via satisfaction surveys, complaints, and other reporting mechanisms.¹¹⁸ Although the concept of customer satisfaction dates back centuries,¹¹⁹ surveying and measuring customer satisfaction is a relatively recent phenomenon resulting from total quality management theories positing that product quality is best measured through external metrics like customer satisfaction rather than internal metrics such as compliance with engineering and design specifications.¹²⁰ Whereas customer satisfaction research once was primarily limited

¹¹⁵ *Id.* at 1051, 1055.

¹¹⁶ *See id.* at 1055.

¹¹⁷ *Id.* at 1057–58. In a disparate impact case, the employer is liable for facially neutral employment practices and policies that disparately impact a protected group unless the employer is able to show the policy is “job related for the position in question and consistent with business necessity.” *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

¹¹⁸ *See* Flake, *supra* note 88, at 18.

¹¹⁹ *See, e.g.,* Shep Hyken, *Oldest Customer Service Complaint Discovered: A Lesson from Ancient Babylon*, FORBES (Apr. 23, 2015, 12:01 PM), <http://www.forbes.com/sites/shephyken/2015/04/23/oldest-customer-service-complaint-discovered-a-lesson-from-ancient-babylon/#43bf23945a06> [<https://perma.cc/ZR95-CYSW>] (discussing a letter dated 1750 BC from an unsatisfied copper ore customer to his supplier in which the customer implies he dispatched his personal assistants to the supplier “at least once looking for a refund, only to be rebuffed and sent home empty handed”).

¹²⁰ *See* Gilbert A. Churchill, Jr. & Carol Surprenant, *An Investigation Into the Determinants of Customer Satisfaction*, 19 J. MKT. RES. 491, 491 (1982); (“In the early 1970s, consumer satisfaction began to emerge as a legitimate field of inquiry.”). *See generally* Thomas C. Powell, *Total Quality Management as Competitive Advantage: A Review and Empirical Study*, 16 STRATEGIC MGMT. J. 15 (1995) (discussing which features of total quality management provide advantages); Barbara A. Spencer, *Models of Organization and Total Quality Management: A Comparison and Critical Evaluation*, 19 ACAD. MGMT. REV. 446 (1994) (suggesting that understanding certain management models can be furthered by total quality management research).

to telephone calls, in-person interviews and focus groups, and paper surveys, the advent of the internet and new social media tools have made soliciting customer feedback easier, faster, and less expensive than ever.¹²¹ Today, consumers are bombarded seemingly at every turn with feedback requests, and businesses often provide incentives—from free desserts¹²² to gift cards¹²³—to those who participate.

As critical as customer feedback has become, it may be deeply problematic for antidiscrimination purposes for at least two reasons. First, it is well established that customers discriminate in their evaluation of service workers. For instance, one study found that restaurant customers not only tipped white servers more than black servers but also rated servers of their same race higher than servers of other races on situational dimensions of performance such as attentiveness and promptness.¹²⁴ Importantly, the authors concluded that much of the bias resulted from aversive rather than overt racism.¹²⁵ A tripartite study of consumer discrimination revealed similar evaluational biases: medical patients evaluated female and nonwhite physicians less favorably than white male physicians, students observing a video of an employee-customer interaction rated female and black employees lower than white male employees, and country club members reported higher satisfaction levels at clubs with low percentages of female and nonwhite employees.¹²⁶ Likewise, another study found that post-secondary students evaluated their male instructors more favorably than their female instructors.¹²⁷ These studies make clear that when consumers consciously or, more likely, unconsciously allow biases to affect their evaluation of a

¹²¹ See Ray Poynter, *The Rise of Customer Satisfaction Research*, VISIONCRITICAL (Nov. 6, 2013), <https://www.visioncritical.com/rise-customer-satisfaction-research/> [<https://perma.cc/45Y8-Y89H>].

¹²² See, e.g., *List of Fast Food Receipts That Give Free Food with Survey*, SLICKDEALS, <http://slickdeals.net/f/2180785-list-of-fast-food-receipts-that-give-free-food-with-survey-yymm> [<https://perma.cc/AJ6Q-ETS5>] (compiling a list of fast food restaurants offering free desserts and appetizers to customers who take a survey).

¹²³ See, e.g., *The Best Online Surveys for Amazon Gift Cards*, SURVEY CHRIS, <http://survey.chris.com/best-online-surveys-amazon-gift-cards/> [<https://perma.cc/94U6-EC4X>] (compiling list of websites where consumers can take surveys in exchange for Amazon gift cards).

¹²⁴ Michael Lynn & Michael C. Sturman, *Is the Customer Always Right? The Potential for Racial Bias in Customer Evaluations of Employee Performance*, 41 J. APPLIED SOC. PSYCHOL. 2312, 2317–18 (2011).

¹²⁵ *Id.* at 2321 (“In summary, this study found that restaurant patrons rated the performance of same-race servers higher than that of different-race servers, at least on more situational dimensions of service. This finding provides support for the basic tenets of aversive racism theory.”).

¹²⁶ David R. Hekman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. MGMT. J. 238, 246–57 (2010).

¹²⁷ Robin L. Snipes et al., *Gender Bias in Customer Evaluations of Service Quality: An Empirical Investigation*, 20 J. SERVS. MARKETING 274, 280–81 (2006).

service encounter, the feedback becomes compromised because it does not accurately reflect reality.

The second reason customer feedback may be problematic is because employers may use data tainted by customer bias to determine the terms and conditions of employment.¹²⁸ Customer evaluations can influence compensation, including bonuses and raises.¹²⁹ They can also affect working conditions, such as what shift an employee works or how much contact the employee has with customers.¹³⁰ Employers may also consider customer feedback in making hiring, firing, and promotion decisions.¹³¹ When discriminatory customer feedback factors into employment decisions, the employment decisions themselves become unintentionally discriminatory.¹³² For example, if customers unconsciously rate a female customer service representative lower because of her sex, and her employer decides not to give the employee a promotion because of her poor ratings, the employee's sex motivated (albeit unknowingly) the employment decision—an unequivocal violation of Title VII.¹³³

Identifying discriminatory customer feedback can prove daunting for employers. As racism, sexism, ageism, xenophobia, and other forms of discrimination become less overt and more aversive, it is increasingly difficult for employers to detect customer feedback tainted by bias.¹³⁴ Although certainly not unheard of, it seems unlikely that a customer would expressly state to an employer that he was dissatisfied with an employee because she was Muslim—particularly if the feedback is presented in person or otherwise non-anonymously. More probable, the customer considers himself perfectly accepting of Muslims but nonetheless allows his unconscious biases to taint his perception of the employee. Absent any explicitly anti-Muslim comment in the feedback, it would be nearly impossible for an employer to detect this bias. A related problem is that customer feedback may include

¹²⁸ See Flake, *supra* note 88, at 29–30; Linda Fuller & Vicki Smith, *Consumers' Reports: Management by Customers in a Changing Economy*, 5 WORK, EMP. & SOC. 1, 5–8 (1991) (a qualitative study of fifteen firms finding that each firm utilized customer feedback mechanisms and that such feedback “was funneled into employees’ personnel files and often used in bureaucratic systems of evaluation and discipline”).

¹²⁹ See Wang, *supra* note 9, at 280.

¹³⁰ See *id.* at 250 (noting that “customers play a powerful role in determining the terms, conditions, and privileges of employment”).

¹³¹ See *id.* at 279–80.

¹³² See Flake, *supra* note 88, at 34–36 (discussing unintentional and unknown bias in customer feedback).

¹³³ See 42 U.S.C. § 2000e-2(a)(1) (2012).

¹³⁴ See Deitch, *supra* note 100, at 1301 (noting that “subtle, everyday discrimination may become even more common, as blatant racism becomes less prevalent among dominant group members”).

ostensibly nondiscriminatory observations that neither the customer nor the employer realizes might be unconscious proxies for discrimination. For instance, a museum patron may leave feedback that an older tour guide “lacked energy,” a gym member might complain that her Asian trainer is “not athletic enough,” or a homebuyer might report that he wished his Latina agent had been “more articulate.” Although none of these comments is facially discriminatory, each could conceivably reflect a customer’s biases.

In sum, non-employees discriminate against employees in a variety of ways, whether consciously or unconsciously, directly or indirectly. When discrimination tended to be more overt, it was generally easier for employers to detect and, consequently, remedy. However, as discrimination becomes more subtle, unintentional, and unconscious, it is worth considering whether holding employers liable for non-employee discrimination continues to make sense. The remainder of this Article focuses on the extent to which courts currently hold employers liable for non-employee discrimination and whether this approach can be improved going forward.

III. JUDICIAL TREATMENT OF NON-EMPLOYEE DISCRIMINATION

Although the courts have been addressing non-employee discrimination for more than thirty-five years,¹³⁵ the types of cases they have heard are surprisingly limited. In fact, there are just two categories of non-employee discrimination cases, both of which involve conscious, relatively easy-to-spot discrimination: harassment and discriminatory preferences. Section A of this Part analyzes the key non-employee harassment cases,¹³⁶ whereas Section B addresses the most important discriminatory preference decisions.¹³⁷ Although neither line of cases addresses non-employee discrimination that is unconscious, they nonetheless provide important insights regarding the employer-employee-non-employee relationship that help lay the foundation for the legal framework proposed in Part IV.

A. Harassment by Non-employees

Non-employee harassment is the most common type of non-employee discrimination before the courts. Although many of the cases involve alle-

¹³⁵ The first case to substantively address employer liability for non-employee harassment appears to be *Marentette v. Mich. Host, Inc.*, 506 F. Supp. 909, 911–12 (E.D. Mich. 1980) (holding that the restaurant-employer could be liable for customers harassing its waitresses because it required the waitresses to wear provocative uniforms).

¹³⁶ See *infra* notes 138–201 and accompanying text.

¹³⁷ See *infra* notes 202–274 and accompanying text.

gations of sexual harassment,¹³⁸ non-employees also have been accused of harassing employees because of race,¹³⁹ religion,¹⁴⁰ and national origin.¹⁴¹ Each federal circuit to consider employer liability for non-employee harassment has reached the same general conclusion: The same analytical framework that applies to coworker harassment also applies to non-employee harassment.¹⁴² Under this framework, a plaintiff must prove: (1)

¹³⁸ See, e.g., *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957–58, 962 (11th Cir. 2010) (holding that prison could be liable for failing to remedy a sexually hostile work environment created by its inmates); *EEOC v. GNLV Corp.*, No. 2:06-cv-01225-RCJ-PAL, 2014 U.S. Dist. LEXIS 177439, at *9–11 (D. Nev. Dec. 18, 2014) (denying summary judgment for employer whose employee, a cards dealer, alleged customers at her table repeatedly called her a “f***ing bitch,” and one customer kissed her on the lips approximately twenty times); *Santos v. P.R. Children’s Hosp.*, No. 11-1539, 2012 U.S. Dist. LEXIS 140731, at *2–4, *6–13 (D.P.R. Sept. 28, 2012) (denying motion to dismiss where plaintiff, a hospital employee, claimed two non-employee physicians made unwanted sexual advances toward her and rubbed their genitalia against her).

¹³⁹ See, e.g., *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 426 (4th Cir. 2014) (reversing summary judgment for employer based on allegations that an independent sales representative repeatedly made racially disparaging remarks to the plaintiff); *Muldrow v. Schmidt Baking Co.*, No. WDQ-11-0519, 2012 U.S. Dist. LEXIS 144783, at *48–50 (D. Md. Oct. 5, 2012) (granting summary judgment to employer on claim that the plaintiff, a delivery driver, was racially harassed by a store manager on one of his routes because the employer immediately addressed the plaintiff’s complaint upon learning of the allegations).

¹⁴⁰ See, e.g., *Aguilar v. Elite Care Mgmt.*, No. 12 C 6245, 2012 U.S. Dist. LEXIS 169159, at *1 (N.D. Ill. Nov. 28, 2012) (illustrating a home health care associate suing an employer based on allegations that a client subjected them to slurs about their religion).

¹⁴¹ See, e.g., *Galdamez v. Potter*, 415 F.3d 1015, 1022–25 (9th Cir. 2005) (reversing denial of motion for new trial because the district court erroneously held that the employer could not be liable for non-employee harassment where the plaintiff, a postmaster, alleged customers made death threats toward her based on her Honduran ancestry); *Zasada v. City of Englewood*, No. 11-cv-02834-MSK-MJW, 2013 U.S. Dist. LEXIS 45550, at *5–6, *12–13 (D. Colo. Mar. 29, 2013) (denying motion to dismiss the plaintiff’s claim that while serving on a drug taskforce, a fellow undercover officer employed by a different municipality made demeaning comments to him about his Polish heritage).

¹⁴² See *Freeman*, 750 F.3d at 423 (“[A]n employer is liable under Title VII for third parties creating a hostile work environment if the employer knew or should have known of the harassment and failed to ‘take prompt remedial action reasonably calculated to end the harassment’”) (quoting *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995)); *Medina-Rivera v. MVM, Inc.*, 713 F.3d 132, 137 (1st Cir. 2013) (“Because . . . employers must provide their personnel with a harassment-free workplace, they may be on the hook for a nonemployee’s sexually-harassing behavior under certain conditions—one of which being that they knew or should have known about the harassment and yet failed to take prompt steps to stop it.”); *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (“[W]e now adopt the well-reasoned rules of the [EEOC] in imputing employer liability for harassment by non-employees according to the same standards for non-supervisory co-workers”); *Erickson v. Wis. Dep’t of Corr.*, 469 F.3d 600, 605 (7th Cir. 2006) (“[F]or purposes of Title VII hostile work environment liability based on negligence, whether the potential harasser is an employee, independent contractor, or even a customer is irrelevant”); *Galdamez*, 415 F.3d at 1022 (2005) (“An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it.”); *Frank v. Harris Cnty.*, 118 F. App’x 799, 803 (5th Cir. 2004) (“[E]mployers may be liable under Title VII for the conduct of non-employees

membership in a protected class, (2) subjection to unwelcome harassment, (3) the harassment was based on the protected characteristic, and (4) the harassment was so serious as to affect a term, condition, or privilege of employment.¹⁴³ Even if the plaintiff establishes these elements, the employer will only be liable if it was negligent: that is, whether it knew or should have known about the harassment and failed to take prompt action reasonably calculated to end the harassment.¹⁴⁴

The courts' rationale for holding employers to the same standard for non-employee harassment as coworker harassment warrants scrutiny in light of the reality that employers do not have the same agency relationship with non-employees as they do with employees.¹⁴⁵ Perhaps the best, and certainly most vivid, explanation comes from Judge Easterbrook in *Dunn v. Washington County Hospital*, a case involving allegations that an independent contractor physician sexually harassed a hospital nurse.¹⁴⁶ The district court granted the hospital summary judgment based on its determination that the hospital could not control the alleged harasser because he was a non-employee.¹⁴⁷ In reversing the lower court, Judge Easterbrook explained that the district court erred in proceeding "as if this were a tort suit" in which the hospital could not be liable under principles of respondeat supe-

in the workplace when the employer knows of the harassment but fails to act."); *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003) ("When . . . the alleged harassment is committed by co-workers or customers, a Title VII plaintiff must show that the employer either knew (actual notice) or should have known (constructive notice) of the harassment and failed to take immediate and appropriate corrective action."); *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1244 (10th Cir. 2001) ("[A]n employer may be responsible for sexual harassment based upon the acts of nonemployees" under a "negligence analysis."); *Weston v. Pennsylvania*, 251 F.3d 420, 427 (3d Cir. 2001) ("Prison liability for inmate conduct may indeed apply when, for example, the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior."), *abrogated by Burlington N. & Santa Fe Ry. Co. v White*, 548 U.S. 53 (2006); *Slayton v. Ohio Dep't of Youth Servs.*, 206 F.3d 669, 677 (6th Cir. 2000) ("[T]his general rule against prison liability for inmate conduct does not apply when the institution fails to take appropriate steps to remedy or prevent illegal inmate behavior."); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1110 (8th Cir. 1997) (applying coworker harassment standard to case involving claim that a developmentally disabled resident of a group home sexually harassed employees).

¹⁴³ See, e.g., *Wierengo v. Akal Sec., Inc.*, 580 F. App'x 364, 371 (6th Cir. 2014); *EEOC v. Boh Bros. Constr. Co., L.L.C.*, 731 F.3d 444, 453 (5th Cir. 2013) (en banc).

¹⁴⁴ See, e.g., *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 683 (8th Cir. 2012); *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 403–04 (5th Cir. 1993).

¹⁴⁵ See *Schlinker & Payok*, *supra* note 12 at 30 ("Employers may also be responsible, however, for a hostile environment created by non-employees, such as customers, if a court determines the employer could have fixed the problem. The logic of imposing this liability is not as sound, since the employer did not hire the customer and the employer has done absolutely nothing that would constitute harassment.").

¹⁴⁶ 429 F.3d 689, 690, 693 (7th Cir. 2005).

¹⁴⁷ *Id.* at 690.

rior for intentional torts committed by an independent contractor.¹⁴⁸ Vicarious liability is irrelevant in non-employee harassment cases “because liability under Title VII is direct rather than derivative.”¹⁴⁹ Therefore, “it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter a customer,” because the “[a]bility to ‘control’ the actor plays no role.”¹⁵⁰ Judge Easterbrook further reasoned that “[e]mployees are not puppets on strings,” and that employers have a full “arsenal of incentives and sanctions” at their disposal to affect conduct.¹⁵¹ “It is the use (or failure to use) these options,” he explained, “that makes an employer responsible—and in this respect independent contractors are no different from employees.”¹⁵² To illustrate this key point, Judge Easterbrook provided a hypothetical:

Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the Hospital’s responsibility to protect its female employees by excluding the offending bird from its premises.¹⁵³

From this, Judge Easterbrook concluded: “The employer’s responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem.”¹⁵⁴ Judge Easterbrook’s position, which other courts have endorsed, essentially reduces employers to gatekeepers who must protect their employees from any discrimination that occurs within the workplace, regardless of its source.¹⁵⁵ Under this view, the only thing that matters is the employer’s response to the harassment; the source of the harassment is immaterial.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 691.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Dunn*, 429 F.3d at 691.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See, e.g., Grasty v. World Flavors, Inc.*, No. 11-1778, 2011 U.S. Dist. LEXIS 89277, at *24 (E.D. Pa. Aug. 11, 2011); *Davis v. Nat’l R.R. Passenger Corp.*, 733 F. Supp. 2d 474, 487 (D. Del. 2010); *Bodman v. Me., Dep’t of Health & Human Servs.*, 720 F. Supp. 2d 115, 122 n.7 (D. Me. 2010); *Guthrie v. Consol. Delivery & Warehousing*, 583 F. Supp. 2d 668, 680 (W.D. Pa. 2008).

Other circuits have articulated slightly different justifications for holding employers to the same standard in non-employee and coworker harassment cases. For instance, the Ninth Circuit has adopted a theory of employer liability grounded in negligence and ratification rather than intentional discrimination.¹⁵⁶ From this perspective, employers ratify or condone non-employee harassment when they fail to respond adequately to such discrimination; it is as if the employer itself harassed the employee.¹⁵⁷ By contrast, the Second Circuit bases employer liability on “the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.”¹⁵⁸ The Fifth Circuit has explained that employer liability for non-employee harassment derives from the “*employer’s failure to act in accordance with its statutory duty not to discriminate in the workplace . . . by requiring an employee to work in . . . an abusive working environment.*”¹⁵⁹ Like Judge Easterbrook, none of these circuits seems particularly concerned with the absence of an agency relationship between employers and non-employees. Instead, their focus rests primarily on how the employer responds to the harassment.

Like in conventional coworker harassment cases, often the most contested element of non-employee harassment cases is whether the employer knew or should have known about the harassment and responded appropriately. In *Freeman v. Dal-Tile Corp.*, Lori Freeman sued her employer for failing to protect her from repeated harassment by an independent sales representative.¹⁶⁰ The non-employee purportedly subjected Freeman to a barrage of derogatory names, made comments to her about women he had been with the night before, passed gas on her phone, and once told her he was “as

¹⁵⁶ See *Galdamez*, 415 F.3d at 1022 (“An employer may be held liable for the actionable third-party harassment of its employees where it ratifies or condones the conduct by failing to investigate and remedy it after learning of it.”); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 968 (9th Cir. 2002) (holding employer liable where, by “failing to take immediate and effective corrective action,” it “ratified” rape of an employee by a potential client); *Folkerson v. Circus Circus Enters., Inc.*, 107 F.3d 754, 756 (9th Cir. 1997) (“We now hold that an employer may be held liable for sexual harassment on the part of a private individual . . . where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”).

¹⁵⁷ See *Galdamez*, 415 F.3d at 1022; *Little*, 301 F.3d at 968 (holding employer liable where, by “failing to take immediate and effective corrective action,” it “ratified” rape of employee by potential client); *Folkerson*, 107 F.3d at 756 (9th Cir. 1997) (“We now hold that an employer may be held liable for sexual harassment on the part of a private individual . . . where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct.”).

¹⁵⁸ See *Summa*, 708 F.3d at 124 (quoting 29 C.F.R. § 1604.11(e) (2012)).

¹⁵⁹ See *Rowinsky*, 80 F.3d at 1020.

¹⁶⁰ 750 F.3d at 416.

f***ed up as a n****r's checkbook.”¹⁶¹ In reversing summary judgment for the employer, the Fourth Circuit held that a reasonable jury could conclude that Dal-Tile knew or should have known of the harassment because Freeman complained to her supervisor on multiple occasions and the supervisor witnessed Freeman cry and leave the room when the harasser passed gas on her phone.¹⁶² The court further explained that even if the supervisor did not have actual knowledge that Freeman was offended by the behavior, “at the very least, she *should* have known it” because she was “aware of [the harasser’s] on-going inappropriate behavior and comments, had received several complaints . . . , [and] had witnessed Freeman crying from the harassment”¹⁶³ The court further found that a fact issue persisted as to the adequacy of Dal-Tile’s response.¹⁶⁴ Dal-Tile did not take any effective action until the harassment had been ongoing for three years, and although the company told Freeman it would permanently ban the harasser from its facility, it quickly lifted the ban and instead simply prohibited him from communicating with her.¹⁶⁵

In *EEOC v. Cromer Food Services, Inc.*, the EEOC brought suit on behalf of Ray Howard, who claimed he suffered “a daily barrage of lewd comments and gestures” by employees of a hospital, Cromer’s biggest client, as he stocked vending machines at the client site.¹⁶⁶ Hospital employees allegedly harassed Howard by leaving him a note calling him gay, referring to him as “Homo Howard,” and making unwanted sexual comments to him as they groped themselves.¹⁶⁷ Howard complained to various supervisors, but they laughed at him, ignored him, and even told him that Cromer “was not responsible for the hospital but only responsible for [its own] employees.”¹⁶⁸ Howard claimed that when he told the chairman of the board of directors about the harassment, the chairman became “visibly upset” and responded, “[D]o you not realize this could cost me everything?”¹⁶⁹ Only after Cromer discovered that Howard had filed an EEOC charge did it offer to move him to a different shift.¹⁷⁰ Howard declined the offer because the new shift conflicted with his childcare responsibilities.¹⁷¹ In the ensuing lawsuit,

¹⁶¹ *Id.* at 416–18.

¹⁶² *Id.* at 423–24.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 424.

¹⁶⁵ *Id.*

¹⁶⁶ 414 F. App’x 602, 603 (4th Cir. 2011).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 603–04.

¹⁶⁹ *Id.* at 604.

¹⁷⁰ *Id.* at 604–05.

¹⁷¹ *Id.* at 605.

Cromer claimed it did not have actual or constructive knowledge of the harassment because Howard's complaints were "vague and insufficiently detailed," and he failed to follow company protocol requiring employees to report harassment to the president.¹⁷² In reversing summary judgment for the employer, the Fourth Circuit reasoned that "to fault Howard for failing to communicate more information about the incidents or for ineffectively conveying their gravity . . . would be a perversion of the law of anti-harassment, which although requires notice to the employer, does not and should not require it to be pellucid."¹⁷³ The court further determined Cromer's offer to move Howard to a less desirable shift was an insufficient remedy if it resulted in Howard being worse off, and that regardless, it was "too little, too late" because Howard endured months of inaction before the company even attempted to address his complaints.¹⁷⁴

Moreover, in *Aguiar v. Bartlesville Care Center*, Diana Aguiar sued her former employer, a residential health care facility, for failing to protect her from a resident's sexual harassment.¹⁷⁵ Aguiar, a certified nurse assistant, claimed the resident repeatedly subjected her to unwanted touching and verbal abuse.¹⁷⁶ The center was aware the resident had been "involved in criminal proceedings concerning domestic abuse, assault and battery, and violation of a protective order" and likewise knew the resident targeted Aguiar for harassment.¹⁷⁷ The center took some steps to end the harassment by speaking with the resident and ordering that two other people be present when attending to him.¹⁷⁸ When these solutions failed, the center claimed it "offered Ms. Aguiar the opportunity to move to the other side of the building and away from the resident."¹⁷⁹ Aguiar denied any such offer was made and further pointed out that even if the center had suggested she move, "there were no attempts made by management . . . to change my hall or follow through with such a suggestion."¹⁸⁰ In reversing summary judgment for the employer, the Tenth Circuit concluded that a rational trier of fact could find the center's response inadequate.¹⁸¹ Although the center took some

¹⁷² *Id.* at 607.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 608.

¹⁷⁵ No. 10-5002, 2011 U.S. App. LEXIS 8427, at *2 (10th Cir. Apr. 18, 2011).

¹⁷⁶ *Id.* at *4-11.

¹⁷⁷ *Id.* at *4-10.

¹⁷⁸ *Id.* at *18-19.

¹⁷⁹ *Id.* at *19.

¹⁸⁰ *Id.* at *10.

¹⁸¹ *Id.* at *19.

steps to remedy the harassment, whether it should have done more was a question best left for a jury.¹⁸²

By contrast, when an employer acts promptly to remedy non-employee harassment, the courts do not hesitate to award the employer summary judgment. For example, in *Summa v. Hofstra University*, the Second Circuit had little difficulty concluding the university's response to non-employee harassment was adequate.¹⁸³ Hofstra hired graduate student Lauren Summa as a manager for the football team.¹⁸⁴ During Summa's employment, members of the football team sexually harassed her by "creat[ing] a Facebook page insulting both her and her boyfriend," and by making sexually offensive comments to her as the team watched a film containing "numerous sex scenes" during a bus ride home from an away game.¹⁸⁵ When Summa complained to the head coach about the offensive Facebook posts, the coach "promptly spoke to the three players involved . . . and instructed the players to remove the posts."¹⁸⁶ They complied, and no further online postings were directed at Summa.¹⁸⁷ When Summa complained to an assistant coach about the movie and the players' corresponding behavior, he immediately turned off the movie, "instructed [the players] to be quiet and stationed himself near Summa for the rest of the bus ride."¹⁸⁸ Within forty-eight hours, the head coach investigated the incident and kicked one of the offending players off the team.¹⁸⁹ Thereafter, the university administration required all athletics staff to complete additional sexual harassment training.¹⁹⁰ In affirming summary judgment for Hofstra, the court concluded there was no fact issue as to the reasonableness of the university's response because it promptly and effectively addressed both incidents, expelled the offending player, and provided employees with additional sexual harassment training, thus taking "proactive steps to create a better environment for all employees in the future."¹⁹¹

Similarly, in *Whiting v. Labat-Anderson, Inc.*, the district court granted summary judgment to the employer based on its prompt and reasonable response to an employee's allegations of harassment.¹⁹² Labat hired Paula

¹⁸² *Id.*

¹⁸³ 708 F.3d at 132.

¹⁸⁴ *Id.* at 120.

¹⁸⁵ *Id.* at 120–21.

¹⁸⁶ *Id.* at 124.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 124–25.

¹⁸⁹ *Id.* at 125.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See 926 F. Supp. 2d 106, 117–19 (D.D.C. 2013).

Whiting to provide temporary, on-site general office services to the Department of Justice (“DOJ”).¹⁹³ Whiting alleged that during the course of her employment, a DOJ paralegal inappropriately hugged her, kissed her neck, grabbed her chest, and pinned her to a desk on two occasions.¹⁹⁴ Whiting reported this incident to her supervisor the same day, and in response the supervisor asked Whiting if she wanted to make a complaint.¹⁹⁵ Whiting stated that she did not want to make a complaint because “she did not want to get anyone in trouble.”¹⁹⁶ Instead, she wanted her supervisor to reassign her and otherwise keep her away from the alleged harasser.¹⁹⁷ The supervisor immediately notified the paralegal’s supervisor of the allegations, spoke directly to the paralegal, and changed office procedures to decrease contact between Whiting and the paralegal.¹⁹⁸ The supervisor’s response was effective, as there were no other incidents involving Whiting and the paralegal.¹⁹⁹ The court determined these measures, coupled with the absence of any further complaints from Whiting, proved the employer took “timely, appropriate, and reasonable action,” thus entitling it to summary judgment.²⁰⁰

These cases illustrate the highly fact-specific nature of the courts’ analysis of non-employee harassment. Consequently, few doctrinal principles have emerged from the case law pertinent to non-employee discrimination, and a number of questions still abound regarding the limits of employer liability in these instances. Should courts be more sympathetic to employers who claim they did not know, or had no reason to know, of non-employee harassment when a third party outside the employer’s control, rather than a coworker directly under the employer’s control, commits the discrimination? Should courts hold employers to a lower standard in terms of responding to non-employee harassment, given the fact that employers cannot discipline or fire non-employee harassers like they could coworker harassers? Although these issues may be subsumed in the courts’ “reasonableness” analysis, it would be prudent for courts to address these questions head on.²⁰¹

¹⁹³ *Id.* at 109.

¹⁹⁴ *Id.* at 110.

¹⁹⁵ *Id.* at 112.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 117.

²⁰¹ *See supra* note 143 (discussing reasonableness analysis).

B. Discriminatory Preferences/Requests

Unlike third-party harassment cases, where the non-employee directly discriminates against the employee, in discriminatory preference/request cases the non-employee—typically a customer or client—discriminates against the employee indirectly by pressuring the employer to take employment actions that accommodate the non-employee’s discriminatory preference.²⁰² Sometimes customers make explicit demands,²⁰³ other times they may merely express a preference for a certain type of employee,²⁰⁴ and in some cases the employer simply infers or assumes a discriminatory preference based on customer data, behavioral patterns, or anecdotal evidence.²⁰⁵ In many customer preference cases, the employer deliberately mistreats certain workers to keep the customer satisfied. However, occasionally customer preference will prompt an employer to adopt facially neutral policies that disparately impact a particular group. The courts apply different analytical frameworks depending on whether customer preference leads to disparate treatment²⁰⁶ or disparate impact.²⁰⁷

1. Disparate Treatment

Customer preference cases typically involve allegations that the employer deliberately discriminated against employees in order to accommodate a customer’s discriminatory preferences, whether expressed or assumed. In such cases, the employer is the discriminatory actor insofar as it takes the adverse employment action. However (and somewhat uniquely), discriminatory animus on the employer’s part typically does not motivate the adverse employment decision.²⁰⁸ Instead, the motivation is customer satisfaction—a seemingly legitimate, nondiscriminatory purpose. Indeed, an employer that refuses to hire Latino employees because customers would boycott the business may be more motivated by wanting to attract custom-

²⁰² See, e.g., *Diaz v. Pan Am. World Airways, Inc. (Diaz II)*, 442 F.2d 385, 387 (5th Cir. 1971).

²⁰³ See, e.g., *Williams v. G4S Secure Sol. (USA), Inc.*, No. ELH-10-3476, 2012 U.S. Dist. LEXIS 66249, at *4–6 (D. Md. May 11, 2012) (illustrating an instance where a client insisted that security staffing company provide only male security guards).

²⁰⁴ See, e.g., *Diaz II*, 442 F.2d at 387 (demonstrating where an airline attempted to justify its policy of hiring only females as flight attendants based on evidence that its “passengers overwhelmingly preferred to be served by female stewardesses”).

²⁰⁵ See, e.g., *Johnson v. Maestri-Murrell Prop. Mgmt.*, 487 F. App’x 134, 135 (5th Cir. 2012) (demonstrating an instance where an apartment management company refused to hire black assistant manager because it thought parents of mostly white tenants would be upset).

²⁰⁶ See *infra* notes 208–262 and accompanying text.

²⁰⁷ See *infra* notes 263–274 and accompanying text.

²⁰⁸ See, e.g., *Diaz II*, 442 F.2d at 387.

ers than by any racial bias. Yet the absence of discriminatory motive is of no importance to the courts in such a circumstance; it is the employer's actions, not its motives, that justify holding employers liable in such cases.

Significantly, not all customer preference based discrimination is illegal under federal antidiscrimination laws. Title VII contains a provision that allows employers to discriminate if the employer can show that sex, religion, or national origin—but not race²⁰⁹—constitutes a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”²¹⁰ The Age Discrimination in Employment Act of 1967 contains a similar provision.²¹¹ The Supreme Court has cautioned that the BFOQ defense “provides only the narrowest of exceptions to the general rule requiring equality of employment,” and has made clear that the employer bears the burden of affirmatively demonstrating that the discrimination was “reasonably necessary” to the job at issue.²¹²

What is the judicial rationale for holding employers liable in most customer preference cases despite their lack of discriminatory animus? The answer to this question finds its origins in the seminal case on customer preference: *Diaz v. Pan American World Airlines, Inc.*²¹³ Pan Am maintained a policy of hiring only female flight attendants.²¹⁴ When the airline rejected Celio Diaz's employment application on this basis, Diaz brought suit alleging sex discrimination under Title VII.²¹⁵ Pan Am defended its policy by claiming that being female was a BFOQ for its flight attendants.²¹⁶ The airline argued that in its experience, female attendants outperformed male attendants in the non-mechanical aspects of the job such as “providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible.”²¹⁷ Pan Am also presented evidence that its passengers “overwhelmingly preferred to be

²⁰⁹ *But see* *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 653–54 (5th Cir. 1980) (questioning whether race might in fact constitute a BFOQ in certain situations, such as “the undercover infiltration of an all-Negro criminal organization,” a black actor portraying George Wallace or a white actor portraying Martin Luther King Jr., or, in the case at hand, assigning a black man as an undercover investigator of black barber shops because “it is difficult to imagine a Caucasian successfully disguised as a shoeshine boy in or as a patron of an all-black barber shop”).

²¹⁰ 42 U.S.C. § 2000e-2(e)(1) (2012).

²¹¹ *See* 29 U.S.C. § 623(f)(1) (2012) (“It shall not be unlawful for an employer . . . to [discriminate against an employee based on age] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .”).

²¹² *See* *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977).

²¹³ 442 F.2d at 388–89.

²¹⁴ *Id.* at 386.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Diaz v. Pan American World Airways, Inc. (Diaz I)*, 311 F. Supp. 559, 563 (S.D. Fla. 1970).

served by female stewardesses.”²¹⁸ Although Pan Am prevailed in the district court, it had no such luck before the Fifth Circuit.²¹⁹ The appellate court centered its rationale on what it considered Title VII’s chief purpose of “provid[ing] equal access to the job market for both men and women.”²²⁰ Even if Pan Am itself bore no discriminatory animus toward men, allowing customers’ discriminatory preferences to dictate the airline’s employment decisions was enough to trigger liability under Title VII.²²¹ The court was not entirely unsympathetic to Pan Am’s predicament, acknowledging that “the public’s expectation of finding one sex in a particular role may cause some initial difficulty.”²²² But while singling out the employer for liability perhaps was not the most equitable solution, the court thought it necessary to serve Title VII’s overarching purposes: “[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”²²³ Significantly, the court recognized an employer can lawfully accommodate a customer’s discriminatory preferences in certain cases but set the bar almost impossibly high: Customer preference discrimination is only lawful if the preference “is based on the company’s inability to perform the primary function or service it offers” absent such discrimination.²²⁴

Since *Diaz*, many courts have come down hard on employers that discriminate or retaliate in the name of customer preference.²²⁵ Courts have on occasion recognized the obvious catch-22 this creates for employers,²²⁶ yet

²¹⁸ *Diaz II*, 442 F.2d at 386.

²¹⁹ *Id.* at 385–86.

²²⁰ *Id.* at 386.

²²¹ *See id.* at 388–89.

²²² *Id.* at 389.

²²³ *Id.*

²²⁴ *See id.* The *Diaz* court concluded that even if employing only female flight attendants was essential to the ability to perform non-mechanical functions of the job, such functions were tangential to the essence of Pan Am’s business and therefore did not satisfy the requirements for a BFOQ. *Id.* at 388 (“The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as . . . their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved.”).

²²⁵ *See, e.g.,* *Tamosaitis v. URS Energy & Constr., Inc.*, 781 F.3d 468, 476, 489 (9th Cir. 2015) (rejecting employer’s defense that employee was fired because of customer’s request).

²²⁶ *See Diaz II*, 442 F.2d at 389 (“While we recognize that the public’s expectation of finding one sex in a particular role may cause some initial difficulty”); *Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052, 1065 n.4 (D. Ariz. 1999) (“[T]his Court does not disregard or trivialize the Marriott’s emphasis on the importance of customer preference to its success in the massage business”).

remain resolute in refusing to allow customer preference to end-run legal proscriptions against discrimination and retaliation, most hardships notwithstanding.²²⁷ For instance, in *Tamosaitis v. URS Energy & Construction, Inc.*, the most recent appellate case to address customer preference, Dr. Walter Tamosaitis brought suit under the Energy Reorganization Act against URS, his employer, for acquiescing to a contractor's demand that he be taken off a project for whistleblowing.²²⁸ The Department of Energy ("DOE") contracted with Bechtel National, Inc. to assist in its clean-up efforts at a former nuclear weapons production facility.²²⁹ Bechtel in turn subcontracted with URS to perform some of the cleanup responsibilities.²³⁰ During the cleanup, Dr. Tamosaitis presented many safety concerns not only at a Bechtel meeting, but also directly to several Bechtel employees.²³¹ Bechtel's management was outraged by Dr. Tamosaitis' actions, believing it could jeopardize their six million dollar fee from the DOE, and demanded URS remove him from the project immediately.²³² A few days later, Dr. Tamosaitis was fired from the project and reassigned, in a nonsupervisory role, to a basement office at a different facility.²³³ In reversing the lower court's award of summary judgment to the employer, the Ninth Circuit took URS to task for its "the-customer-made-do-it" defense.²³⁴ Like in discriminatory preference cases, the court found that "the presence of an employer's subjective retaliatory animus is irrelevant."²³⁵ It explained that "[t]he relevant causal connection is not between retaliatory animus and personnel action, but rather between *protected activity* and personnel action," such that "there is no meaningful distinction between an employer who takes action based on its own retaliatory animus and one that acts to placate the retaliatory animus of a customer."²³⁶

²²⁷ See, e.g., *Ames v. Cartier, Inc.*, 193 F. Supp. 2d 762, 769 (S.D.N.Y. 2002) ("While pandering to customers' discriminatory preferences could very well help effectuate a sale, employers nevertheless 'may not discriminate on the basis of their customers' preferences.'") (quoting *Wiginess Inc. v. Fruchtmann*, 482 F.Supp 681, 692 (S.D.N.Y. 1970), *aff'd*, 628 F.2d 1346 (1980); *Feder v. Bristol-Myers Squibb Co.*, 33 F. Supp. 2d 319, 333 (S.D.N.Y. 1999) (an employer "cannot justify otherwise unlawful discrimination on the ground that one's customers do not like to deal with members of a protected class").

²²⁸ See 781 F.3d at 481–84.

²²⁹ *Id.* at 474.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 481.

²³³ *Id.* at 474.

²³⁴ *Id.* at 481–84.

²³⁵ See *id.* at 482.

²³⁶ *Id.*; see also *Turner v. Parker Sec. & Investigative Servs., Inc.*, No. 1:13-cv-113 (WLS), 2014 U.S. Dist. LEXIS 158448, at *11–21 (M.D. Ga. Nov. 10, 2014) (denying the employer summary judgment where it transferred the plaintiff to a different jobsite after the client demanded the change in retaliation for the plaintiff accusing the client's employees of sexual harassment).

In many customer preference cases the controlling inquiry seems to be whether allowing the employer to cater to customer preference would undercut Title VII's goal of eradicating discrimination in the workplace. If so, the employer is on the hook for discrimination absent a successful BFOQ defense. For example, in *Sparenberg v. Eagle Alliance*, James Sparenberg's employer moved him from his system analyst assignment with the National Security Agency ("NSA") to a less prestigious client after the NSA requested the change due to Sparenberg missing too much work to care for his sick wife.²³⁷ His employer honored the NSA's request, even though Sparenberg was entitled to the leave under the Family and Medical Leave Act of 1993 ("FMLA").²³⁸ Sparenberg brought an FMLA retaliation claim, to which his employer responded that it was simply honoring its client's request.²³⁹ The court rejected this argument, characterizing it as an attempt to "push[] blame for Sparenberg's transfer onto its client."²⁴⁰ Citing a string of Title VII cases, the court proclaimed that "[a]n employer may not immunize its actions by ducking behind the preferences of a client."²⁴¹ This is because of the "broader employment law principle that the employer has the ultimate responsibility for providing a non-discriminatory working environment—even when third parties are creating discriminatory conditions."²⁴²

In *Williams v. G4S Secure Solutions (USA), Inc.*, the court rejected G4S's claim that it reassigned Williams to a less desirable client only because the client to whom she was assigned demanded only male security guards.²⁴³ In rejecting G4S's "the-client-made-me-do-it" defense, the court observed that "[c]ourts have repeatedly held employers responsible for discrimination against their employees, even when the employer itself claimed to be free of bias."²⁴⁴ The court found the employer's defense incongruous Title VII because staffing companies, like other employers, "are not insulated from liability, so as to discriminate with impunity, merely because they are satisfying the requests or directives of their clients."²⁴⁵ Similarly, in *Chaney v. Plainfield Healthcare Center*, the employer could not escape liability for reassigning Chaney different job duties because certain nursing home residents refused to be treated by black nurses.²⁴⁶ In reversing the

²³⁷ See No. JFM-14-1667, 2015 U.S. Dist. LEXIS 140368, at *1-6 (D. Md. Oct. 15, 2015).

²³⁸ *Id.* at *4-6; see also 29 U.S.C. § 2601 (2012).

²³⁹ *Sparenberg*, 2015 U.S. Dist. LEXIS 140368, at *4-6.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at *20.

²⁴³ 2012 U.S. Dist. LEXIS 66249, at *50, *58-75.

²⁴⁴ See *id.* at *66.

²⁴⁵ *Id.* at *71.

²⁴⁶ 612 F.3d 908, 912-15 (7th Cir. 2010).

lower court, the Seventh Circuit reasoned that “[i]t is now widely accepted that a company’s desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race.”²⁴⁷ The court rejected the employer’s claim that an exception should be made for long-term care facilities or that the applicable state patients’ rights law mandated such an exception.²⁴⁸

The cases where courts have permitted employers to discriminate based on customer preference are few and far between. Indeed, the courts have acknowledged BFOQs in just three contexts: where privacy,²⁴⁹ safety,²⁵⁰ or genuineness²⁵¹ is concerned. Some courts insist customer preference can never be a BFOQ,²⁵² but this seems an issue of semantics, given that privacy, safety, and genuineness concerns easily can be recast as customer preferences: A client insists on having male security guards because they make customers feel safe, a female customer requests a female masseuse because she is uncomfortable with a male masseuse touching her body, and audiences prefer a white man play the role of Jean Valjean in a production of *Les Miserables*.²⁵³

²⁴⁷ *Id.* at 913.

²⁴⁸ *Id.* at 913–14.

²⁴⁹ See generally *Healy v. Southwood Psychiatric Hosp.*, 78 F.3d 128 (3d Cir. 1996) (child-care specialists); *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (catheterization and other intimate services provided to male patients by nurse’s aides); *Norwood v. Dale Maint. Sys. Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) (washroom attendant); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D.W. Va. 1982) (janitor cleaning bathrooms and restrooms); *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191 (E.D. Ark. 1981), *vac’d on other grounds*, 671 F.2d 1100 (8th Cir. 1982) (discussing BFOQs for nurses in obstetrics unit of hospital where intimate procedures performed and female body and genitalia routinely exposed).

²⁵⁰ See, e.g., *Dothard*, 433 U.S. at 321 (prison guards); *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 999–1002 (5th Cir. 1984) (airline passenger safety); *Harriss v. Pan Am. World Airways*, 649 F.2d 670, 676–77 (9th Cir. 1980) (same).

²⁵¹ See 29 C.F.R. § 1604.2 (recognizing sex as a BFOQ where authenticity or genuineness is at issue).

²⁵² See, e.g., *Chaney*, 612 F.3d at 913 (“It is now widely accepted that a company’s desire to cater to the perceived . . . preferences of its customers is not a defense under Title VII for treating employees differently . . .”); *Diaz II*, 442 F.2d at 389 (“[A] BFOQ ought not be based on the ‘refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers’”) (quoting 29 C.F.R. § 1604); *G4S Secure Sol.*, 2012 U.S. Dist. LEXIS 66249, at *66 (“[C]ourts have repeatedly held that ‘customer preference’ does not excuse an employer’s intentional discrimination against its employees.”); *Hylind v. Xerox Corp.*, 380 F. Supp. 2d 705, 713 (D. Md. 2005) (stating that customer preference is not considered a BFOQ for Title VII purposes); *Olsen v. Marriott Int’l, Inc.*, 75 F. Supp. 2d 1052, 1065 (D. Ariz. 1999) (“Courts have consistently rejected requests for a BFOQ based on customer preference.”).

²⁵³ In fact, several courts have explicitly acknowledged that customer preference can form the basis of a BFOQ under certain conditions. See, e.g., *Swint v. Pullman-Standard*, 624 F.2d 525, 535 (5th Cir. 1980) (stating that Congress “has indicated that customer preference may be considered under the limited [BFOQ] exception in the areas of religion, sex, and national origin, but not on the grounds of race or color”); *EEOC v. Sedita*, 816 F. Supp. 1291, 1295 (N.D. Ill. 1993)

Although proving a customer preference related BFOQ defense can be extremely difficult, employers have found modest success when the preference is rooted in privacy concerns. For example, in *Wade v. Napolitano*, the district court granted summary judgment to the Transportation Security Administration (“TSA”) on a claim that it engaged in sex discrimination by requiring that one-third of its screeners be female.²⁵⁴ The court determined sex constituted a BFOQ based on the privacy interests of passengers.²⁵⁵ The court found persuasive evidence that TSA implemented the policy in direct response to passengers’ concerns about their privacy and security:

Customer satisfaction surveys revealed that the same-gender screening procedures met the public’s expectations [while] also further[ing] TSA’s ultimate objective of providing security as the TSA found that if passengers are more comfortable with how searchers [sic] are conducted, then they are less likely to object and more likely to comply with pat-down requests, resulting in a quicker screening process and more thorough inspection.²⁵⁶

By comparison, the safety-based BFOQ cases focus more on the ability to protect customers and other clientele than on explicit demands from such persons for employees who will keep them safe. For instance, in *Dorthard v. Rawlinson*, the U.S. Supreme Court upheld Alabama’s creation of male-only and female-only positions in its prison system because maintaining prison security was the “essence” of a correction officer’s job.²⁵⁷ Cautioning that “the BFOQ exception [is] in fact meant to be an extremely narrow exception,” the Court nevertheless upheld the defense by emphasizing the “peculiarly inhospitable” environment of the prison, characterized by a

(“[D]espite the fact that customer preferences do not usually establish a BFOQ, in some situations customer preference may give rise to a BFOQ.”); *Slivka v. Camden-Clark Mem’l Hosp.*, 594 S.E.2d 616, 620–21 (W. Va. 2004) (“Unlike the cases in which customer preference as a reflection of stereotypical thinking has failed to justify discriminatory employment practices, courts have concluded that customer preference having roots in an individual’s beliefs regarding personal privacy and modesty may form the basis of a gender-based BFOQ.”). The EEOC seems to agree, at least where sex is necessary for authenticity purposes. *See* 29 C.F.R. § 1604.2(a)(2) (“Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress.”).

²⁵⁴ No. 3-07-0892, 2009 U.S. Dist. LEXIS 132628, at *1–2 (M.D. Tenn. Mar. 24, 2009).

²⁵⁵ *Id.* at *27–28.

²⁵⁶ *Id.* at *5, *26; *see also Sedita*, 816 F. Supp. at 1293–96 (finding that a women’s fitness club was justified in not employing men in certain positions that involved intimate contact with members and exposure to nudity in showers and locker rooms based on privacy concerns).

²⁵⁷ 433 U.S. 321, 332–37 (1977). *See* Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1188–94 (2016) (explaining why certain forms of sex discrimination in employment are legally permitted).

“jungle atmosphere” and “rampant violence.”²⁵⁸ Outside of *Dothard*, courts have only upheld safety-based BFOQs where pregnancy reduces an employee’s capabilities to perform essential work.²⁵⁹

There has been remarkably little litigation over whether employers can discriminate based on customers’ preferences for genuineness or authenticity. The EEOC has taken the position that only sex can constitute a BFOQ where authenticity or genuineness is at issue.²⁶⁰ The courts tend to agree with the EEOC that sex can constitute a BFOQ for authenticity purposes²⁶¹ but have left the door open to the possibility of race and national origin-based authenticity BFOQs as well.²⁶²

2. Disparate Impact Discrimination

Sometimes customer preferences lead employers to enact facially neutral policies that disparately impact a certain group of employees. In such cases, a plaintiff must assert a disparate impact claim because the challenged policy is facially neutral, rather than deliberately discriminatory.²⁶³ The BFOQ defense is not available to employers in disparate impact cases.²⁶⁴ Nevertheless, an employer can still prevail if it proves the policy is

²⁵⁸ *Dothard*, 433 U.S. at 334.

²⁵⁹ See, e.g., *Levin*, 730 F.2d at 999–1002 (upholding a policy prohibiting pregnant flight attendants from working on flights because of the safety concerns created for passengers if pregnant flight attendants could not properly perform their roles in emergency situations). But see *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (rejecting company’s policy that prohibited women of reproductive age from working in positions where they would be exposed to lead due to the potential negative impact such exposure could have on an unborn fetus because, unlike the airline cases, protecting a fetus (as opposed to a passenger) was not essential to the job).

²⁶⁰ See 29 C.F.R. § 1604.2.

²⁶¹ See, e.g., *St. Cross v. Playboy Club*, Appeal No. 773, Case No. CFS 22618-70 (N.Y. Human Rights App. Bd. 1971) (being female was deemed a BFOQ for the position of a Playboy Bunny, female sexuality being reasonably necessary to perform the dominant purpose of the job, which is to titillate and entice male customers). But see *EEOC v. Joe’s Stone Crab, Inc.*, 136 F. Supp. 2d 1311, 1312–13 (11th Cir. 2001) (rejecting the argument that hiring only male servers was necessary to create an “Old World” ambience modeled after the highest-quality restaurants in Europe).

²⁶² See, e.g., *Miller*, 615 F.2d at 653–54 (questioning whether race might in fact constitute a BFOQ in certain situations, such as a black actor portraying George Wallace or a white actor portraying Martin Luther King Jr.); *Util. Workers v. S. Cal. Edison*, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970) (suggesting, without holding, that the authenticity exception would give rise to a BFOQ for Chinese nationality where necessary to maintain the authentic atmosphere of an ethnic Chinese restaurant). See generally, Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473 (2001).

²⁶³ See *Tyler v. Manhattan*, 118 F.3d 1400, 1405 (10th Cir. 1997) (noting that “courts have found it useful to distinguish between intentional discrimination, often labeled as ‘disparate treatment,’ and unintentional or incidental discrimination, labeled as ‘disparate impact’”).

²⁶⁴ See *UAW, Inc.*, 499 U.S. at 198–200.

job related and consistent with business necessity.²⁶⁵ Although the BFOQ and business necessity defenses are quite similar, they differ in one key regard: An employer can never justify race discrimination as a BFOQ,²⁶⁶ but it can justify race discrimination as a business necessity.²⁶⁷ This difference could lead to oddly incongruent results. For example, if a customer comments to a restaurant manager that she refuses to be served by anyone with dreadlocks, and the manager subsequently fires all of the black servers, the employer could not assert a BFOQ defense to a disparate treatment claim. But, if the employer implements a “no dreadlocks policy” resulting in the termination of all black servers, it could assert a business necessity defense to a disparate impact claim.

EEOC v. Sephora USA, LLC illustrates how the courts approach customer preference-based disparate impact claims.²⁶⁸ The EEOC brought a disparate impact claim against Sephora, a cosmetics retailer, after the company implemented a policy requiring employees to speak English to customers.²⁶⁹ Sephora conceded its policy disparately impacted Hispanic employees but maintained the policy was job related and consistent with its business needs of politeness and approachability as components of customer service.²⁷⁰ Although nothing in the record suggested customers explicitly demanded that employees speak English, Sephora inferred such a preference.²⁷¹ The court granted Sephora summary judgment based on its determination that customer preference was sufficiently related to job perfor-

²⁶⁵ See 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also *UAW, Inc.*, 499 U.S. at 198–200 (noting different applications of BFOQ and business necessity defenses and holding that the business necessity defense, not the BFOQ defense, is the appropriate standard in disparate impact cases); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 474 (11th Cir. 1999) (“When a facially neutral practice is challenged for its disparate impact, an employer need not assert a BFOQ for justification, but may argue instead that the practice is grounded in a legitimate, job-related purpose.”).

²⁶⁶ See 42 U.S.C. § 2000e-2(e)(1).

²⁶⁷ See, e.g., *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 245–48 (3d Cir. 2007) (finding that a criminal background policy that disparately impacted blacks was justified as a business necessity); *Burwell v. E. Air Lines, Inc.* 633 F.2d 361, 370 n.13 (4th Cir. 1980) (“The logical equation would seem to be: a prima facie case of disparate treatment discrimination, a BFOQ defense; a prima facie case of disparate impact discrimination, a business necessity defense. There is, however, a ‘clinker’ in this otherwise symmetrical reasoning. The statutory BFOQ defense . . . is not permitted as a defense to race discrimination in employment.”).

²⁶⁸ See 419 F. Supp. 2d 408, 418 (S.D.N.Y. 2005).

²⁶⁹ *Id.* at 410–11. An employee did not have to speak English, however, if the customer expressed a preference to speak in a different language. *Id.*

²⁷⁰ *Id.* at 416.

²⁷¹ *Id.* (“[T]he Company . . . expects employees who are hired and trained specifically to serve clients to speak English while on the sales floor out of respect for the client and in order to remain approachable to clients at all times’ [—] ‘a common sense rule against offending customers.’”) (quoting *Rivera v. Baccarat*, 10 F. Supp. 2d 318, 324 (S.D.N.Y. 1998)).

mance so as to qualify as a business necessity.²⁷² The link between customer preference and job performance was critical in the court's mind because it "prevents employers from using customers' intolerance as a business necessity justification."²⁷³ The court found:

[h]elpfulness, politeness and approachability . . . are central to the job of a sales employee at a retail establishment, and are distinct from customers' prejudices. When salespeople speak in a language customers do not understand, the effects on helpfulness, politeness and approachability are real and are not a matter of abstract preference.²⁷⁴

As the cases analyzed in this Part illustrate, the courts employ a variety of frameworks when assessing employer liability for non-employee discrimination. In harassment cases, the courts apply a negligence standard; in customer preference cases, they consider whether the discrimination is justified under a BFOQ or business necessity defense. These varying approaches generally serve their respective purposes in cases where discrimination is conscious, intentional, and relatively easy to spot. But as non-employee discrimination becomes more pervasive and harder for employers to detect, a more flexible analytical framework that both unites and simplifies the current approach is both warranted and highly possible.

IV. RETHINKING THE EMPLOYER LIABILITY STANDARD

Non-employee discrimination will likely become even more prevalent in coming years as employees and non-employees have more frequent interaction in the workplace and as non-employees have greater influence over employment decisions.²⁷⁵ At the same time, non-employee discrimination will become harder to detect, as discrimination becomes more subtle, unintentional, and even unconscious.²⁷⁶ As this perfect storm brews, now is an opportune time to consider how judicial treatment of non-employee discrimination claims can be improved.

The foregoing analysis of the case law reveals two major deficiencies with the current judicial approach to non-employee discrimination. First, the law draws no distinction between discrimination committed by employees and non-employees—despite glaring differences in how much control

²⁷² *Id.*

²⁷³ *Id.* at 417.

²⁷⁴ *Id.*

²⁷⁵ See Flake, *supra* note 88, at 6–11; *supra* notes 31–70 and accompanying text.

²⁷⁶ See Flake, *supra* note 88, at 16–17; *supra* notes 71–134 and accompanying text.

employers are able to exercise over these different actors. Because employers alone are responsible for the discriminatory acts of non-employees, it makes sense that the liability standard should account for the limited control employers exert over non-employees' behavior. Unfortunately, employer control factors very little into the courts' analysis of non-employee discrimination because judges mechanically apply the same frameworks and doctrines that are used in conventional discrimination cases. This approach is problematic because employment discrimination laws were not created with non-employee discrimination in mind. Rather, they were designed to address employee-on-employee discrimination.²⁷⁷ As such, there was no need at the outset to factor employer control into the liability standard because control was assumed in most cases, given the agentic nature of the employer-employee relationship. Applying the conventional employment discrimination framework to non-employee discrimination is akin to fitting a square peg into a round hole: The framework functions relatively well for conventional discrimination claims but generates incongruent and often unfair results in the non-employee discrimination context.²⁷⁸

The second problem with the current judicial approach is that it is not adequately equipped to handle the harder cases, where non-employees unconsciously discriminate against employees either directly or indirectly. It is one thing for the law to hold an employer liable for failing to stop a vendor from explicitly harassing an employee or for acquiescing to a client's highly discriminatory demand but it is quite another to hold an employer liable for its customers' unconscious discriminatory tipping practices or for basing employment decisions on implicitly biased customer feedback. That is not to say employers should be absolved from liability in these harder cases, but rather that the law should adopt an analytical framework that can fairly and effectively administer justice in such situations.

Rather than inventing some entirely new scheme, I argue in this Part that the courts should adopt a simple, unified approach that adequately accounts for employers' diminished control over non-employees and that can be applied easily to all forms of non-employee discrimination. Under this approach, the courts would need only ask two questions: Did the employer know, or should it reasonably have known, about the non-employee discrimination?²⁷⁹ If so, did the employer act reasonably in how it responded

²⁷⁷ See *supra* note 47 and accompanying text (explaining that workplace communication used to be fairly binary).

²⁷⁸ See *supra* notes 138–201 (discussing instances where the employer was found liable for non-employee discrimination)

²⁷⁹ See *infra* notes 283–300 and accompanying text.

to the discrimination?²⁸⁰ This analytical framework more fairly apportions employer liability while also reordering and refining the existing doctrines into a more flexible approach that is better suited for the unique challenges of non-employee discrimination.

A. Employer Knowledge of Non-employee Discrimination

Under the proposed framework, the first question a court must ask is whether the employer knew or should reasonably have known that a non-employee acted in a discriminatory manner. Although it makes sense for antidiscrimination laws to position employers as gatekeepers whose job is to protect employees from discriminatory conditions in the workplace, employers can only respond to discrimination of which they are actually aware. Non-employee discrimination presents unique challenges in this regard. It can be much harder to monitor non-employees' behavior because they are not under an employer's direct control. For example, an employer would have no way of knowing that one of its delivery drivers is being sexually harassed by employees of a store on her delivery route unless the employee herself advises the employer of the harassment. An additional challenge is the fact that employees may not recognize mistreatment by non-employees as harassment because harassment trainings and policies tend to focus on narrow definitions of harassment.²⁸¹ If an employee herself does not recognize the mistreatment as harassment, her employer would have no way of knowing that she is being harassed. Moreover, as non-employees continue to exert greater control over employing functions such as compensation,²⁸² employees understandably may be more reluctant to report non-employee harassment to their employers out of fear non-employees will retaliate against them.

Perhaps employers' biggest challenge in detecting non-employee discrimination involves biased customer evaluations and feedback. To be clear, customers are not the only ones who provide biased employee evaluations; supervisors and coworkers are often guilty of this practice too.²⁸³ But cus-

²⁸⁰ See *infra* notes 301–321 and accompanying text.

²⁸¹ See generally Elissa L. Perry et al., *Sexual Harassment Training: Recommendations to Address Gaps Between the Practitioner and Research Literatures*, 48 HUMAN RESOURCE MGMT. 817 (2009) (describing deficiencies in harassment training and offering suggestions for improvements).

²⁸² See Albin, *supra* note 16, at 184.

²⁸³ See, e.g., Shelley Correll & Caroline Simard, *Research: Vague Feedback Is Holding Women Back*, HARV. BUS. REV. (Apr. 29, 2016), <https://hbr.org/2016/04/research-vague-feedback-is-holding-women-back> [<https://perma.cc/LU8Z-76X5>] (detailing an analysis of performance evaluations of men and women across three high-tech companies and a professional services firm found that “women consistently received less feedback tied to business outcomes”—a

customer feedback presents unique challenges in that it is often anonymous, brief, narrow in scope, and based on limited interactions.²⁸⁴ It may also be less accurate, given that customers often have even less training than supervisors in how to properly evaluate an employee's performance.²⁸⁵ Additionally, the largely anonymous nature of customer feedback, coupled with the complete absence of any repercussions from the employer, may encourage customers to give conscious, yet hard-to-detect discriminatory feedback.²⁸⁶ For instance, a customer who dislikes Muslims could rate her Muslim waiter's objectively outstanding service as unsatisfactory on a customer review card that she then anonymously drops in the customer feedback box on her way out of the restaurant. Unless the customer wrote an explicitly discriminatory comment on the card—for example, "Fire all Muslims!"—the employer would have no way of knowing the feedback was not only inaccurate but also tainted by extreme bias. Although supervisory and coworker reviews can also be biased, at least employers have the ability to "cross examine" the employee reviewer.²⁸⁷ Furthermore, given the non-anonymous nature of such reviews, supervisors may be less likely to consciously discriminate in their evaluations of other employees out of fear their employer will accuse them of discrimination.²⁸⁸

Of course, the fact that non-employee discrimination may be harder to detect should not insulate an employer from liability. Despite their limitations, employers are still the best positioned to protect employees from discriminatory working conditions, whether internally or externally imposed.

phenomenon the researchers attribute to unconscious employer bias that inhibits reviewers from "connect[ing] women's contributions to business outcomes or . . . acknowledg[ing] their technical expertise"); Jeffrey H. Greenhaus et al., *Effects of Race on Organizational Experiences, Job Performance Evaluations, and Career Outcomes*, 33 ACAD. MGMT. J. 64, 68–69 (1990) (finding that blacks received lower ratings from their supervisors on their job performance and promotability).

²⁸⁴ See Hekman et al., *supra* note 126, at 240–41 (noting that customer satisfaction ratings may be more susceptible to negative stereotypes and biases than employer evaluations because "customers are afforded the luxury of anonymity . . . are asked to make summary judgment rather than to accurately recollected performance-related behaviors, and are untrained in techniques that might help them overcome unconscious biases"); Wang, *supra* note 9, at 281–85 (analyzing studies on bias in customer feedback).

²⁸⁵ See Hekman et al., *supra* note 126, at 241 ("Customers are not trained in or expected to use [bias-reducing] techniques when forming satisfaction judgments.").

²⁸⁶ See *id.*, at 240–41 ("Customer anonymity does not motivate raters to reduce bias, and customer satisfaction questionnaire instructions and items may even facilitate the expression of such biases.").

²⁸⁷ See *id.* ("[S]upervisors, but not customers, know that their ratings are part of the employee record . . . Supervisors can not only be identified, but also must justify their ratings, and as such they are even more motivated to engage in effortful information processing to help them reduce the influence of racial or gender bias and appear, at least superficially, to be objective.").

²⁸⁸ See *id.*

For this reason, employers cannot be permitted to adopt a “see no evil, hear no evil” approach to non-employee discrimination.²⁸⁹ We want and need employers who not only are vigilant but are also proactive in recognizing when discrimination infiltrates their workplaces. To this end, it is not enough to hold employers liable only for the non-employee discrimination of which they are aware; liability must also extend to cases in which the employer reasonably should have been aware of the discrimination. A reasonable-knowledge standard is flexible enough to take into account the aforementioned difficulties of detecting non-employee discrimination. For example, it may be reasonable for an employer to claim ignorance where a customer’s feedback shows no hint of bias, whereas it may be unreasonable for an employer not to have known its delivery employee, who wears a body camera at all times while on her route, is being sexually harassed by customers. Moreover, the reasonableness standard could very likely change over time as social scientists learn more, and employers become better educated, about the subtle and nuanced ways in which individuals discriminate in modern society. As we come to better understand the intricacies of contemporary discrimination, it would be reasonable to expect employers to use this knowledge to better detect discrimination.

Although a reasonable-knowledge requirement already exists for non-employee harassment claims,²⁹⁰ it would require a modest shift in how courts evaluate other types of non-employee discrimination. In discriminatory preference cases, the courts seem to give no thought to whether the employer knew it was honoring a discriminatory request when it took an adverse action to appease the non-employee.²⁹¹ This may be due to the fact that the extant case law only involves customer preferences and requests that are blatantly discriminatory.²⁹² Nevertheless, one can easily envision scenarios in which such discrimination is less obvious. In *Lingle v. Safety and Ecology Corp.*, Marilyn Lingle alleged her employer passed her over for a promotion because of her age and sex.²⁹³ Her employer countered that it gave the promotion to a younger male because an influential client had recommended he be promoted.²⁹⁴ The court accepted this as a valid reason,

²⁸⁹ See *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003) (“An employer cannot avoid Title VII liability for third-party harassment by adopting a ‘see no evil, hear no evil’ strategy.”).

²⁹⁰ See *supra* notes 138–201 and accompanying text (analyzing judicial treatment of harassment by non-employees).

²⁹¹ See *supra* notes 202–274 and accompanying text (analyzing judicial treatment of discriminatory preferences and requests by non-employees).

²⁹² See *supra* notes 202–274 and accompanying text.

²⁹³ No. 3:06-cv-219, 2007 U.S. Dist. LEXIS 62371, at *1 (E.D. Tenn. Aug. 23, 2007).

²⁹⁴ *Id.* at *18.

concluding that “[s]electing an employee for a position based upon a customer’s preference for a particular employee is a legitimate, non-discriminatory reason for selecting that employee.”²⁹⁵ But what if the client recommended the younger male be promoted because, unknown to the employer, the client disliked older women? Should the employer have been held liable for unknowingly doing the client’s discriminatory bidding? Although existing case law provides no definitive answer, this conundrum can be remedied easily enough by imposing a reasonable-knowledge requirement. Under such a standard, the *Lingle* court would have scrutinized whether the employer knew or reasonably should have known the client’s recommendation was discriminatory, rather than accepting the recommendation at face value.

A reasonable-knowledge requirement would also be useful in cases that otherwise would be analyzed under a disparate impact framework, such as where an employer’s facially neutral tipping policy results in black servers earning fewer tips than white servers.²⁹⁶ Although the thought of imposing a knowledge requirement in disparate impact cases may seem unpalatable to some, it makes good sense in the non-employee discrimination context because an employer exercises much less control over non-employees than it does over its own employees. If employers must bear the entire burden for non-employees’ discriminatory actions, it seems only fair to limit employer liability to situations in which the employer knows or reasonably should know its facially neutral policy produces discriminatory outcomes. Thus, in the case of discriminatory tipping, rather than holding an employer strictly liable for its customers’ discrimination—something over which it arguably has little control—the employer would only be liable if it knew or reasonably should have known its tipping policy produced disparate results. In all likelihood, a knowledge requirement would not present much of an obstacle for most plaintiffs: A simple employee complaint of unequal pay or a tip audit would seem sufficient to prove the employer knew or should have known its policy produced a disparate impact. Although this would shift some responsibility to employees to alert employers to the possibility of disparate impact, this does not seem unreasonable—particularly in light of the fact that employees already bear this responsibility in harassment cases.²⁹⁷

²⁹⁵ *Id.*

²⁹⁶ See *supra* notes 202–274 and accompanying text.

²⁹⁷ See, e.g., *Fodor v. E. Shipbuilding Grp.*, 598 F. App’x 693, 697 (11th Cir. 2015) (affirming summary judgment for employer where the plaintiff failed to report any nationality or disability harassment to the employer); *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 655 (2013) (affirming summary judgment for the employer where the plaintiff stayed silent about the

In sum, if federal antidiscrimination laws are going to position employers as gatekeepers who are responsible for protecting employees from all employment discrimination regardless of its source, it seems sensible that employers can only be liable for the non-employee discrimination they can reasonably be expected to detect. To borrow from Judge Easterbrook's hypothetical, a hospital can only be liable for a patient's macaw biting and scratching women if the hospital knows the macaw exists.²⁹⁸ At the same time, employers should actively monitor their workplaces to ensure employees are adequately protected from discrimination. Just as the hospital could not escape liability by claiming it never saw the macaw despite several reports of it flying around the building, an employer should not be allowed to avoid liability by failing to adequately monitor its workplace. Holding employers liable for non-employee discrimination that they know about or reasonably should know about strikes an appropriate balance between requiring too much and too little of employers. Furthermore, this requirement is flexible enough to work just as effectively in cases where discrimination is blatant as in cases where discrimination is subtle. Moreover, the employer-knowledge requirement can easily be applied not just in non-employee harassment cases but also to customer preference-based disparate impact and disparate treatment claims as well.

B. Employer's Reasonable Response to Non-employee Discrimination

If an employer knew or reasonably should have known a non-employee's actions, preferences, or requests were discriminatory, the courts must then consider whether the employer acted reasonably in light of such knowledge. This standard would effectively combine the various defenses presently available to employers into a single, unified framework. In non-employee harassment cases, employers with actual or constructive knowledge of the discrimination can avoid liability by showing they took "prompt remedial action reasonably calculated to end the harassment."²⁹⁹ In customer preference-based disparate treatment cases, employers can prevail by showing that "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business"³⁰⁰ And in customer preference-based disparate impact cases, an employer can defend itself by establishing that its policy or practice "is

harassment even after her employer "provided sexual harassment training, annual reminders, an open-door policy with the management team, and an anonymous hotline to report harassment").

²⁹⁸ See *Dunn v. Washington Cnty. Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005).

²⁹⁹ *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995).

³⁰⁰ 42 U.S.C. § 2000e-2(e)(1) (2012).

job related for the position in question and consistent with business necessity”³⁰¹ Although the wording of these defenses varies, in essence each holds employers to a reasonableness standard. Thus, merging these defenses into a single reasonableness standard hardly requires a radical departure from the current approach. A singular standard would provide much needed unity to the current fragmented approach and have the added benefit of resolving the aforementioned quirk in the law whereby customer-driven racial discrimination is forbidden in disparate treatment cases³⁰² yet is sometimes permitted in disparate impact cases.³⁰³

Under the proposed standard, the fact that the perpetrator of the discrimination is a non-employee would directly factor into the reasonableness of the employer’s response. Judge Easterbrook’s observation that “[t]he genesis of inequality matters not”³⁰⁴ is accurate in the sense that an employer has an obligation to reasonably respond to any discrimination that infiltrates its workplace, whether from employees or non-employees. But in considering the reasonableness of an employer’s response, the genesis of the discrimination does—and should—matter. This is because employers tend to exercise much more control over employees than they do non-employees. Employers can subject employees to harassment training, promulgate workplace rules and policies, monitor employee conduct, and discipline, suspend, or fire an employee who violates its harassment policy. Moreover, most employers have harassment reporting policies firmly in place that require employees to immediately report to specific members of management any harassment they experience or observe. By contrast, employers tend to have much less control over non-employees. Customers, in particular, can be especially difficult to manage. Consequently, it is neither realistic nor fair to hold employers to the same standards when evaluating the reasonableness of how they respond to non-employee discrimination as opposed to employee discrimination. Of course, employers cannot get a free pass simply because the discriminator is not under their direct control. The courts have made clear that employer inaction based on the perceived inability to control a non-employee is never justified.³⁰⁵ The fact that an employer may exercise less control over a non-employee does not mean it can-

³⁰¹ *Id.* § 2000e-2(k)(1)(a)(i).

³⁰² *See id.* (limiting BFOQ defense to religion, sex, and national origin).

³⁰³ *See id.* § 2000e-2(e)(1) (making disparate impact defense available for all types of discrimination).

³⁰⁴ *Dunn*, 429 F.3d at 691.

³⁰⁵ *See, e.g., EEOC v. Cromer Food Servs., Inc.*, 414 F. App’x 602, 606–09 (4th Cir. 2011) (rejecting the employer’s claim that it could only be responsible for the conduct of its own employees).

not exercise *any* control. The “arsenal of incentives and sanctions” employers have at their disposal in responding to non-employee discrimination may not be as full as Judge Easterbrook claims,³⁰⁶ but employers are not powerless in this regard.

The reasonableness of an employer’s response to non-employee discrimination may differ depending on the facts and circumstances of each case. In cases of direct, conscious discrimination, such as where a customer sexually harasses an employee, an employer would almost always be obligated to take reasonable steps to end the harassment. Depending on the situation, such measures could include prominently displaying a customer code of conduct that makes clear that any harassing or otherwise discriminatory behavior will not be tolerated,³⁰⁷ expanding workplace harassment policies and trainings to include non-employee discrimination, banning a non-employee harasser from the premises,³⁰⁸ reassigning an employee to a different location or job position to separate her from the harasser,³⁰⁹ audio or video surveillance, and having employees work in pairs so as never to be alone with a non-employee.³¹⁰ An employer could also insist on contractual provisions with vendors, suppliers, and contractors that require such organizations to provide harassment training to their employees, maintain antidiscrimination policies, and monitor and adequately respond to incidents of discrimination.

³⁰⁶ *Dunn*, 429 F.3d at 691.

³⁰⁷ *See, e.g.*, COLUMBUS METRO. LIBRARY, *supra* note 14 (prohibiting patrons from “[h]arassing customers or staff,” which it defines as “[d]eliberate repeated behavior that is intimidating, hostile, offensive, or adversely impacts staff work performance”); CURTISS-WRIGHT, CODE OF CONDUCT—SUPPLIERS AND CUSTOMERS, <http://www.curtisswright.com/investors/corporate-governance/Code-of-Conduct—Suppliers-and-Customers/> [<https://perma.cc/2ULH-WKKZ>] (“Our businesses prohibit all forms of harassment of employees by fellow employees, employees of outside contractors or visitors. This includes any demeaning, insulting, embarrassing or intimidating behavior directed at any employee because of his or her . . . [protected status].”).

³⁰⁸ *See, e.g.*, *Klausman v. CSK Auto Inc.*, No. C07-0314-JCC, 2008 U.S. Dist. LEXIS 106665, at *1 (W.D. Wash. Apr. 29, 2008) (discussing a customer who verbally and physically harassed employee was banned from premises); *Franklin v. Carrows Rest., Inc.*, No. B163553, 2003 Ca. App. Unpub. LEXIS 11302, at *2 (Cal 2d App. Dec. 3, 2003) (demonstrating where a diner who harassed a waitress was banned from restaurant). *But see* *Flower v. Mayfair Joint Venture*, No. 95 Civ. 1744 (DAB), 2000 U.S. Dist. LEXIS 2829, at *28 (S.D.N.Y. Mar. 10, 2000) (rejecting plaintiff’s claim that Title VII requires an employer to ban a customer who is accused of harassing an employee).

³⁰⁹ *See, e.g.*, *Whiting v. Labat-Anderson, Inc.*, 926 F. Supp. 2d 106, 112 (D.D.C. 2013) (demonstrating where the supervisor changed office procedures so the plaintiff did not have to interact with the harasser).

³¹⁰ *See, e.g.* *Aguiar v. Bartlesville Care Ctr.* No. 10-5002, 2011 U.S. App. LEXIS 8427, at *9 (10th Cir. Apr. 18, 2011) (illustrating where an employer required two employees to be present when caring for a resident who had a history of harassing healthcare workers).

Where discrimination is less obvious and results in disparate impact, what constitutes a reasonable response may present a more difficult question. For instance, if a black waiter accuses an employer of maintaining a tip policy that disparately impacts blacks, what is a reasonable response? Under the current disparate impact framework, an employer can successfully defend against such a claim only by showing the policy is job related and consistent with business necessity. This standard easily can be recast in terms of reasonableness: The employer acted reasonably if its tipping policy is job related and consistent with business necessity. Under the proposed standard, the employer could still prevail on a disparate impact claim by showing job relatedness and business necessity; but this would no longer be the employer's sole defense. Other reasonable responses might include educating customers about unconscious discrimination in tipping, pooling tips, replacing tipping with a service charge, or eliminating tipping altogether.³¹¹ Because this new framework would impose a knowledge requirement, an employer would not be liable for a facially neutral policy that has a disparate impact unless it is somehow aware of the problem and fails to take appropriate action. In some cases—such as when an employer can prove the practice is reasonable because it is job related and consistent with business necessity—the appropriate action may be to do nothing. In other cases, the reasonable response might be to educate customers or perhaps revise policies. Either way, the employer would only be liable based on the reasonableness of its response in light of its actual or constructive knowledge of the discrimination.

In customer preference-based disparate treatment cases, where discrimination is usually conscious and indirect, what constitutes a reasonable response from the employer may yet again differ. In some cases, it may be reasonable for the employer to acquiesce to the customer's request. The BFOQ cases make clear that sometimes it is reasonable for an employer to honor discriminatory customer preferences, where safety, privacy, or genuineness is concerned. Like the disparate impact defense, the BFOQ defense easily can be reconfigured as a question of reasonableness: Was the employer's decision to honor the customer's discriminatory request reasonable because sex is a bona fide occupational qualification that is reasonably necessary to the normal operation of the business?

³¹¹ See, e.g., Pete Wells, *Danny Meyer Restaurants to Eliminate Tipping*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/dining/danny-meyer-restaurants-no-tips.html> [https://perma.cc/5VHW-NHAB] (reporting on restaurateur Danny Meyer's announcement that he would eliminate tipping from his thirteen New York City restaurants and bars and stating that "[s]ome believe it is unfair for servers' pay to be affected by their race and age, their customer's moods, the weather and other factors that have nothing to do with performance").

Lastly, in cases of indirect, unconscious discrimination, such as where an employer uses customer feedback that is unintentionally tainted by bias to make employment decisions, applying a reasonableness standard converts what are potentially the hardest cases into a more straightforward analysis: If the employer knew or should have known the feedback was discriminatory, did it act reasonably in light of this knowledge? Again, in some cases it may be reasonable for the employer to do nothing if it can prove its policy of basing employment decisions on customer feedback is job related and consistent with business necessity. In other cases, an employer may be able to show it acted reasonably by taking measures to minimize the risk of discriminatory feedback. For example, rather than soliciting anonymous, quantitative feedback from customers such as, "Rate the tour guide's performance on a scale of one to five," a questionnaire could include open-ended questions that force the respondent to articulate her experience. Employers could also solicit feedback through face-to-face interactions and focus groups. If an employer does solicit feedback through quantitative questions, perhaps it could exclude any outlier responses from its data analysis. To solve the problem of anonymity, an employer could require customers to enter their contact information on the feedback form.³¹²

As gatekeepers to the workplace, employers can and should be liable for how they respond to non-employee discrimination that they either know or reasonably should know about. Under the current framework, employers can assert a variety of defenses to non-employee discrimination, all of which essentially go to the question of reasonableness.³¹³ Reorganizing these defenses into a single reasonableness standard would help unify the existing case law, simplify and clarify an employer's duty with regard to non-employee discrimination, and, in some cases, expand the options an employer has available in responding to such discrimination.

C. Potential Implications

The creation of a separate standard of employer liability for non-employee discrimination acknowledges that non-employee discrimination differs from employee discrimination in ways that matter. Contrary to Judge Easterbrook's claim, the "genesis of inequality"³¹⁴ matters very much. It

³¹² Indeed, an employer may use this tactic simply by requiring customer respondents to enter at least their email address so they can email them a coupon or discount code for completing the survey.

³¹³ See *supra* notes 138–274 and accompanying text (discussing the different defenses an employer may use in a non-employee discrimination case).

³¹⁴ See *Dunn*, 429 F.3d at 691.

matters because non-employee discrimination can be harder for an employer to prevent and detect than coworker discrimination. It also matters to the extent an employer has fewer options in responding to discrimination by actors not under its direct control.

If the law is going to continue to hold employers solely responsible for the discriminatory actions of non-employees but essentially give non-employees a free pass to discriminate, it is fair and reasonable to create a standard of liability that recognizes this inequity. To be clear, the standard would remain unchanged in most cases. For instance, in non-employee harassment cases—a common and arguably most egregious form of non-employee discrimination—the standard would remain virtually unchanged.

In the harder cases, where discrimination is often indirect and/or unconscious, the new framework may lessen the employer's burden in two important ways. First, the employer-knowledge requirement would protect employers from liability for all forms of non-employee discrimination that were neither known nor reasonably should have been known to the employer. This requirement would be especially helpful to employers in cases where a customer disguises a discriminatory request as neutral (such as asking for a specific male employee to manage their account because the non-employee secretly does not think a woman could do the job as well) and in cases where an employer maintains facially neutral policies that disparately impact a particular group (such as an employer who ties its bonus system to customer feedback but has no idea the customer feedback is tainted by unconscious customer bias). Second, the reasonable-response requirement would in some cases expand the options an employer has at its disposal to address non-employee discrimination. For example, in a discriminatory tipping case, an employer could still defend itself by proving business necessity and job relatedness, but it could also prevail by showing it acted reasonably by modifying its policies to create a more equitable distribution of tips once it was made aware of the problem. In all likelihood, these modest concessions to employers would not cause employers to take non-employee discrimination less seriously. Because the new framework imposes reasonable knowledge and reasonable response obligations on employers, there is no reason to think employers would be any less diligent in protecting employees from non-employee discrimination. If anything, this simplified, universal standard would bring much needed clarity to employers so they can protect their employees more effectively.

In addition to more fairly apportioning liability for non-employee discrimination, the proposed framework would unite the currently fragmented approaches into a single, uniform standard. Under the current system, an employer can sometimes be held liable only if it had actual or constructive knowledge of the non-employee discrimination (e.g., non-employee har-

assessment), whereas other times an employer can be liable even if it had no knowledge whatsoever of the discrimination (e.g., disparate impact cases). Moreover, in some cases an employer can only avoid liability by showing it acted promptly to end the discrimination (e.g., non-employee harassment), whereas in others it must justify the discrimination as a BFOQ reasonably related to the operation of the business (e.g., customer preference-based disparate treatment) or show the discrimination was job related and consistent with business necessity (customer preference-based disparate impact). Implementing a new framework to non-employee discrimination cases does not require a radical departure from the existing approach. This new approach requires courts to ask just two questions: Did the employer have actual or constructive knowledge of the non-employee discrimination, and if so, was the employer's response reasonable? This framework reorders existing principles from the case law into a commonsense approach that will unite the case law going forward while at the same time providing the flexibility necessary to ensure the framework can be easily applied to all forms of non-employee discrimination.

Finally, this new framework acknowledges that the nature of discrimination in the United States has fundamentally changed, and will continue to do so in the years to come.³¹⁵ As discrimination becomes less overt and more unconscious, it will likely become even harder to detect—especially when it comes from non-employees. The existing analytical framework functions reasonably well when discrimination is relatively easy to spot but is less equipped to handle the harder cases. To date, the courts have managed to avoid the more challenging cases, such as discriminatory tipping and customer feedback. A growing chorus of commentators warn, however, that these cases are coming down the pike.³¹⁶ Unconscious discrimination can be just as devastating to an employee as is overt discrimination, if not more so.³¹⁷ The

³¹⁵ See Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 482 (2005) (“The nature of discrimination today is dramatically different from the pernicious, overt discrimination that existed prior to the passage of the Civil Rights Act of 1964.”).

³¹⁶ See, e.g., Lynn, *supra* note 75, at 1057 (“Given the potential costs to a large restaurant chain of a class-action lawsuit alleging adverse impact from tipping, we believe that restaurant chains would be foolish to ignore the possibility of such legal action.”); Sachin Pandya, *Tipping as Employment Discrimination?*, WORKPLACE PROF. BLOG (Nov. 23, 2015), http://lawprofessors.typepad.com/laborprof_blog/2015/11/tipping-as-employment-discrimination.html [<https://perma.cc/SEU4-VAP6>] (arguing that despite the dearth of litigation on the issue, race disparity caused by tip compensation can trigger Title VII disparate impact liability).

³¹⁷ See generally Samuel Noh et al., *Overt and Subtle Racial Discrimination and Mental Health: Preliminary Findings for Korean Immigrants*, 97 AM. J. PUB. HEALTH 1269 (2007) (finding that subtle racism is more psychologically damaging than overt racism because recipients can more easily shrug off overt discrimination, whereas subtle racism is more likely to be committed

potential harm of such discrimination must be weighed against the reality that unconscious discrimination tends to be more subtle and harder for employers to detect. Requiring employers to be reasonably aware of and to reasonably respond to such discrimination strikes an appropriate balance: Employers cannot rest on their laurels, but they need not be so obsessed with rooting out unconscious bias so as to overly burden their business operations. The proposed framework works well in both the easy cases, where expectations of employer knowledge and response would be higher, and in the harder cases, where such expectations might necessarily be lower.

CONCLUSION

Non-employee discrimination is not going away anytime soon. In fact, the problem is likely to become more pervasive and complicated in the coming years. The economy is changing in important ways that are bringing employees into greater contact with non-employees in the workplace than ever before. Moreover, the nature of such interactions is also changing, as non-employees have inserted themselves into the traditional employer-employee relationship and have taken on certain employing functions that make them a powerful force in employees' lives. As employees and non-employees interact more frequently and in ways that both directly and indirectly impact the terms and conditions of employment, it is imperative that the law provide a strong, unified framework for addressing the discrimination that arises from such interactions.

Such a framework is further necessitated by the fact that discrimination is becoming increasingly complex. Fortunately, the days of whites boycotting businesses that hire black employees seem mostly behind us. But this hardly means non-employees no longer discriminate against employees. In some ways, the type of discrimination that has emerged in the twenty-first century—subtle, unintentional, and often unconscious—presents an even greater challenge for antidiscrimination law. Is an employer as guilty of discrimination when it bases employment decisions on customer feedback that neither it nor the customer realizes is tainted by inadvertent bias as when it allows a customer to sexually harass an employee? Probably not, but under the existing law there does not seem to be much of a difference. A

by colleagues, neighbors, or friends, which causes recipients to feel that people do not like or accept them, thereby lowering self-esteem and leading to depression); Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOL. 271 (2007) (invisibility and deniability of racial microaggressions make them especially problematic for recipients, who must try to decide whether the discrimination was deliberate or unintentional).

new framework is needed that is both broad and flexible enough to apply to all types of non-employee discrimination in a fair and equitable manner.

Although non-employee discrimination can be extremely nuanced and complex, the analytical framework for assessing employer liability for such discrimination can and should be much simpler. In all cases of non-employee discrimination, whether conscious or unconscious, direct or indirect, employer liability can be distilled to two straightforward questions: Did the employer know or should it have reasonably known about the discrimination, and if so, did the employer act reasonably in response to the discrimination? This new framework recognizes that discrimination by non-employees differs from discrimination by employees. It unifies the existing approaches into a single standard. It also creates a fairer standard of liability. And it can be applied with equal effectiveness to both the easy and the hard cases. This approach will protect employers and employees alike as non-employee discrimination becomes an even greater challenge in the future.