COMMENTS

THE LIMITS OF THE LAW: TIPPING, EMPLOYMENT DISCRIMINATION, AND LEGAL THEORIES FOR PLAINTIFFS UNDER TITLE VII

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I. INTRODUCTION

Hidden in plain sight, the practice of tipping is a Trojan horse of workplace discrimination. Research increasingly shows that tipping encourages racial and sexual wage discrimination, sex stereotyping and sexual harassment. At the same time, tipping obfuscates accountability. Employers who take advantage of the practice to save money that would have been paid in wages also pass the buck to their hapless customers. Customers effectively enforce the behavior of employees by tying proffered wages – tips – to impermissible sex and race stereotyping and sexual harassment. The practice of tipping has become deeply engrained in American restaurant culture. This note argues that tipping is

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nevertheless irredeemably tied to serious workplace injustice. Further, this note argues that employers who maintain tipping policies may be liable under employment discrimination law.

Section II of the note discusses the history of tipping in the United States and summarizes the research on discrimination and sexual harassment in tipped restaurant work. From its inception, tipping has been synonymous with discrimination, and that discrimination has not been shed by the passage of time. Many of tipping's 19th and early 20th century opponents argued that the practice degraded workers who were paid in tips. Nevertheless, New Deal legislation codified the practice.

Studies have shown that tipping channels the prejudices of the tipper. Because prejudice is expressed in part by variation in the amount tipped, it is objectively measurable by researchers. Studies show that women and people of color in the restaurant industry are tipped, and therefore paid, based on different standards than men and white people are. Men in tipped restaurant server positions are often tipped in relation to the tipper's perception of the male server's job skill. Women in tipped restaurant server positions, on the other hand, are largely tipped on the basis of their physical appearance. Workers of color are tipped at significantly lower rates than are white workers.

Tipping further facilitates sex discrimination in the form of sexual harassment. Studies have shown that sexual harassment in the restaurant industry is widespread, but it is even more severe where restaurant workers are dependent on tips. The research is affirmed by the anecdotal accounts of restaurant workers. Many female restaurant workers report that they endure sexual harassment from customers rather than risk the tips upon which they rely.

Tipped restaurant workers are forced to make these calculations because it is very difficult to hold customers accountable for their tipping decisions. Sexual harassment is prohibited as a form of sex discrimination under Title VII of the Civil Rights Act of 1964. Because customers' tips are often counted as wages when calculating an employer's minimum wage obligation, tipping customers are a direct source of wages. Because the law does not recognize tipping customers as payers of wages similar to employers, customers who sexually harass tipped workers are not held accountable.

Section III discusses a potential challenge to tipping policies: a disparate impact claim that folds in elements of sexual harassment claims. In order to win a disparate impact claim, a plaintiff would have to demonstrate that a specific employment practice adversely and disparately affects a protected group. The plaintiff would then have to show that an alternative practice exists and that the alternative practice would have a less adverse impact than the current practice. The note concludes that a tipped worker could make such a case.

II. BACKGROUND

A. A History of Tipping

The practice of tipping originated in Europe and was imported to the United States at the end of the 19th century by American travelers.[2] As the practice spread in the United States, backlash ensued.[3] Americans of the period commonly believed tipping to be indicative of subservience.[4] On that basis, some found it anti-democratic. In his 1916 anti-tipping polemic, William R. Scott wrote, "[i]n the American democracy to be servile is incompatible with citizenship. Every tip given in the United States is a blow at our experiment in democracy."[5] Scott linked the practice of tipping to the institution of slavery, writing "[t]he relation of a man giving a tip and a man accepting it is as undemocratic as the relation of master and slave."[6] As Scott's reference to slavery indicates, tipping was a highly racialized practice in the early twentieth century.

The movement against tipping in the United States was in large part spearheaded by labor leaders of color, especially Pullman railroad company workers. The Pullman company exclusively hired black southern workers, paid them poorly, and made that fact known to its customers. Pullman cut costs by suggesting that customers tip its workers.[7] The Pullman Company's customers accepted the practice in part because of the racial connotations of tipping at the time.[8] Tipping workers of color was considered far more appropriate than tipping white workers.[9] In 1902, a Southern journalist observed that:

"Negroes take tips, of course; one expects that of them—it is a token of their inferiority. But to give money to a white man was embarrassing to me . . . no man who is a voter in this country by birthright is in the least justified in being servile."[10] The practice of tipping was seen as an affirmation of the extant system of white supremacy.

The Brotherhood of Sleeping Car Porters union, which was the first union of black workers in the United States, made a priority of eliminating tips, while recognizing that a victory against tipping would risk leaving them without a

2. KERRY SEGRAVE, TIPPING: AN AMERICAN SOCIAL HISTORY OF GRATUITIES, 6 (2009); Ofer H. Azar, *The History of Tipping—From Sixteenth-Century England to United States in the 1910s*, 33 J. SOCIO-ECON. 745, 754 (2004).

3. Segrave, *supra* note 1, at 6.

4. Ian Ayres et. al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1620 (2005).

5. *Id.* (quoting William R. Scott "[i]n the American democracy to be servile is incompatible with citizenship. Every tip given in the United States is a blow at our experiment in democracy.").

6. *Id.* at 1621.

7. *Id.* at 1622.

8. *Id.*

9. Saru Jayaraman, *Why Tipping is Wrong*, N.Y. TIMES, Oct. 15, 2015, at A33.

10. Ayres, *supra* note 3, at 1621.

potential source of income.[11] The workers prioritized their dignity over wages. In a petition to the Interstate Commerce Commission in November of 1927, the union labeled tipping as a "hold-over from slavery."[12] The *New York Times* described the petition in this way: "[i]t is pointed out that the operation of sleeping cars began in this country in 1867. Only negroes, many of them ex-slaves, were employed as porters. This, says the petition, caused the work to be looked on as 'menial and servile' and led to the giving and taking of gratuities."[13] The *Times* noted that "[s]imilar campaigns against tipping are being agitated among other workers, such as waiters, barbers, and taxicab drivers, who customarily accept tips offered by patrons."[14] The fact that underpaid workers were willing to fight the practice of tipping— a practice which put money in their pockets— in the post-Red Scare America of embattled labor organizations and white supremacist terrorism demonstrates its symbolic power.

As years passed, tipping increasingly became an accepted and unchallenged business practice in the United States. Employers experimented with a variety of ways of integrating tipping into their business models.[15] As tipping became more accepted in the workplace and employment law expanded, the groundwork was laid for tipping's codification.

B. The Codification of Tipping

The Fair Labor Standards Act (FLSA) was enacted in 1938 as part of President Roosevelt's New Deal. The Act was the first federal mandate that required employers to pay a minimum wage to their employees. As first enacted, the FSLA did not address the practice of tipping.[16] Because the FSLA failed to address it, employers continued the practice, incorporating it into the mandated wage requirements.[17] Many employers required their workers to give up all or a portion of their tips in order to satisfy the minimum wage requirements.

Congress later embraced this integrated practice of tipping when it amended the FLSA in 1966, establishing a "tip credit" system.[18] Under that system, employers were permitted to pay employees 50% of the minimum wage and

11. *Id.* at 1622.

12. *Porters Assail Tipping,* N.Y. TIMES, Nov. 27, 1927.

13. *Id.*

14. *Id.*

15. Some required employees to pay employers for their positions; those employees hoped to earn enough money to live on through tips. Segrave, *supra* note 1, at 49-50.

16. *See* Williams v. Jacksonville Terminal Co., 315 U.S. 386, 404 (1942) (holding that the Fair Labor Standards Act is silent on the subject of tips).

17. *Id.*

18. *See* Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 101(a), 52 Stat. 1061 (1966) (codified as amended at 29 U.S.C. § 203(m)); *See also* Rajesh D. Nayak & Paul K. Sonn, *Restoring the Minimum Wage for America's Tipped Workers,* Nat'l Emp. L. Project, at 3 (2009).

allocate tips to make up the difference.[19] "Tip pooling"[20] was still permitted. Congress further changed the ability of employers to use a "tip credit" when it set the required payment by employers at a specific dollar amount, rather than a percentage of the minimum wage. In 1996 Congress amended FLSA to require that employers pay tipped employees a rate of $2.13 per hour, where the employee's tips are sufficient to make up the difference between $2.13 and the normal federal minimum wage. In contrast to the pre-1996 FLSA Amendment era, tipped employees who receive the FLSA-mandated tipped minimum wage now receive a greater proportion of their wages from customers in the form of tips than they do from employers.[21]

C. Restaurant Work and Restaurant Workers

The restaurant industry is the largest sources of tipped work in the United States today.[22] Restaurant workers comprise 62% of all tipped workers.[23] The restaurant industry employs nearly 11 million employees across the United States.[24] The most prominent opponent of parity between tipped and non-tipped minimum wage, and of raising the national minimum wage, is the lobbying organization of restaurant owners.[25]

Restaurant owners, of course, have an interest in keeping wages low by relying on customers to make up the majority of their minimum wage obligations. Despite the size of the restaurant industry, the pay of tipped restaurant employees remains low.[26] Tipped restaurant workers live in poverty at a rate 2.6 times that of the general workforce.[27] The percentages of waiters and waitresses who are Black or Hispanic and live below the poverty line are significantly higher than the percentage of white waiters and waitresses who live

19. This is a reflection of the 1974 amendment to clarify the practice. *Id.* at 4.

20. The practice of combining tips between restaurant employees and then dividing them by agreement. *See* 29 C.F.R. § 531.54.

21. This is because minimum wage obligations have increased, while the tipped minimum wage has remained static at $2.13.

22. Nayak & Sonn, *supra* note 17, at 3.

23. *The State of Tipped Workers in America*, Rest. Opportunity Ctr. United (May 6, 2015), http://rocunited.org/wp2015b/wp-content/uploads/2015/05/OneFairWage_SOTW_national.pdf.

24. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, Rest. Workers Opportunity Ctr. United & Forward Together, at 1, (Oct. 7, 2014), http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.

25. *Tipped Over the Edge*, Rest. Opportunity Ctr. United at 12, (Feb. 13, 2012), http://rocunited.org/wp-content/uploads/2012/02/ROC_GenderInequity_F1-1.pdf.

26. The restaurant industry is "currently the second-largest and one of the fastest-growing employer sectors in the United States" and is the lowest-paying employer in the United States. SARU JAYARAMAN, FORKED: A NEW STANDARD FOR AMERICAN DINING 7 (2016).

27. The State of Tipped Workers in America, *supra* note 22.

below the poverty line.[28] Server positions in restaurants are often tipped positions. On average, 58% of a restaurant server's pay comes from tips.[29]

Women comprise 52% of all restaurant employees, and 66% of all tipped restaurant workers.[30] Though the majority[31] of restaurant servers across all types of restaurants are women, the most prestigious restaurants often hire a disproportionately high number of men.[32] Casual dining restaurants and other informal establishments hire more women than men.[33]

Women are disproportionately impacted by the economic precarity of restaurant work. "Women restaurant workers experience poverty at nearly one and one third the rate of men restaurant workers. Women's greater economic insecurity in the industry is largely attributable to their greater likelihood of being employed as tipped workers."[34] Another factor in the precarity of women restaurant workers is that server positions are perceived to require little training. Restaurateurs commonly believe that "[t]here will always be another waitress to hire because there will always be women who need immediate income."[35] Women are generally tipped based on qualifications that men are not subject to,[36] and they are often excluded from the best-tipped positions in the industry.[37]

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28. The rate for white waiters and waitresses is 13.8%; the rate for Black waiters and waitresses is 22.3%; the rate for Hispanic waiters and waitresses is 18%. Those numbers are current as of the years 2003-2007. Nayak & Sonn, *supra* note 17, at 12.

29. *See* PayScale, *How Your Tips Impact Incomes: PayScale's 2012-2013 Tipping Study*, http://www.payscale.com/tipping-chart-2012 (last visited Mar. 16, 2017).

30. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23.

31. 71.8% of waiters and waitresses are women, according to *Women in the Labor Force: A Databook*, Department of Labor, http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2015.pdf (last visited Jan. 19, 2016).

32. *See* E.E.O.C. v. Joe's Stone Crabs, Inc., 296 F.3d 1265 (11th Cir. 2002) (finding evidence of discriminatory hiring in an upscale Miami Beach restaurant); David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q. J. ECON. 915, 925-927 (1996) (concluding, on the basis of a sex discrimination study comparing high-priced restaurants' rates of hiring women to low-priced restaurants' rates, that women were disproportionately not hired at high-priced restaurants).

33. Lu-in Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL'Y & L. 101, 137 and 164 (2014); *See* Elaine J. Hall, *Waitering/Waitressing: Engendering the Work of Table Servers*, 7 GENDER & SOC'Y 329, 330 (1993) ("A formal service style requires servers to appear dignified and reserved and is gendered as masculine, where as home-style service promotes a casual, familial form of interaction and is gendered as feminine.").

34. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23.

35. Lisa C. Huebner, *It is Part of the Job: Waitresses and Nurses Define Sexual Harassment*, 24 SOC. VIEWPOINTS 75, 81 (2008).

36. Michael Lynn & Tony Simons, *Predictors of Male and Female Servers' Average Tip Earnings*, 30 J. OF APPLIED SOC. PSYCHOL. 1, 9 (2000), http://www.tippingresearch.com/uploads/TipAveJASP.pdf.

37. *See Joe's Stone Crab Liable for Intentional Discrimination Court Rules in Sex Bias Suit Brought by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, (March 28, 2001), https://www.eeoc.gov/eeoc/newsroom/release/3-28-01.cfm; David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q. J. ECON. 915, 936-937 (1996) (concluding, on the basis of a sex discrimination study comparing high-priced restaurants'

D. Discrimination in Tipping

Tipping behavior is a reliable measure of discrimination. A customer's decision of how much to tip is normatively ambiguous: there is no consensus on the proper amount to tip.[38] Normatively ambiguous situations have been shown to best facilitate discriminatory decision-making.[39] Because tips are objectively measurable, it is much easier to conclusively demonstrate discrimination in tipping than in many other circumstances.[40] It is entirely possible to learn the extent that take-home pay (employer by employer) is impacted by discrimination.[41]

E. Gender Stereotypes and Expectations of Male and Female Tipped Restaurant Servers

Customers tend to best tip servers whose performance most closely aligns with gender stereotypes. Studies have found that physical "attractiveness" is a significant predictor of the tips received by women servers.[42] Tipped female workers may also face almost insurmountable standards from management.[43] It is common for women servers to experience pressure in their workplaces to "perform waitress": to assume a servile and exaggeratedly feminized persona.[44] Studies have shown that physical attractiveness is a stronger predictor of tips received by women servers than service ability.[45]

In contrast, studies have shown that the best predictor of tips received by male servers is job proficiency.[46] In a study addressing the differences between tips received by men and women, the authors found that "self-rated service was a much better predictor of waiters' average tips than of waitresses' average tips," and overall, "[among] the highest tipped employees were beautiful females [and]

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rates of hiring women to low-priced restaurants' rates, that women were disproportionately not hired at high-priced restaurants).

38. Wang, *supra* note 32, at 127-128.

39. *Id.*

40. *Id.* at 126-127.

41. *Id.*

42. Michael Lynn & Tony Simons, *supra* note 35, at 9 (measuring physical attractiveness subjectively).

43. *See* Lorraine Bayard de Volo, *Service and Surveillance: Infrapolitics at Work Among Casino Cocktail Waitresses*, 10 SOC. POL. 346, 367 (2003) (describing a casino mandate that cocktail waitresses maintain a weight within six pounds of their weight when they were hired).

44. Chauntelle Anne Tibbals, *Doing Gender as Resistance: Waitresses and Servers in Contemporary Table Service*, 36 J. OF CONTEMP. ETHNOGRAPHY 731, 734 (2007).

45. Michael Lynn & Tony Simons, *supra* note 35, at 9; *see also* Michael Lynn, *Determinant and Consequences of Female Attractiveness and Sexiness: Realistic Tests with Restaurant Waitresses* (2009), http://scholarship.sha.cornell.edu/cgi/viewcontent.cgi?article=1028&context=articles (finding that "waitresses . . . with large breasts, blond hair, and/or slender bodies received larger average tips than their counterparts without these characteristics.").

46. Michael Lynn & Tony Simons, *supra* note 35.

highly competent males."[47] Male servers also report "receiving a significantly higher percent tip . . . than female servers."[48] Male restaurant servers are advantaged by having their wages tied to skill, while women in the same positions are disadvantaged by having their wages tied to gender performance.

Perhaps because male servers do not receive tips based primarily on stereotyped ideas of sexual attractiveness, they are implicitly excused from much of the appearance work that women are commonly asked to do. For example, restaurant managers commonly ask women in tipped positions to wear makeup or revealing clothing.[49] Women in tipped positions may also wear makeup or revealing clothing in order to maximize their tips, regardless of whether they are asked to do so by management.[50] Studies have shown that the use of makeup by women in the context of employment in general "is strongly linked to assumptions of health, heterosexuality, and credibility in the workplace.[51] In turn, these qualities are associated with professional success."[52] Some men in tipped positions dress and act in ways calculated to maximize tips by making educated guesses about the social status and demeanors of customers and comporting themselves to match those customers' expectations.[53] However, survey evidence suggests that it is far more common for women to be pressured by managers to alter their presentation to maximize tips.[54]

While the tips male servers receive are tied somewhat to quality of service, women take home different amounts of pay due to a number of factors related to sex and not at all within their control.

F. Race Discrimination

Race is also a significant factor in the amount of money earned by tipped workers. White tipped restaurant workers are paid consistently more in tips than

47. *Id.* at 9.

48. Wang, *supra* note 32, at 136; *see also* Nayak & Sonn, *supra* note 17, at 10 ("waitresses average $0.70 per hour less than waiters").

49. *See Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1116 (9th Cir. 2006) (dissenting opinion) ("The inescapable message is that women's undoctored faces compare unfavorably to men's, not because of a physical difference between men's and women's faces, but because of a cultural assumption-and gender-based stereotype-that women's faces are incomplete, unattractive, or unprofessional without full makeup); Tipped Over the Edge, *supra* note 24, at 25.

50. *See* Bayard de Volo, *supra* note 42 at 357.

51. Kirsten Dellinger & Christine L. Williams, *Makeup at Work: Negotiating Appearance Rules in the Workforce*, 11 GENDER SOC'Y 1 (Apr.-May 1997), http://www.rmu.edu/SentryHTML/pdf/lib_charlesworthComm3160_Dellinger.pdf.

52. *Id.* at 22.

53. Alex I. Thompson, *Wrangling Tips: Entrepreneurial Manipulation in Fast-Food Delivery,* 44(6) JOURNAL OF CONTEMPORARY ETHNOGRAPHY 737, 750-751 (2014) (studying the strategies employed by young white men working as food delivery drivers to best solicit tips from customers).

54. *The Glass Floor: Sexual Harassment in the Restaurant Industry, supra* note 23 at 21 ("Over twice as many women were told to flirt with customers (17% vs. 7%) or told to expose parts of their bodies (7% vs. 2%) as men. Women were told to alter their appearance, or "look sexy" at six times the rate experienced by men (20% vs. 3%).").

are restaurant workers of color.[55] Women tipped restaurant workers of color face the same sex stereotypes that white women face, as well as racially stereotyped expectations. The Restaurant Opportunity Center reports that African-American female servers "earn only 60 percent of what male servers are paid, which equals a loss of $400,000 over a lifetime."[56] Some researchers have advocated for abolishing the tipping system on this basis.[57]

Arguments to ban tipping on the basis of racial discrimination can be traced to the early twentieth century tipping controversies. However, pre-FLSA efforts to ban tipping were undertaken largely because of concerns about dignitary interests. African-American workers fought the practice in part because the practice was applied almost entirely to African-American workers, and because it was a custom associated with demeaning attitudes and slavery.[58] Since that time, the practice has been extended to apply to a broader spectrum of workers. Nevertheless, white, male tipped workers reap a disproportionate benefit from the practice,[59] and white men are subjected to different, fairer standards.[60]

G. Sexual Harassment and Tipping

Sexual harassment is endemic in the restaurant industry and it is exacerbated by tipping. Thirty-seven percent of all sexual harassment claims submitted to the Equal Employment Opportunity Commission come from the restaurant industry.[61] In a recent national survey of restaurant workers, 66% of respondents reported that they had been sexually harassed by managers and 78%

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55. Zachary Brewster & Michael Lynn, *Black–White Wage Gap Among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping* (2014), http://scholarship.sha.cornell.edu/articles/924. (Last accessed February 17, 2017); *See also* Wang, *supra* note 32, at 103.

56. Jayaraman, *supra* note 8.

57. *Id*. (tipping "extends an ugly, radicalized history."); *see Should Tipping Be Banned?*, FREAKONOMICS PODCAST (June3, 2013) http://freakonomics.com/podcast/should-tipping-be-banned-a-new-freakonomics-radio-podcast/ (quoting Michael Lynn). Michael Lynn, a leading scholar on tipping and the author of over fifty academic papers on the subject, has stated that he believes that tipping should be abolished. During a "Freakonomics" podcast, the hosts asked Lynn whether, as an expert on the practice of tipping, there was anything that Lynn would "rewrite [about] the custom". Lynn replied, "You know, I think I would outlaw it . . . Yeah, and it might be illegal as it is because of the race of server effect that we had previously discussed . . . You could make the argument that tipping is a condition of employment that has an adverse impact on a protected class." .

58. *See* discussion *supra* Section II.A.

59. Sylvia A. Allegretto & Kai Filion, Economic Policy Institute, *Waiting for Change: The $2.13 Federal Subminimum Wage* 6 (2011), http://www.epi.org/files/page/-/BriefingPaper297.pdf; *See also* Bayard de Volo, *supra* note 42 at 366 (2003) (reporting that Reno casinos disproportionately hired white women as cocktail waitresses and assigned women of color to non-tipped positions).

60. *See* discussion *supra* Section II.D.

61. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23 (one third of restaurant workers surveyed said that they did not report being sexually harassed by co-workers or managers because they were concerned that they would be assigned to less favorable shifts).

reported "high levels of harassing behavior" from customers.[62] Given the historical association between tipped work and servility, and that the workers who are dependent on gratuities are disproportionately women, the high level of sexual harassment in restaurant work is sadly predictable. Women and transgender workers are sexually harassed at higher rates than male restaurant workers are.[63] Half of all female restaurant workers reported "scary" or "unwanted" sexual behavior, as compared to 60% of respondents who identified as transgender and 47% of male workers.[64] Forty percent of transgender respondents reported that "being touched inappropriately was a common occurrence in their restaurant"; 30% of women and 22% of men reported this."[65]

Because sexual harassment has been normalized in restaurant work culture, and because some restaurateurs require restaurant workers to pursue alternative dispute resolution procedures rather file suit,[66] it is almost certain that sexual harassment in the industry is under-reported.[67] There are powerful motivators for women in restaurant server positions to underreport sexual harassment by tipping customers.[68] Workers may decide to "keep" customers who both harass and tip, enduring the harassment rather than losing tips.[69] Research shows that "women in states that paid the tipped-worker minimum (often $2.13 an hour) experienced *twice* the rate of sexual harassment from customers as they did in states that paid the same wage to tipped and non-tipped workers."[70]

With a large majority of women reporting that sexual harassment behavior is an inescapable aspect of restaurant work, and a large majority of women reporting threatening sexual harassment behaviors at work, the data clearly show that sexual harassment is an significant part of women restaurant servers' work lives. An Olive Garden server who used the synonym April to speak with a writer reported that she "learned to ignore sexual harassment," noting that "better looking servers got more tips."[71] "That's what it's all about," she said. "[W]hen people go out . . . [t]hey want someone who's going to make them feel good about themselves, flirt a little. It's not a gentleman's club, but people still think in the service industry, that we're supposed to meet those personal needs. If I don't wear makeup to work, I don't make money."[72]

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62. *Id*. at 2.
63. *Id.*
64. *Id.*
65. *Id.*
66. JAYARAMAN, *supra* note 25, at 47.
67. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23, at 1.
68. *Id.* at 27-28; There are also powerful pressures to not report harassment by coworkers. Reporting harassment internally can be "perilous, often stifled by store management through threats of termination if the claims were not substantiated." *See* JAYARAMAN, *supra* note 25, at 50.
69. Bayard de Volo, *supra* note 42 at 359.
70. JAYARAMAN, *supra* note 25 at 38.
71. *Id*. at 50-51.
72. *Id*. at 51.

"Depending on customers' tips for wages discourages workers who might otherwise stand up for their rights and report unwanted sexual behaviors."[73] Tipped workers are more likely to be pressured by their managers to have sexualized interactions with customers than are non-tipped workers. This pressure is gendered, and is unequally applied to men and women. Women workers are more likely than men workers to be told to wear revealing clothing, for example.[74]

Restaurant workers subject to the tipped minimum wage experience more sexual harassment than workers who are not dependent on tips. Women who are paid the federal minimum tipped wage are "twice as likely to experience sexual harassment and three times as likely to be told to appear 'sexier.'"[75] They are three times more likely than a server paid on a different basis to be told by a manager to alter their appearance and to wear more revealing clothing.[76]

The *Guardian* profiled a tipped Houston restaurant worker named Tiffany Kirk in 2014. "Tips are the reason that Kirk and many other women like her put up with sexual harassment in their workplaces. 'There is a running joke in the industry that if you are not being sexually harassed, then you are not doing it right,' says Kirk."[77] Kirk says that her employer, a Houston piano bar, asks its servers to be "date ready."[78] There is a clear connection, understood by customers, restaurant servers, and restaurant mangers between stereotypical gender performance, sexual harassment and wages.

Studies of sexual harassment in restaurant work have been conducted for decades, in part because sexual harassment is known to be associated with restaurant work. In a sociological study on sexual harassment of waitresses and nurses undertaken by Lisa C. Huebner, "Waitresses said that the sexualized and service-oriented nature of their job fueled sexual harassment. Nine out of ten waitresses said that there was a high prevalence of sexual harassment of waitresses."[79] Huebner also connects sexual harassment with gender stereotyping and workplace expectations. "Institutional practices and policies also encourage ongoing displays of heterosexuality and sexualization of staff, such as physically revealing uniforms or efforts to encourage staff to flirt with customers."[80]

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73. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23, at 1.

74. *Id*. at 38.

75. Jana Kasperkevic, *Restaurant Industry Rife with Sexual Harassment but Bosses 'Just Laugh it Off'*, THE GUARDIAN (Oct. 7, 2014), http://www.theguardian.com/money/2014/oct/07/sexual-harassment-rife-restaurant-industry-women.

76. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23, at 2-3.

77. Kasperkevic, *supra* note 74.

78. *Id.*

79. Lisa C. Huebner, *It is Part of the Job: Waitresses and Nurses Define Sexual Harassment*, SOC. VIEWPOINTS 75, 80 (Fall 2008).

80. *Id*. at 77.

H. Emotional Labor and Tipping

Closely related to the sexual harassment that female tipped restaurant workers are commonly expected to endure is the "emotional labor" that they are expected to perform for customers. "[A] way to elicit higher tips is to build rapport with customers by engaging in socially "immediate" behaviors, such as briefly touching the customer on the shoulder or hand, standing close to the customer, or squatting next to the table so that the server's eyes are in line with the customer's."[81] Waitresses interviewed as part of studies on sexual harassment and the restaurant industry commonly report that managers ask them to make sexually charged emotional connections with customers.[82]

Friendliness and the ability to communicate effectively and kindly are important to many types of employment. However, tipped positions are unusual in that communicating a false sense of a relationship, often sexually tinged, is an important factor in the earnings of tipped restaurant workers. The emotional component of tipped work can be exhausting. "No matter how friendly or caring the interaction between customer and server, it still resides within a relationship of unequal status and power, wherein the customer is freer and the server more constrained in their 'rights to feeling and display.'"[83] Indeed, emotional labor can be more draining than the physical demands of a restaurant job.[84] Remarking on a series of interviews with restaurant servers, many of whom chose to 'invest' in their relationships with customers, sociologist Karla Erickson noted that, "when discussing the difficulties of waiting tables, they emphasized almost exclusively emotion management rather than tired feet or dirty aprons."[85]

I. Worker-Employer-Customer Triangle

Tipping, especially when tips are incorporated into minimum wage obligations, makes customers an integral part of a work relationship that would normally include only the employer and the employee.[86] "Customers take part in a variety of employing entity roles, including setting the workers' levels of earnings through the provision of tips or other types of gratuity, shaping employers' decisions to hire and fire workers and determining the general work environment."[87]

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81. Wang, *supra* note 32, at 123. There are a number of articles cited that support the claim regarding emotional labor.

82. *See* Huebner, *supra* note 78, at 80 ("A country club manager asked one waitress 'to take care of' a disgruntled member of a country club at which she worked. From the tone of his voice, she understood that she was supposed to make the customer feel good and also perhaps flirt with him. . .").

83. Wang, *supra* note 32, at 125-126.

84. The physical aspects of the job are also very demanding. *See* Bayard de Volo, *supra* note 42 at 356.

85. Wang, *supra* note 32, at 125-126.

86. Einat Albin, *A Worker-Employer-Customer Triangle: The Case of Tips*, 40 INDUS. LAW J. 181 (2011).

87. *Id.* at 188-189.

Because employers' ability to supervise tipped workers may be more limited than employers' ability to supervise workers in other contexts, managers sometimes use the amount that workers are tipped as a measure of workers' skill and effectiveness.[88] Customers' ability to tip facilitates their exercise of power over tipped employees directly, though their ability to pay or withhold wages, and indirectly, because of management's reliance on the total of tips collected as a signifier of employee performance. In some workplaces, customers are able to exercise more immediate and effective control over the behavior of restaurant servers than the servers' own employer.[89]

III. LEGAL ANALYSIS

Title VII of the Civil Rights Act of 1964 states:

"It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[90]

In the years since 1964, legal theories addressing employment discrimination have grown more complex, data on discriminatory tipping has become more accessible, and tipped restaurant work positions are more common than ever. There is now a real possibility for tipped restaurant workers to combat the discrimination produced by tipping through the resources provided by Title VII.

A. Hostile Work Environment

Sexual harassment is a form of sex discrimination under the law.[91] For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.[92] It must also be "unwelcome" and must be "because of" a category protected by Title VII. A plaintiff "need not show that a campaign of harassment interfered with her work performance in order to establish a violation of Title VII."[93] The intent of the harasser is irrelevant; harassment is actionable if it renders the conditions of employment for men and women different.[94] The "unwelcomeness" requirement can arise in cases of harassment because of sex where the plaintiff was perceived as participating in the harassing behavior in some way. Whether the harassing conduct is severe enough to be legally

88. Thompson, *supra* note 52, at 739.

89. Bayard de Volo, *supra* note 42 at 349.

90. 42 U.S.C. § 2000e-2 (2012).

91. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

92. *Id.* at 67 (quoting Henson v. Dundee, 682 F. 2d 897, 904 (1982)).

93. Dey v. Colt Constr. & Dev. Co., 28 F.3d 1446, 1455 (7th Cir. 1994).

94. *See* Billings v. Town of Grafton, 515 F.3d 39, 43 (1st Cir. 2008) (reversing summary judgment in favor of an employer who was accused of staring at an employee's chest, though there was evidence that the manager in question stared as a result of a medical condition).

cognizable under Title VII "is not, and by its nature cannot be, a mathematically precise test."[95] The creation of a hostile work environment due to harassment on the basis of race or national origin is likewise employment discrimination.

Courts will take into account all of the circumstances when determining whether conduct is sufficiently severe or pervasive to be cognizable.[96] Courts may consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[97] A single incident, depending on its nature, may be enough to create liability.[98]

With 60% of female restaurant workers reporting that sexual harassment is "an uncomfortable aspect of work life,"[99] it is clear that harassment is pervasive. But does it "alter the conditions of employment"? How does the law apply to a workplace, or an industry, where harassment is the rule rather than the exception?[100]

There is a subjective and an objective element to showing a hostile work environment.[101] The employee-plaintiff must subjectively experience the environment as abusive and the fact-finder must find that a "reasonable person" would experience the environment as objectively abusive. In this context, a "reasonable person" would be a reasonable person in the position of the plaintiff. Feminist and critical race theory scholars have objected to the "reasonable person" formula because it may not take into account differing experiences based on gender and race. Courts have absorbed this critique to varying degrees. For example, the Ninth Circuit noted that "[a] complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women."[102]

B. Employer Liability for Third-Party Harassment

The prototypical sexual harassment case is one in which a supervisor harasses an employee. In that case the employer is liable for the supervisor's behavior where the supervisor's actions are empowered by their status as an agent of the employer.[103] However, employers may also be held liable for sexual harassment of employees by third parties in the workplace, "where the employer (or its agents or supervisory employees) knows or should have known of the

95. Harris v. Forklift Sys., 510 U.S. 17, 22 (1993).

96. *Id.* at 21-23.

97. *Id.*

98. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998).

99. *The Glass Floor: Sexual Harassment in the Restaurant Industry*, *supra* note 23.

100. *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.").

101. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

102. *Ellison*, 924 F.2d at 878.

103. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

conduct and fails to take immediate and appropriate corrective action."[104] The Equal Employment Opportunity Commission, in reviewing such cases of third-party sexual harassment of employees, "will consider 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."[105]

In the early to mid 1990s, a series of lawsuits were filed against the Hooters restaurant chain by servers. The Hooters servers alleged that the revealing uniforms that they were required to wear, and the sexualized atmosphere of the restaurant chain, led to customer harassment and created a hostile work environment.[106] Though a number of lawsuits were filed by servers across the country, all of the suits settled for undisclosed amounts.[107]

Another prominent case involving a claim of employer liability for third-party sexual harassment is *EEOC v. Sage Realty Corp.*, which was tried before sexual harassment docrine had been clearly defined.[108] In *Sage Realty*, a receptionist was made, as a condition of employment, to wear a revealing uniform that was provided to her by the employer.[109] The employee was sexually harassed by third parties to the employment relationship. The District Court of the Southern District of New York held that "[i]n requiring [the plaintiff] to wear the revealing Bicentennial uniform in the lobby . . . defendants made her acquiescence to sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant."[110]

Both of these cases causally link employer liability to the employer's imposition of a revealing, or sexually provocative, uniform. The *Sage Realty* holding in particular rests on the assumption that sexually revealing clothing predictably leads to sexual harassment. That predictable circumstance is the basis of employer liability in *Sage Realty*: the employer mandated a dress code that the court found would predictably "cause" sexual harassment. As commentators have noted, that is an outdated and sexist way of understanding sexual harassment.[111] Nevertheless, these cases demonstrate that employers can be held liable for policies that predictably result in sexual harassment by third parties.

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104. 29 C.F.R. § 1604.11(e)(2016).

105. *Id.*

106. Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163, 164-165 (1997).

107. *Id.*

108. *See Meritor*, *supra* note 102 (outlining the elements of a sexual harassment claim); Equal Emp't Opportunity Comm'n v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981), *amended by* Equal Emp't Opportunity Comm'n v. Sage Realty Corp., 521 F. Supp. 263 (S.D.N.Y. 1981).

109. *Equal Employment Opportunity Comm'n*, 507 F. Supp. 599.

110. *Id.* at 609-610.

111. *See* Rhee, *supra* note 105, at 179 ("Regardless of whether her sexuality is exposed by employer mandate or by the woman's own agency, the logic of Sage Realty suggests that public expression of female sexuality instigates sexual harassment.").

C. Proving a Prima Facie Case of Disparate Impact

Disparate impact claims, in which the plaintiff makes out a claim of discrimination based not on discriminatory intent but on discriminatory effect, are available to plaintiffs with Title VII complaints.[112] The disparate impact theory of employment was codified as part of the 1991 Civil Rights Act.[113] The theory effectuates the intent of Title VII with regard to "facially neutral job requirements [that] necessarily [operate] to perpetuate the effects of intentional discrimination."[114]

To make a prima facie case, a plaintiff would have to (1) identify a particular[115] policy or practice and (2) show it has a disparate adverse impact against a protected class.[116] To make a prima facie case of disparate impact due to the use of tipping as an element of wages, a plaintiff would first have to identify tipping as the discriminatory practice and show that it has a disparate impact based on sex and race. It is theoretically possible to rely upon a showing of increased rates of sexual harassment to demonstrate disparate impact. While very unusual, "there is no reason to prohibit discriminatory-impact claims predicated on a hostile work environment."[117]

Tipping scholars and restaurant worker advocacy organizations have compiled sufficient data to make a convincing showing of discrimination as a general matter. The effects of discrimination on wages are clearly measurable in a way that many other instances of disparate treatment are not.[118] If courts permitted a plaintiff to present evidence about the adverse effects that having a tipping policy has on all tipped restaurant employees based on sex, the sample size would be very large.[119] If a court restricted the evidence to disparities in compensation for the tipped employees in a single workplace, plaintiffs could have a more difficult case, depending on the evidence available for tipping patterns at the specific employer. While some courts have raised doubts about whether it is possible to convincingly demonstrate disparities in a small workplace,[120] others have held that plaintiffs have met their burden even when

112. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("[Title VII] proscribes not only over discrimination but also practices that are fair in form, but discriminatory inoperation.").

113. 42 U.S.C.A. § 2000e-2 703(k) (West 2012).

114. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988); *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that a system of facially neutral job test requirements that operated to bar African-Americans from holding certain kinds of positions, continuous to the existing distribution of jobs at the company, was a discriminatory employment practice).

115. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

116. *See, e.g., Griggs*, 401 U.S. 424 (1971).

117. Maldonado v. City of Altus, 433 F.3d 1294, 1304 (10th Cir. 2006).

118. Wang, *supra* note 32, at 129.

119. *The Glass Floor: Sexual Harassment in the Restaurant Industry, supra* note 23.

120. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 996-97 (1988) (noting that weak statistical evidence is often the result of "small or incomplete data sets").

making use of data from small workplaces.[121] Plaintiffs are not required to meet a "practical significance" requirement in making a prima facie case, meaning that plaintiffs do not have to meet a particular rate of discrimination as a threshold to wielding Title VII authority.[122]

Plaintiffs have encountered difficulty with making societal-level statistical arguments to prove disparate impact. For example, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held that the evidence produced by plaintiffs, which included statistical and anecdotal evidence, and evidence from at least one social scientist expert, was insufficient to establish causation.[123] Wal-Mart delegated to local managers the power to make hiring, pay and promotion decisions.[124] Local managers made those decisions by applying subjective criteria.[125] Plaintiffs argued that the local managers exercised their power to subjectively evaluate applicants disproportionately in favor of male applicants.[126] Plaintiffs also alleged that Wal-Mart was aware that the policy of subjective management decisions had this effect.[127] Writing for the majority, Justice Scalia reasoned that the actual existence of disparities on a national or regional level, even disparities that could be attributed to discrimination, does not necessarily mean that *specific* stores practiced discrimination when arriving at *specific* employment decisions.[128] The majority's concerns in *Dukes* were raised most sharply[129] in the context of certifying a class action, however, and may not be applicable to a non-class action case.

Nevertheless, the *Dukes* Court's reasoning could potentially be brought to bear against a plaintiff alleging a Title VII violation of discrimination on the basis of sex. Although studies show that, in general, customers tip female restaurant servers on the basis of appearance and male restaurant servers on the basis of job performance, it would be practically impossible for the hypothetical plaintiff to point to any *specific* customer who tipped her on this basis. This difficulty is analogous to the *Dukes* Court's complaint that the plaintiff

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121. Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist., 180 F.3d 468, 475 (2d Cir. 1999) (holding that a small statistical sample combined with expert testimony on the practice of comparable employers was sufficient to support the district court's finding of disparate impact).

122. Jones v. City of Boston, 752 F.3d 38, 53 (1st Cir. 2014) (finding that "any theoretical benefits of inquiring as to practical significance outweighed by the difficulty of doing so in practice in any principled and predictable manner. We therefore conclude that a plaintiff's failure to demonstrate practical significance cannot preclude that plaintiff from relying on competent evidence of statistical significance to establish a prima facie case of disparate impact.").

123. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356-357 (2011).

124. *Id.* at 343.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 355. ("A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.").

129. *Id.* at 342.

employees in that case were unable to demonstrate that the policy operated discriminatorily in specific instances.

D. Tipping Policies and "Business Necessity"

After the plaintiffs establish a prima facie case, the burden would shift to the defendant to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[130]

Courts have described various tests for the "business necessity" element. A common way of evaluating whether a practice comprises a genuine business necessity is to establish that the practice is essential to the safety and efficiency of the business.[131] Many cases in which courts have construed the term "business necessity" involve tests that applicants are required to take in order to be promoted or hired.[132] In this context, courts hold that employers have established business necessity where the test or criteria "effectively measure the minimum qualifications for successful performance of the job in question."[133] Employers may not utilize tests or qualifications that would effectively qualify only employees who are significantly more qualified than is required in order to do the job, or employees who are very impressive in ways that are unrelated to job performance.[134] As the Third Circuit noted in 2007, "Congress continues to call the test 'business necessity,' not 'business convenience' or some weaker term."[135]

An employer seeking to defend itself by demonstrating that its tipping policy constitutes a genuine business necessity might argue that tipping policies are standard practice in the restaurant industry. Employers who pay their workers the tipped minimum wage and make up their minimum wage obligations through the payment of tips might be able to demonstrate that they would have to substantially alter their business in order to continue without a tipping policy. For example, an employer could argue that, if they were to pay their staff the non-tipped minimum wage, they would be unable to remain profitable, or that they would be unable to compete with similar businesses not asked to pay full minimum wage. The defendant's burden with regard to the business necessity of a tipping policy would be one of both production and persuasion.[136]

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130. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2017).

131. *See, e.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974).

132. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); El v. Se. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007) (giving an overview of existing interpretation of "business necessity" up to that point).

133. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 242 (3d Cir. 2007) (internal quotations deleted).

134. *Id.*

135. *Id.*

136. 42 U.S.C. § 2000e-2(k)(1)(A), *superseding* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (establishing that employers bore only a production burden and not a persuasion burden with regard to business necessity evidence).

E. Less Discriminatory "Alternative Practices" to Tipping Policies

Plaintiffs may attempt to demonstrate that alternative practices that would have a less adverse impact either exist or are conceiveable. If the plaintiff meets this burden, they can prevail against an employer that has successfully raised a business necessity defense. The employer must have been aware that the practices exist and that they would have had a less adverse impact. Competitors using those practices can be a type of evidence on this point. However, given that tipping is not only widespread, but allows a restaurant employer to save a substantial amount of money in minimum wage obligations, this could be a difficult hurdle.

In order to prevail at this stage of litigation, the plaintiffs must demonstrate that the alternative method was available to the defendants at the time of the discriminatory employment action and that the employer rejected it.[137]

Next, the plaintiffs would have to demonstrate that the method met some standard of adequacy. The nature of that standard has not been explicitly or thoroughly established.[138] In *Wards Cove*, the Supreme Court stated that "any alternative practices which respondents offer up in this respect must be equally effective as petitioners' chosen [practice] in achieving petitioners' legitimate employment goals."[139] Other courts have held that the proposed alternative must be "equally valid,"[140] that the practice would be "comparably as effective at serving the employer's identified business needs,"[141] or that the practice must "serve the employer's legitimate interest."[142]

A plaintiff could push back against arguments based on standard industry practice by pointing to the fact that many restaurants continue to operate in states that have embraced minimum wage parity.[143] Note that, while minimum wage parity does seem to have an effect on the amount of sexual harassment experienced by tipped female restaurant servers, there is no evidence that minimum wage parity would affect the fact that men and women are tipped on different bases. A plaintiff would certainly also want to demonstrate that many restaurants that have done away with tipping altogether remain perfectly operational.[144]

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137. Adams v. City of Chicago, 469 F.3d 609, 616 (7th Cir. 2006) (holding that racial minority Chicago Police officers' failure to demonstrate that the Chicago Police Department was aware of an alternative test that would have had a less discriminatory effect and that the Chicago Police department rejected the implementation of that practice meant that the plaintiffs had not met their burden under 42 U.S.C. § 2000e–2(k)(1)(A)).

138. ZIMMER, SULLIVAN, WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 257 (8th ed. 2012).

139. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989).

140. Allen v. City of Chicago, 351 F.3d 306, 312 (7th Cir. 2003).

141. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1118 (11th Cir. 1993).

142. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

143. Those states are Alaska, California, Nevada, Oregon, Washington, Montana and Minnesota. United States Department of Labor Wage and Hour Division, *Minimum Wages for Tipped Employees* (Jan. 1 2017), http://www.dol.gov/whd/state/tipped.htm.

144. For instance, Danny Meyer, owner of a number of restaurants, ended the tipping policies at his restaurants in 2015. Maura Judkis, *Restaurant industry leader Danny Meyer*

It is difficult for plaintiffs to prevail in systematic disparate impact claims. Claims that name subjective practices, such as interview tests, have particularly low success rates.[145] Discriminatory practices that are subjective in nature have been approached by courts differently than have practices that are possible to objectively observe.[146] The basis upon which customers tip is a subjective one: customers tip on a variety of bases, and they may not even be aware of why they tip in a particular way at a particular time. On the other hand, the institution of a tipping policy by an employer is a clear and objective employment practice. The employer's practice is to accept customer tips and to apply tips received to its minimum wage obligations.

IV. CONCLUSION

Tipping has a noxious and largely forgotten history in America, and its widespread modern embrace facilitates dramatic wage discrimination and pervasive sexual harassment. Tipping's shadow reaches beyond the restaurant sector: "women who move on from this industry into other professions [report] that they never did anything about being sexually harassed on the job, because it was never as bad as it had been when they were young and working in restaurants."[147] Today, the widespread acceptance is increasingly challenged. Associations of restaurant workers are doing the hard work of connecting the individual experiences of restaurant employees into a robust body of knowledge. A legal battle seems inevitable.

Women who work in tipped restaurant server positions are subject to sex discrimination in the form of wage disparity and sexual harassment. The legal system has been available to them since the passage of Title VII, but impact litigation may have a better chance now than ever before to win real gains. There is sufficient research to show convincingly that women are tipped on a different basis than are men and that customers tip people of color worse than whites. National surveys and first-hand anecdotal evidence demonstrate the connection between status as a tipped worker and the probability of sexual harassment. More frequently now than in decades past, tipping is being done away with by private employers and coming under political scrutiny both in the United States and in Europe. The fast-accumulating informattion can and should be wielded by tipped restaurant employees to push back and eventually abolish the custom.

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ends tipping. Who will follow? WASH. POST (Oct. 14, 2015) https://www.washingtonpost.com/lifestyle/restaurant-industry-leader-danny-meyer-cuts-out-tipping-wholl-follow/2015/10/14/e7c0635a-729f-11e5-9cbb-790369643cf9_story.html.

145. Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 744 (2006).

146. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that an objective hiring and promotion policy violates Section VII); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (examining a subjective promotional policy.).

147. JAYARAMAN, *supra* note 25 at 33.