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Matthew B. Seipel

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THE LOYAL MATCHMAKER DILEMMA: WHEN STAFFING FIRMS SHOULD PAY FOR THE SINS OF THEIR CLIENT*

*Matthew B. Seipel***

This Article recognizes the "loyal matchmaker" dilemma in employment discrimination law. This dilemma exists when a staffing firm complies with or otherwise acquiesces to its client's unlawful discrimination against its temporary employee not because of that employee's race, sex, national origin, disability, etc. Rather, it does so because it sees itself as a loyal matchmaker to the client or because of another lawful reason. In these situations, when should the staffing firm be liable?

Employment discrimination law has failed to give a practical, consistent, and flexible liability standard in this context. Generally, courts hold the staffing firm liable only if it is a joint employer with the client and it had constructive knowledge of the discrimination and failed to take corrective action. Other potential liability standards include forms of strict liability or no liability whatsoever for its client's unlawful discrimination.

Drawing from Professor Jeremias Prassl's work on a functional conception of the employer, this Article proposes a liability standard to apply here—the functional liability standard. This standard holds the staffing firm strictly liable for its client's discrimination that directly implicates one of the staffing firm's employer functions. A staffing firm's employer functions may include paying wages, providing work, controlling the internal work processes, and beginning and ending the employment relationship. A staffing firm can escape liability if it shows that it reasonably accommodated the employee's harm. This standard provides the flexibility, ease, consistency, and fairness lacking in other potential liability standards. With this proposal, the Article expands upon existing scholarship on employer responsibility, membership causation, and theories of the employment relationship in U.S. employment discrimination law.

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INTRODUCTION

Anthony is a carpenter by trade. Seeking employment, Anthony contacts Workforce, a temporary staffing agency. He submits his application to Workforce, which contains his employment history, education, references, and other pertinent data. After a phone screening and a skills test, Workforce brings Anthony in for an interview. The interview was successful, and Workforce keeps Anthony's information on file so he can be matched up to work at one of Workforce's carpentry clients.[1]

Nails Corp., a high-end carpentry business that caters to wealthy customers, called Workforce seeking a temporary carpenter. Workforce immediately thinks of Anthony and calls to tell him the news. But after an initial meeting with Nails, Nails tells Workforce that it wants someone who is a good fit for the job—someone who is not too ethnic. Anthony is Hispanic.

Workforce, although appalled by its client's discrimination, sees itself as a loyal matchmaker for Nails Corp.[2] It is not in the business of judging its clients' unlawful practices. It complies with Nails not because of Anthony's race, but rather it feels it has a duty to comply with every client request. Anthony, suspecting that Nails may have taken his race into account when deciding not to hire him, files charges with the Equal Employment Opportunity Commission ("EEOC").

Generally, to succeed on a disparate treatment claim under Title VII of the Civil Rights Act of 1964,[3] Anthony must show that his employer treated him less favorably than other employees similarly situated because of his race.[4] To qualify as an employer, an entity must exercise considerable control over major aspects of a worker's terms, conditions, wages, and privileges of employment.[5]

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* The title is derived from a title of one of Professor O'Gorman's articles. *See* Daniel P. O'Gorman, *Paying for the Sins of Their Clients: The EEOC's Position That Staffing Firms can be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 PENN ST. L. REV. 425 (2007).

** Class of 2017, UCLA School of Law; B.A. 2010, UCLA. I would like to thank Professor Noah Zatz for his thoughtful oversight, guidance, and insight.

1. *See* Meghan M. Sweeney, *"We'd Love to Match Them, But. . .": How Temporary Employment Agencies Understand and Use Race and Ethnicity*, 11 CONN. PUB. INT. L.J. 51, 59-60 (2011) (describing the typical hiring and placement process in place at staffing firms).

2. *See id.* at 73 (detailing a temporary staffing agency that catered to a carpentry client's request for non-white workers because it saw itself as a loyal matchmaker).

3. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k) (2012).

4. *See* Int'l Bhd. Of Teamsters v. United States, 431 U.S. 324, 335-36 & n.15 (1977).

5. *See* Magnuson v. Peak Tech. Servs., Inc., 808 F. Supp. 500, 507 (E.D. Va. 1992); Donald

Here, Nails Corp. rejected Anthony on the basis of his race. But, as it happens, Nails fails to qualify as his employer under Title VII—Nails does not determine Anthony's compensation or any major aspects of his terms and conditions of employment. Nails left those determinations to Workforce. Thus, Anthony cannot pursue a discrimination claim against Nails. While Workforce qualifies as his employer, Workforce technically never took Anthony's race into account when it complied with Nails' request. As discussed, Workforce complied because it is a loyal matchmaker, and it complies with every client request—unlawful and lawful. No employer harmed Anthony because of his race.

Anthony's situation—what I label the "loyal matchmaker" dilemma—involves what Professor Noah Zatz refers to as external membership causation: "when an employee suffers workplace harm because of her disability (or sex, or race, and so on), even though her employer never took her disability into account."[6] And it involves two entities engaging in functions normally associated with employers—beginning and ending the employment relationship, paying wages, providing work, or supervising work processes.

This Article explores situations similar to Anthony's, and it proposes a solution to the following question: When should a court hold a staffing firm liable for its client's discriminatory intent?[7]

As discussed, this question involves external membership causation with two employer-like entities. The question has left courts and commentators struggling to find an appropriate liability standard to apply.[8] Some courts have combined negligence principles and joint liability, finding the staffing firm liable for its end-user client's discrimination only if: (1) the client and staffing firm are joint employers; (2) the staffing firm had constructive knowledge of the client's discriminatory intent; and (3) the staffing firm failed to take corrective action.[9] Such a standard would leave Anthony without relief

F. Kiesling, Jr., *Title VII and the Temporary Employment Relationship*, 32 VAL. U. L. REV. 1, 8 (1997).

6. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1361 (2009).

7. This Article does not specifically address situations where the client would be liable for its staffing firm's unlawful discriminatory acts. Though, one could simply apply my proposal's liability standard to the client as well. For a thoughtful comment on problems and issues involving client liability for its staffing firm's discrimination, see Lara Samuels, *"It's Not You, It's Me" — When are Client Companies Liable for Staffing Firms' Discriminatory Hiring Practices?*, 3 AM. U. BUS. L. REV. 339, 366-69 (2014).

8. *See, e.g.*, Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 228 (5th Cir. 2015).

9. *See, e.g.*, *id.* at 229; *see also infra* Part III.A.

because Nails Corp. and Workforce fail to qualify as joint employers.

Some commentators have proposed strict joint employer liability.[10] The staffing firm would be strictly liable for any discrimination that its client commits against a temporary worker when both entities qualify as joint employers.[11] This would still leave Anthony without relief, and its effect may be too harsh on the staffing firm. It would be unfair to hold Workforce liable for *every* discriminatory act that Nails commits, especially if such acts occur outside of the purview and control of Workforce.

Finally, another possible liability regime might hold the staffing firm only liable for its own disparate treatment, and not for any of its client's discrimination.[12] In other words, the staffing firm is only liable if it itself commits an employment-related harm with discriminatory intent. But this gives staffing firms little incentive to protect their temporary employees from potential, unscrupulous client practices.[13]

This Article proposes a sensible compromise: The staffing firm should only be liable if the client's discriminatory act implicates one of the staffing firm's *employer functions*.[14] Employer functions include paying wages, beginning and ending the employment relationship, providing work, and controlling the internal processes of the workplace. If a staffing firm shares control over an employer function with the client, the staffing firm is still responsible for the client's discrimination.[15] But the staffing firm can escape liability through an affirmative defense by showing that it reasonably accommodated the harmed employee.[16]

For example, suppose that one of a staffing agency's functions is to begin and end the worker's employment relationship with the client. Suppose further that a staffing firm's client rejects an employee's assignment because that employee is a woman. And the staffing firm did not know and could not have known its client's discriminatory reasons. Because the staffing agency engages in the function of beginning that worker's employment relationship with the client, the agency is the relevant employer and is thus strictly liable. The staffing

10. *See, e.g.*, Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727, 743 (2004); *see also infra* Part III.B.

11. *See infra* Part III.B.

12. *See infra* Part III.C.

13. *See infra* Part III.C.

14. *See infra* Part IV.A.

15. *See infra* Part IV.A.

16. *See infra* Part IV.B.

firm could escape liability if it shows that it immediately reassigned the worker and paid that worker any backpay.

As should be clear, this proposal does away with a joint employer requirement. Thus, under the hypothetical discussed above, Anthony could get relief from the courts by pursuing a claim against both Workforce and Nails because the rejection implicates its employer function of ending the employment relationship.

Only a few scholars have focused their attention on when a staffing firm should be liable for its client's discrimination. Professor O'Gorman dedicates an article criticizing the EEOC's approach to solving the loyal matchmaker dilemma.[17] And Professor Jeremias Prassl argues that the law should adopt a functional conception of the employer.[18] In multilateral relationships—such as the relationship between the staffing firm, client, and employee—Professor Jeremias Prassl argues that the law should define the employer "through the exercise of a particular set of functions . . . ."[19] But Prassl fails to meaningfully analyze the theoretical appeal, disadvantages, and normative value of such a conception as applied to U.S. antidiscrimination law. This paper fills the gaps left open by Prassl and O'Gorman by proposing a modified version of Prassl's functional conception of the employer and by analyzing its applicability to the loyal matchmaker dilemma under U.S. antidiscrimination law.

Within existing literature, this Article sits at the intersection between Zatz's unifying theory of discrimination and Prassl's concept of the employer. Zatz proposes a general theory of discrimination.[20] A claim of employment discrimination, Zatz argues, should be separated into three elements: (1) employment-related harm, (2) membership causation, and (3) a basis to hold an employer responsible for that harm.[21] Membership causation is separated into internal and external membership causation.[22] As discussed, external status causation exists when an employee suffers harm because of her protected status by something other than her employer. Internal status causation exists

17. *See generally*, Daniel P. O'Gorman, *Paying for the Sins of Their Clients: The EEOC's Position That Staffing Firms can be Liable When Their Clients Terminate an Assigned Employee for a Discriminatory Reason*, 112 PENN ST. L. REV. 425 (2007).

18. JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER 1 (2015).

19. *Id.*

20. *See* Zatz, *supra* note 6, at 1412-15; *see also* Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1358 (2017) (expanding the unifying theory of discrimination and focusing on disparate impact liability).

21. Zatz, *supra* note 6, at 1413.

22. *Id.* at 1412-15.

when an employer makes an employment decision because of its employee's protected status.[23] The type of membership causation generally determines the basis by which a court holds the employer responsible for workplace harm.[24]

Prassl's concept of the employer disaggregates the employer into employer functions and holds an entity responsible depending on whether that entity is engaging in an employer function.[25] The question this Article seeks to answer involves both external causation and employer responsibility in a multi-entity relationship involving employer functions.

This Article's proposal expands upon Zatz's research by suggesting that, in the staffing firm context and when external status causation exists, employer functions should dictate employer responsibility. The proposal thus also expands upon Professor Prassl's research on employer functions and the concept of the employer.

The first purpose of this Article is descriptive. The rise of staffing firms and decentralized employment has resulted in various problems in applying current antidiscrimination law. One such problem is the loyal matchmaker dilemma: when should the staffing firm be liable when it complies with or otherwise acquiesces to a client's unlawful discrimination for reasons other than race, sex, religion, national origin, disability, etc.?

The second purpose is normative. Courts and commentators have failed to create a liability standard that considers the unique nature the loyal matchmaker problem implicates. Instead, they have resorted to negligence, which is too inconsistent and unpredictable, or they have proposed an inflexible and, sometimes harsh, strict liability regime.[26] Another proposal contends that the staffing firm should never be liable for its client's "sins."[27] This Article argues that courts should adopt the functional liability standard because it is more practical, flexible, and consistent than the available alternatives. Further, it is fairer to both employees and to the staffing firm.

Part I introduces the temporary staffing firm and the various problems they raise for U.S. antidiscrimination law. It then introduces the question I hope to resolve: when should the staffing firm be liable for its client's discriminatory harm against a temporary employee? Part II

23. *See id.* at 1362.
24. *See id.*
25. *See generally* PRASSL, *supra* note 18.
26. *See infra* Part III.
27. *See* O'Gorman, *supra* note 17, at 425.

analyzes two employer responsibility rules that courts use to find an entity liable under antidiscrimination law: direct and vicarious liability. With a solid grasp of direct and vicarious employer responsibility, I detail three ways the law may solve our dilemma in Part III. I examine the benefits and drawbacks to holding a staffing firm (1) liable only if the firm is negligent to the client's discrimination when a joint employer relationship exists; (2) strictly liable for its client's actions when a joint employer relationship exists; and (3) liable only if the firm itself engages in disparate treatment. I conclude that while all three have their appeal, they lack flexibility, fairness, and, sometimes, clarity and predictability.

Part IV introduces my solution to the loyal matchmaker dilemma: the functional liability standard. I argue that this standard brings the appropriate amount of fairness, predictability, efficiency, clarity, and flexibility to the dilemma. It applies strict liability where the staffing agency is engaging in an employer function but gives the staffing firm a chance to escape liability through an affirmative defense. This affirmative defense is satisfied where the staffing firm reasonably accommodates the harmed employee. Where the staffing firm fails to engage in an employer function implicated by its client's discrimination, the staffing firm will not be liable.

I. THE RISE OF STAFFING FIRMS

The time has long passed when permanent, full-time jobs were the norm.[28] During that time, especially right after the Great Depression, such stability was often required under collective bargaining contracts, seniority provisions, and other agreements.[29] Employees tended to have one, singular employer that exercised all the relevant employer functions and all control over the employee.[30] What has been called the "model of career employment," employees advanced through one organization over a long period, developing a loyalty to that firm.[31]

28. *See, e.g.*, Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 529-39 (2001) (discussing the rise of Taylorism and Fordism during the early 20th century that brought about the encouragement of long-term firm loyalty through specific policies such as seniority packages, promotion and retention plans, long-term benefit packages, etc.).

29. *See* Peter H. Cappelli & JR Keller, *A Study of the Extent and Potential Causes of Alternative Employment Arrangements*, 66 ILR REV. J. WORK & POL'Y 874, 876 (2013).

30. *See id.*

31. Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 175-76 (2006).

But over the past forty years, U.S. employers have dramatically changed the way they engage with labor and the labor market.[32] Enticed by their flexibility and relative inexpensive cost, employers now are more likely to use contingent workers through temporary staffing firms.[33] Use of staffing firms represents, more generally, the vertical disintegration of the enterprise and the use of atypical workers.[34] A staffing firm (or temp agency) contracts with its employer-clients to supply temporary workers.[35] The client usually pays the temp agency an agreed upon amount for the temporary worker, and the temp agency pays the worker a wage.[36] The client usually does the day-to-day of the employee's work.[37] And the staffing firm may move an employee from one of its clients to another, often with no break in between employment.[38] One author notes that, in 1973, temporary workers hovered at around 250,000 in the U.S.[39] By 1999, that number rose to 4.4 million.[40] Another commentator states that staffing services employment more than doubled in the 1990s, reaching 3.8 million in 2000 from 1.4 million in 1989.[41]

The rise of staffing firms and contingent employees presents at least two problems for the application of antidiscrimination law. The first problem deals with how the law determines which entity is the relevant

32. *See, e.g.*, Erin Hatton, *Temporary Weapons: Employers' Use of Temps Against Organized Labor*, 67 ILR REV. J. WORK & POL'Y 86, 86-87 (2014); Cappelli & Keller, *supra* note 29, at 876; Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 253 (2006); Leah F. Vosko, *Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective*, 19 COMP. LAB. L. & POL'Y 43, 43-44 (1997).

33. *See, e.g.*, Jamie Peck & Nik Theodore, *Contingent Chicago: Restructuring the Spaces of Temporary Labor*, 25 INT'L J. URB. & REGIONAL RES. 471, 475 (2001) (discussing the rise in temporary employment and the "explosive growth" of the temp industry); Shannon Smith, *The Rehabilitation Act and the Contingent Workforce: Effects of the Extension of Anti-Discrimination Legislation to the Contingent Workforce*, 11 GEO. J.L. & PUB. POL'Y 683, 684 (2013); Stone, *supra* note 28, at 539-40 (discussing the "new psychological contract" in the employment setting); Tarantolo, *supra* note 31, at 175.

34. PRASSL, *supra* note 18, at 3.

35. *See* Katherine Hannan Wears & Sandra L. Fisher, *Who is an Employer in the Triangular Employment Relationship? Sorting Through the Definitional Confusion*, 24 EMP. RESP. & RTS. J. 159, 159 (2012).

36. *See* Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 511 (1997).

37. *See* Stone, *supra* note 28, at 623; Wears & Fisher, *supra* note 35, at 160.

38. *See* Summers, *supra* note 36, at 511.

39. Peck & Theodore, *supra* note 33, at 475.

40. *Id.*

41. Matthew Dey, Susan N. Houseman & Anne E. Polivka, *Manufacturers' Outsourcing to Staffing Services*, 65 ILR REV.: J. WORK & POL'Y 533, 535-36 (2012).

employer. Is the employer the staffing firm or the client, or both?[42] Under Title VII, the *Magnuson* court set out two tests that both must be satisfied before the entity is considered an employee's employer: (1) definition test, and (2) control test.[43] To satisfy the definition test, the entity must fall within the scope of Title VII's definition of "employer."[44] To meet Title VII's definition, the entity must both be "engaged in an industry affecting commerce" and employ "fifteen or more employees."[45] And the control test is satisfied if the entity exercises "substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment."[46]

For example, imagine a client that relinquishes its responsibility of hiring certain employees and gives that responsibility to a staffing firm. The staffing firm finds employees, interviews them, and then assigns them to the client without significant input from the client. Assuming that is all the staffing firm does in its relationship with the temporary employees, it is unclear whether it would satisfy the control test above. The firm would not control the day-to-day activities of the worker, including what the worker wears, how the worker works, etc. Thus, the worker may not be able to sue the staffing firm as her "employer."

But it seems that this problem may not be as significant as it might appear for a worker—at least under Title VII. Guidance by the EEOC states that the staffing firm and the client will generally qualify as a temp worker's employer.[47] This is so because both entities tend to exercise the requisite amount of control over the worker.[48] The guidance describes the relationship between the standard staffing firm and the

42. For a general discussion and overview of U.S. work law statutes and their definitions of employee and employer, see Wears & Fisher, *supra* note 35, at 160.

43. Magnuson v. Peak Tech. Servs., Inc., 808 F. Supp. 500, 507 (E.D. Va. 1992); *see* Parker v. Golden Peanut, LLC, 115 F. Supp. 3d 702, 708 (E.D. Va. 2015); Lee v. Mobile Cty. Comm'n, 954 F. Supp. 1540, 1545 (S.D. Ala. 1995), *aff'd*, 103 F.3d 148 (11th Cir. 1996); *see also* Jason E. Pirruccello, *Contingent Worker Protection from Client Company Discrimination: Statutory Coverage, Gaps, and the Role of the Common Law*, 84 TEX. L. REV. 191, 198-99 (2005); *cf.* Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 408-10 (4th Cir. 2015). Note that the *Magnuson* court did not use the terms "definition test" and "control test." I use these terms for simplicity's sake.

44. *Magnuson*, 808 F. Supp. at 507.

45. 42 U.S.C. § 2000e(b) (2000).

46. *Magnuson*, 808 F. Supp. at 507; *see also* Kiesling, Jr., *supra* note 5, at 8 (discussing the manner of control exercised).

47. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NOTICE 915.002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS 3 (1997) [hereinafter EEOC NOTICE].

48. *See id.* at 6.

employee as the following:

> [T]he [staffing] firm typically hires the worker, determines when and where the worker should report to work, pays the wages, is itself in business, withholds taxes and social security, provides workers' compensation coverage, and has the right to discharge the worker. The worker generally receives wages by the hour or week rather than by the job and often has a continuing relationship with the staffing firm. Furthermore, the intent of the parties typically is to establish an employer-employee relationship.[49]

The guidance then notes that the client will usually qualify as an employer because the client tends to "exercise[] significant supervisory control over the worker."[50]

And even if a staffing firm or client fails to qualify as an employee's employer, Title VII allows an employee, in some circumstances, to sue an entity even if that entity does not qualify as the aggrieved employee's "employer."[51] For example, an employee may claim that the entity discriminatorily interfered with that employee's employment relationship with another entity.[52] In *Sibley Memorial Hospital v. Wilson*, the D.C. Circuit addressed whether a nurse, Verne Wilson, could have standing to sue the Sibley Memorial Hospital, an entity with which Wilson did not have an employment relationship.[53] The court held that Sibley's liability under Title VII could be based on its interference with Wilson's employment relationship with his patients.[54] In other words, Sibley could be liable because it blocked Wilson's access to new employers even though Sibley itself was not Wilson's employer.[55]

The court based this decision on Title VII's policy and text. It first stated that Title VII's goal was "to achieve equality of employment

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49. *Id.* at 7.

50. *Id.* In some circumstances, courts have found that clients do not qualify as the employee's employer. *See* Dunn v. Uniroyal Chem. Co., 192 F. Supp. 2d 557, 560 (M.D. La. 2001) (finding that client was not employee's employer under Title VII where employee was subject to client's policies, but temp agency paid employee and could reassign employee at any time, and Uniroyal failed to enter into an employment contract with employee).

51. *See* Pirruccello, *supra* note 43, at 200-01.

52. *See id.* at 200.

53. Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1339-42 (D.C. Cir. 1973).

54. *Id.* at 1342.

55. *Id.* at 1342-43.

opportunities."[56] It then noted that Title VII bans labor organizations, employment agencies, and employers "from exerting any power it may have to foreclose, on indivious [sic] grounds, access by any individual to employment opportunities otherwise available to him."[57] And that it makes little sense to allow an entity to discriminatorily restrict an individual's employment with another employer, when that entity could not do the same with its own employees. To allow such interference "would be to condone continued use of the very criteria for employment that Congress has prohibited."[58] The court further noted that Title VII specifically refers to "person aggrieved," indicating that persons other than the offending employer's employees have sufficient standing.[59]

The second problem presented by the staffing firm-client-employee relationship deals with when a staffing firm should be held responsible for its end-user client's harmful, discriminatory intent. For example, imagine that Regina, a black woman, is employed by the staffing firm Workforce. Workforce seeks to assign Regina to one of its clients, ABC Company. ABC rejects Regina's assignment, stating that it does not want black women at its workplace. Workforce is appalled by the client's blatant sexism and discrimination. But, instead of somehow correcting this awful situation, Workforce accepts the ABC's reasoning and keeps ABC as a client and a business partner. Workforce merely seeks to be its client's loyal matchmaker. Should Workforce be liable for ABC's discrimination?

On the one hand, Workforce never engaged in disparate treatment itself—it never harmed Regina because she is black. Thus, Workforce may not have breached any duty it owed to Regina as Regina's employer. But, Workforce failed to affirmatively reject its client's discrimination. In fact, Workforce made the decision to keep ABC as a client knowing that ABC engaged in unlawful discrimination.

The focus of this Article is on this problem, and my core argument is that the functional approach can help resolve this problem by providing a clear conceptual framework to sort out when the staffing firm should be liable. The way the law can currently tackle this dilemma is inflexible, unclear, and unpredictable. But before we reach that framework, we should parse out the situational context in which this problem arises, namely, the types of employer responsibility standards

56. *Id.* at 1340-41 (emphasis omitted) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1969)).

57. *Id.* at 1341.

58. *Id.*

59. *Id.*

the problem implicates: vicarious and direct liability.

II. BACKGROUND PRINCIPLES

This part details two employer responsibility doctrines the courts have used to hold an employer responsible for employment-related harm—vicarious liability and direct liability. Under vicarious liability, an employer is liable for an employee's harm regardless of whether it breached a duty to that employee. Direct liability requires some sort of negligence or wrongdoing on the part of the employer. As I will discuss in Part IV, vicarious liability principles work to justify this Article's proposal, thus a discussion of them is appropriate. Ultimately, however, this paper's proposal should be viewed through a direct liability lens.[60]

A. Vicarious Employer Responsibility

Professor Alan Sykes defines vicarious liability as "the imposition of liability upon one party for a wrong committed by another party."[61] Professor Fleming James, Jr. further describes vicarious liability as a situation where "*A* is held liable to *C* for damages which *B's* negligence has caused *C*, even though *A* has been free from negligence or other fault."[62] The nature of *B*'s tort or wrong need not be an act of negligence—it can be based on strict liability, intent, etc.[63]

Scholars have recognized at least four justifications to impose vicarious liability on an actor. The first justification is *control*.[64] The level of control *A* has over *B* justifies imposing vicarious liability.[65] The reasoning is twofold. First, where *A* exercises control over *B*, it is inherently *A*'s fault that *B* committed a wrongful act.[66] Second, because of *A*'s control, *A* is in a better position to prevent *B*'s wrongful conduct.[67]

60. *See infra* Part IV.C.

61. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988).

62. Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161, 161 (1954).

63. *See* Paula J. Dalley, *All in a Day's Work: Employers' Vicarious Liability for Sexual Harassment*, 104 W. VA. L. REV. 517, 540 (2002).

64. *See id.* at 535-36.

65. James, Jr., *supra* note 62, at 165; *see* Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1754 (1996) ("Indeed, under the common law the factor of the employer's 'control' plays a major role in defining the extent of the employer's vicarious liability."); *see also* Dalley, *supra* note 63, at 535-36.

66. *See* Dalley, *supra* note 63, at 536.

67. *See id.* at 536-37.

A second justification for vicarious liability is what Dalley terms the "*risks-and-benefits-of-the-business theory*."[68] Under this theory, the policy behind vicarious liability "is to coordinate the burdens and benefits of a business."[69] In the case of the employment relationship, vicarious liability is justified because, at the time that employee committed a wrongful act, the employer was profiting from the employee.[70] James articulates an iteration of this theory noting that the business creates risks and is deployed to create profit or to benefit the employer in some way, thereby making the employer responsible for any consequences that may arise.[71]

A third justification is *choice*. Again, in the employment relationship context, a decision-maker finds vicarious liability because of "the master's power to choose and discharge his servants."[72] As James notes, this relates back to the *control* justification.[73] But it could also relate to how the employer holds its employee out to the world. For example, because an employer has chosen a particular employee, that employer trusts that employee and asks others to do the same.[74] In a way, the employer is telling others to rely on its choice of employee, and the employer should therefore be vicariously liable when others are harmed because of that reliance.[75]

The fourth justification is *causation*. Professor Sykes, making an economic efficiency argument, justifies vicarious liability when an enterprise "fully causes" the wrongful act in question.[76] In other words, the stronger the causal relationship between the enterprise and the wrongful act, the more likely that a decision-maker should impose vicarious liability on the enterprise.[77] Sykes notes that holding the employer vicariously liable for its supervisor's harassment is justified under his causation theory because "[a]bsent the existence of a supervisor-subordinate relationship, the supervisor would have no leverage over the subordinate, and the likelihood of sexual harassment

68. *Id.* (emphasis added).

69. *Id.* at 538.

70. *Id.*

71. James, Jr., *supra* note 62, at 169 (quoting and referencing Lord Brougham's statement in Duncan v. Findlater, 6 Clark & F. 894, 910 (H.L. 1838)).

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.*

76. Sykes, *supra* note 61, at 571-76 ("An enterprise 'fully causes' the wrong of an employee if the dissolution of the enterprise . . . would reduce the probability of the wrong to zero.").

77. *See id.* at 606-07.

would be significantly reduced."[78] Conversely, when a non-supervisory employee commits harassment, Sykes finds that the causal relation to the employer is not strong enough to warrant vicarious liability.[79] Thus, Sykes notes that this employment relationship, at best, only somewhat affects the likelihood that a non-supervisory employee will harass a co-worker because such employees "have no leverage to exert over the individual who is the object of harassment, and individuals prone to commit acts of harassment in the absence of any leverage may well do so irrespective of their occupation, position, employment, or unemployment."[80]

Under current Title VII jurisprudence, an employer may be vicariously liable for its supervisor's discriminatory actions, and generally not for its non-supervisory employees.[81] Suppose, for example, a mid-level manager commits a "tangible" discriminatory act, such as terminating an employee because of that employee's race. An employer could be vicariously liable for that manager's act even though it did not know about the act and it officially prohibited such discrimination.[82]

In the harassment context, where a supervisor fails to commit a tangible employment act, the Supreme Court has found that a supervisor's harassment is not within the scope of employment.[83] Yet, the Court held that an employer is vicariously liable in such a situation because the employment relationship gives the supervisor the leverage and assistance to commit the acts.[84] But the employer can escape vicarious liability if it proves that it took reasonable care to avoid and correct the harassment and that the plaintiff did not take advantage of ways to fix the issue.[85] This affirmative defense, known as the

78. *Id.*

79. *Id.* at 607-08. Sykes terms "vicarious liability based on negligence" as the proper liability standard to be applied in this situation. *Id.* at 578. Note that although he uses the words "vicarious liability," what he is actually referring to is direct liability. *See* Dalley, *supra* note 63, at 528.

80. Sykes, *supra* note 61, at 608.

81. EEOC regulations hold an employer directly liable for low-level employees' discriminatory harassment. *See* 29 C.F.R. § 1604.11(d).

82. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998).

83. *Id.* at 793-94; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 757 (1998); *see also* Zatz, *supra* note 6, at 1380-81.

84. *See Faragher*, 524 U.S. at 802-03; *Ellerth*, 524 U.S. at 760-64.

85. *See, e.g.*, Jones v. Southeastern Pa. Transp. Auth., 796 F. 3d 323, 329 (3d Cir. 2015); E.E.O.C. v. Boh Bros. Const. Co., 731 F.3d 444, 463-66 (5th Cir. 2013) (finding that employer was vicariously liable for its manager's discriminatory harassment where employer did not have a specific sexual harassment policy; employer's nondiscrimination policy unknown to employees; policy failed to tell employees how to file harassment complaints; employer failed to train its

Faragher/Ellerth defense, is not available to an employer where the harasser is a high-ranking official in the company, such as the president.[86] The Supreme Court justified the *Faragher/Ellerth* defense as essential to fulfilling the policy of Title VII to discourage harassment, and to increase employers' use of antiharassment policies and grievance mechanisms.[87]

The joint employer liability standard under the Fair Labor Standards Act ("FLSA") holds employers strictly liable for their joint employer's unlawful acts.[88] Department of Labor regulations state that "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA] . . . ."[89] One article noted that "[t]his is a basic and significant distinction between the FLSA and Title VII."[90]

There is some indication that courts view this standard as a type of vicarious liability. For example, the court in *Thompson v. Real Estate Mortgage Network* distinguished this type of liability from direct liability, writing: "Under these circumstances, each joint employer may be held jointly and severally liable for the FLSA violations of the other, in addition to direct liability for its own violations."[91]

B. Direct Employer Responsibility

In certain circumstances, an employer is directly liable rather than vicariously liable. In contrast to vicarious liability where liability is not based on fault, "an employer is directly liable when its own act or omission causally contributed to tortious conduct."[92] For example, an employer may be directly liable when it adopts or ratifies an employee's

supervisors on harassment complaint procedures; and employer failed to discipline harasser).

86. *See* Wells v. Hi Country Auto Grp., 982 F. Supp. 2d 1261, 1265 (D.N.M. 2013) (noting that the *Faragher/Ellerth* defense is unavailable where the harasser was the company's president and/or owner).

87. *Ellerth*, 524 U.S. at 764-65.

88. *See, e.g.*, Thompson v. Real Estate Mortg. Network, 748 F.3d 142, 148 (3d Cir. 2014).

89. 29 C.F.R. § 791.2(a) (2000).

90. Steven A. Carvell & David Sherwyn, *It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising*, 5 AM. U. BUS. L. REV. 5, 16 (2015).

91. *Thompson*, 748 F.3d at 148. However, one could view this as a form of direct liability as well. For example, suppose that where a joint employer relationship exists, those employers have a heightened duty to ensure that their employees are receiving FLSA mandated overtime or wages. Thus, when employer *A* fails to follow the FLSA, employer *B* has breached its duty to the employee—even when employer *B* has no constructive knowledge of the FLSA violation.

92. Katherine Philippakis, Comment, *When Employers Should be Liable for Supervisory Personnel: Applying Agency Principles to Hostile-Environment Sexual Harassment Cases*, 28 ARIZ. ST. L.J. 1275, 1280 (1996).

unlawful act,[93] or when it tells an employee to commit a tort.[94] Put simply, an employer is directly liable for its own negligence or for its breach of a duty to its employee.[95]

Title VII cases follow this negligence standard when dealing with third parties or non-supervisory employees, finding the employer directly liable when it unreasonably fails to shield its employees from discrimination originating from these actors. For example, in the Seventh Circuit decision *Dunn v. Washington County Hospital*, an independent contractor of the employer, Dr. Coy, "made life miserable" for the plaintiff because of her sex.[96] The district court below found that the employer hospital was not liable for Dr. Coy's discriminatory acts because the hospital could not be held vicariously liable for Coy's acts.[97] But the Seventh Circuit noted that "liability under Title VII is direct rather than derivative."[98] Thus, "[t]he employer's responsibility is to provide its employees with nondiscriminatory working conditions. The genesis of inequality matters not; what *does* matter is how the employer handles the problem."[99] The Seventh Circuit then found that the plaintiff stated a claim of sex discrimination because the plaintiff alleged that the hospital knew of Coy's discriminatory acts and failed to remedy the situation.[100]

Commentators have recognized that other third-party harasser cases similar to *Dunn* apply a direct liability standard rather than a vicarious liability standard.[101] Besides the third-party harasser scenario, direct liability rears its head in co-worker harassment as well.[102] Further,

93. *See* Dalley, *supra* note 63, at 528; *see also* Slack v. Havens, No. 72-59-GT, 1973 WL 339, at *5-6 (S.D. Cal. May 15, 1973), *aff'd and remanded*, 522 F.2d 1091 (9th Cir. 1975) (finding employer liable for supervisor's discriminatory job order in part because employer's top management ratified the order).

94. Dalley, *supra* note 63, at 528.

95. *See id.*

96. Dunn v. Wash. Cty. Hosp., 429 F.3d 689, 690 (7th Cir. 2005).

97. *Id.*

98. *Id.* at 691.

99. *Id.*

100. *Id.* at 692-93.

101. *See* Zatz, *supra* note 6, at 1380-82 ("Third-party harasser cases, however, cannot be governed by the agency principles applicable to supervisors. By definition, the harasser is not the employer's agent. Recognizing this point, courts rest employer responsibility on negligence principles, not vicarious liability for intentional discrimination.").

102. *See, e.g.*, EEOC v. CRST Van Expedited, Inc., 679 F.3d 657, 684-85 (8th Cir. 2012) (noting that an employer is not vicariously liable for its non-supervisory employees' harassment, and instead is held to a negligence plus corrective action standard); Alvarez v. Des Moines Bolt Supply, Inc., 626 F.3d 410, 419 (8th Cir. 2010) ("DMB cannot be vicariously liable for sexual harassment by non-supervisory coworkers. . . . But DMB may be directly liable for its employees'

courts hold labor unions directly rather than vicariously liable for an employer's discriminatory actions against that employer's employees. For example, the *Romero* court noted that the union must take steps to remedy an employer's discrimination: "[W]e point out that labor organizations have an affirmative duty to insure compliance with Title VII."[103]

Later cases, drawing from *Romero*, developed the deliberate acquiescence theory. A union is liable under this theory where (1) the employer discriminates against an employee, and (2) the union deliberately or purposely acquiesces in the discrimination.[104] The court in *Greenier* found the union liable where it "cooperated with, facilitated and condoned" the employer's discrimination under this doctrine.[105] The court said that the employee established the second prong because the union refused to remedy a discriminatory termination, and instead cooperated with the employer with the termination.[106] It is unclear under this theory if the employee can establish the second prong by merely showing that the union was negligent to discrimination and failed to take corrective action. The words "deliberately" and "purposely" hint that the union must have actual knowledge.[107] Nonetheless, direct liability standards are at play because the court focuses on the labor union's actions or omissions, and such focus is in line with direct liability principles.[108]

Where two employers exercise sufficient control over an employee to establish a joint employer relationship, courts hold employers directly

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actions that violate Title VII if the company 'knows or should have known of the conduct, unless it can show that it took immediate action and appropriate corrective action.'" (citations omitted)); Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1278 (11th Cir. 2002) ("Where the perpetrator of the harassment is merely a co-employee of the victim, the employer will be held directly liable if it knew or should have known of the harassing conduct but failed to take prompt remedial action."). *See also* Dallan F. Flake, *Employer Liability for Non-employee Discrimination*, 58 B.C. L. REV. 1169, 1193 (2017) (noting that employer negligence is required in both co-worker and non-employee harassment claims).

103. Romero v. Union Pac. R.R., 615 F.2d 1303, 1310 (10th Cir. 1980).

104. *See* Greenier v. Pace, Local No. 1188, 201 F. Supp. 2d 172, 182 (D. Me. 2002).

105. *Id.*

106. *See id.* at 182-84.

107. *See id.* at 182; *see also* York v. AT&T, 95 F.3d 948, 956-57 (10th Cir. 1996) (noting that "mere inaction" by a union does not constitute acquiescence but rather, proof of the union's "requisite knowledge" is required).

108. For more information on *Romero* and similar doctrines, see Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1836-46 (2001) (summarizing existing jurisprudence on unions' antidiscrimination requirements and arguing that the law should place an affirmative duty on unions to promote a discrimination-free workplace).

liable for the discriminatory acts of their joint employer.[109] In *EEOC v. Sage Realty Corp.*,[110] the court found a building management company liable for its joint employer's actions where the joint employer required the employee to wear a sexually provocative outfit that subjected her to sexual harassment.[111] After noting the joint employer relationship, the court stated, "[m]ore importantly, there was no evidence adduced at trial (other than Palumbo's self-serving statement to Hasselman on June 7, 1976) that Monahan Building was powerless to remedy the situation created by Hasselman's ill-fitting uniform."[112] It then stressed that, at the very least, the building management company had constructive knowledge of the harassment related to the outfit.[113] Thus, the court found the building management company liable essentially because it knew or should have known about the discrimination and failed to take corrective action.[114] In other words, it held the company directly liable for its own negligent actions with respect to its employee, and not vicariously liable.[115]

Decided under the Americans with Disabilities Act ("ADA"), *Burton v. Freescale Semiconductor, Inc.* articulates a similar direct liability regime for a temp agency and end-user client that are joint employers.[116] The court found that the agency's client requested an employee's termination because of her disability under the ADA.[117] The court also decided whether the staffing agency could be held liable for its client's discriminatory request.[118] The agency argued that it could not be liable because it did not make the decision to terminate the employee—its client did.[119] In the agency's brief, it urged the court to

109. *See, e.g.*, Torres-Negrón v. Merck & Co., 488 F.3d 34, 40-41 n.6 (1st Cir. 2007) ("[A] finding that two companies are an employee's 'joint employers' only affects each employer's liability to the employee for their *own* actions, not for each other's actions . . . ." (citing Virgo v. Riviera Beach Assocs., 30 F.3d 1350, 1359-63 (11th Cir. 1994)); *see also* Whitaker v. Milwaukee Cty., 772 F.3d 802, 811-12 (7th Cir. 2014) ("Some of our sister circuits have held explicitly that establishing a 'joint employer' relationship does not create liability in the co-employer for actions taken by the other employer. . . . We have no reason to depart from the course set by the other circuits . . . .").

110. EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y.), *amended by* 521 F. Supp. 263 (S.D.N.Y. 1981).

111. *See id.* at 612-13.

112. *Id.*

113. *See id.* at 613.

114. *See id.*

115. *See id.* at 612-13.

116. Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 229 (5th Cir. 2015).

117. *Id.* at 241.

118. *Id.* at 228-29.

119. *Id.* at 228.

find liability only if the agency was "instrumental in making the final decision to terminate" the employee's assignment.[120]

The court did not accept that argument.[121] Instead, the court applied a standard it interpreted from the EEOC Guidance.[122] The court articulated their rule as the following: "A staffing agency is liable for the discriminatory conduct of its joint-employer client [(1)] if it participates in the discrimination, or [(2)] if it knows or should have known of the client's discrimination but fails to take corrective measures within its control."[123] In finding the agency liable, the court noted several determinative facts. First, agency personnel carried out the termination of the assignment even though it doubted the legality of its client's request.[124] Second, it did not matter that the agency was legally bound to comply with the client's request. The court held that it was not a defense. Plus, the contract expressly required that the agency follow the ADA.[125]

Other courts follow this negligence plus corrective action standard, holding the temp agency directly liable where there exists a joint employer relationship.[126] In *Williams v. Grimes Aerospace Co.*, the employee failed to establish Title VII liability against a staffing agency for the client's failure to put the employee in a full-time position.[127] The court noted that the employee never told the agency about the client's discriminatory actions and the agency had no reason to know because the agency was effectively just a payroll service.[128] The court in *Caldwell v. ServiceMaster Corp.* also followed the same standard, finding an agency not liable for its client's actions because the employees did not give enough notice to the agency of the discrimination.[129]

120. Response Brief of Defendant-Appellees Manpower of Texas, L.P.; Manpower, Inc.; and Transpersonnel, Inc. at 46, *Burton*, 798 F.3d 222 (No. 14-50944), 2014 WL 10537282.

121. *Burton*, 198 F.3d at 228-29. The court specifically rejected the staffing agency's argument that a court can only hold a staffing agency liable for a client's discriminatory decision when the staffing agency was instrumental in making the decision. *Id.* at 229 n.5. The staffing firm cited *Vance v. Union Planters Corp.* in support of its "instrumental" liability standard. *Id.* (citing Vance v. Union Planters Corp., 279 F.3d 295 (5th Cir. 2002)). The court wrote: "[w]e have already observed that *Vance* dealt only with . . . whether a given defendant is an employer under the ADA. We again reject the invitation to misread *Vance* . . . ." *Id.*

122. *Id.* at 228-29.

123. *Id.* at 229.

124. *Id.*

125. *Id.*

126. *Id.* at 228.

127. Williams v. Grimes Aerospace Co., 988 F. Supp. 925, 937 (D.S.C. 1997).

128. *Id.* at 938.

129. Caldwell v. ServiceMaster Corp., 966 F. Supp. 33, 46 (D.D.C. 1997). The court

III. THREE POTENTIAL EMPLOYER RESPONSIBILITY REGIMES

With knowledge of vicarious and direct employer responsibility, we can then apply versions of these standards to our problem. As a reminder, the loyal matchmaker dilemma is the following: when should the staffing firm be liable when it complies, consents, or otherwise acquiesces to a client's discrimination for reasons other than race, sex, religion, national origin, disability, etc.?

Consider the following three hypotheticals:

(1) Regina is employed by Workforce. Workforce contracted with Hotel, Inc. to supply Hotel temporary housekeepers during the busy holiday season. Workforce seeks to place Regina with one of its clients, a hotel managed by Hotel, Inc. Hotel tells Workforce that it does not want Regina, a black woman, because she lacks the relevant qualifications. In secret though, Hotel does not want Regina because she is black and thinks that black women are not appropriate for their clientele. Workforce complies with Hotel's request and retains Hotel as a client. Should Workforce be liable for Hotel's race discrimination?

(2) Suppose that Hotel accepts Regina's placement. Regina is tasked with cleaning the guest rooms and other areas of Hotel's property. Workforce has no say, legally or practically, in how Hotel controls Regina at its property. Throughout her assignment, one of Hotel's supervisors, John, singles Regina out because Regina is black. John constantly refers to Regina using racial stereotypes and offensive slurs, causing Regina to dread coming to work every day. Regina complains to both Workforce management and management at Hotel. Neither Hotel nor Workforce take any corrective action. For example, Hotel does not discipline John nor conduct any kind of investigation. Similarly, Workforce fails to speak with Hotel about the situation and does not offer Regina a placement with another client. Is Workforce liable for Hotel's harassment?

(3) One day, John orders Regina to clean the men's restroom in the hotel's main lobby, a restroom that is not Regina normally part of her

articulated the rule: "To prevail on a theory of joint employer liability, a plaintiff must show that the defendant knew or should have known of the discriminatory conduct and that it failed to take those corrective measures within its control." *Id.*

duties to clean. When Regina asks John why he is choosing her to clean the restroom, John replies, "because you black people are the best at cleaning restrooms. And you're the only one working today." When Regina refuses to clean the restroom, John tells her, "you clean the restroom or I'll have you fired!" Regina refuses again and leaves to do her other duties for the day. John relays to high-level Hotel management the discriminatory statements he told Regina, and Hotel explicitly approves of the statements, telling John, "Regina will be out of here by tomorrow. She should know her place." Later that day, Hotel informs Workforce that Regina cannot return to her assignment because she disobeyed a direct order. Workforce investigated Regina's dismissal by interviewing Regina and John. Neither John nor Regina told Workforce about John's discriminatory comments and bias. Workforce immediately reassigned Regina to a new client. Is Workforce liable for the discriminatory termination?

In this section, I will analyze the merits of three possible employer responsibility regimes for the staffing agency that we might apply to the three hypotheticals: (1) liability based on the staffing firm's negligence and a joint employer relationship,[130] (2) strict liability when a joint employer relationship exists,[131] and (3) liability only if the staffing firm engages in disparate treatment.[132] I will discuss these regimes' disadvantages, theoretical appeal, and whether they are consistent with current law.

A. Liability Based on Negligence and a Joint Employer Relationship

Out of the three incidents in our hypo involving Regina—discriminatory assignment, workplace harassment, and discriminatory termination—when would Workforce be liable under a negligence liability plus joint employer regime? Recall that negligence liability is a form of direct liability—where the employer has breached some duty owed to the employee.[133] A negligence liability standard would hold Workforce liable when it knew or should have known that Hotel was discriminating against Regina and failed to take corrective action. In other words, Workforce would be liable for harm inflicted by Workforce through its own negligent act or omission, but caused by Hotel's

130. *See* discussion *infra* Section III.A.
131. *See* discussion *infra* Section III.B.
132. *See* discussion *infra* Section III.C.
133. *See* discussion *infra* Section III.A.2.

discriminatory intent.[134] As discussed in the previous section, several courts hold staffing firms to this standard.[135] And a similar standard is applied in the third-party harassment and co-worker harassment context.[136] The EEOC Guidance applies this standard to discrimination that occurs at the client's workplace.[137] At the work site, the Guidance states that a temp agency is liable if it: (1) participates in work site discrimination, or (2) if it knows or should know about discrimination and did not take corrective measures.[138]

1. Regina's Discriminatory Assignment

Workforce would likely escape liability when it assigned Regina to Hotel. Workforce had no reason to suspect that Hotel was refusing Regina because she was black. In fact, Hotel engaged in this discrimination in secret to keep it hidden from Workforce. Because it did not know and should not have known about Hotel's assignment bias for women, Workforce would not be liable.

Finding that Workforce is not liable here presents a problem though. The Workforce's *raison d'etre* is finding temporary workers and assigning them to its clients. When discrimination occurs during the temp agency's primary business function, should it not be held to a higher standard than mere negligence? Antidiscrimination law does, in certain contexts, consider the employer's primary function when determining whether to hold that employer liable.[139] Title VII and the Age Discrimination in Employment Act ("ADEA") allow certain employer discrimination where such discrimination is essential to preserve the employer's primary business function.[140] This defense, called the bona fide occupational qualification ("BFOQ"), requires an inquiry into the employer's primary business function.[141] The Supreme Court calls this inquiry the "essence of the business test."[142]

For example, the court in *Wilson v. Southwest Airlines* addressed

134. *See* O'Gorman, *supra* note 17, at 439.

135. *See* cases cited *supra* note 102.

136. O'Gorman, *supra* note 17, at 434.

137. *See* EEOC NOTICE, *supra* note 47, at 14.

138. *See id.*

139. *See* Katie Manley, Note, *The BFOQ Defense: Title VII's Concession to Gender Discrimination*, 16 DUKE J. GENDER L. & POL'Y 169, 169 (2009).

140. Title VII allows the BFOQ defense where discrimination involves national origin, religion, and gender. 42 U.S.C. § 2000e-2(e)(1) (2012).

141. *See* Manley, *supra* note 139, at 169.

142. UAW v. Johnson Controls, Inc., 499 U.S. 187, 203 (1991).

whether defendant Southwest Airlines' policy of hiring only females for its flight attendants and ticket agents satisfied the BFOQ defense.[143] Defendant argued that its hiring of only females for these positions went toward the brand and image that defendant worked hard to advertise to its customers, and fulfilled "its public promise to take passengers skyward with 'love.'"[144] Without its female-only policy, defendant emphasized, its future financial success would be in serious jeopardy.[145] The court rejected Southwest's argument, proclaiming, "[l]ike any other airline, Southwest's primary function is to transport passengers safely and quickly from one point to another."[146] Thus, any "sex-linked job function" has only an incidental consequence on Southwest's primary business function. Because of this, the court rejected Southwest's BFOQ defense.[147]

Where antidiscrimination law considers an employer's primary business function as part of an affirmative defense, maybe the law should also consider it in multilateral employment relationships when determining how to distribute liability. In other words, if the law allows an employer to use its primary function as a shield, why not allow employees to use it as a sword in some circumstances?

2. Regina's Workplace Harassment

Moving to the next incident—the workplace harassment—Workforce would likely be liable under a negligence liability standard.[148] First, Workforce had notice of Hotel's discriminatory acts because Regina informed Workforce of the acts. Second, Workforce failed to engage in corrective action—it did not investigate Regina's accusations and it did not immediately reassign Regina to a new client. Thus, Workforce would be liable for its own negligence assuming, of course, that Workforce and Hotel are joint employers.

143. *See* Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 302-04 (N.D. Tex. 1981).

144. *Id.* at 293.

145. *Id.*

146. *Id.* at 302.

147. For more information on the BFOQ defense and the "essence of the business" test, see Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 930-39 (1993); Manley, *supra* note 139, at 174 (summarizing the BFOQ defense, its history, and issues and problems that have been raised regarding its application); Rachel L. Cantor, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. CHI. LEGAL F. 493, 493 (1999) (discussing different cases analyzing employers' BFOQ defense and arguing that courts should engage in a market definition inquiry to determine the "essence of the business").

148. Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001).

But is negligence liability appropriate here? As previously discussed, the EEOC Guidance specifically approves of this standard when the client's discrimination occurs at the client's workplace.[149] And third-party harassment cases, similar in structure to the agency-client-employee relationship, use this standard.[150] But a key difference is that the employer in third-party harassment cases tends to control the workplace where the harassment is occurring.[151] Judge Easterbrook in *Dunn v. Washington County Hospital*, a third-party harassment case discussed above, speaks to the importance of the harassment occurring on employer-owned premises.[152] Citing the Second Restatement of Agency with approval, Easterbrook writes that "a person 'can be subject to liability for harm resulting from his conduct if he is negligent or reckless in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, *upon premises or with instrumentalities under his control.*'"[153] Shortly before that, Easterbrook indicates that the employer is responsible for protecting its employees by keeping harassers away from "its premises."[154] The staffing firm is unlikely to control or own the client's premises or instrumentalities.

Another key difference is that the temp agency and the client are employers of the temp worker, while certain third-party harassment cases tend to involve an actor that engages in no employer functions over the employee.[155] These two key differences may hint that a different kind of standard is needed here—a standard that is flexible enough to consider both whether the temp agency engages in a relevant employer function and whether that function involves the control over the client's premises or instrumentalities. The functional liability standard that I propose in the next part considers both.

Further, the negligence liability standard may impose an undue financial burden on the staffing firm:

149. *See* EEOC NOTICE, *supra* note 47, at 14.

150. *See* cases cited *supra* note 102.

151. Some third-party harassment cases hold the employer to a direct negligence liability standard when the harassment occurs at another entity's workplace. *See, e.g.*, EEOC v. Cromer Food Servs, Inc., 414 F. App'x 602, 607-08 (4th Cir. 2011) (showing an employee harassed by a hospital's employees at the hospital's premises).

152. Dunn v. Wash. Cty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005).

153. *Id.* (emphasis added) (quoting RESTATEMENT (SECOND) OF AGENCY § 213(d) (1958)).

154. *Id.*

155. *See, e.g.*, *Dunn*, 429 F.3d at 690 (holding that a third party was employer's independent contractor and not aggrieved employee's employer); *see also* Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 608 (7th Cir. 2006) (holding a third party was an inmate housed on employer's premises).

> When a staffing firm is neither aware of a client's discrimination nor should be aware of it, the firm cannot take any corrective measures. If, however, there is a disputed issue of fact as to whether the firm knew or should have known of the discrimination, the firm will not obtain summary judgment and will have to defend the case through trial. Even if the jury finds that the firm neither knew nor should have known of the client's discrimination, the cost of defending the case through trial will make the win Pyrrhic. Also, the risk of an adverse jury finding regarding the firm's actual or constructive knowledge of the client's discrimination will cause many staffing firms to settle prior to trial. Thus, the corrective action standard, while appearing to impose a minimal and reasonable burden on staffing firms, may have a substantial financial impact on them.[156]

Though this argument is directed toward the negligence liability standard more generally, the argument's force may be the strongest when focused on client discrimination at the client's workplace. Suppose that Workforce got conflicting reports about Regina's discrimination. Hotel's management says that John is an upstanding supervisor and that John never interacts with Regina in a discriminatory way. Hotel accuses Regina of fabricating the whole incident. Workforce personnel were not present during any of John's interactions with Regina, and Workforce has little leverage over John to force John to confess. So, would a decision-maker find that Workforce has constructive knowledge here? It depends. But this unpredictability and lack of clarity puts the staffing firm in a precarious position: (1) believe Regina, reassign her, and potentially damage its relationship with Hotel,[157] or (2) believe Hotel and face the risk of liability in the future. Therefore, in addition to being too inflexible, the negligence liability standard as applied here may be too unclear and unpredictable.

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156. O'Gorman, *supra* note 17, at 469.

157. Anecdotal evidence, as well as common sense, suggests that clients hold in high regard a communicative and healthy relationship with the staffing firm. *See* Mark Scott, *Relationships are Critical to Companies that Rely on Staffing Firms*, SMART BUS. (Aug. 1, 2017), http://www.sbnonline.com/article/relationships-are-critical-to-companies-that-rely-on-staffing-firms/ ("In the end, companies tend to value communication and a good working relationship."); *see also* Chris Forde, *Temporary Arrangements: The Activities of Employment Agencies in the UK*, 15 WORK, EMP. & SOC'Y 631, 634-37 (2001) (discussing the rise of more personalized relationships between clients and staffing firms in the UK).

3. Regina's Discriminatory Termination

In the final incident—the discriminatory termination—holding Workforce to a negligence standard would allow Workforce to escape liability for Hotel's discriminatory request for termination.[158] Workforce did not know about John's statements and, when it investigated the circumstances surrounding the request, it failed to find out about Hotel's discriminatory bias. Even then, it still immediately reassigned Regina to a new client. Thus, it probably did not have constructive knowledge about the discrimination, and for that reason, it would escape liability.[159]

Some support for the standard as applied here can be found in the "customer feedback discrimination" literature.[160] In certain circumstances, customer feedback discrimination is similar in structure to Regina's discriminatory assignment termination.[161] Imagine that Hotel revolutionized the industry by allowing its customers the chance to choose which housekeeper they want and to change the housekeeper with no questions asked. This policy effectively allows customers to choose or change their housekeeper based on their explicit or implicit bias. In other words, the customers can take race or sex into account. Hotel is essentially outsourcing its decisions concerning housekeeper reassignment to its customers, giving customers the power to commit an adverse employment action.

This customer feedback discrimination hypothetical and Regina's discriminatory termination both involve: (1) a third party with employer powers (real employer powers in Regina's discriminatory termination and de facto powers in the customer feedback discrimination hypo),[162]

158. O'Gorman, *supra* note 17, at 434.

159. *Id.* at 469.

160. Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. (forthcoming 2018) (manuscript at 3-5) (using the term "customer feedback discrimination").

161. *See, e.g.*, *id.*; *see also* Lu-in Wang, *When the Customer Is King: Employment Discrimination as Customer Service*, 23 VA. J. SOC. POL'Y & L. 249, 286 (2016); Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 95-98 (2015) (recognizing that Uber makes employment decisions based on customer feedback and the need for law protecting against employment decisions based on customers biased or discriminatory feedback).

162. Courts are not completely unfamiliar with situations where a third party possesses employer powers over an employee. The Second Circuit has recognized a situation where an employer gives employer-like authority to an independent contractor. *See* Halpert v. Manhattan Apartments, Inc., 580 F.3d 86, 87-88 (2d Cir. 2009). The court there identified that an employer may be liable for an independent contractor's discriminatory employment decisions made on the employer's behalf. *Id.* at 88 ("If a company gives an individual authority to interview job applicants and make hiring decisions on the company's behalf, then the company may be held liable if that individual improperly discriminates against applicants on the basis of age."); *see also* Mitchell H.

(2) exhibiting discriminatory intent, and (3) committing an adverse employment action (termination and reassignment).[163] And both involve another party—Hotel in the customer feedback discrimination hypo and Workforce in Regina's discriminatory termination—without discriminatory intent.

Because of the structural similarity between both situations, if the law holds the employer to a negligence liability standard in customer feedback discrimination cases, it may make sense to do the same for Regina's discriminatory termination. Unfortunately, no court has addressed this issue directly.[164] But Professor Dallan Flake argues that courts should hold the employer to a direct negligence liability standard.[165] Supporting his argument, he notes that courts' pervasive use of negligence principles under antidiscrimination law "shows the feasibility of their application to customer feedback discrimination."[166] And the standard would encourage employers to investigate any customer feedback for discriminatory bias, while not being "so onerous" as to impose an undue financial burden on the employer.[167]

At least one commentator has dedicated a whole article to disparaging the negligence liability standard as applied to the discriminatory termination of an employee's assignment.[168] Professor O'Gorman argues that a staffing firm should not be liable for the client's

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Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-And-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 606 (2012) (discussing "quasi-employers" and related liability theories in work law that implicate these types of entities).

163. Some courts may view employee reassignment as not rising to the level of an adverse employment action in Title VII substantive law claims. While the circuit courts are split over when an action rises to the level of adverse employment action, the Fifth and Eighth Circuits adopt the narrowest test, holding that "only ultimate employment decisions" qualify as adverse employment decisions. McCoy v. City of Shreveport, 492 F.3d 551, 559 (5th Cir. 2007) (holding that ultimate employment decisions include "hiring, granting leave, discharging, promoting, or compensating" (citation omitted)); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) ("Changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case."). Thus, these circuit courts may find that a reassignment of a hotel housekeeper to another assignment without any difference in pay or prestige would not constitute an adverse employment action. *See* Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996) ("[A] *purely* lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action.").

164. Flake, *supra* note 160, at 21.

165. *Id.* at 44.

166. *Id.* at 47.

167. *Id.* at 48.

168. *See generally* O'Gorman, *supra* note 17.

discriminatory termination of the employee's assignment.[169] O'Gorman supports his argument by noting that caselaw, at best, only indirectly supports applying the negligence liability standard to a client's tangible employment action.[170] When courts do use the standard, they do so "without critical analysis, sometimes seemingly conceding that the standard is inappropriate because a staffing firm has no control over a client."[171]

O'Gorman also concludes that this standard, as applied to the client's tangible employment action, goes against antidiscrimination statutes' plain language.[172] The statutes ban discrimination based on a protected status, and because the staffing firm is not the entity discriminating nor taking an adverse employment action, the staffing firm cannot be liable.[173] It is not correct to say that the staffing firm removed the employee from her assignment. Instead, according to O'Gorman, "the *client* has removed the employee from the assignment, and the staffing firm is simply without the power to force the client to continue the assignment."[174] Thus, the staffing firm has not committed an adverse employment action when it acquiesces to the client's discriminatory termination.[175] In addition to not committing an adverse employment action, the staffing firm lacks the requisite discriminatory intent—the staffing firm is only obeying the client's wish because it has no other choice.[176]

The statutes' twin purposes—deterrence and compensating victims[177]—are also not promoted with this standard because the staffing firm has little power to investigate the client and its workplace, and will more likely than not believe the client's legitimate non-discriminatory reason for the termination.[178] "Thus, even when the client has discriminated, the staffing firm will rarely reach such a conclusion, even if it is aware of its potential liability, and the statutes' purposes will not

169. *Id.* at 436.
170. *See id.* 441-57.
171. *Id.* at 456-57.
172. *Id.* at 459-61.
173. *Id.* at 459.
174. *Id.*
175. *Id.*
176. *Id.*
177. The Supreme Court has described Title VII's key purposes as achieving equality, making employees whole, and removing discriminatory barriers. *See* Ablemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); *see also* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) (noting that two purposes of both Title VII and the ADEA is deterrence and compensation).
178. O'Gorman, *supra* note 17, at 462.

be significantly advanced."[179] O'Gorman also argues that staffing firms lack control over the offending actor and cannot effectively correct any of the client's discriminatory bias, hindering the deterrence purpose behind the statutes.[180]

4. Conclusion

As discussed, although the negligence liability standard may help to deter future discrimination, it is inherently unclear and unpredictable. This lack of clarity and predictability may place an unfair burden on the staffing firm. The negligence standard's unpredictability and elasticity may, at times, prevent an employee from succeeding on a valid claim if that employee is in front of a decision-maker with a bias for the employer; and the same might occur for an employer in front of a decision-maker who is biased in favor of the employee.[181]

B. Strict Liability When Joint Employer Relationship Exists

Under this standard, Workforce is held strictly liable for harms inflicted by Hotel regardless of Workforce's negligence, knowledge, or discriminatory intent.[182] Furthermore, both entities must be in a joint employer relationship.[183] Thus, Workforce would be liable in all three incidents assuming that Hotel engaged in unlawful discrimination and that both entities are joint employers.

When compared to negligence liability, strict liability is clear and predictable. The staffing firm would know exactly when it would be liable: whenever its joint employer client is liable. Of course, there would be instances where the client's liability would be unclear, but the staffing firm would not have to go through a separate negligence analysis as applied to the staffing firm. It would also deter client discrimination to a greater degree because the threat of strict liability would presumably be a stronger threat than negligence. It would likely cause the staffing firm to create mechanisms, concerning the ending and

179. *Id.* at 462-63.

180. *Id.* at 463.

181. *See generally* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994) (examining bias in the judiciary). *See also* Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1074 (2002) (arguing that judges should recognize how "they are influenced by factors related to the cases they hear" and adjust accordingly).

182. *See supra* note 9 and accompanying text.

183. *See* Davidov, *supra* note 10, at 743.

beginning of the employment relationship, and concerning the employee at the workplace, to prevent discrimination. For example, it might require that each client agree to not discriminate against its employee or else pay for any legal fees. Or it might require that its personnel be at the jobsite at all times, acting as a watchdog for any unlawful conduct. Thus, strict liability for a client's discriminatory acts throughout the employment relationship furthers the deterrence purpose behind antidiscrimination law.

Additionally, this regime finds support from the FLSA joint employer doctrine.[184] As I discussed, joint employers are jointly and severally responsible for FLSA compliance.[185] Thus, "each joint employer is individually responsible, for example, for the entire amount of wages due."[186] A strict liability standard whenever a joint employer relationship exists in the staffing agency context would thus be in line with the FLSA joint employer doctrine.

But the FLSA and antidiscrimination law differ in a key way: the FLSA employer definition is much broader than Title VII's definition.[187] This evidences Congress's intent that the FLSA cover as many entities as possible.[188] Therefore, it may make sense to hold an employer strictly liable for all the unlawful acts of its joint employer under the FLSA, while not doing the same under antidiscrimination law.

The strict liability regime finds support from Professor Guy Davidov. Davidov, discussing work law more generally, argues for a form of strict liability where the temp agency and the client would be jointly and severally liable.[189] Davidov writes that this type of liability would "relieve[] the courts of some of the need to tangle with blurry

184. *Id.* at 734-35.

185. *See* sources cited *supra* notes 88-91 and accompanying text.

186. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on Fair Labor Standards Act (FLSA) (Jan. 20, 2016), 2016 WL 284582, at *1 n.4.

187. Carvell & Sherwyn, *supra* note 90, at 15-16 ("The FLSA defines 'employ' as 'to suffer or permit to work.' This is considered among the broadest definitions of 'employ' that has ever been included in any legislation .... Title VII's definition of an employer is 'much narrower' than the FLSA's definition."). For more on the FLSA's "employ" definition and its scope, see Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 989 (1999) (arguing that courts have failed to effectuate Congress's intent behind its definition of employ by narrowing its scope).

188. *See, e.g.*, Noelle M. Reese, Note, *Workfare Participants Deserve Employment Protections Under the Fair Labor Standards Act and Workers' Compensation Laws*, 31 RUTGERS L.J. 873, 884 (2000) ("The United States Supreme Court has held repeatedly that courts should construe the [FLSA] liberally to achieve the congressional intent of broad coverage in favor of employees."); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296-97 (1985).

189. *See* Davidov *supra* note 10, at 743.

lines, and minimizes the extent to which employers can use such blurry lines to escape responsibilities."[190]

But as I have discussed extensively, a broad strict liability regime does not find much support from caselaw because caselaw tends to follow the negligence liability standard where a joint employer relationship exists.[191] Plus, exposing a staffing firm to this much liability might force staffing firms to go out of business or otherwise cause them to run less efficiently. Such inefficiency might be detrimental to workers and firms more generally in the competitive market. Thus, while this regime has theoretical and normative appeal, it might be too rigid and too harsh to apply to staffing firms.[192]

C. Liability Only if the Temp Agency Engages in Disparate Treatment

This regime would hold Workforce liable only if it acted because of its employee's protected status. This type of liability is a form of direct liability where the staffing firm only breaches its duties to the employee when the firm itself harms that employee because of a protected category. In all three incidents, Workforce did not act because of Regina's sex, race, color, etc. For example, when Hotel asked that Regina be terminated from her assignment, Workforce complied not because of Regina's protected status, but because of Hotel's request. Similarly, at assignment, Workforce did not fail to assign Regina to Hotel based of her race. Finally, at the worksite Workforce personnel never engaged in any harassment and did not explicitly approve of or help John harass Regina. Thus, because Workforce lacked discriminatory intent, it would not be liable for any of the three incidents.

This regime is in line with the conventional view that Title VII "recognizes only disparate treatment and disparate impact theories of employment discrimination."[193] The three incidents do not implicate any disparate impact theory, and because Workforce nor any of its agents engaged in discrimination, Workforce has not engaged in disparate treatment. To hold Workforce liable, a decision-maker would

190. *Id.* at 744.

191. *See* Flake, *supra* note 102, at 1211.

192. For a discussion of other objections to, and, possible justifications for, strict liability more generally, see Stephen Cohen, *Justification for a Doctrine of Strict Liability*, 8 SOC. THEORY & PRAC. 213, 214 (1982).

193. Zatz, *supra* note 6, at 1368 (internal quotation marks omitted) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993)).

have to turn to the employment discrimination theory of non-accommodation—Workforce must reasonably accommodate its employee that was harmed by Hotel's discriminatory acts by taking corrective action. Those subscribing to the conventional view would argue that non-accommodation theories have no place in Title VII doctrine.[194] Thus, holding Workforce liable only if it engages in disparate treatment finds support from the conventional view.

This standard would encourage a staffing agency to only concern itself with its own actions. For example, it would be unlikely to create certain deterrence mechanism to prevent its clients from discriminating against its employees. This standard, at least partially, goes against Title VII's policy of encouraging "the creation of antiharassment policies and effective guidance mechanisms."[195] Although a staffing firm may be inclined to create an antiharassment policy for its own workplace, it would not be incentivized to create any kind of policy for its employees while at one of its clients. On the other hand, this standard would allow the staffing firm to spend more energy and money into expanding its business—energy and money that would have been spent on limiting its clients' discrimination. This might be beneficial for its employees if the staffing firm reinvests those benefits reaped from expansion back into its employees through wages, benefits, training, etc.

Overall though, because this standard has the potential to cause staffing firms to only be concerned with itself and not with its clients' possible discriminatory actions, it is probably not a viable standard to address our dilemma.

IV. THE SOLUTION: FUNCTIONAL EMPLOYER LIABILITY

This paper proposes a new temp agency employer responsibility standard for a client's discriminatory actions: the functional liability standard. This standard draws from Jeremias Prassl's work to develop a functional concept of the employer.[196] Prassl argues that the concept of the employer should mean: "[T]he entity, or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law."[197]

Thus, Prassl argues that we should define an employer by its

194. *See, e.g., id.* at 1362-63.
195. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).
196. *See generally* PRASSL, *supra* note 18.
197. *Id.* at 6.

exercise of explicit functions.[198] And in multi-entity relationships, such as the agency-client-employee relationship, the legally responsible "employer" is the one that exercises the relevant employer function.[199] Prassl lays out five employer functions: (1) the employer's hiring and firing powers; (2) the employer's power to obtain the employee's work and the employee's work-product; (3) the employer's duty to pay the employee wages and to give the employee work; (4) the employer's control over all aspects of production; and (5) the employer's ability to expose itself to economic profit or loss.[200]

For purposes of different legal claims, an employee might have a different employer depending on which employer function the claim implicates. Recall the hypo discussed above regarding Regina, Workforce, and Hotel. Workforce oversees paying Regina and Hotel does not set the wage rate. For purposes of a minimum wage violation, the employer would be Workforce because it is responsible for paying Regina. The employer in that situation would not be Hotel. In other words, the employer in question is defined by its function—paying wages.

Professor Hugh Collins summarizes Prassl's legal standard as the following: "[A]n entity should be regarded as the employer if it either actually carries out the relevant employment function or if it is legally entitled to perform that function."[201] But, what about employer functions that are shared among several loci of control? Who should be the relevant employer? Suppose Hotel asks Workforce to terminate Regina (for discriminatory reasons) from her assignment, and the agency complies. Which entity is the relevant employer? You can argue that Hotel is the employer because it set into motion the termination by asking Workforce to end the employment. But Workforce is the entity that complied or, in one sense, ratified the client's actions. Or, could it be that both that Workforce and Hotel are the relevant employers here? As Collins notes,[202] Prassl gives some guidance on this issue: the "lead

198. *Id.*; *see also* Jeremias Prassl & Martin Risak, *Uber, Taskrabbit, and Co.: Platforms As Employers? Rethinking the Legal Analysis of Crowdwork*, 37 COMP. LAB. L. & POL'Y J. 619, 646-47 (2016); Jeremias Prassl, *The Employment Impact of Private Equity Investors: A Return of the Barbarians?*, 44 IND. L. J. 150, 157 (2015) (book review); Ewan McGaughey, *Social Rights and the Function of Employing Entities*, 37 OXFORD J. LEGAL STUD. 482, 482-83 (2017).

199. Prassl & Risak, *supra* note 198, at 621.

200. PRASSL, *supra* note 18, at 32.

201. Hugh Collins, *A Review of the Concept of the Employer by Dr Jeremias Prassl*, U. OF OXFORD FAC. OF L.: LAB. L. BLOG (Nov. 10, 2015), https://www.law.ox.ac.uk/content/labour-law-0/blog/2015/11/review-concept-employer-dr-jeremias-prassl.

202. *Id.*

or primary" entity should be the responsible employer, "without undue deference to formalism, however, in case backup becomes required."[203] Collins finds this guidance unhelpful, stating, "[b]ut if no-one was performing the function of employer at all or nobody was taking the lead responsibility, the facts will simply not tell us the answer the question of who is the employer."[204] Collins then proposes a fix to this dilemma: The responsible employer is the one who could have complied with the law at the least cost.[205]

But this fix is unhelpful as well. How does a court determine which entity could have complied with the least cost? Does the court consider non-monetary costs including monetary costs? I propose that when both entities share the relevant employer functions, both entities are the relevant employer. This reduces any confusion or ambiguity. So, in the hypo involving Regina above, where both entities had control over the end of her employment relationship, the agency would be strictly liable for its client's discriminatory actions even if it did not know about the discrimination. But suppose Workforce accommodated the employee's harm by immediately reassigning Regina or reimbursing Regina for any harm. In this situation, Workforce would have an affirmative defense even though the law at issue implicated the agency's employer function.

A. Overview of the Proposal

I summarize my proposal as the following: A staffing firm is liable for its client's discriminatory act if the discriminatory act involves, arises from, or directly relates to one of the firm's employment functions. An employment function is one that the agency actually engages in or one that it is legally obligated to engage in.[206] An agency is still the responsible employer even if the agency shares control over an employment function with the client.

I have slightly changed Prassl's employer functions to make them more relevant to the temp agency and employment discrimination context. I kept function one the same, but function three is split up into two separate functions: providing work and providing pay. And functions two and five are unlikely to be relevant in this context, so I

203. PRASSL, *supra* note 18, at 187.

204. Collins, *supra* note 201.

205. *Id.*

206. I changed Professor Hugh Collins' restatement of Prassl's rule from "legally entitled" to "legally obligated." *See id.* Legally entitled seems too broad and ambiguous. A legal obligation refers to a legal requirement such as a law requiring that a staffing firm pay wages to the employee.

dropped them from the list. My revised functions are the following:

(1) *Inception and Termination of the Employment Relationship*
(2) *Providing Work*
(3) *Providing Pay*
(4) *Managing the Enterprise—Internal Market*

Note that the entirety of function one (both inception and termination powers) is implicated if the agency exercises, or is contractually obligated to exercise, either inception or termination. For example, if an agency has no say in termination, but has some power over inception (a staffing agency should inherently have this power), then the agency also exercises powers related to termination.[207]

B. The Affirmative Defense: Reasonable Accommodation

1. Overview

Under my proposal, the staffing firm may escape liability if it can show that it reasonably accommodated the discriminatory harm. The burden is on the employer to prove reasonable accommodation. A staffing firm satisfies this affirmative defense when it shows that it either accommodated the harmed employee such that the employee is made whole or it made a good faith effort to accommodate the employee, but the employee refused the accommodation. Reasonableness is determined by looking at the specific circumstances and all the relevant facts, and it is satisfied if it is effective in (1) making the employee whole and (2) achieving equal opportunity.[208]

For example, suppose that Hotel creates a policy prohibiting

207. This conception of function one allows courts to simplify their analysis. For example, suppose a client's discrimination implicates the employment function of termination. And it is unclear as to whether the staffing firm engaged or was legally obligated to engage in the termination employer function. The court need not go into a lengthy analysis. Instead, it can merely recognize that the staffing firm engages in beginning the employment relationship, and end their analysis there, finding the staffing firm strictly liable for the harm. Of course, as I will discuss further, the firm can reasonably accommodate the employee's harm to escape liability.

208. Generally, the ADA requires that the employee show that a proposed accommodation is reasonable "in the sense both of efficacious and of proportional to costs." *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995). Contrarily, here, the employer has the burden to show that the accommodation it gave, or, attempted to give, was effective and reasonable *for the employee*. Thus, it may be effective to place the temporary employee back with an unscrupulous client—assuming that client won't harm the employee again—but it may be unreasonable for the employee considering her financial, emotional, or physical well-being.

women from using of certain cleaning agents containing ammonia or bleach. Hotel thought that such chemicals may harm women to a greater degree than men, and, thus, thought it appropriate to implement this policy. Violation of this policy by any employee would result in termination. Regina, upset about her cleaning supplies being less effective, uses the banned cleaning agents with ammonia and bleach. Hotel finds out and terminates Regina.

The termination implicates the employer function of ending and beginning the employment relationship. Workforce engages in this employer function and is therefore strictly liable.[209]

How may Workforce reasonably accommodate this harm? Workforce has several options. Workforce may (1) order Hotel to reinstate Regina with backpay and ensure that the policy does not apply to other temporary employees; (2) immediately reassign Regina to a similar client without a related policy and give her backpay; or (3) assist Regina in litigation against Hotel seeking relief. All these would probably be reasonable accommodations that would make Regina whole and bring her equality.

Workforce need not even know that the policy is unlawful or potentially unlawful for the affirmative defense to apply. Suppose that Hotel never tells Workforce the reasons for the firing under a "no questions asked" policy. Under this policy, Workforce may not ask why Hotel terminated Regina, but must immediately reassign Regina and provide her with backpay. If Regina later sues Hotel and Workforce, although Hotel would be liable, Workforce would have satisfied the affirmative defense.

At first glance, a lack of a knowledge requirement may seem too favorable to the staffing firm. For example, a staffing firm can escape liability even if it does not act with the specific intent to stamp out its client's discrimination. But the lack of knowledge requirement cuts both ways. A staffing firm may never have any notice of discrimination and may otherwise be without fault, and it still might not satisfy the affirmative defense. Plus, a knowledge requirement would limit instances where a staffing firm could escape liability to only those instances where it knew of the employee's harm. This might be too

209. Hotel's policy would violate Title VII because it took sex into account when creating and implementing the policy. Further, the policy itself is facially discriminatory. *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991) (finding employer's fetal-protection policy unlawful because policy excluded only fertile women from lead-exposed jobs); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 717 (1978) (finding pension contribution policy unlawful because it required that women pay more into employer-operated fund than men).

unforgiving.

Besides a knowledge requirement being too harsh on a staffing firm, it would also require a court to engage in excessive inquiry into the employer's mens rea. One of the functional liability's appeals is that it does not require laborious review and investigation into the employer's thought process. Thus, an affirmative defense that requires such review would negate one of the functional standard's appealing attributes. For these reasons, it makes more sense not to require employer knowledge.

2. Potential Challenges to the Affirmative Defense

Other employees not receiving reasonable accommodation under my proposal's regime may argue that the affirmative defense entails special or preferential treatment. In *US Airways, Inc. v. Barnett*, the Supreme Court faced a similar argument made by the employer, US Airways.[210] Robert Barnett injured his back on the job and transferred to a mailroom position, a less physically demanding position.[211] After being in that position for two years, other employees that were senior to Barnett sought his mailroom position.[212] Barnett requested that US Airways keep him in the mailroom and make an exception to the company's seniority system.[213] US Airways eventually denied his request and Barnett lost his job.[214]

US Airways argued that by providing Barnett an exception to a neutral rule, it would have been required to provide special or preferential treatment to Barnett at the expense of other employees.[215] Justice Breyer wrote that such special treatment was sometimes necessary to realize the goals of the ADA. Accommodation, by its very definition, "requires the employer to treat an employee with a disability differently, *i.e.*, preferentially."[216]

One can imagine a similar situation in the staffing firm context. Workforce's client fires Regina because she is black. As part of Workforce's attempt to reasonably accommodate Regina, it places her application in the front of all the other employee's applications for placement. The next client that requests a temporary worker will get

210. US Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002).
211. *Id.* at 394.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 397.
216. *Id.*

Regina first. Other temp employees that find out about this, may argue that Workforce is giving Regina special treatment and the law does not allow such treatment. Employees that are let go by a client because of something other than sex, race, national origin, disability, etc. would not get this kind of treatment.

What is different about Regina's situation and Barnett's is that the ADA, as Justice Breyer noted, requires preferences.[217] Here, Title VII, at least on its face, does not require any kind of preferences or special treatment.[218] In other words, Title VII is symmetrical, while the ADA is explicitly asymmetrical.[219] Thus, the employees' argument against Workforce may be more akin to *Trans World Airlines, Inc. v. Hardison*[220] where the Supreme Court dealt with a Title VII claim.

Hardison involved reasonable accommodation for an employee with religious needs under Title VII.[221] The employer, TWA, fired Larry Hardison after he refused to work on Saturdays.[222] Hardison's religion required that he refrain from working on the Sabbath, which is all day Saturday.[223] He was ordered to work Saturdays when his co-worker took time off for vacation.[224] To provide an exception for Hardison would, among other things, result in a violation of the seniority agreement in his union contract.[225] Or it would result in Hardison only working four days a week, which would further necessitate a supervisor filling his position, or require employing someone who does not regularly work on Saturdays and paying that person premium wages.[226]

The court, finding for the employer, emphasized that any accommodation would result in other employees losing out on rights under their union contract.[227] And the accommodation would be unfair because it would have harmed other employees who could not get Saturdays off for "strong, but perhaps nonreligious, reasons . . .."[228]

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217. *See id.*

218. *See id.*

219. *See* Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 71 (2017) (recognizing symmetry and asymmetry in different areas of antidiscrimination law); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 290-91 (1976) (holding that Title VII bans discrimination on the basis of race regardless of the type of race at issue).

220. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 63 (1977).

221. *Id.*

222. *Id.* at 68-69.

223. *Id.* at 67-68.

224. *Id.* at 68.

225. *Id.*

226. *Id.* at 68-69.

227. *Id.* at 81.

228. *Id.*

Such "unequal treatment" could not occur in a Title VII regime.[229]

When compared to Regina's situation, the discriminatory harm that the employer accommodates is more prominent than the discriminatory harm in *Hardison*. In fact, no employer engaged in disparate treatment in *Hardison*.[230] Hardison could not work on Saturday because of his religion.[231] The employer refused to heed his requests to get Saturday off, not because of religion, but because it would result in inequality or unequal treatment.[232] In Regina's situation, we can point to Hotel's disparate treatment—its discriminatory policy. In other words, both situations involve external status causation, but we can point to a specific employer-like entity that takes a protected status into account in Regina's situation. In *Hardison*, religion entered the causal chain before TWA terminated Hardison and outside of TWA's thought process.[233]

But what does it mean to complain about "unequal treatment"? This argument requires three assumptions. First, there exists a baseline that is used to measure what is equal or unequal. Second, this baseline rests in a world where the employer does not accommodate the employee to the disadvantage of co-workers. Third, the baseline is neutral, and any action deviating from the baseline represents favoritism or bias.

In *Hardison*, the neutral baseline is one that fails to consider Hardison's religious beliefs.[234] Suppose that the baseline is one where all religious beliefs are accommodated and any non-accommodation represents a deviation. This was surely Hardison's view.[235] The court may have come to a different decision if it took this view of the baseline—that accommodation was not unequal. Rather, non-accommodation would maintain inequality.

In Regina's situation, we can also view the relevant baseline as one where Hotel's disparate treatment does not exist. And making Regina whole is merely shifting all employees, as a whole, back to the baseline.[236]

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229. *Id.* ("Title VII does not contemplate such unequal treatment.").

230. *Id.* at 77.

231. *Id.* at 67.

232. *Id.* at 81.

233. *Id.* at 67-69.

234. *Id.* at 69.

235. *Id.*

236. Scholars have recognized versions of this type of "special treatment" argument or baseline assumption in antidiscrimination law. *See, e.g.*, Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155, 1156 (2015). Zatz notes that special treatment arguments exist throughout U.S. employment discrimination law. *Id.* at 1178.

C. Functional Liability as a Category of Direct Liability

I argue that this proposal is best viewed as a type of direct liability where a duty is placed on the staffing firm to prevent discrimination, regardless of where it comes from, during any of its employer functions. So, when the client engages in discrimination during the staffing firm's employer function, that firm is directly liable for breaching its duty to its harmed employee. Recall that the court in *Romero*, placed a similar duty on the employee's union.[237] The court wrote:

> With respect to the assertion that the union consented to the Railroad's alleged discriminatory delay in reinstating Romero, we point out that labor organizations have an affirmative duty to insure compliance with Title VII. If a union does not take action against discriminatory practices by an employer, it may be held responsible for those practices.[238]

In general, a staffing firm holds a different position in relation to its employees than a union holds to its union members.[239] For example, a key goal of labor unions is to increase the bargaining power of its members, and advocate for better working conditions and wages.[240] One view is that unions were created to "unit[e] the class of workers against the class of management."[241] In other words, unions exist to represent

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And that these arguments are "confused, a confusion enabled by failure to acknowledge the relevant nondiscriminatory baseline." *Id.* at 1158; *see also* Samuel R. Bagenstos, *"Rational Discrimination,", Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 862 (2003) (arguing that, contrary to arguments that accommodation requires redistribution, accommodation restores a just distribution). Cass Sunstein has described a version of the baseline assumption underlying *Lochner v. New York*, 198 U.S. 45 (1905). Sunstein argues that the *Lochner* Court's conception of neutrality—as opposed to government intervention—rested on "common law distribution of entitlements and wealth." Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 917 (1987) ("Once the common law system came to be seen as a product of legal rules, the baseline from which constitutional decisions were made had to shift.").

237. *See* Romero v. Union Pac. R.R., 615 F.2d 1303, 1310 (10th Cir. 1980); *see also* Donnell v. Gen. Motors Corp., 576 F.2d 1292, 1300 (8th Cir. 1978) ("Labor unions, as well as employers, have an affirmative duty to take corrective steps and to insure compliance with Title VII . . .." (footnote omitted)).

238. *Romero*, 615 F.2d at 1310 (internal citation omitted). Recall, however, that the courts after *Romero* developed the deliberate acquiescence theory, seemingly requiring that the union have some knowledge of the employer's discrimination before it could be liable. *See* Greenier v. Pace, Local No. 1188, 201 F. Supp. 2d 172, 182 (D. Me. 2002).

239. *See* Pirruccello, *supra* note 43, at 196.

240. *See* Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 283 (1948).

241. Andrew W. Neidhardt, *The Federalist View of Right-to-Work Laws*, 18 U. PA. J.L. &

and further the interests of labor.[242] On the other hand, the staffing firm inherently has different motives and goals. First and foremost, its chief goal is to serve its clients and stay in business. And work law tends to classify staffing firms like other employers—i.e. the staffing firm in the private sector employs its temp workers on an at-will basis and the firm is not required to advocate on behalf of the temp worker any differently than other employers.[243]

Because of these differences, it may make sense to not create the *Romero* duty for the staffing firm. But what I argue is slightly different. Rather than create a broad duty to assure nondiscrimination, I suggest that the law impose this duty only when the staffing firm is engaging in a specific employer function. This compromise is appropriate, assuming that *Romero*'s holding is correct, given the differences between a union and a staffing firm.

D. Differences and Similarities with the Negligence Liability Standard

Through looking at several hypotheticals, I hope to compare the functional standard to the current standard used by most courts—the negligence liability standard. I begin by examining discrimination at job assignment and termination. I then look at discrimination at the worksite. And I end by analyzing discriminatory wage practices.

1. Job Assignment and Termination

Generally, the temporary staffing agency engages in function one—the inception and termination of employment.[244] It interviews and decides which workers to place at its client's workplace. Even if an agency does not have a say in the ending of the worker's assignment, through its control of assigning workers (inception), the staffing agency exercises all of function one—including termination powers.[245] Thus, any client discrimination arising from the inception or the ending of the employment relationship automatically creates agency liability.

Suppose Workforce enacts a policy that requires it to comply with its client's requests no matter what, with no questions asked. Workforce

SOC. CHANGE 251, 277 (2015).

242. *Id.*

243. *See supra* Part I.

244. *See supra* Part IV.A.

245. *See supra* Part IV.A.

gives its client, Hotel, a worker who happens to be black. Despite the worker's qualifications, Hotel declines the black worker's assignment on the worker's first day at work. Citing its "no questions asked" policy requiring it to comply, Workforce takes the worker off the assignment. The real reason for Hotel's refusal is that it prefers to hire white or Hispanic workers. But Workforce never asks why Hotel refused and never has constructive knowledge of why. And the worker never told Workforce that Hotel discriminated against her because she was black. Workforce merely complied with Hotel because of Workforce's policy. The worker then sues both Workforce and Hotel alleging discrimination under Title VII.

Under the negligence standard, Workforce was not negligent to the discrimination. Hotel and the worker never hinted to Workforce that Hotel harbored discriminatory intent. Thus, Workforce is not liable.

But under the functional liability standard, both Workforce and Hotel would be held liable. The relevant employer function is function one—inception and termination of the employment relationship—because the employee's assignment was terminated. Workforce picked the worker to be assigned to Hotel. This began the employment relationship. And Workforce complied with Hotel's request to remove the worker from assignment. This ended the employment relationship. Thus, regardless of Workforce's intent or knowledge of discrimination, it would be liable because Workforce actually engaged in the inception or termination of the employment relationship.[246]

Further, because Workforce requested that Hotel assign its temp worker, Workforce exercises function one even if it has no say in the termination. Of course, this employer function can be stronger or weaker for the agency depending on the context. But as long as a temp agency has the power to give workers to the client, it actually engages in, or is legally obligated to engage in, function one.

The negligence liability standard and the functional standard merge when Workforce knows that Hotel is discriminating and refuses to comply with Hotel's request. For example, Workforce could oppose Hotel's demand, end its contract with Hotel, and place the worker in the next available assignment. This would likely fulfill the corrective action requirement of the current standard and the functional standard's affirmative defense of reasonable accommodation. But for the functional standard, the agency would bear the burden of proving the affirmative defense. This contrasts with the current standard's

246. *See supra* Part III.A.

requirement that the employee bear the burden of proving that the agency failed to take corrective action.

2. At the Worksite

Unlike at job assignment and termination, discrimination only affecting worksite conditions are likely only to implicate the client's function—function four (managing the enterprise—internal market). For instance, recall incident two of the hypo in the previous part where Hotel's supervisor John harasses Regina. The harassment Regina suffered was so severe that it qualified as a hostile work environment. Generally, a temp agency does not control any aspect of the client's workplace, such as its production or its day-to-day operations.[247] Further, a temp agency generally does not have control over the client's supervisors.[248] Thus, even if Workforce knew about the harassment and could have taken corrective action, i.e. taking the worker out of the assignment and ending its contract with the client, Workforce would not be held liable under the functional standard. Under the current standard, Workforce would be liable if it knew of the harassment and failed to take action.

As an additional wrinkle, suppose that Regina's hostile work environment culminates in Regina opposing the harassment, and Hotel demands that Workforce end her assignment in retaliation for the opposition. If the agency complies, even for a non-discriminatory reason, it would be liable for the employee's retaliation claim because the claim directly relates to Workforce's employer function (inception and termination of employment). However, it still would not be liable under the hostile work environment claim, assuming the employee does not group the termination as part of the hostile work environment claim.

What if Hotel discriminates against Regina by refusing to give her enough work? This implicates function two—providing work. And it implicates function four. Under function two, the provision of day-to-day work is likely a function of the client, and not the agency.[249] But the agency might have some say in what work and how much work the client gives to its employee generally. For instance, the agency might contract with the client requiring the client to give the temp worker at

247. *See* PRASSL, *supra* note 18, at 51.

248. *See supra* notes 49-50 and accompanying text.

249. PRASSL, *supra* note 18, at 51 ("[T]he provision of day-to-day work is . . . clearly a role of the end-user . . ..").

least thirty hours a week. If it does, then the agency is strictly liable.[250] The agency may accommodate the employee and escape liability under the affirmative defense.[251] For example, if Hotel discriminates against Regina by refusing to give her thirty hours per week because of her sex, even if Workforce fails to recognize Hotel's discriminatory intent, Workforce would escape liability if it reasonably accommodated Regina through additional hours at another assignment, reassignment, or additional pay to make up for the hours lost due to her sex.

Consider a client's discriminatory suspension: Which function or functions does that fall under? It probably does not fall under function one because it does not have to do with the beginning or the ending of the employment relationship. But functions two and four are implicated because the employer is both refusing to give the employee work (function two) and is exercising its power to manage the internal processes of its enterprise (function four). If there is a suspension without pay, then function three is implicated. Thus, the agency would be strictly liable if it engaged in any of those functions (two, three, or four). Comparing this situation under the traditional rule, a court would have to determine if the agency was negligent as to the discriminatory suspension and whether it took corrective action.[252]

3. Wage Practices

Generally, the agency pays the employee wages.[253] The amount that the agency pays the employee is determined by both the agency and the client, or the pay level is determined by how much the client pays the agency for its services.[254] Thus, so long as the agency gives the employees' wages or has some hand in setting the wage level, it engages in function three. And it is therefore liable for any of its client's discriminatory wage practices.[255] Suppose that Hotel decides that it wants to pay a Hispanic worker less money based on the stereotype that Hispanic workers will accept a lower wage. It tells Workforce that it needs to cut that worker's wage because the worker is not as efficient as other workers. Workforce complies and gives the worker less money on her paycheck. Even without Workforce's knowledge of Hotel's

250. *See id.* at 186.
251. *See supra* Part IV.B.1.
252. *See supra* Part IV.B.1.
253. PRASSL, *supra* note 18, at 51.
254. *Id.* at 51-52.
255. *See infra* Part IV.F.

discrimination, it is liable. Under the current standard, the agency is not liable because it was not negligent to Hotel's discrimination.

But you could imagine a situation where the agency completely relieves itself of function three. For example, an agency gives the client a worker. The worker and client agree on a wage and the client pays the worker wages. The agency has no say in setting the wage or in determining the payment method. In that scenario, the agency would not be liable for discriminatory wage practices even with knowledge of that the client was engaging in discriminatory wage practices.[256]

E. The Functional Liability Standard is Justified by Vicarious Liability Principles and by a Fairness Concern

While I consider the functional liability standard a type of direct liability, vicarious liability principles might be used to justify a heightened duty during a temp agency's employer functions. Let us assume that a staffing firm engages in the function of beginning and ending the employment relationship—which, in principle, it always should be engaging in. One justification for vicarious liability is choice.[257] At assignment, the staffing firm is choosing to contract with an end-user client and is consequently holding that client out to the potential temporary worker its assigning as an entity deserving of reliance. The temporary worker, by deciding to accept the assignment with the client, is relying on the agency's choice of the client. And the staffing firm's choice of its client is most evident to the worker at assignment because that is when the worker is explicitly presented with the choice for the first time.

Another vicarious liability justification is control.[258] The staffing firm's control over its client is likely at its highest when the client is engaging in its employer function. At assignment or termination, the staffing firm can implement mechanisms to detect and prevent discrimination by its client. It can fail to disclose the protected status of the potential employee to the client at assignment. At termination, it can require that its client give a non-discriminatory reason for its request for reassignment. For supervisor or co-worker harassment at the client's workplace, where the staffing firm is unlikely to play any part in employer functions, the staffing firm inherently has less control over the

256. *See infra* Part IV.F.
257. *See supra* Part II.A.
258. *See supra* Part II.A.

client's actions.

Finally, an additional justification for vicarious liability is causation. At assignment or termination, the probability that the client will discriminate and the extent of the client's discrimination depends on the staffing firm's contractual relationship with the client and the power that the firm grants its client over the potential employees.[259] As discussed, the staffing firm can easily implement mechanisms to prevent its client from discriminating here—i.e. not disclosing the race, sex, national origin, etc. of the employee to the client or requiring a non-discriminatory reason for termination. Further, rejecting, accepting, or terminating employment is a tangible employment action committed by high-level management in both entities.[260]

Besides vicarious liability principles, a concern of fairness justifies holding a staffing firm strictly liable during its employer functions. Imagine that an employer directly employs employees without using a staffing firm. The employer's human resources department or some sort of in-house recruitment department would probably perform the employer functions usually performed by a staffing firm: scouting employees, vetting them, training them, and placing them at the workplace. Imagine further that the recruitment department tells general management that it wants to hire a female employee, and general management disagrees because it only wants to hire men. In this instance, this company, as a whole, including its recruitment department, would be liable for sex discrimination. Using a staffing firm as an outsourced recruitment department allows the staffing firm to escape liability when it otherwise would not if it were in-house at the company. Thus, fairness dictates holding a staffing firm strictly liable when engaging in an employer function.

F. The Functional Liability Standard is Justified by the Participation Theory of Employment

The functional liability standard is consistent with Professor Matthew Bodie's theory of employment as participation in a firm.[261] This theory argues that the proper definition of employment should not

259. *See* Magnuson v. Peak Tech. Servs., Inc., 808 F. Supp. 500, 511-13 (E.D. Va. 1992).

260. *Id.* at 507-08.

261. *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661 (2013) [hereinafter Bodie, *Participation*]; *see also* Matthew T. Bodie, *Employment as Fiduciary Relationship*, 105 GEO. L.J. 819, 822 (2017) (using the participation theory of employment to justify the argument that employers owe fiduciary duties to their employees).

involve an analysis into the level of employer control.[262] An employee is defined by the level of participation she has in the putative employer's common economic enterprise.[263] Thus, to be an employee, a worker must be "within the boundaries of the firm."[264]

Through a lens of employee participation, the functional liability standard as applied to the loyal matchmaker dilemma makes sense. Where the worker is directly participating in the staffing firm's productive processes, that staffing firm is more likely to be liable for discrimination under the functional standard. For example, a staffing firm's central process is to find temporary workers and assign them to employees. The staffing firm makes its money from these assignments. Thus, it makes sense that a staffing firm be strictly liable for any discrimination occurring at assignment or termination of assignment since the employee is directly participating in those processes.

On the other hand, whatever harassment or discrimination that occurs while the employee is at the client's workplace is further removed from the staffing firm's central production processes. In fact, while the temp is at the client's workplace, she is mainly participating in the client's productive processes. Thus, it makes sense to not hold the staffing firm liable here.

In other words, the staffing firm's central processes are closely related to its employer functions. Where a temporary employee is participating in the staffing firm's processes, the staffing firm is bound to be acting within its employer functions.[265] Contrastingly, where a temporary employee is not directly participating in the firm's processes, the client's employer functions are likely to be at play.

G. The Appeal and the Disadvantages of Functional Liability Under

262. *See e.g.*, Magnuson v. Peak Tech. Servs., Inc., 808 F. Supp. 500, 507 (E.D. Va. 1992); Parker v. Golden Peanut, LLC, 115 F. Supp. 3d 702, 708 (E.D. Va. 2015); Lee v. Mobile Cty. Comm'n, 954 F. Supp. 1540, 1545 (S.D. Ala. 1995), *aff'd*, 103 F.3d 148 (11th Cir. 1996); Butler v. Drive Auto. Indus. of Am., Inc., 793 F.3d 404, 408-10 (4th Cir. 2015).

263. Bodie, *Participation*, *supra* note 261, at 705 ("It is not that employees are controlled by the firm that makes them employees. It is rather that they are part of a process of joint production, acting together within one unit.").

264. *Id.* at 706. Bodie derives his theory from theory of the firm scholarship and argues that the standard control test to determine whether an employee-employer relationship exists is inapplicable to modern forms of economic production. *Id.* at 664-66. Instead of focusing on employment as ideas about employees, the concept of employment should be focused on employers. *Id.* at 664-65.

265. *See* discussion *supra* Section IV.A.

U.S. Antidiscrimination Law

The functional standard is less ambiguous and easier to apply than the negligence liability standard. To find liability, a court does not have to engage in intensive fact finding surrounding the agency's knowledge or lack of knowledge of the discrimination. Instead, a court need only look at whether the agency engaged in the implicated function. The only type of in-depth inquiry involved is the affirmative defense inquiry where it looks at reasonable accommodation.

The functional standard creates more incentive for an employer to eliminate client discrimination. Because the agency is strictly liable, it is likely that it would work harder to root out their client's implicit or explicit bias. For example, a client requests that its worker be terminated from her assignment. The agency then has an incentive to work extra hard to ensure there was no discrimination or bias because it is strictly liable. This work might include an independent investigation, interviews, etc. Compare this to the negligent standard under current law. Where a court only holds an employer to a negligent standard, the employer has less concern to root out a client's discrimination.

On the other hand, the functional standard creates an incentive to limit the agency's employer functions. To avoid liability, temp agencies might stop playing any role in functions two, three, and four. It could theoretically have no control or say over the provision of work, the provision of pay, and workplace operations and processes (functions two, three, and four respectively). But it would have to stop being a temp agency to relieve itself of function one—powers over the employment relationship. Because as long as it assigns workers to its clients, it is engaging in function one. It is unclear if the benefits of removing these employer functions (less chance of liability) would outweigh any costs. For instance, a client might not want to contract with an agency if the agency does not pay the employee or if it does not have some role in the provision of work. So, market forces might work to prevent some agencies from completely relieving itself of functions two, three, and four.

While making it easier to find an agency liable for issues arising from hiring and firing, and from wage practices, the functional standard would make it more difficult to find agency liability for client discrimination at the workplace. As discussed, it is unlikely that an agency will engage in function four. You could argue that this is how the law should treat the temp agency. For example, under *Dunn*'s

rationale, the agency might not be liable.[266] In *Dunn*, the court held the employer liable for a third-party's discriminatory acts partly because those acts occurred at the employer's workplace.[267] If all the discriminatory acts arose from the client's workplace and did not implicate any of the agency's employer functions, then it should not be held liable.[268] Plus, if the agency truly does not engage in any employer functions related to workplace processes, then it is unlikely to be able to take any corrective action under the current standard. So maybe the functional standard is not completely changing the legal landscape.

On the other hand, by limiting liability here, an agency has less incentive to help the employee who is being harassed or harmed at the workplace. While there are some market pressures on an agency to keep a client's workplace harassment free, those might not be enough at the margins. Thus, it may be worthwhile to consider keeping the negligence liability standard for workplace issues not implicating any of the agency's employer functions.

But note that while the functional liability standard limits employer responsibility at the workplaces, it vastly expands employer responsibility in other contexts. As discussed, there exists several factual scenarios where an agency would not be liable under a negligence liability standard but would be liable under the functional standard. Similarly, because the functional standard views the employer through its employer functions, strict liability is used narrowly, only in circumstances where it is likely justified under vicarious liability principles.

The functional standard may also be consistent with employee expectations. To the extent that the employee perceives the staffing firm engage in an employer function, that employee should also expect that the staffing firm be liable for discrimination occurring during that function. Contrarily, when a staffing firm affirmatively disclaims an employer function, say paying wages, the employee should have little reason to suspect that the staffing firm would be liable for discrimination based on her wages.

This standard's consistency with employee expectations would contribute to less instances of employee-perceived organizational injustice. Organizational psychology literature recognizes two kinds of

266. Dunn v. Wash. Cty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005).

267. *Id.* (noting that it is the employer's responsibility to exclude discriminatory people or entities from its "premises").

268. *Id.*

organizational justice: distributive and procedural.[269] Distributive organizational justice is most relevant here. Distributive organizational justice refers to perceived outcome fairness, while procedural organizational justice refers to perceived process fairness.[270] According to one strand of scholarship, distributive justice occurs when employee expectations match actual outcomes.[271]

Recall the discriminatory assignment incident I described in the previous part. Regina should expect Workforce to be liable for anything directly involving Regina's assignment to Hotel because Workforce played a huge role in that function. But, as I discussed, under a negligence standard or where the staffing firm is only liable for its own discrimination, Workforce would escape liability.[272] Thus, Regina's expectations would not match the actual outcome, resulting in organizational injustice. But under a functional liability regime, Workforce's legal responsibility should be clear to all parties involved including Regina. This would result in less distributive organizational injustice.

Besides being important to employees' sense of psychological well-being, organizational justice should be important to employers too. Studies have indicated that organizational justice is related to counterproductive work behaviors, organizational commitment, the likelihood that an employee will quit, and organizational citizenship behavior.[273]

CONCLUSION

While commentators have recognized the loyal matchmaker dilemma identified in this paper, none have meaningfully and critically analyzed the dilemma under a functional conception of the employer. Decision-makers apply current employer responsibility principles in a

269. STEPHEN W. GILLILAND & DAVID CHAN , *Justice in Organizations: Theory, Methods, and Applications*, *in* 2 HANDBOOK OF INDUSTRIAL, WORK AND ORGANIZATIONAL PSYCHOLOGY 143, 144-46 (Neil Anderson et al. eds., 2001).

270. *Id.* at 144-45, 146.

271. *See id.* at 145.

272. *See Dunn*, 429 F.3d at 691.

273. Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta-Analysis*, 86 ORG. BEHAV. & HUM. DECISION PROCESSES 278, 304-07 (2001). Organizational commitment may be particularly important to staffing firms. Some have suggested that temporary employment, by its very nature, negatively affects a temporary employee's organizational commitment. *See, e.g.*, Robert W.D. Veitch & Helena D. Cooper-Thomas, *Tit for Tat? Predictors of Temporary Agency Workers' Commitments*, 47 ASIA PAC. J. HUM. RES. 318, 319-20 (2009) (summarizing theoretical research on organizational commitment in temporary employment).

rigid way, and fail to account for the complex, multi-lateral relationship inherent in the staffing agency context.

As I have shown, the functional liability standard I have proposed is preferable because it is flexible enough to account for certain instances where strict liability is more justified. It is also consistent with the employee's expectations, and such consistency allows for an employee to perceive more organizational justice. The functional standard is also predictable—the temp agency will be liable for every employer function it engages in. To be fair to the staffing firm, given the standard's penchant for strict liability, the staffing firm is entitled to an affirmative defense. The staffing firm can satisfy the affirmative defense through reasonable accommodation, like the reasonable accommodation mandate found in the ADA[274] or religious accommodation under Title VII.[275]

With the rise of temporary staffing firms comes new challenges to employment discrimination law. The loyal matchmaker dilemma is one such challenge, and it must be met with a flexible, predictable, and consistent liability standard that is not only fairer to staffing firms, but also fairer to their temporary employees. This Article's proposal, I hope, meets that challenge.

274. Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(b)(5)(A)-(B) (2012).

275. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2012).