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INDUSTRY

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WHEN THE CUSTOMER IS WRONG: SYSTEMIC DISCRIMINATION IN THE APP-BASED SERVICE INDUSTRY

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I. THE APP-BASED SERVICE INDUSTRY: AN INTRODUCTION

Service industry workers will tell you that they are underpaid, overworked, and often harassed inappropriately by customers. Many service workers work long hours at sub-minimum wages, often surviving on caffeine and sheer determination. Many Americans feel that hospitality and customer service jobs are unimportant, undesirable, or intended for teenagers,¹ and yet there are nearly 16 million people employed in the hospitality industry alone in the United States.² The newest sector of the service industry is the so-called “gig” or sharing economy,³ an app-based service industry. App-based employment, currently classified as a form of independent contracting wherein workers connect via an app to perform tasks for each other, gained nearly 10 million new workers in the past decade,⁴ a number

* J.D., May 2019, *magna cum laude*, University of Pittsburgh School of Law. Thank you to Professor Deborah Brake for her guidance during law school and throughout the drafting of this note.

¹ *Customer Service Begins on the Front Lines*, 24 LEGAL MGMT. 12 (2005) [hereinafter *Customer Service*]; see also, e.g., Neil Strebig, *A Public Discussion at Scratch Food & Beverage Last Week About Tipping in the Hospitality Industry Has Left Some Sour Notes*, THE NORTHSIDE CHRONICLE (Dec. 13, 2017), <http://www.thenorthsidechronicle.com/op-ed-why-isnt-anyone-talking-about-the-service-industry-the-right-way/>.

² *Bureau of Labor Statistics: Leisure and Hospitality*, U.S. DEPT. OF LABOR (Nov. 9, 2017), <https://www.bls.gov/IAG/TGS/iag70.htm#about>.

³ Neil Irwin, *With ‘Gigs’ Instead of Jobs, Workers Bear New Burdens*, THE UPSHOT (Mar. 31, 2016), <https://www.nytimes.com/2016/03/31/upshot/contractors-and-temps-accounted-for-all-of-the-growth-in-employment-in-the-last-decade.html>.

⁴ *Id.*

projected to increase in coming years.⁵ App-based employment is often referred to as a “sharing economy,” because workers often utilize their own property (e.g., their car) to perform their job.⁶ While app-based employment allows for increased flexibility for workers, their current classification as independent contractors generally prevents them from receiving the statutory protections and social insurance benefits that “employees” enjoy.⁷

Companies may prefer to classify their workers as independent contractors for various reasons relating to cost savings, including avoidance of various employment expenditures and liabilities, which result in profit increases.⁸ Employment discrimination statutes protect only those in an “employment relationship,” which does not include independent contractors.⁹ Employers can also avoid the various damages liabilities arising from a violation of federal employment statutes by simply not categorizing themselves as “employers,”¹⁰ and workers may find themselves without an appropriate avenue for remedying discrimination. This rationale makes sense in a situation where the person compensating the independent contractor is truly not an “employer,” such as an individual person or small business hiring a tradesperson for a specific job. The purposes behind the differentiation are less understandable, however, when the entity classifying the employees is a multi-million-dollar corporation employing millions of workers.

This Note will address whether app-based service workers might, in the future, sustain a tenable employment discrimination claim when their termination is based solely on customer ratings. Part I gives a brief overview of current Title VII jurisprudence in the United States. Part II discusses implicit bias as it pertains to customer service and employment. Part III addresses the future of app-based service workers and whether their classification as independent contractors should be changed so that the workers are protected by Title VII. Part IV evaluates the potential for a disparate impact discrimination claim by minority and female app-based service

⁵ Karsten Strauss, *What Is Driving The ‘Gig’ Economy?*, FORBES (Feb. 21, 2017), <https://www.forbes.com/sites/karstenstrauss/2017/02/21/what-is-driving-the-gig-economy/#6f22bad8653c>.

⁶ Gillian B. White, *In the Sharing Economy, No One’s an Employee*, THE ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/in-the-sharing-economy-no-ones-an-employee/395027/>.

⁷ *Id.*; see also Irwin, *supra* note 3.

⁸ *Customer Service*, *supra* note 1.

⁹ See 42 U.S.C. § 2000e(b), (f) (2018).

¹⁰ *Id.*

workers who are terminated solely based on customer ratings. Part V proposes a twofold mechanism for avoiding discrimination, and potential liability, to be implemented by companies who employ app-based service workers.

II. STATUTORY PROTECTIONS ARE AFFORDED TO EMPLOYEES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

To understand the protections currently unavailable to those classified as independent contractors, it is necessary to examine the existing statutory framework and jurisprudence regarding intentional and systemic discrimination. In the United States, there are statutes that protect workers from discrimination on the basis of race, color, sex, national origin, religion, age, and disability.¹¹ Title VII of the Civil Rights Act of 1964 was enacted to help address the pervasive issue of discrimination in employment based on immutable protected traits.¹² There are two main avenues for relief for employees bringing an employment discrimination claim under Title VII: “disparate treatment,” which can be either individual or systemic, and “disparate impact.”¹³ Disparate impact discrimination is a mode of liability not requiring intent.¹⁴ “[D]isparate impact discrimination exists when employment policies, regardless of intent, adversely affect one group more than another and cannot be adequately justified.”¹⁵

The Supreme Court held in *Griggs*, its seminal disparate impact case, that “[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”¹⁶ The Court analyzed the text of the statute, along with available evidence of congressional intent, to determine that employment practices that operate to maintain the results of prior discrimination are unlawful.¹⁷ The statutory language from which disparate impact liability arises states that it shall be unlawful for an employer “to limit, segregate, or classify his employees or

¹¹ See MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (8th ed. 2013).

¹² *Id.* at 1.

¹³ *Id.*

¹⁴ *Id.* at 167.

¹⁵ *Id.*

¹⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁷ *Id.* at 430.

applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect his status as an employee*” because of a protected trait.¹⁸

The decision set forth in *Griggs* imposes liability on an employer using a particular employment practice which, while facially neutral, has unjustified discriminatory effects.¹⁹ The Court in *Griggs* set forth the burden-shifting framework for a successful disparate impact claim.²⁰ The plaintiff must show a business practice that operates disproportionately against a protected class; then the employer must show that the practice is job-related and consistent with business necessity.²¹

Most early disparate impact cases involved standardized employment tests or criteria, and the Court made clear that tests with a disproportionate impact, unless justified, were unlawful.²² An employer could prevail on a disparate impact claim only by showing that the practice upon which the claim was predicated was job-related and consistent with business necessity.²³ The Supreme Court further held, in *Watson*, that subjective employment criteria would be subject to the same scrutiny under Title VII.²⁴ After some appellate courts inappropriately narrowed the framework, Congress made a definitive statement on the proper framework for a disparate impact claim when it passed the 1991 Civil Rights amendments, codifying the *Griggs* framework.²⁵

Critics of disparate impact doctrine argue that it is on shaky ground, and will soon be abandoned because of constitutional concerns.²⁶ Justice Scalia made the argument, in his *Ricci* concurrence, that disparate impact doctrine is at odds with the constitutional guarantees of equal protection.²⁷ Although Justice Scalia argued that

¹⁸ 42 U.S.C. § 2000e-2(a)(1) (2018) (emphasis added).

¹⁹ *Griggs*, 401 U.S. at 436 (“What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.”).

²⁰ *Id.* at 432.

²¹ *Id.* at 431.

²² ZIMMER, *supra* note 11, at 196.

²³ *Griggs*, 401 U.S. at 434.

²⁴ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 978–79 (1988).

²⁵ *See Griggs*, 401 U.S. 424; *see also* 42 U.S.C. § 2000 (2018).

²⁶ *See Ricci v. DiStefano*, 557 U.S. 557, 594–96 (2010) (Scalia, J., concurring).

²⁷ *See id.*

“the war between disparate impact and equal protection will be waged sooner or later,”²⁸ proponents of maintaining the necessary disparate impact doctrine provide much more rational insight.²⁹ Justice Ginsburg refers to disparate impact as one of the “twin pillars” of Title VII, advancing the objective of “ending workplace discrimination and promoting genuinely equal opportunity.”³⁰ Because of the significant role that implicit bias plays in everyday interactions, disparate impact doctrine remains necessary to ensuring that the status quo of systemic racial, gender, and other biases do not win the day. As the Supreme Court stated in *Griggs*, and in countless cases thereafter, disparate impact doctrine seeks to dismantle the status quo to which much of our society so desperately clings.³¹

III. WORKERS WHOSE JOB STABILITY IS TIED TO CUSTOMER RATINGS RUN A SIGNIFICANT RISK OF LOSING THEIR JOBS BASED ON IMPLICIT CUSTOMER BIAS

Recent studies show that implicit racial and gender bias is very real, and quite pervasive.³² Research has held that, all other factors being equal, females are still discriminated against in employment opportunities in various fields.³³ Studies have been conducted showing implicit bias against African Americans in various circumstances including employment, medical care, and consumer purchasing.³⁴ The challenging thing about implicit bias is that it is unconscious, shaped by exposure to perpetuating societal stereotypes.³⁵ Often, the people who have participated in biased

²⁸ *Id.* at 596.

²⁹ *See id.* at 624 (Ginsburg, J., dissenting).

³⁰ *Id.*

³¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

³² *See, e.g.*, Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <https://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias.html>; Ilana Yurkiewicz, *Study Shows Gender Bias in Science is Real. Here's Why It Matters*, SCIENTIFIC AMERICAN (Sept. 23, 2012), <https://blogs.scientificamerican.com/unofficial-prognosis/study-shows-gender-bias-in-science-is-real-heres-why-it-matters/>.

³³ Yurkiewicz, *supra* note 32; *see* Justin D. Levinson & Danielle Young, *Implicit Bias in the Legal Profession: An Empirical Study*, 2 DUKE J. GENDER L. & POL'Y 1, 10 (2010); *see generally* Rebecca Knight, *7 Practical Ways to Reduce Bias in Your Hiring Process*, HARVARD BUS. REV. (June 12, 2017), <https://hbr.org/2017/06/7-practical-ways-to-reduce-bias-in-your-hiring-process>.

³⁴ Mullainathan, *supra* note 32.

³⁵ *See* Yurkiewicz, *supra* note 32.

decision-making do not believe that bias affected their decision, and therefore believe they did not ostensibly use biased reasoning to make their decision.³⁶

This idea is the basis behind “Project Implicit,” a long-running research survey sponsored by Harvard University, which brings to light systemic implicit bias.³⁷ The project seeks to understand implicit bias, stereotypes, and other forms of implicit social cognition that influence people’s perception.³⁸ People often draw “upon ostensibly sound reasons” to justify their action, without any inkling that their conduct is affected, in large part, by the more subtle prejudices that permeate much of our society.³⁹ Even if, when analyzing conduct carefully, we work to avoid discriminatory behavior, “it can easily creep into our fast thinking,” our snap judgements that often rely on stereotypes.⁴⁰

The American consumer economy focuses intently on customer satisfaction as a method of gleaning customer feedback in order to maximize service quality and profits.⁴¹ More than half of all employees in the United States work in service occupations, and it is more likely that lower-level, customer interaction jobs will be held by women and people of color.⁴² Customer satisfaction, which has become the touchstone of American consumerism, teaches us that the customer is “always right” and encourages businesses to do whatever is necessary to satisfy customers.⁴³ Positive customer perception of the service is essential to the profitability of service industries.⁴⁴

The very nature of the service industry is enigmatic. The product is “the experience,” and even when selling tangible goods like food or alcohol, a significant

³⁶ *Id.*

³⁷ *Implicit Social Cognition*, PROJECT IMPLICIT, <https://www.projectimplicit.net/index.html> (last visited Apr. 1, 2019).

³⁸ *See id.*

³⁹ *See* Yurkiewicz, *supra* note 32.

⁴⁰ Mullainathan, *supra* note 32.

⁴¹ Lu-in Wang, *When the Customer is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL’Y & L. 249, 250 (2016).

⁴² *Id.* at 251.

⁴³ *See id.* at 252.

⁴⁴ *Id.* at 263.

portion of the cost is attributed to the subjective experience.⁴⁵ When the experience goes awry, the customer often uses every means at their disposal to express their indignation, including a host of online rating websites.⁴⁶ A minor error or inconvenience, often unrelated to the conduct of the employee, gives rise to an extremely negative customer reaction that leads to a negative review rating. Implicit biases likely further increase the chance that an employee will receive a poor rating for seemingly innocuous or unrelated conduct.

Customer expectations, often based on perceptions of what constitutes “good” service, are clouded by implicit bias and stereotypes.⁴⁷ “Employers seek workers who ‘look good’ and ‘sound right’; they are less interested in ‘what people can do.’”⁴⁸ Eliminating implicit bias is particularly challenging because most skills needed for effective customer service are not technical, and therefore must be judged subjectively, adding an additional layer of potential implicit bias to the process.⁴⁹ Hospitality and service workers are so frequently subjected to harassment by customers that it is deemed normal by the employee victims.⁵⁰ Even without overt harassment, based on studies showing that most people harbor implicit racial and gender bias, female and minority employees may be more likely to receive customer complaints than similarly situated Caucasian male employees.⁵¹ Research indicates that women and people of color working in the service industry generally receive less compensation, and work longer hours, than their white male counterparts.⁵² For example, in tipped positions, white male workers tend to make significantly more than women and people of color,⁵³ although there is no reason to believe that white male workers provide better customer service. “[W]omen as servers both are highly

⁴⁵ *See id.*

⁴⁶ *See, e.g.,* *Levitt v. Yelp! Inc.*, 765 F.3d 1123 (9th Cir. 2014).

⁴⁷ *Wang, supra* note 41, at 271.

⁴⁸ *Id.* at 271–72 (citation omitted).

⁴⁹ *See id.*

⁵⁰ *Id.* at 274.

⁵¹ *See* Mullainathan, *supra* note 32; Yurkiewicz, *supra* note 32.

⁵² *Tipped Over the Edge: Gender Inequity in the Restaurant Industry*, RESTAURANT OPPORTUNITIES CENTERS UNITED 17–19 (Feb. 13, 2010), https://rocunited.org/wp-content/uploads/2012/02/ROC_GenderInequity_F1-1.pdf.

⁵³ *Id.* at 17.

dependent on tip income and work in an environment where gender stereotypes are especially pervasive and strong.”⁵⁴

Title VII jurisprudence has long prohibited employers themselves from discriminating out of a mere desire to satisfy customer preferences,⁵⁵ yet there is currently no actionable claim for discrimination by customers themselves.⁵⁶ “The problem lies in the fact that customer feedback discrimination does not fit neatly under either the disparate treatment or the disparate impact model of discrimination—the only two judicially endorsed pathways to proving discrimination under antidiscrimination rules.”⁵⁷ While an employer who based an employment decision on a customer complaint that specifically detailed misogynistic or racist reasoning would likely be held liable,⁵⁸ if the customer fails to explicitly divulge their biased viewpoint, the employer may never know that the rating was based on bias. Professor Lu-in Wang posits that “the argument for holding the employer responsible for decisions that incorporate discriminatory customer feedback is even stronger when we consider the ways in which relying on customer feedback to manage workers serves the employer’s interest while exposing employees to discrimination.”⁵⁹ The employer, by relying on customer feedback as an employee management tactic, has effectively delegated the employee evaluation function to the customers.⁶⁰ Professor Wang further notes that such delegation often “creat[es] incentives and opportunities for customers . . . to discriminate.”⁶¹

There is currently no cognizable framework for gig-based “independent contractors” to bring claims under Title VII for discriminatory customer feedback. Such a framework is necessary, however, if our judiciary seeks to continue the progress it has helped to make in eliminating invidious racial and gender

⁵⁴ Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL’Y & L. 103 (2014).

⁵⁵ See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

⁵⁶ Wang, *supra* note 41, at 252–53.

⁵⁷ Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2172 (2018).

⁵⁸ Wang, *supra* note 41, at 288.

⁵⁹ *Id.*

⁶⁰ *Id.* at 288–89.

⁶¹ Wang, *supra* note 54, at 104.

discrimination in employment.⁶² “Claims of unintentional discrimination are well suited for the disparate impact framework because a court’s sole focus is on the effect of an employment practice—not the employer’s intent.”⁶³ Gig-based workers are poised to become a significant portion of our workforce, and therefore the current system should adapt to ensure employment protections for them.

IV. GIG-BASED WORKERS SHOULD RECEIVE TITLE VII PROTECTION

The Supreme Court has not yet extended Title VII to allow an actionable claim based on customer discrimination. Recently, however, the Court indicated that an employer who effectively delegates power to a supervisor or employee, and relies on the supervisor’s recommendation to take an adverse employment action, may be vicariously liable.⁶⁴ The Court therefore is beginning to set the framework for a form of liability based on agency principles, even for persons not authorized to make tangible employment decisions.⁶⁵ In *Vance*, the Court reasoned that the “injury could not have been inflicted absent the agency relation,” and therefore the employer would be vicariously liable for such action.⁶⁶ Management might use customer feedback to measure employee performance, determine scheduling, and enforce progressive discipline. It is reasonable to think that if an employer uses customer ratings as the chief measure of employee performance, and then takes an adverse employment action solely based on those ratings, the employer should be held liable when discriminatory results occur.⁶⁷

Legal scholars view the gig-economy as the next frontier in employment law.⁶⁸ Many opine that it is only a matter of time until the “independent contractor”

⁶² See *supra* notes 30–31 and accompanying text.

⁶³ Flake, *supra* note 57, at 2207.

⁶⁴ See, e.g., *Vance v. Ball State University*, 570 U.S. 421, 431 (2013) (holding that “an employer may be vicariously liable for an employee’s unlawful harassment” if the employer has allowed that employee to effect a “significant change in employment status”); *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011) (holding that if a supervisor performs a discriminatory act intended to cause adverse employment action, and that act proximately causes the action, then the employer is liable).

⁶⁵ See *Vance*, 570 U.S. at 431.

⁶⁶ *Id.* at 429.

⁶⁷ See *Vance*, 570 U.S. 421; see also Wang, *supra* note 41, at 288.

⁶⁸ See, e.g., Pamela A. Izvanariu, *Matters Settled But Not Resolved: Worker Misclassification in the Redeshare Sector*, 66 DEPAUL L. REV. 133, 136 (2016); Richard A. Bales & Christian Patrick Woo, *The*

classification in gig-based service industries is viewed for what it really is: a method of cutting costs by subverting regulatory requirements.⁶⁹ Companies like the ridesharing service Uber profit because they outsource their biggest costs (in Uber's case, the costs of cars, fuel, and insurance) and act from a unique bargaining power advantage: Their workers are often economically dependent.⁷⁰ Gig-based workers are often millennials who work various gig jobs as their sole income, or who supplement a non-paying passion project or an insufficient salary with gig jobs.⁷¹ Many workers do these jobs out of necessity, "because they can't find better work or pay."⁷² Furthermore, a lack of available education and guidance about available tax benefits and deductions puts gig workers at an even greater disadvantage.⁷³

Although certain workers may not fit neatly into either the "employee" or "independent contractor" category, it is essential for employment laws to adapt to the changing workforce.⁷⁴ Other federal statutes, such as the Fair Labor Standards Act ("FLSA"), adopt a broader definition of "employer" than Title VII.⁷⁵ In interpreting the FLSA, courts often consider the circumstances of the work, control over workers, and inherent bargaining disadvantages to determine whether an independent contractor classification is warranted.⁷⁶ In interpreting Title VII as it applies to gig workers, courts should heavily consider bargaining disadvantage, especially with the business model of companies like Uber, to determine whether employers really utilize independent contractors or are simply outsourcing their costs while avoiding liability.

Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?, 68 MERCER L. REV. 461 (2017).

⁶⁹ Brishen Rogers, *Employment Rights in the Platform Economy: Getting Back to Basics*, 10 HARV. L. & POL'Y REV. 479, 490 (2016).

⁷⁰ *Id.* at 494.

⁷¹ Patrick Gillespie, *Intuit: Gig Economy Is 34% of US Workforce*, CNN MONEY (May 24, 2017), <http://money.cnn.com/2017/05/24/news/economy/gig-economy-intuit/index.html> [hereinafter Gillespie I].

⁷² Patrick Gillespie, *Millions in Gig Economy Can't Find Better Jobs or Pay*, CNN MONEY (Oct. 27, 2016), <http://money.cnn.com/2016/10/27/news/economy/gig-economy-workers/?iid=EL>.

⁷³ *Id.*

⁷⁴ Rogers, *supra* note 69, at 498.

⁷⁵ 29 U.S.C. § 203(d) (2018).

⁷⁶ See *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989).

Gig workers consider themselves employees; they do not feel independent; their “employers” exercise significant control over them; and they feel that the idea of being a “freelance” worker is an illusion.⁷⁷ Gig workers should not be forced to choose between a flexible job and decent wages and benefits.⁷⁸ The courts will be forced to confront the new reality that the gig economy involves approximately thirty-five percent of the workforce, a number that is expected to increase in coming years.⁷⁹ While the courts have been notoriously slow to react to the evolving job market, they typically address problems once they become unavoidable.⁸⁰

As the American workforce percentage employed as “independent contractors” increases,⁸¹ courts will have to address worker protections. Various solutions have been proposed, including: introducing a level of worker that falls between “employee” and “independent contractor,”⁸² creating separate wage and benefits laws,⁸³ imposing a negligence standard,⁸⁴ and simply classifying gig workers as employees to ensure total protection.⁸⁵ Regardless of the method of protection chosen, it is essential that workers be guaranteed Title VII protections to guard against both intentional and systemic discrimination.⁸⁶ As gig-based employment becomes increasingly prevalent, public policy will necessitate extension of protection to such workers; otherwise, companies will be incentivized to switch to independent contractor systems in order to subvert the requirements of the law and avoid liability for discriminatory behavior. There is considerable uncertainty, both

⁷⁷ Sarah Butler, *Gig Economy Workers on Their Jobs: ‘They Do Exercise Control Over Us,’* THE GUARDIAN (July 11, 2017), <https://www.theguardian.com/business/2017/jul/11/gig-economy-workers-jobs-couriers-care-homes-pay>.

⁷⁸ See Monica Stonier, *This State Wants to Offer Universal Benefits to Gig Workers*, FORTUNE (Oct. 13, 2017), <http://fortune.com/2017/10/13/gig-economy-workers-benefits/>.

⁷⁹ Gillespie I, *supra* note 71.

⁸⁰ After the passage of the Civil Rights Act of 1964, some employers began requiring that applicants pass an aptitude or intelligence test to gain employment as a covert method of discriminating against African American applicants. The Supreme Court addressed this in 1971 in *Griggs*. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸¹ Gillespie I, *supra* note 71.

⁸² Izvanariu, *supra* note 68, at 163–64.

⁸³ Stonier, *supra* note 78.

⁸⁴ Flake, *supra* note 57, at 2172.

⁸⁵ Rogers, *supra* note 69, at 519.

⁸⁶ See 42 U.S.C. § 2000e–2.

in litigation⁸⁷ and among scholars,⁸⁸ as to the future of the law for gig workers. However, as the issue becomes increasingly prevalent, the law will likely adapt.⁸⁹

V. WHEN COMPANIES USE CUSTOMER RATINGS AS THE SOLE FACTOR IN EMPLOYEE RETENTION, THEY RUN THE RISK OF TERMINATING EMPLOYEES BASED ON RACIAL AND GENDER BIAS

Companies like Uber often use customer ratings as a method of determining which drivers should continue working and which should be “deactivated.”⁹⁰ Many drivers are simply “deactivated” without any warning whatsoever,⁹¹ but others must pay out-of-pocket for “training” classes if they want to keep their livelihood.⁹² The threshold for re-training is a mere 4.6 out of 5 stars, according to drivers.⁹³ Uber refers to deactivation as termination of the “partnership” between itself and the drivers,⁹⁴ although the drivers view Uber as their employer.⁹⁵ Since implicit bias has been shown to affect people, even subconsciously,⁹⁶ it follows that Uber customers may rate their drivers differently based on their gender or race.⁹⁷

Uber was recently sued in the United Kingdom for sex discrimination for this very reason, shortly after an employment tribunal held that drivers were in an

⁸⁷ See, e.g., *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087 (9th Cir. 2018).

⁸⁸ Naomi Schoenbaum, *Gender and the Sharing Economy*, 43 *FORDHAM URB. L.J.* 1023, 1058–59 (2016) (citation omitted).

⁸⁹ See generally Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 *U.C. DAVIS L. REV.* 1511 (2016).

⁹⁰ Jack Smith IV, *Uber Drivers: The Punishment for Bad Ratings Is Costly Training Courses*, *OBSERVER* (Feb. 3, 2015), <http://observer.com/2015/02/uber-drivers-the-punishment-for-bad-ratings-is-costly-training-courses/>.

⁹¹ Ellen Huet, *How Uber's Shady Firing Policy Could Backfire On The Company*, *FORBES* (Oct. 30, 2014), <https://www.forbes.com/sites/ellenhuet/2014/10/30/uber-driver-firing-policy/#3c4d16431527>.

⁹² Smith IV, *supra* note 90.

⁹³ *Id.*

⁹⁴ *Star Ratings*, *UBER*, <https://www.uber.com/drive/resources/how-ratings-work/> (last visited Apr. 2, 2019).

⁹⁵ Butler, *supra* note 77.

⁹⁶ Yurkiewicz, *supra* note 32.

⁹⁷ Nancy Leong, *The Race-Neutral Workplace of the Future*, 51 *U.C. DAVIS L. REV.* 719, 724 (2017) (arguing that the star-based rating system might create a “vicious cycle” for drivers of color).

employment relationship with the company.⁹⁸ The complaint stated that a female driver often must choose between allowing an aggressive or harassing passenger to remain in the vehicle or terminating the ride and receiving a low rating, which she has no recourse to dispute.⁹⁹ Low ratings eventually lead to deactivation¹⁰⁰ or costly training courses,¹⁰¹ and these customer ratings are just as vulnerable to explicit or implicit bias as any other subjective judgement.¹⁰² Furthermore, “[i]f a company affirmatively chooses to use a customer rating system that has been shown to introduce bias, one might [even] argue that the company’s decision should help to establish intent.”¹⁰³ Given the scholarly viewpoint that app-based independent contractors in the United States are likely to receive some sort of Title VII protections in the future,¹⁰⁴ suits may soon follow.

It seems contrary to the policies of employment discrimination law to allow companies like Uber to insulate themselves from liability for biased decision-making solely because the actual biased actors are technologically removed from the discriminatory result.¹⁰⁵ In fact, it seems that these policies would be better served by creating a remedy for situations where an employee is unjustly terminated based solely on customer ratings with a disparate gender or racial impact. Much like with other disparate impact claims, the onus would remain on the employer to demonstrate that the rating system used was job-related and consistent with business necessity, and that there was no available nondiscriminatory alternative practice.¹⁰⁶

It is important to note that recent organizational psychology studies indicate that ratings of job performance *even by supervisors* are generally viewed as poor

⁹⁸ Josie Cox, *Uber Sexism Case: London-Based Female Driver Issues Sex Discrimination Proceedings Against Taxi Company*, INDEPENDENT (Sept. 26, 2017), <http://www.independent.co.uk/news/business/news/uber-sexism-case-london-female-driver-sex-discrimination-women-ride-hailing-taxi-a7968126.html>.

⁹⁹ *Id.*

¹⁰⁰ See Huet, *supra* note 91.

¹⁰¹ Smith IV, *supra* note 90.

¹⁰² Matthew T. Bodie et al., *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 1027 (2017).

¹⁰³ Leong, *supra* note 97, at 728.

¹⁰⁴ See Izvanariu, *supra* note 68, at 163; see also Rogers, *supra* note 69, at 519; Stonier, *supra* note 78.

¹⁰⁵ See Bodie et al. *supra* note 102, at 1026–27.

¹⁰⁶ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

measures of actual job performance.¹⁰⁷ Success at many jobs involves a variety of intangible characteristics that cannot be properly quantified numerically,¹⁰⁸ not to mention certain characteristics may be viewed more positively in people of certain races and genders.¹⁰⁹ Much of the research conducted on employee performance reviews has been confined to reviews by supervisors, who work with and around the affected employees frequently.¹¹⁰ The Tenth Circuit recently held that an employee rating system (by supervisors) constitutes a specific employment practice that may be challenged under the disparate impact provisions of Title VII.¹¹¹ The rating system in *Tabor v. Hilti* was facially neutral but was deemed a specific employment practice because it required supervisors to assign subjective ratings to the employees.¹¹² There are currently no published decisions involving a disparate impact claim based on negative customer feedback,¹¹³ although customer feedback results have been used both affirmatively and defensively in Title VII claims.¹¹⁴

If supervisory reviews are inconsistent at best,¹¹⁵ there is a strong likelihood that customer reviews are more likely to be tinged with bias. Customers, unlike supervisors, interact only briefly with a given employee; furthermore, customers often have a subjective standard of behavior to which they hold certain customer service employees.¹¹⁶ These subjective standards may be reasonable or unreasonable, and the nuances of such standards are never known to the employee with whom they interact.

The “star” rating system utilized by Uber and other gig-based service providers is altogether too basic and arbitrary to represent an accurate picture of a worker’s

¹⁰⁷ Kevin R. Murphy, *Explaining the Weak Relationship Between Job Performance and Ratings of Job Performance*, 1 INDUS. & ORGANIZATIONAL PSYCHOL. 148 (2008), <http://people.tamu.edu/~w-arthur/611/Journals/Murphy%20%282008%29%20IOP%20job%20performance.pdf>.

¹⁰⁸ *Id.* at 149.

¹⁰⁹ See generally Wang, *supra* note 41.

¹¹⁰ Murphy, *supra* note 107, at 148.

¹¹¹ *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1222 (10th Cir. 2013).

¹¹² *Id.* at 1221.

¹¹³ Flake, *supra* note 57, at 2207.

¹¹⁴ See, e.g., *Chandler v. Regions Bank*, 573 Fed. Appx. 525 (6th Cir. 2014); *Dodson v. Morgan Stanley DW, Inc.*, 2007 U.S. Dist. LEXIS 85535 (W.D. Wash. 2007).

¹¹⁵ Murphy, *supra* note 107, at 148.

¹¹⁶ Wang, *supra* note 41, at 270–71.

customer service abilities. Online rating websites such as Yelp! and Google+ have been shown to be inconsistent in results. For example, a recent Consumer Reports study found that a single business' ranking ranged from 2.5 stars (out of 5) on one website, to an A+ rating on another.¹¹⁷ Such inconsistencies in customer perceptions of the same business lead to a reasonable inference that customer ratings are also more arbitrary and inconsistent than many ratings websites might indicate.¹¹⁸ Thus, “[i]f customer ratings are as vulnerable to bias as research suggests, it is likely that minority [or female] drivers will be more likely . . . to be deactivated.”¹¹⁹ Nonetheless, because deactivation “looks like an automatic event, divorced from a person with bias,” traditional Title VII doctrines have been unable to provide a proper remedy.¹²⁰ Once proper protections are granted, there is a strong likelihood that a cognizable disparate impact claim can be brought against employers, like Uber, who terminate employees based solely on customer ratings. To avoid these issues, employers should proactively implement policies to eliminate or minimize the effects that implicit bias has on the employment decisions of the company.

VI. THE SOLUTION TO THIS PROBLEM IS TWOFOLD: THE SUPREME COURT NEEDS TO EXTEND EMPLOYMENT PROTECTIONS TO INDEPENDENT CONTRACTORS, AND COMPANIES NEED TO DEVELOP COMPREHENSIVE, HOLISTIC EMPLOYEE REVIEW SYSTEMS

While the problem created by allowing customers to control the fate of gig workers is obvious, the solution is less clear. It seems inevitable that gig workers will soon receive at least some legal employment protections,¹²¹ especially as gig jobs become an increasingly significant percentage of America's workforce.¹²² It is yet uncertain whether those protections will be equivalent to the current protections given to employees, or whether it will be some new or different type of limited protected status. Scholars have proposed differing solutions, but those scholars agree

¹¹⁷ *The Truth About Online Ratings Services*, CONSUMER REPORTS MONEY ADVISOR (Sept. 2013), <https://www.consumerreports.org/cro/2013/09/online-ratings-services/index.htm>.

¹¹⁸ *See id.*

¹¹⁹ Bodie et al., *supra* note 102, at 1027.

¹²⁰ *Id.* at 1027–28.

¹²¹ *See Izvanariu, supra* note 68; *see also Bales & Woo, supra* note 68; Rogers, *supra* note 69.

¹²² Irwin, *supra* note 3.

that gig workers will soon receive some type of protection.¹²³ As the workforce is changing, and gig-based jobs are becoming the new normal, it will be necessary, for public policy reasons, to extend some type of employment law protections to these employees. If those protections are given, the employment practices utilized by Uber and other similar companies will be open to challenge under Title VII's disparate impact provisions.¹²⁴

Customer preference has been consistently held as insufficient to justify discriminatory employment actions.¹²⁵ A gender classification will not rise to the level of business necessity unless it is necessary to the essential function of the job, and the Supreme Court has never upheld a racial classification in the employment context.¹²⁶ Additionally, courts have begun to acknowledge that employment actions caused by persons other than the employee's supervisor may be sufficient to justify liability under Title VII.¹²⁷ Companies who engage in the practices of terminating employees based on customer ratings,¹²⁸ and forcing employees to incur the cost of re-training programs,¹²⁹ might find those practices challenged under Title VII disparate impact provisions.

The Court has already determined that subjective employment practices are subject to a disparate impact challenge so long as the practice can be shown to cause the observed statistical disparity.¹³⁰ “[S]ome employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to

¹²³ See Izvanariu, *supra* note 68, at 163; see also Rogers, *supra* note 69, at 519; Stonier, *supra* note 78.

¹²⁴ ZIMMER, *supra* note 11, at 1, 191.

¹²⁵ See, e.g., Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (“[C]ustomer preference may be taken into account only when it is based on the company’s inability to perform the primary function or service it offers.”); EEOC v. Sephora USA, LLC, 419 F. Supp. 2d 408, 417 (S.D.N.Y. 2005) (“The requirement that a customer preference relate to job performance prevents employers from using customers’ intolerance as a business necessity justification for a policy that has a disparate impact on a protected class.”); Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 298 (N.D. Tex. 1981) (“[T]he Senate did not intend to weaken Title VII’s prohibition against sex discrimination by allowing an employer to consider customer attitudes and preferences.”).

¹²⁶ *Id.*

¹²⁷ See, e.g., Vance v. Ball State Univ., 570 U.S. 421 (2013); Staub v. Proctor Hosp., 562 U.S. 411 (2011).

¹²⁸ See Huet, *supra* note 91.

¹²⁹ See Smith IV, *supra* note 90.

¹³⁰ Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1004 (1988).

intentional discrimination.”¹³¹ In this case, if a plaintiff could show that the policy of terminating employees based on low ratings negatively affected women and people of color, that employment practice might be subject to challenge under Title VII.¹³² Employers would then be forced to show that the customer ratings system is a sufficiently accurate indicator of job performance, and that it rises to the level of business necessity.¹³³ Even with such a showing, a plaintiff could still prevail if she could show that there was an available alternative with a less discriminatory result.¹³⁴

As app-based employment becomes increasingly prevalent, companies utilizing those platforms should develop systems that are less likely to have disparate racial and gender consequences on their employees. Gig and sharing economy companies employ an increasingly significant percentage of the workforce.¹³⁵ Social scientists nearly unanimously agree that implicit bias is a prevailing societal issue,¹³⁶ and while there is no obvious universal fix, it is essential for companies to actively work to ensure that such biases on the part of customers do not result in the maintenance of the status quo of gender and racial discrimination in employment.¹³⁷

As society and employment evolves alongside technological innovation, so must our Title VII jurisprudence. Courts should continue to effectuate the stated purposes of Title VII: breaking down societal barriers and eliminating the discriminatory status quo.¹³⁸ “The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no . . . discrimination, subtle or otherwise.”¹³⁹ There are multiple systems, of varying complexities, that could be developed to address this problem. Employers should be wary of allowing

¹³¹ *Id.* at 987.

¹³² *See id.*

¹³³ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹³⁴ *Id.* at 432.

¹³⁵ *Gillespie I*, *supra* note 71.

¹³⁶ *See Mullainathan*, *supra* note 32; *Yurkiewicz*, *supra* note 32.

¹³⁷ *Leong*, *supra* note 97, at 725 (arguing that a questionnaire pre-rating might help identify biases).

¹³⁸ *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971) (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

¹³⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

simplistic customer reviews to act as the sole marker of employee performance, for the reasons outlined above.¹⁴⁰

It will be essential to establish a holistic evaluation system that considers customer ratings but does not use them as the sole evaluation method for employees. This will be especially important for companies such as Uber that have no managerial or supervisory structure in place to monitor and evaluate employees. There are various performance appraisal methods available to companies, all of which have their advantages and drawbacks. It is generally accepted that there are two categories of performance review: objective and judgmental.¹⁴¹

Objective appraisals are usually quantifiable, using scored tests and other objective criteria.¹⁴² Objective tests have been subject to criticism under Title VII and have been more frequently invalidated by American courts.¹⁴³ The potential for error in evaluating an employee is just as significant, if not more so, with subjective rating systems.¹⁴⁴ “[T]he list of named errors includes personal bias which occurs when the rater completes the performance measurement ‘not on the basis of actual performance, but on other grounds.’”¹⁴⁵

There is no doubt, however, that some type of performance appraisal is necessary. Performance appraisals are important to employer profitability,¹⁴⁶ and should be available as guidelines to assist employers in employee evaluation. Additionally, customers demand a forum in which they can voice their complaints, concerns, or compliments. It is essential, then, for companies like Uber to develop systems where customer reviews can be considered alongside other relevant factors, including timeliness or use of the most efficient routes. The Uber platform can synchronize with drivers’ phones and allow the company to ascertain the efficiency

¹⁴⁰ See *supra* text accompanying notes 82–98.

¹⁴¹ Thomas Earl Geu, *Are Employee Appraisals Making the Grade? A Basic Primer and Illustrative Application of Federal Private Employment Discrimination Law*, 47 S.D. L. REV. 430, 441 (2002).

¹⁴² *Id.*

¹⁴³ See 1 BARBARA T. LINDEMANN ET AL., *EMPLOYMENT DISCRIMINATION LAW*, Ch. 4, Pt. II(B)(3), at 4–72–73 (Debra A. Millenson et al. eds., 5th ed. 2012).

¹⁴⁴ See Geu, *supra* note 141, at 442.

¹⁴⁵ *Id.* at 442–43.

¹⁴⁶ *Id.* at 506 (“Employee performance appraisals are valuable management tools that, when used correctly, can increase the profits of the organization through gains in efficiency and by aligning individual employee goals and organizational goals.”).

and timeliness of its employees by way of monitoring their ride pickups and routes, which would allow the company to eliminate or disregard erroneous or incorrect assessments of such factors.

Companies like Uber should implement a more specific questionnaire for customers to fill out that asks relevant questions, while allowing customers to use an existing SMS feature to voice specific complaints.¹⁴⁷ Such complaints could be considered and assessed for accuracy without directly and immediately affecting the star-rating of the driver. Furthermore, requiring customers to answer specific, objective questions would allow for a less arbitrary system of ratings than the “star” system currently utilized. Businesses in the service industry often provide a platform for customers to articulate specific complaints; these complaints can then be assessed, with a managerial determination as to the severity of any potential disciplinary consequences on the employee. Although a specific questionnaire does not eliminate implicit bias, if customers are asked questions with quantifiable answers, they may be more likely to answer objectively.

An arbitrary “star” rating leaves open the possibility that differences in perception and implicit biases may affect the actual rating given to an employee.¹⁴⁸ Additionally, much like with supervisors subjectively evaluating employees, there is a strong likelihood that individual customers may have markedly differing ideas of what constitutes a “five-star” experience.¹⁴⁹ This should encourage companies to develop more comprehensive and effective ratings systems. A system using specific questions, supplemented with a platform to submit a description of unique issues, would be more likely to be deemed a business necessity that justifies an employment practice with disparate racial or gender impact.¹⁵⁰ Furthermore, such a system would likely be more helpful to the company itself in that it would more accurately reflect areas of opportunity and customer issues.

The Supreme Court has upheld holistic evaluation systems with racial effects in affirmative action challenges under the Equal Protection Clause.¹⁵¹ While this is a

¹⁴⁷ See Sverre Rorvil Nilsen, *I Drove for Uber for a Week, and Here's What It Was Like*, BUS. INSIDER (Feb. 4, 2015), <http://www.businessinsider.com/i-drove-for-uber-for-a-week-heres-what-its-really-like-2015-2>.

¹⁴⁸ See Wang, *supra* note 41, at 271–72.

¹⁴⁹ *Id.*

¹⁵⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“... the touchstone is business necessity . . .”).

¹⁵¹ See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

distinct constitutional inquiry, it indicates that our court system is more likely to uphold practices with racial (or gender) effects when they are part of a comprehensive evaluation process.¹⁵² The Court stated that such systems must ensure that each applicant is “evaluated as an individual and not in a way that makes . . . race or ethnicity the defining feature.”¹⁵³ This type of rationale might be logically extended to the business necessity analysis in a potential disparate impact claim; if companies can prove that a comprehensive rating system actually compares and considers the employee’s capability to perform job functions, then their system will likely meet the business necessity test. Although the standard of review for Equal Protection challenges is altogether separate and distinct from a Title VII analysis, the Court’s recognition of the preferability of a comprehensive system indicates that such a system is more apropos in these circumstances.

Another simple and essential component of any effective rating system is a mechanism by which employees can dispute ratings. The recent Uber sexism case in the UK indicated that drivers currently have no ability to dispute a rating.¹⁵⁴ If a driver receives a rating in a comprehensive evaluation system that they feel is unjustified, and the metric is not one that can be proven quantifiably true or false, then the driver should have a method of disputing the rating. This would avoid complaints like the one recently filed in the UK, where a female driver turned down sexual advances from a customer and received a poor rating in retaliation.¹⁵⁵ Such conduct cannot be tolerated by companies that employ such a large sector of the workforce, and a dispute mechanism would be a logical starting point for avoiding similar suits in the future.¹⁵⁶ Otherwise, the balance of power between the employer and the worker is inappropriately skewed, leaving an employee with no recourse in the case of a false or inappropriate rating.

Alternatively, the company could provide each driver with a limited number of opportunities to simply remove an unjustified rating. This could be a percentage of total ratings given, allowing for consideration of the tenure of the employee. A system like this would allow a worker some recourse to eliminate potentially false or discriminatory ratings without significantly compromising the company’s ability to ensure effective and efficient service. This type of system would need to be

¹⁵² See, e.g., *Fisher*, 136 S. Ct. 2198; *Grutter*, 539 U.S. 306.

¹⁵³ *Grutter*, 539 U.S. at 306.

¹⁵⁴ *Cox*, *supra* note 98.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

evaluated to ensure that companies are effectively protected, and able to receive and utilize legitimate negative customer feedback.

VII. CONCLUSION

Systemic discrimination is a social evil that our Congress has worked to eliminate through various statutory protections including Title VII. With the rise of gig-based employment in the sharing economy, it will be essential for our courts to extend some type of statutory protections to workers currently classified as independent contractors. Once such employees are covered under employment discrimination statutes or a similar regime, to avoid disparate impact liability, companies like Uber should develop systems of employee review that are not solely reliant upon customer feedback. Due to the prevalence of implicit (and explicit) bias, such ratings systems might be successfully challenged under Title VII. Employers should develop holistic employee evaluation systems to ensure that biased customer ratings are not the sole metric of employee performance. This will further the essential goal of eliminating and prohibiting discrimination on the basis of sex.