One Bad Apple May Spoil the Bunch: Title VII Mixed-Motives Claims and Groupthink

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Introduction

In 2014, biochemist Beverly Emerson was elected to the post of faculty chairwoman of the Salk Institute for Biological Studies.[1] From this position, Emerson pushed to include more women in leadership, but she was met with resistance from her male counterparts.[2] Indeed, at one point, a male coworker told her: "[B]oys run committees and boys choose boys."[3] Salk relied on the faculty committee for major employment decisions, including hiring and allocating research funds to scientists.[4] Due to the discriminatory views of male counterparts, the female researchers of Salk struggled to be elevated to leadership positions and to receive the funds necessary to pursue their research agendas.[5] Multiple forms of discrimination—involving decisions to hire, promote, and fire diverse employees—persist in some workplaces today, and courts are repeatedly called upon to address these issues.

New corporate structures have complicated the legal analysis in employment discrimination cases. Today, it is common practice among institutions, large and small, to use groups or committees to hire and promote employees.[6] Under such a decision-making structure—referred to hereinafter as horizontal decision-making—the bias of even a single member of a hiring committee may impact the decision of the group acting on behalf of an organization. Such bias can lead to discriminatory employment decisions and, ultimately, Title VII litigation. Horizontal decision-making cases, however, do not fit easily into the current jurisprudence. Existing Supreme Court precedent only addresses vertical decision-making cases, where the discriminatory animus rests with other members of the organization—often a supervisor—and not the ultimate decision maker.[7]

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[1] Mallory Pickett, *'I Want What My Male Colleague Has, and that Will Cost a Few Million Dollars,'* N.Y. Times (April 18, 2019), https://www.nytimes.com/2019/04/18/magazine/salk-institute-discrimination-science.html [https://perma.cc/25PM-PL45].

[2] Ultimately, Emerson and her fellow senior female professors settled in a trio of lawsuits. Meredith Waldman, *Salk Institute Settles Last of Three Gender Discrimination Lawsuits*, Sci. Mag. (Nov. 21, 2018), https://www.sciencemag.org/news/2018/11/salk-institute-settles-last-three-gender-discrimination-lawsuits [https://perma.cc/W9S7-YSQV].

[3] Pickett, *supra* note 1.

[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Atta Tarki, *How to Avoid Groupthink When Hiring*, Harv. Bus. Rev. (Aug. 13, 2019), https://hbr.org/2019/08/how-to-avoid-groupthink-when-hiring [https://perma.cc/GRY5-549D]; Harv. Univ., Fac. of Arts & Scis., 2018–2019 Tenure-Track Handbook (2018), https://facultyresources.fas.harvard.edu/files/facultyresources/files/final_2018_2019_tenure_track_hbk_for_website.pdf [https://perma.cc/59XD-TQAN].

[7] For the purposes of this Note, vertical decision-making refers to circumstances in which a lower-level supervisor—for discrimination cases, harboring discriminatory animus—recommends an adverse employment action to the ultimate decision maker. *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision-making*, 61 La. L. Rev. 495, 496 (2001) (coining the terms "vertical" and "horizontal" decision-making). Notably, in vertical decision-making cases, the ultimate decision maker may be unaware of the discriminatory animus. *See also* Staub v. Proctor Hospital, 562 U.S. 411, 421 (2011) (holding that "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action[—]by the terms of

This Note explores the development of jurisprudence concerning Title VII employment discrimination cases since the adoption of the 1991 amendments to Title VII contained in § 703(m)[8] and § 706(g)(2)(B).[9] This Note argues that since the adoption of the 1991 amendments, lower courts have struggled with how to apply those provisions in horizontal decision-making cases.[10] Currently, neither Congress nor courts have established a definitive standard for what constitutes a "motivating factor,"[11] which is the legal standard under § 703(m) to prove a Title VII discrimination claim. Likewise, there is no guidance addressing what evidence is sufficient for a defendant to carry its "but-for" defense by proving it "would have taken the same action in the absence of the impermissible motivating factor" pursuant to § 706(g)(2)(B).[12] Importantly, in horizontal decision-making cases in which one or a few, but not all, members of a committee may have harbored discriminatory animus, it can be very difficult for a plaintiff to overcome the defendant's "but-for" § 706(g)(2)(B) defense, as the employer can present the testimony of other, non-biased committee members.

This Note argues for a new interpretation of and approach to § 703(m) cases by proposing a definition of "motivating factor," as well as an approach for courts to use in considering new types of evidence under § 703(m) and § 706(g)(2)(B) in horizontal decision-making cases. Guiding courts with a clearer definitions and standards for § 703(m) and § 706(g)(2)(B) would potentially animate those provisions in a manner consistent with Congressional intent in the Civil Rights Act of 1991.[13] Clarifying the evidentiary practices could also have important practical implications. Current jurisprudential ambiguity concerning horizontal decision-making cases has arguably had a chil-

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USERRA it is the employer's burden to establish that[—]then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.").

[8] 42 U.S.C. § 2000 e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

[9] *Id.* -5(g)(2)(B) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court- (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).").

[10] *See* LEX K. LARSON, LARSON'S EMPLOYMENT DISCRIMINATION, § 8.04 (2d. 2003) (stating that "it may be difficult or impossible to show intentional discrimination when more than one decision maker is involved"). *See also* Austin v. City of Chicago, No. 14-cv-9823, 2018 WL 1508484, at *12 (N.D. Ill. Mar. 27, 2018) (observing that the "presence of multiple decision-makers often makes it 'difficult' to prove that an employer's action is discriminatory").

[11] 42 U.S.C. § 2000e-2(m).

[12] 42 U.S.C. § 2000e-5(g)(2)(B).

[13] *See* Pub L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C).

ling effect on legal actions, as plaintiffs and their lawyers are confused and uncertain of the risks of bringing a Title VII case under § 703(m).[14]

In considering the evidence that could be admissible under § 703(m) and the § 706(g)(2)(B) "but-for" standard, this Note looks to academic research on groupthink[15]—or extreme consensus tendencies in decision-making groups—and discuss how courts can use such research in discrimination cases, particularly those involving horizontal decision-making. Using this literature, this Note develops a framework for assessing when evidence of animus in a group context is sufficient to overcome the burden of § 703(m) and § 706(g)(2)(B).[16] Psychological and sociological concepts are increasingly taken into account in the law, albeit most often today in criminal proceedings.[17] This Note examines the opportunity to effectively incorporate such concepts in Title VII § 706(g)(2)(B) cases as well.

Finally, this Note addresses the implications of the Supreme Court's 2011 *Staub v. Proctor Hospital*[18] decision. As more fully described, *Staub* is a vertical decision-making case. This Note accepts *Staub* as binding precedent in such cases but argues that it need not be followed in horizontal decision-making cases. Thus, in the absence of Supreme Court precedent addressing horizontal decision-making, courts are not bound by *Staub*. Litigants and the judiciary can look to groupthink concepts as an evidentiary tool in horizontal decision-making employment cases. Given the heightened focus on discrimination in the United States,[19] this Note is timely and has the potential to impact future workplace discrimination jurisprudence.

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[14] Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 210–11 (2011) (footnotes omitted).

[15] *See* KEITH SAWYER, GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION, 71 (2008); Marlene E. Turner and Anthony R. Pratkanis, *Twenty-Five Years of Groupthink Theory Research: Lessons from the Evaluation of a Theory*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 105, 107–08 (1998) (tracing the history of groupthink research); IRVING LESTER JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT, 131 (1997).

[16] 42 U.S.C. § 2000e-2; *id.* -5(g)(2)(B).

[17] *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1972 (2019); Rebecca E. Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 523 (2012); Dora Klein, *The Mentally Disordered Criminal Defendant at the Supreme Court: A Decade in Review*, 91 OR. L. REV. 207, 208 (2012); Reid Griffith Fontaine, *Disentangling the Psychology and Law of Instrumental and Reactive Subtypes of Aggression*, 13 PSYCH., PUB. POL'Y, L. 143, 145 (2007); Branden D. Jung, *Criminal Law's Folk Psychological Dilemma: Resolving Neuroscientific and Philosophical Challenges to the Voluntary Act Requirement*, 122 W. VA. L. REV. 561, 564 (2019); Astrid Birgden & Tony Ward, *Jurisprudential Considerations: Pragmatic Psychology Through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System*, 9 PSYCH., PUB. POL'Y, L. 334, 335 (2003); Ziv Bohrer, *Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology*, 33 MICH. J. INT'L L. 749, 756 (2012); Side Liu, *Law's Social Forms: A Powerless Approach to the Sociology of Law*, 40 LAW & SOC. INQUIRY 1, 8 (2015); Calvin Morrill, John Hagan, Bernard Harcourt, Tracey Meares *Punishment and Crime: Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future*, 2005 U. CHI. LEGAL F. 289, 307 (2005).

[18] 562 U.S. 411 (2011).

[19] *See* Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May Be The Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/inter-

I. Background

In 1991, Congress enacted § 703(m)[20] of Title VII to create greater opportunities for redress by victims of workplace discrimination.[21] Section 703(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even if other factors also motivated the practice."[22] Notably, while § 703(m) ensures that prevailing plaintiffs receive at least some relief, Congress added section, § 706(g)(2)(B),[23] which specifies that if "a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor the court . . . may grant declaratory relief, injunctive relief . . . and attorney's fees and costs" but "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[24] In other words, § 706(g)(2)(B) established a but-for standard for defendants to limit their liability to declaratory relief, injunctive relief, attorney's fees and costs. If an employer can show that it would have taken adverse employment action against the plaintiff regardless of "the impermissible motivating factor," it will be found to have engaged in an unlawful employment practice under § 703(m), yet will not be required to grant the plaintiff compensatory relief (e.g. backpay, compensatory or punitive damages, rehiring, reinstating, or promoting).

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active/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/EN52-YYJ3]; Ailsa Chang, Rachel Martin, & Eric Marrapodi, *Summer of Racial Reckoning*, NPR (Aug. 16, 2020), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-matchlit [https://perma.cc/NSG5-MZCX]; John Eligon & Audra D.S. Burch, *After a Summer of Racial Reckoning, Race Is on the Ballot*, N.Y. Times (Oct. 30, 2020), https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html [https://perma.cc/WL98-QHKU]; Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. Times (March 18, 2021), https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html [https://perma.cc/4BLR-WK9K]; Jessica Bennett, *The #MeToo Movement: The Year in Gender*, N.Y. Times (Dec. 30, 2017), https://www.nytimes.com/2017/12/30/us/the-metoo-moment-the-year-in-gender.html [https://perma.cc/7LRP-4P9L].

[20] 42 U.S.C. § 2000e-2(m).

[21] *See* Pub. L. No.102-166, 105 Stat. 1071 (1991) ("The Congress finds that—(1) additional remedies under federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.").

[22] 42 U.S.C. § 2000e-2(m) (emphasis added).

[23] *See* Sheppard v. Riverview Nursing Ctr., 870 F. Supp. 1369, 1384 (D. Md. 1994) ("As part of the same Act, these remedies, as well as backpay, were explicitly denied to Title VII plaintiffs who succeed in proving illegal discrimination, but fail to prove that the employer would have made a different decision in the absence of the illegal motivation. In order to assure vigorous enforcement of Title VII, even in cases where an employer may have acted with mixed motives, Congress had to ensure that such plaintiffs would be able to hire competent counsel to pursue their claims. Because no monetary damages are available where section 2000e-5(g)(2)(B) applies, if post-offer attorney's fees were also potentially cut off, few attorneys would be willing to handle mixed-motive cases at all. By deliberately and significantly altering the verbal formulation in section 2000e-5(g)(2)(B) to separate attorney's fees from "costs," Congress has steered a middle course. Plaintiffs will recover no damages, but will be fully compensated for their costs in enforcing Title VII.").

[24] 42 U.S.C. § 2000e-5(g)(2)(B).

As victims of employment discrimination seek relief for such unlawful practices through the recovery of monetary damages beyond attorney's fees, this but-for causation provision can impair a plaintiff's opportunity for monetary relief or equitable redress. By not allowing plaintiffs to show how discriminatory animus actually animated or drove an employment decision, current practices have a chilling effect on the use of § 703(m) as a cause of action.

The history of Title VII, first within the Civil Rights Act of 1964[25] and then in its modified form in the Civil Rights Act of 1991,[26] shows Congress's intent to use Title VII as a meaningful tool to address employment discrimination.

A. History of Title VII

Following President John F. Kennedy's assassination, President Lyndon B. Johnson urged Congress to honor President Kennedy's memory by passing a civil rights bill aimed at ending racial discrimination. Addressing a joint session of Congress, President Johnson stated, "[W]e have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law."[27] Heeding his call, Congress passed the Civil Rights Act of 1964 on July 2 of that year. Title VII, on which this Note focuses, prohibited "discrimination by covered employers on the basis of race, color, religion, sex or national origin."[28] For its part, however, the Supreme Court, following the enactment of the Civil Rights Act of 1964, handed down decisions that interpreted Title VII narrowly.

B. Pre- § 703(m) Jurisprudence

In the mid to late 1980s, the Supreme Court decided a number of cases that addressed standards for plaintiffs to prevail that are directly applicable to Title VII cases involving discriminatory employment practices.[29] In the Court's 1989 decision, *Price Waterhouse v. Hopkins*, the justices specifically addressed how a plaintiff could prevail in a Title VII case at the time.[30]

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[25] Civil Rights Act of 1964, Pub L. No. 88-325 (codified at 42 U.S.C. § 2000e-5).

[26] Civil Rights Act of 1991, Pub L. No. 102-166, 105 Stat. 1071.

[27] President Lyndon B. Johnson, Address to a Joint Session in Congress Regarding President John F. Kennedy's Assassination, *in* H.R. Doc. No. 12009378 (1963).

[28] 42 U.S.C. § 2000e–2.

[29] *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (making it easier under Federal Rule of Civil Procedure 56 to shift the burden to the non-moving party—the plaintiff in this case—to produce evidence in support of discrimination); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (holding that the trial court must take all factual inferences in the movant's favor); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (raising the standard for surviving a summary judgment motion to require unambiguous evidence of illegal activity).

[30] *See* 490 U.S. 228, 246-47 (1989).

Price Waterhouse was a lawsuit by Ann Hopkins, a senior manager at the accounting firm Price Waterhouse. At the time of Hopkins's employment, Price Waterhouse was male-dominated.[31] The firm considered Hopkins for partnership, given "her successful 2-year effort to secure a $ 25 million contract with the Department of State."[32] In fact, the district court judge, Judge Gesell, found that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for partnership."[33] Despite her impressive record at the firm, Hopkins was not promoted to partner.[34] At the time of the suit, Price Waterhouse followed a specific process for promoting an employee to partner in which the partners at the firm wrote comments on each candidate, and the firm's Admission Committee read the comments and made recommendations to the Policy Board. In turn, the Policy Board made employment decisions including which employees to promote.[35] In this case, several partners encouraged the Policy Board not to promote Hopkins.[36] These suggestions appeared to be driven by her gender: the Court found that "[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins's personality because she was a woman. One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'"[37]

Despite Hopkins showing "that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations,"[38] the plurality in *Price Waterhouse* gave the company a way of absolving itself of liability. Though the Court altered the standard that existed prior to *Price Waterhouse*, which kept the burden of persuasion throughout the case on the plaintiff to prove but-for causation, it nevertheless held that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability by proving that it would have made the same decision even if it had not allowed gender to play such a role."[39] In remanding the case to the lower court to apply this new standard, the Court gave a defense to employment discrimination claims. If employers

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[31] *See id.* at 233 ("Of the 662 partners at the firm at the time, 7 were women. Of the 88 persons proposed for partnership that year, only one—Hopkins—was a woman.").

[32] *Id.*

[33] *Id.* at 234 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985)).

[34] *Id.* at 233 (stating that "20 [candidates]—including Hopkins—were 'held' for reconsideration the following year").

[35] *Id.*

[36] *Id.* at 228.

[37] *Id.* at 235 (internal citations omitted).

[38] *Id.* at 251.

[39] *Id.* at 244–45.

could show that the employment decision would have happened absent such discrimination, the company would not be liable under Title VII.

Even after Hopkins made a prima facie case that discrimination motivated the decision through her strong evidence of discriminatory comments, Price Waterhouse was given the opportunity to rebut the claim and absolve itself of liability. In fact, Justice Brennan postulated that in most cases, the employer should be able to present some objective evidence that rebuts claims of discrimination: "As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive."[40] As such, while a plaintiff must show evidence of discrimination, defendants need to present evidence that would convince the trier of fact that it is more likely true than not that it would have made the same employment action in order to avoid liability.

Interestingly, *Price Waterhouse* was in some ways a pro-plaintiff case. For the first time, the Court introduced a "motivating factor"-type standard[41] later seen in § 703(m). But in providing the defense with the opportunity to present evidence to absolve itself from all liability, the Court essentially established a "but-for" standard that precluded even nominal relief for the plaintiff.[42] In passing § 703(m) and § 706(g)(2)(B), Congress sought to overturn the new "but-for" standard established under *Price Waterhouse* by providing for nominal liability, but not monetary damages, when a defendant proved that an employment decision was made for reasons beyond discrimination.

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[40] *Id.* at 252.

[41] *Id.* at 244 (using the language "motivating part" not "motivating factor").

[42] *See id.* at 282–83 (Kennedy, J., dissenting) (noting that "the plurality's theory of Title VII causation is ultimately consistent with a but-for standard").

C. Passage of § 703(m) of Title VII

In response to *Price Waterhouse*[43] and other Supreme Court decisions,[44] Congress passed the Civil Rights Act of 1991,[45] in which it sought to overturn the Court's interpretations of Title VII[46] Under the Civil Rights Act of 1991's new § 703(m), Title VII does not require a plaintiff to show that discrimination was the but-for, or determinative, cause of the adverse employment action for liability, but rather requires that the plaintiff show that one of the protected characteristics was a "motivating factor" for "any employment practice, even though other factors also motivated the practice."[47] The exact language of the statute reads:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.[48]

Representative John J. LaFalce, who had sponsored an earlier version of the bill in the House of Representatives,[49] directly addressed the *Price*

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[43] S. 2189, 112th Cong. § 2(a)(4)(B) (2012) ("Congress disagrees with the Supreme Court's interpretation . . . . [It declines] to apply the Supreme Court's ruling in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a part of which was subsequently approved by Congress, and enacted into law by section 107 of the Civil Rights Act of 1991, as section 703(m) of the Civil Rights Act of 1964, which provides that an unlawful employment practice is established when a protected characteristic was a motivating factor for any employment practice, even though other factors also motivated the practice."); H.R. REP NO. 102-40, pt. 2, at 18 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 586 (statement of Rep. Brooks) ("The Court's holding in Price Waterhouse severely undermines protections against intentional employment discrimination by allowing such discrimination to escape sanction completely under Title VII. Under this holding, even if a court finds that a Title VII defendant has clearly engaged in intentional discrimination, that court is powerless to end that abuse if the particular plaintiff who brought the case would have suffered the disputed employment action for some alternative, legitimate reason. If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions.").

[44] *See* Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (interpreting the language of 42 U.S.C. § 1981 and holding that an employee cannot sue for damages caused by racial harassment on the job because the employer had not denied the employee his employment); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (requiring employees to prove that an employer's personnel practice has an unlawful disparate impact on them by showing that the policy or requirement at issue, in isolation, had the discriminatory effect); Martin v. Wilks, 490 U.S. 755 (1989) (permitting white firefighters who had not been party to the litigation that established a consent decree governing the hiring and promoting of Black firefighters to bring suit to challenge the decree).

[45] 42 U.S.C. § 2000 e–2(m).

[46] *See* Jeffrey A. Van Detta, *The Strange Career of Title VII's § 703(M): An Essay on the Unfulfilled Promise of the Civil Rights Act of 1991,* 89 ST. JOHN'S L. REV. 883, 884 (2015) (noting that Congress passed the Civil Rights Act of 1991 to reverse the effects of the Reagan Supreme Court's rulings on Title VII).

[47] 42 U.S.C. § 2000e–2(m).

[48] *Id.*

[49] Civil Rights Act of 1990, H.R. 5385, 101st Cong. (1990).

Waterhouse decision in his statement on the House floor in connection with the passage of § 703(m). Though Rep. LaFalce's own bill was not adopted by Congress, he believed the bill ultimately adopted satisfied his concerns about *Price Waterhouse*:

> In cases of intentional discrimination in which the discrimination was only one factor motivating the employment decision, my bill would have overturned *Price Waterhouse versus Hopkins* by allowing an employee or applicant for employment to establish an unlawful employment practice whenever the discrimination was a major contributing factor to the employment decision. The bill before us today likewise allows a finding of unlawful discrimination if discrimination was one of the motivating factors in the employment decision.[50]

With § 703(m)'s passage, Congress "left it in the hands of a jury to determine whether an adverse employment action taken against [an employee] was in some discernible way motivated by that employee's race."[51] Now, if the plaintiff can convince a jury that an unlawful motivating factor was at least partially present in the decision-making process that led to the adverse employment decision, the employee will be entitled to judgment in his or her favor and to at least some relief.

Congress, however, added an important qualifier. Though a plaintiff receives declaratory judgment and more once he or she proves that unlawful consideration was a "motivating factor" in the employment decision, the plaintiff will not be granted monetary damages, including backpay, nor will be entitled to reinstatement, hiring, promotion, etc., unless the plaintiff can also successfully present evidence to convince a jury that the employer has not proven the affirmative defense under § 706(g)(2)(B).[52]

> On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).[53]

Thus, an employee risks not being awarded all monetary damages if the jury divides its verdict, holding the defendant liable under § 703(m) but not

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[50] 102 CONGR. REC. 30,688 (1991) (Statement of Rep. John J. LaFalce).
[51] Van Detta, *supra* note 46, at 888.
[52] *See* 42 U.S.C. § 2000e–5(g)(2)(B).
[53] *Id.*

responsible for damages under § 706(g)(2)(B). Plaintiffs may be reluctant to rely on § 703(m) for relief in horizontal decision-making instances.[54] Arguably, defendants in horizontal decision-making cases have an easier burden under § 706(g)(2)(B) when the plaintiff has proof of a single decision maker's bias: employers can argue that while one or some committee members harbored unlawful animus, the presence of other committee members who the plaintiff cannot prove harbored animus suggests reliance on factors outside of discrimination to justify the employment decision.[55]

New evidentiary practices in § 703(m) and § 706(g)(2)(B) horizontal decision-making cases could provide courts with more appropriate and targeted means to consider unlawful employment practices.

II. Title VII Jurisprudence After § 703(m)'s Passage

This Section examines the Supreme Court's decision in *Staub v. Proctor Hospital*.[56] Although *Staub* was a Uniformed Services Employment and Reemployment Rights Act[57] (USERRA) case, not a Title VII case, the Court analyzed statutory language identical to that in § 703(m), and the decision has proven influential for courts in the Title VII context. This Note contends that *Staub*'s holding is precedent for vertical decision-making cases, but not horizontal decision-making cases.[58] Thus, the Supreme Court has not spoken on the proper application of a "motivating factor" test in horizontal decision-making cases. As such, plaintiffs may be denied the opportunity to provide evidence that the actions of one or a few of the decision makers may have motivated the decision in a manner that would satisfy the § 703(m) standard of causality and § 706(g)(2)(B)'s rebuttal formulation.[59]

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[54] Plaintiffs retain the option to take on the burden of but-for causation under § 703(a), though.

[55] This Note speaks only of the difficult cases in which the biased decision maker is neither the clear deciding vote nor has the ability to "black ball" a candidate or employee from a desired position.

[56] 562 U.S. 411 (2011)

[57] 38 U.S.C. § 4301.

[58] This Note does not take issue with the Supreme Court's *Staub* decision as it applies to proximate causation in vertical decision-making cases.

[59] It is possible that plaintiffs in horizontal decision-making cases rely on § 703(a)(1) for fear of losing monetary damages at the trial stage, which may happen in a § 703(m) claim in light of § 706(g)(2)(B). This too may cause issues in horizontal decision-making cases, as a plaintiff may struggle to prove that he or she suffered an adverse employment action "because of such individual's race, color, religion, sex, or national origin." *See* 42 U.S.C. § 2000 e–2(a). While a groupthink analysis may similarly work in horizontal decision-making cases brought under § 703(a)(1), this Note focuses on § 703(m).

A. Staub v. Proctor Hospital's Motivating Factor Analysis Using Proximate Causation

Congress passed the Civil Rights Act of 1991[60] in part to ease the burden of persuasion for plaintiffs in discrimination cases that was established in *Price Waterhouse*. The Supreme Court in 2011, however, found that motivating factor language identical to § 703(m)'s required a modified proximate causation analysis.[61] In *Staub*, the Court held that, under the specific facts of the case, the discriminatory animus could not simply be called a "motivating factor" for the ultimate decision reached.[62]

1. The Facts of Staub

In *Staub*, the plaintiff sued under the USERRA for employment discrimination after he was fired.[63] Alleging discrimination based on his involvement in the Army Reserves, he provided evidence to the Court that his supervisors were hostile to him, because his participation in the Reserves required his occasional absence from work.[64] Two of Staub's supervisors, Janice Mulally and Michael Korenchuk, created a record of Staub violating internal rules that appeared specifically intended to justify his termination.[65] Ultimately, the Vice President of the Human Resources Department, Linda Buck, fired Staub, though Buck apparently had no knowledge of the supervisors' discriminatory behavior.[66]

Critically, the statute at issue in *Staub*—the USERRA—contains key language identical to that of § 703(m). It provides that discrimination against uniformed service members shall not be a "motivating factor in the employer's action."[67] Though *Staub* is not a Title VII case, Justice Scalia, writing for the majority, explicitly noted that "[t]he statute is very similar to Title VII . . . . The central difficulty in this case is construing the phrase 'motivating factor' in the employer's action."[68]

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[60] 42 U.S.C. § 2000e–2(m).

[61] *Staub*, 562 U.S. at 411, 416 (reinforcing the "cat's paw" theory of liability, in which employers are still liable under Title VII if they fire an employee based on the recommendation of a racially hostile subordinate).

[62] *Id.* at 422–23.

[63] *Id.* at 415.

[64] *Id.* at 414–15.

[65] *Id.* at 415 ("Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations.").

[66] *Id.* ("His contention was not that Buck had any such hostility but that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision.").

[67] 38 U.S.C. § 4301.

[68] *Staub*, 562 U.S. at 416.

2. The Court's Holding in Staub *Is Limited to Vertical Decision-Making Cases*

In the *Staub* opinion, Justice Scalia explained why the facts of the case call for a proximate causality analysis rather than just a straightforward "motivating factor" analysis:

> The governing text . . . requires that discrimination be "a motivating factor" in the adverse action. [But] when a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be . . . a "causal factor" in that decision; but it seems . . . a considerable stretch to call it "a motivating factor."[69]

The Court thus applied a proximate causation analysis that also employed a nuanced motivating factor analysis. If the Court were to find liability, according to the opinion, it cannot be based on a straightforward motivating factor test of the decision maker, as the facts would not meet that standard. The Court outlined why the facts do not call for a motivating factor analysis: the firing agent who is the ultimate decision maker has no unlawful animus and is unaware of the unlawful animus of the supervisor. Thus, the logic in *Staub* applies to factually similar cases with similar decision-making structures—where a lower level employee harbors the discriminatory animus, but the ultimate decision maker at the top does not. The Court's analysis required a vertical decision-making structure, arguably making it inapplicable in horizontal decision-making cases.

Although *Staub* relied primarily on a proximate causation analysis to potentially find liability, some have argued that proximate causation has no place in the Title VII context at all.[70] Further, the distinction between the two causation tests—motivating factor and proximate cause—is admittedly blurred and not probed in greater detail by the Court. The *Staub* Court established a modified motivating factor analysis. The Court has yet to provide guidance, however, on how to assess a "motivating factor" in the context of horizontal decision-making. Ultimately, this Note takes the position that *Staub* is the Supreme Court precedent on vertical decision-making and that a different § 703(m) and § 706(g)(2)(B) standard should be applied in horizontal decision-making cases.

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[69] *Id.* at 418.

[70] Professor Sandra Sperino criticizes the tort-like language of *Staub*, arguing that Title VII is not intended to be a proximate causation analysis. *See* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 3 (2013). As Sperino notes, "only weak textual, intent, or purpose-based arguments support courts' use of proximate cause in Title VII." *Id.* She argues that the judiciary, after the *Staub* decision, should have avoided making proximate cause an element within a federal discrimination claim. *Id.* at 2. Sperino contends that proximate causation should be avoided for a few reasons: it limits the reach of federal discrimination law, it makes it easier for a court to grant summary judgment to employers, and proximate causation is a nebulous concept. *Id.* at 3.

3. Staub*'s Proximate Causation Standard Can Be Met with Fewer Than All Decision Makers Harboring Animus*

The Court ultimately held that a straightforward motivating factor test without regard to a proximate causation analysis was inapplicable in *Staub*.[71] Nevertheless, it found the defendant, Proctor Hospital, could be liable under a "cat's paw" theory, which is rooted in tort law's proximate causation analysis within the context of the motivating factor test called for under § 703(m).[72]

The facts show that Proctor Hospital argued that the ultimate decision maker, Buck, "'looked beyond what Mulally and Korenchuk said,' relying in part on her conversation with Day [another Proctor employee who formally expressed disapproval with Staub's workplace behavior to Human Resources] and her review of Staub's personnel file."[73] Thus, Buck considered complaints against Staub from additional employees, such as Day and others mentioned in Staub's personnel file, who were not alleged to have harbored illegal anti-military animus.

Notably, the Court's holding did not expressly require that each supervisor harbored animus. Justice Scalia carefully laid out the requirements of liability under his cat's paw theory: "[I]f a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[74] The Court's opinion states that "a supervisor," rather than all supervisors, would suffice to show proximate causation.[75]

The Court found that a plaintiff could establish proximate causation without evidence that all decision makers harbored discriminatory animus. As the Court stated, "it is common for injuries to have multiple proximate causes."[76] The reasons given for the adverse action by those not harboring animus may be a proximate cause as well, but so long as the animus is also a proximate cause—and therefore a motivating factor—without a "superseding cause of harm," the Court held that the employer could be liable under the

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[71] *See Staub*, 562 U.S. at 419 ("[I]t seems to us a considerable stretch to call it 'a motivating factor.'").

[72] The "cat's paw" theory is aptly named after the fable "The Monkey and the Cat" by 17th-century poet Jean de La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *See* AESOP, *The Monkey and the Cat*, *in* AESOP FOR CHILDREN (1919), http://mythfolklore.net/aesopica/milowinter/61.htm [https://perma.cc/V453-Q2SV]. Like the monkey, the lower-level employee harboring racial animus convinces the ultimate decision maker to fire or refrain from hiring someone. *See also* Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

[73] *Staub*, 562 U.S. at 415 (citation omitted) (quoting Staub v. Proctor Hospital, 560 F.3d 647, 659 (7th Cir. 2009)).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 421.

USERRA.[77] Therefore, under *Staub*'s proximate causation analysis, though some decision makers may not harbor discriminatory animus, the decision to fire an employee may still be a proximate cause of the adverse employment decision harming the plaintiff. In other words, discriminatory animus need not be the sole proximate cause for it to violate a discrimination statute—whether the USERRA or Title VII.

B. Courts Set Unclear and Disparate Standards for "Motivating Factor" in Horizontal Decision-Making Cases and for § 703(m) and § 706(g)(2)(B)

Many courts have employed unclear, disparate, and heightened standards for "motivating factor" beyond the plain language of the statute. Without a clear test for § 706(g)(2)(B) and § 703(m), plaintiffs and their lawyers may steer clear of § 703(m) as a legal framework under which to bring cases.

The judge in *O'Toole v. Acosta*[78] aptly stated the challenge facing plaintiffs in horizontal decision-making cases: "Showing that discrimination motivated an employer's action becomes 'difficult' where the action involves multiple decision-makers."[79] Different factors have exacerbated this challenge. First, as the *O'Toole* court notes, applying "a motivating factor" language to group decision-making cases is challenging.[80] Indeed, as this Note discusses, some courts, uncertain of the appropriate test in horizontal decision-making cases, require plaintiffs to provide evidence that more than one decision maker, or in some cases all decision makers, harbored animus while others require that a decision-makers' animus explicitly "infected" an adverse employment action.[81] Finally, and most importantly, reading § 703(m)'s motivating factor standard in horizontal decision-making cases strictly, courts have limited the opportunity for plaintiffs to demonstrate that in a group context the discriminatory animus of one decision maker is sufficient to satisfy a motivating factor test.

In one of the earliest horizontal decision-making cases brought under § 703(m), *Lam v. University of Hawai'i*,[82] the plaintiff, Maivan Lam, sued

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[77] *Id.* at 420 ("A cause can be thought 'superseding' only if it is a 'cause of independent origin that was not foreseeable.'" (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996))).

[78] No. 14-cv-2467, 2018 WL 1469045, at *1 (N.D. Ill. Mar. 3, 2019).

[79] *Id.* at *22.

[80] As *Staub* says, "When the company official who makes the decision to take an adverse employment action is personally acting out of hostility to the employee's membership in or obligation to a uniformed service, a motivating factor obviously exists." *Staub*, 526 U.S. at 417. Once more complex decision-making processes are created, the courts struggle with how to determine what evidence is sufficient to constitute a motivating factor.

[81] *See* Candillo v. N.C. Dep't of Corr., 199 F. Supp. 2d 342, 353 (M.D.N.C. 2002) (holding that Powell—accused of sexism for wanting to promote a woman instead of a man—was but one of three interviewers and that "[a]lthough cooperative decision making does not insulate an employer from liability, the fact[ ] that Powell did not make the decision alone" was important).

[82] 40 F.3d 1551 (9th Cir. 1994).

the University of Hawaii for discrimination on the basis of race, sex, and national origin in denying her a directorship position at its law school.[83] The University established an appointments committee to review applications of possible candidates for the position of Director of the Law School's Pacific Asian Legal Studies Program ("PALS") and later for a position in commercial law teaching.[84] In both searches, Lam provided evidence of discriminatory behavior by a member of the selection committee. In the search for the Director of the Law School's PALS program, the chair of the search committee—called only "Professor A"—was particularly opposed to Lam's appointment: "Professor A, in particular, asserted that Lam was not collegial, was a poor scholar, and had poor administrative ability. He finally stated that in his view Lam was unfit to teach anywhere on the University on [sic] Hawaii campus. He also labelled Lam's in-print criticism of another (white male) faculty member inappropriate."[85] Ultimately, a white male candidate received the highest number of votes.[86] Despite finding that the evidence suggested that Professor A harbored prejudicial feelings towards Asians and women and that another white male professor on the committee had stated that the PALS director should be male, the district court awarded summary judgment for the defendants on the claim.[87]

In the search for a commercial law professor, one male committee member openly stated that "the Law School should not have two women teaching commercial law."[88] In hopes of disciplinary action, the comment was reported to the Dean of the law school, "who said that he recognized that the professor had difficulty dealing with women." The Dean nevertheless took no action to remove the committee member from the committee.[89] Ultimately, Lam was passed over by the committee for that position as well.[90]

The district court found that while "some members of the faculty and administration resented Lam's actions and one committee member had difficulty dealing with women," the discriminatory animus was not a motivating factor in the law school's failure to hire Lam.[91] It justified that ruling, in part, by noting that there was no "concerted action" among committee members to not consider Lam for the positions she sought.[92] As this Note will later argue, a concerted effort is not relevant to determining whether illegal animus was a "motivating factor" in an employment decision. One decision maker's animus in a horizontal decision-making setting is sufficient to constitute a motivating factor in the committee.

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[83] *Id.* at 1554.
[84] *Id.* at 1555–57.
[85] *Id.* at 1556.
[86] *Id.* at 1557.
[87] *Id.* at 1560.
[88] *Id.* at 1557.
[89] *Id.*
[90] *Id.* at 1558.
[91] *Id.* at 1565.
[92] *Id.*

In *Lam*, the Ninth Circuit reviewed the district court's ruling. The circuit court similarly found, as the *O'Toole* Court did, that "it often requires a searching factual inquiry to ascertain the motivations for a hiring decision, a difficult task that is exacerbated when multiple decisionmakers are involved."[93] The court's panel then upheld the lower court's ruling with regard to the second search for the commercial law position. However, regarding the first committee, with Professor A, the panel remanded, requiring the lower court to consider whether the hiring process was insulated from the illegitimate biases of faculty members.[94] As the circuit judges said, "discrimination at any stage of the academic hiring or promotion process may infect the ultimate employment decision. Accordingly, a plaintiff in a university discrimination case need not prove intentional discrimination at every stage of the decision-making process; impermissible bias at any point may be sufficient to sustain liability."[95] This decision in some ways more appropriately applies a motivating factor test, though the concept of "infection" is inapposite in a motivating factor analysis because animus need only be in the mind of a committee member, not the sole or primary factor. Thus, its reference to infection is confusing and unnecessary in the context of § 703(m).

Even when finding liability under § 703(m) and remanding for a determination of damages under § 706(g)(2)(B) in favor of the plaintiff, some courts still employ this concept of "infection" in their consideration of a motivating factor. This may again complicate a "motivating factor" analysis and its "but-for" rebuttal in § 706(g)(2)(B). For example, in *Brown v. East Mississippi Electric Power Association*,[96] the plaintiff, Henry Brown, argued that he was fired in violation of Title VII's § 703(m) in his horizontal decision-making case. The two parties agreed that a group of three white superiors, including General Manager Emmett Murray and supervisor Leon Pippen, decided to reassign Brown from serviceman to line crew, which Brown viewed as a demotion.[97] Later, "it was decided that Brown would take a two-week vacation," after which the parties dispute whether Brown was in fact fired or whether he resigned.[98] As the Fifth Circuit noted, "[a]t the heart of this appeal [was] the significance of Pippen's routine use of the term 'n—.'"[99] The East Mississippi Electric Power Association (EMEPA) did not dispute that Pippen routinely used the word—doing so "basically any time there was a reference to a black."[100] The court, then, not unlike the Ninth Circuit, addressed whether the racism "infected the disciplinary decisions of which Brown complain[ed]. Pippen directly participated in those decisions . . . serving as a member of the triumvirate that decided to remove

[93] *Id.* at 1566 n.27.
[94] *Id.* at 1560–61.
[95] *Id.*
[96] 989 F.2d 858 (5th Cir. 1993).
[97] *Id.* at 860.
[98] *Id.* at 860–61.
[99] *Id.* at 861.
[100] *Id.*

Brown from his serviceman position."[101] The judges considered how Pippen and Murray worked together regarding Brown's disciplinary problems.

After concluding that Brown successfully alleged that Pippen's racism did, in fact, "infect" the disciplinary decision, the court then shifted the burden pursuant to § 706(g)(2)(B) to EMEPA to prove that it would have made the same decision regardless of Brown's race.[102] The court concluded that EMEPA did not prove that Murray's participation as a member of the three-person committee was not influenced by racial factors.[103] It did so with reference to another series of complaints against Murray for minimizing employee's complaints about Pippen's use of racial slurs.[104] Further, the court stated, "Murray apparently never considered that Pippen's blatantly racist attitudes might explain his criticism of Brown and might undermine the objectivity of his advice with respect to Brown's position with the company."[105] As such, the court required the defendant to show explicit evidence of other decision makers rejecting Pippen's racism or considering how the racism could have infected the ultimate adverse employment decision.

In a more recent case, *Bivings v. Greenville Tech. College*,[106] the plaintiff, Raymond Bivings, filed a § 703(m) complaint against Greenville Technical college for not hiring him for a construction job allegedly due to racism against him as a black man.[107] The court held that Bivings did not establish, through direct or circumstantial evidence, that racial discrimination motivated Greenville's decision not to hire him.[108] Bivings alleged that one of the members of the hiring committee, Jay Pearson, used the "N" word "in a way that made Bivings believe that Pearson exhibited racial animus and did not want Bivings to apply for the position."[109] Relevant to this Note, the court explicitly noted that the hiring committee "was composed of employees from several different departments and included male, female, and minority representation."[110] Further, the court found it noteworthy that the "committee voted unanimously to hire the eventual hire."[111]

These cases serve as examples of the uncertainty that plaintiffs and their lawyers may face when bringing a § 703(m) case alleging discrimination by one decision maker on an employment committee. Courts have not yet established a clear, uniform standard in horizontal decision-making cases for what constitutes a "motivating factor," nor for what is sufficient for a defen-

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[101] *Id.*
[102] *Id.* at 861–62.
[103] *Id.* at 862–63.
[104] *Id.*
[105] *Id.* at 863.
[106] No. 6:11–518–TMC, 2012 WL 2711542 (D.S.C. July 9, 2012).
[107] *Id.* at *3.
[108] *Id.*
[109] *Id.* In this instance, the court decided that the use of the racial slurs outside of the hiring decision was not relevant. These differing rules regarding when the derogatory term is and is not direct evidence of discrimination as a "motivating factor" likely complicates plaintiffs' cases; however, this Note will not focus on this question specifically.
[110] *Id.* at *1 n.2.
[111] *Id.* at *1 n.3.

dant to prove that it would have made the same decision otherwise. Some courts, such as in *Bivings*, have looked at the composition of the hiring committee to decide whether race was a motivating factor. Others have considered concerted efforts or "infection" in the process to determine whether illegal animus motivated the decision, which is arguably not required to satisfy § 703(m).

Since the early 2000s, few plaintiffs have brought horizontal decision-making cases under § 703(m), likely because of this confusing standard to demonstrate influence or concerted efforts.[112] By not establishing a clear standard for motivating factor in § 703(m) cases and not employing evidentiary tools more suitable to sustain a "but-for" analysis under § 706(g)(2)(B), courts have missed an opportunity to apply these sections of Title VII more appropriately in horizontal decision-making cases.

To properly implement § 703(m) and § 706(g)(2)(B), courts need to interpret the meaning of motivating factor and then determine what evidence is admissible to show that discriminatory animus played a role in an employment decision or that a defendant would have made the same decision regardless of such animus. The next Section discusses the fundamental differences between vertical and horizontal decision-making and then suggest an appropriate definition and evidentiary practices under § 703(m) and § 706(g)(2)(B).

III. A Path for Courts to Remain Loyal to Congressional Intent in § 703(m)

As previously noted, *Staub* focuses exclusively on vertical decision-making cases and a different standard of analysis could apply in horizontal decision-making cases. Such an analysis could and should be more loyal to Congress's "motivating factor" language and intent of § 703(m). The decisional structure fundamentally differs in vertical and horizontal decision-making instances. Such distinct decision-making practices necessitate different analysis, opening an avenue for the courts to realize § 703(m)'s potential.

Vertical decision-making cases fall under *Staub*'s cat's paw analysis, as there is a single person making the adverse employment decision who harbors no unlawful animus. Horizontal decision-making cases, on the other hand, include instances where there are multiple decision makers engaging in group dialogue about an applicant or employee. These groups are thus susceptible to the phenomenon of groupthink, which is described in more detail in this Section. A single decision maker's animus may "motivate" the adverse employment decision, and a plaintiff may be better able to refute a defendant's "but-for" defense under § 706(g)(2)(B) through a groupthink analysis.

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[112] *See* Van Detta *supra* note 46, at 899 ("[I]f the cases go down in flames from the beginning, the incentives for vindication of Title VII through the activities of 'private attorneys general' fall nearly to a subminus zero.").

As Judge Smalkin wisely remarked following an award of attorneys' fees without backpay[113]:

> On my office wall, there hangs a nineteenth century English print entitled *The Lawsuit*, showing two farmers fighting over a stationary cow—one pulling her by the horns and the other by the tail—while a bewigged barrister happily milks her. This case certainly demonstrates that nothing much has changed. The plaintiff and the defendant are right where they started, while the lawyers' pails hold all the milk.[114]

This Section suggests a new approach to Title VII workplace discrimination cases that involve horizontal decision-making in order to avoid the all too familiar image depicted in *The Lawsuit* in which plaintiffs and defendants are essentially in the same position that they started in and only the lawyers seem to benefit. Such an approach would permit evidence of groupthink and its effects on the decision of a group when one or more decision makers harbored discriminatory animus. In adopting this approach, courts would both recognize the findings from compelling academic research in this area and more appropriately address the evils of discrimination as Congress intended in adopting § 703(m) and § 706(g)(2)(B). Such a standard may also have the benefit of pushing companies to have more diversity on employment committees.

A. Section 703(m) and § 706(g)(2)(B) as Distinct Legal Standards from Each Other and from Staub

Section 703(m), which establishes a liability standard and supplies a right of action, does not define the term "motivating factor."[115] Therefore, to inform a definition, I turn to the dictionary. The Oxford English Dictionary[116] defines "motivate" as "to provide (a person, etc.) with a motive or incentive to do something."[117] Black's Law Dictionary defines "factor" as "an agent or cause that contributes to a particular result."[118] From these two definitions, this Note defines motivating factor in the § 703(m) context as one or more discriminatory decision makers who incentivize, animate, or influence an adverse employment decision based on a protected characteristic.

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[113] The case was one in which the jury found that discriminatory animus was a motivating factor in the employer's decision to lay off a pregnant woman, but that the employer would have laid her off absent the unlawful motive.

[114] Sheppard v. Riverview Nursing Ctr., 870 F. Supp. 1369, 1384 (D. Md. 1994).

[115] Again, the language of § 703(m) reads "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e–2(m).

[116] Black's Law Dictionary does not define "motivate," so this Note relies on the OED.

[117] *Motivate*, Oxford English Dictionary (3rd ed. 2002).

[118] *Factor*, Black's Law Dictionary (11th ed. 2019).

This definition, then, is distinct from *Staub*'s proximate causation analysis in that one or more decision makers harbor unlawful animus, whereas in *Staub*, no decision maker exhibited discriminatory behaviors.

A plaintiff can show that discrimination was a motivating factor using proof of a decision maker's discriminatory animus with regard to the employment decision. This definition would align horizontal decision-making cases with those in which there is just one decision maker. Pursuant to § 703(m), then, if a plaintiff provides direct evidence of unlawful animus on the part of one or more decision makers, that is sufficient to hold the defendant liable.

The question this Note then must turn to is what is sufficient for a plaintiff to rebut defendants' proof that it would have "taken the same action in the absence of the impermissible motivating factor"[119] in order to receive monetary damages and other redress such as reinstatement, promotion, etc. under § 706(g)(2)(B). This is a key question in horizontal decision-making cases, given that an employer could almost always argue that it would have made the same decision without the animus of one decision maker, as Justice Brennan noted in *Price Waterhouse*.[120] This Note proposes that courts permit evidence of groupthink in horizontal decision-making cases in order to prove or rebut § 706(g)(2)(B).

B. Under § 703(m), Courts Should Consider Evidence of the Unlawful Animus of One Member of a Decision-Making Committee Sufficient to Establish that Discrimination Was "a Motivating Factor" in the Committee's Decision

To defend the proposition in this Note that evidence of just one decision maker's animus should be sufficient to entitle a Title VII plaintiff to judgment under § 703(m), this Note considers the legislative history, legal precedent, and other commentary around that section. Through a close reading of the language, one can see that in horizontal decision-making cases, evidence of a single biased decision maker on a committee by itself should be sufficient to establish "a motivating factor" due to the logical inference that such bias had at least some possible influence on the committee's adverse employment decision.[121]

Though Congress may not have considered the presence of multiple decision makers in Title VII employment discrimination cases, the House Report that accompanied the enactment of the Civil Rights Act of 1991 reveals that the intent of the Act was to eliminate any prejudice in employment decisions: "[A]ny reliance on prejudice in making employment deci-

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[119] 42 U.S.C. § 2000e–5(g)(2)(B) (2018).

[120] Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989).

[121] If courts are ultimately not convinced that the mere presence of a biased decision maker is sufficient to constitute a motivating factor, then the plaintiff's evidence of groupthink (discussed in the Section IV.C.) may be relevant in the § 703(m) stage as well as the § 706(g)(2)(B) stage.

sions is illegal."[122] Therefore, Congress made it clear that it intended "a motivating factor" to be read liberally and literally: if prejudicial animus played any role, however small, in the adverse employment action, Title VII has been violated. In the horizontal decision-making context, this implies that the involvement of even one prejudiced decision maker in the committee's deliberations that led to an adverse employment decision should be sufficient to entitle the plaintiff relief under § 703(m) and to shift the burden of persuasion to the defendant to prove the affirmative defense provided in § 706(g)(2)(B). Congress in that same 1991 House Report interpreted the Civil Rights Act of 1964 broadly as well, believing that "[w]hen enacting the Civil Rights Act of 1964, Congress made it clear that it intended to prohibit *all* invidious consideration of sex, race, color, religion, or national origin in employment decisions."[123] By using the words "any" and "all," Congress demonstrated its intent to rid employment decisions of any discriminatory animus so long as such discrimination contributed in any way and to any extent to an adverse employment action.

This expansive reading of "a motivating factor" is generally how the courts have interpreted Title VII employment discrimination claims brought under § 703(m), at least in instances not involving decision-making committees. In *Dominguez-Curry v. Nevada Transportation Department*,[124] for example, a Ninth Circuit panel concluded that the district court had erred in granting summary judgment to the employer because "a reasonable factfinder could conclude that the hiring decision was motivated *at least in part* by her gender."[125] Other circuits have similarly ruled that evidence of any level of discriminatory animus exhibited by an individual who participated in the decision-making process is sufficient to make out a violation of § 703(m) and to prevent the grant of summary judgment to the employer.[126] Accordingly, the case law already demonstrates judges' willingness to consider unlawful animus to be a motivating factor in an adverse employment action even in the absence of explicit evidence that such bias made a determinative impact on the decision.

Legal scholars have similarly interpreted § 703(m)'s "a motivating factor" in line with Congressional intent. In his 2005 article *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglass?*,[127] Michael Zimmer argued, "Using § 703(m)'s 'a motivating factor' level of showing, a preponderance of the evidence must support a reasonable

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[122] H.R. Rep No. 102-40(II), at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 694, 695.
[123] *Id.* at 17, *as reprinted in* 1991 U.S.C.C.A.N. at 710 (emphasis added).
[124] 424 F.3d 1027.
[125] *Id.* at 1041 (emphasis added).
[126] *See, e.g.*, Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001) ("Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."); Wells v. New Cherokee Corp., 58 F.3d 233, 237–38 (6th Cir. 1995) (imputing a supervisor's animus to the ultimate decision maker because the evidence showed that the two "worked closely together and consulted with each other on personnel decisions," and they "themselves testified that they acted jointly").
[127] Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 Emory L.J. 1887 (2005).

factfinder in drawing the inference of discrimination, that is, discrimination played a role, no matter how small, in the decision."[128] Zimmer therefore echoes the courts and Congress: if discrimination played even a small role in the employment decision, that is sufficient to show that it constituted a motivating factor within the meaning of § 703(m).

While Congress, courts, and scholars have not articulated an explicit rule for what constitutes a motivating factor under § 703(m) in a horizontal decision-making context, the wording from various sources points to the inference of motivation through evidence of even a small amount of animus. Thus, it logically follows that one decision maker on a committee with discriminatory animus is, in fact, a motivating factor in the committee's ultimate adverse decision, thus shifting the burden to the defendant to prove that it would have made the same decisions in the absence of such discrimination.

C. Groupthink: Its Antecedent Conditions, Evidence, and Impact

Groupthink is a phenomenon that occurs when a group of often well-intentioned people makes suboptimal decisions based on a desire to conform or the belief that dissent is impossible or ill-advised.[129] In an effort to achieve harmony, members of a group may seek to agree while overlooking uncertainties and concerns.[130] This often causes groups to minimize conflict and reach a consensus decision without sufficient critical evaluation.[131] Relevant to this Note, evidence of groupthink in horizontal decision-making cases could materially impact the ability of a defendant to successfully argue that it would have made the same adverse employment action regardless of animus.

In *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment*, Irving Janis laid out a number of antecedent conditions that make the dynamic of groupthink more likely.[132] These conditions include group cohesiveness, group insulation, a lack of methodological procedures, and one clear leader.[133] According to Janis, if the group is too cohesive "each member becomes more psychologically dependent on the group and displays greater readiness to adhere to the group's norms."[134] If the group is insulated in a way that the members have little or no opportunity to discuss certain policy issues outside the group, the group's members "can be expected to show an increased tendency to rely upon the judgment of the group on those issues."[135] Janis argues that the lack of methodological procedures in group decisions leads to greater conformity tendencies within the group, as there

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[128] *Id.* at 1935.
[129] Irving L. Janis, *Groupthink*, PSYCH. TODAY MAG., Nov. 1971, at 84, 84.
[130] *Id.* at 85, 88.
[131] *Id.* at 84.
[132] IRVING L. JANIS & LEON MANN, DECISION-MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT 131 (1977).
[133] *Id.* at 132.
[134] *Id.* at 131.
[135] *Id.*

are no procedural safeguards to protect against groupthink and the bias of one member influencing others.[136] Finally, one clear leader increases the likelihood that the leader will use his or her power to induce the members to conform to his or her decision.[137] Some researchers also suggest that as the number of antecedent conditions increases, so does the chance of groupthink.[138]

While Janis's list of antecedent conditions provides a helpful starting point, it is not exhaustive. Scholars continue to research the impact of diversity on groupthink. Given this new research, courts might add, for example, a complete lack of diverse perspectives on the hiring or employment committee to the list of antecedent groupthink conditions. Psychology professor and leading expert on creativity and collaboration, Keith Sawyer, observes in his seminal 2008 book, *Group Genius: The Creative Power of Collaboration*,[139] that productive thinking is most effective when certain conditions are met. Most important for this Note, the group should be diverse, not just along lines related to protected classes, but in a whole host of contexts including experiential diversity, etc.[140] As Sawyer says, "If group members are too familiar with each other, interaction is no longer challenging, and group flow fades away. Only by introducing diversity can we avoid the groupthink that results from too much conformity."[141] One business analyst expanded: "Groupthink is a natural human bias that can infect any organization—unless there's enough diversity within the group to counterbalance its effects. Encouraging dissent and disagreement may seem counterproductive, but evidence suggests it's the only way to get closer to the truth—and better decisions overall."[142]

In recent years, scholars have created helpful meta-analyses of the many studies confirming and building off of Janis's initial groupthink research.[143] These meta-analyses show the procedures that researchers have employed, including case studies[144] and empirical studies,[145] to examine groupthink in

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[136] *Id.*

[137] *Id.*

[138] Turner & Pratkanis, *supra* note 15, at 107–08.

[139] KEITH SAWYER, GROUP GENIUS: THE CREATIVE POWER OF COLLABORATION 51 (2008).

[140] *Id.* at 59.

[141] *Id.* at 75.

[142] Anna Johansson, *Why Workplace Diversity Diminishes Groupthink and How Millennials Are Helping*, FORBES (Jul. 20, 2017), https://www.forbes.com/sites/annajohansson/2017/07/20/how-workplace-diversity-diminishes-groupthink-and-how-millennials-are-helping/?sh=7a8449464b74 [https://perma.cc/A69F-RVCD].

[143] *See, e.g.*, James D. Rose, *Diverse Perspective on the Groupthink Theory – A Literary Review*, 4 EMERG. LEAD. JOURNEYS 37, 38 (2011); James K. Esser, *Alive and Well after 25 Years: A Review of Groupthink Research*, 73 ORG. BEHAV. & HUM. DEC. PROC. 116, 117 (1998).

[144] *See* Charles P. Koerber & Christopher P. Neck, *Groupthink and Sports: An Application of Whyte's Model*, 15 INT'L J. CONTEMP. HOSP. MGMT. 20, 21 (2003) (indicating that groupthink can be applicable in larger groups); Thomas R. Hensley & Glen W. Griffin, *Victims of Groupthink: The Kent State University Board of Trustees and the 1977 Gymnasium Controversy*, 30 J. CONF. RES. 497, 497 (1986) (finding significant evidence of groupthink in the Kent State University gymnasium controversy and recommending revising the board selection process); David Ahlstrom & Linda C. Wang, *Groupthink and France's Defeat in the 1940 Cam-*

greater detail over the course of several years.[146] One particularly salient analysis was conducted in 1992.[147] Members of the Institute of Personality and Social Research at the University of California, Berkeley analyzed ten cases that potentially showed the dangers of groupthink in group decision-making: the Bay of Pigs, United States involvement in the Korean War, Pearl Harbor, the Vietnam War, the Marshall Plan, the Cuban Missile Crisis, Watergate, Neville Chamberlain's cabinet, the Mayaguez incident, and the Iran hostage situation.[148] The authors confirmed the importance of structural and procedural faults of an organization as antecedents of groupthink.[149]

More recent studies have found that diversity—specifically, racial diversity—within groups can serve as an antidote to groupthink. After conducting an experiment, researchers concluded that white members of mock juries "cited more case facts, made fewer errors, and were more amenable to discussion of racism when in diverse versus all-White groups."[150] In the experiment, participants were shown a trial of a Black defendant. The researchers then compared the decision-making processes of racially heterogenous and homogenous six-person groups.[151] Other studies have similarly shown the positive impact of group diversity—both race[152] and general "cognitive" diversity[153]—on higher integrative complexity of the thinking of those members in the majority.

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paign, 15 J. MGMT. HIST. 159, 159 (2006) (finding evidence of all symptoms from Janis's initial work and concluding that groupthink was a key factor in France's 1940 World War II defeat).

[145] *See* Ferda Erdem, *Optimal Trust and Teamwork: From Groupthink to Teamthink*, 53 WORK STUDY 229, 232–33 (2003) (finding that a high degree of trust within groups increases risk of groupthink); Marlene E. Turner, Anthony R. Pratkanis, Preston Probasco & Craig Leve, *Threat, Cohesion, and Group Effectiveness: Testing a Social Indemnity Maintenance Perspective on Groupthink*, 63 J. PERS. & SOC. PSYCH. 781, 781 (1992) (finding support for Janis's groupthink theory).

[146] Matie Flowers was the first attempt to demonstrate Janis's theory empirically. Matie L. Flowers, *A Laboratory Test of Some Implications of Janis's Groupthink Hypothesis*, 35 J. PERSONALITY & SOC. PSYCH. 888 (1977). Flowers used a two-by-two factor test (leadership type and group cohesion level) in which he split 120 college students into forty groups consisting of three members and one leader. *Id.* at 890. In half of the groups, Flowers told the leader to assert his or her opinion on the issue at hand at the beginning of the group meeting (the "closed" condition), in the other half of the groups, Flowers told the leader to make their personal opinion known only at the end of the group meeting (the "open" condition). *Id.* Though his experiment did not support Janis's theory on group cohesion, the results showed a strong correlation between leadership action and group decision outcomes. *Id.* at 894–95. Groups with closed leaders saw fewer solutions proposed and fewer facts utilized. *Id.* at 895.

[147] Philip E. Tetlock, Randall Peterson, Charles McGuire & Shi-Jie Chang, *Assessing Political Group Dynamics: A Test of the Groupthink Model*, 63 J. PERS. & PSYCH. 403 (1992).

[148] *Id.* at 408-09.

[149] *Id.* at 406.

[150] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCH. 597, 597 (2006).

[151] *Id.* at 600.

[152] *See* Anthony L. Antonio, Mitchell J. Chang, Kenji Hakuta, David A. Kenny, Shana Levin & Jeffrey F. Milem, *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCH. SCI. 507, 508–09 (2004).

[153] Cognitive team diversity is defined as "perceived differences in thinking styles, knowledge, skills, values, and beliefs among individual team members." Shung J. Shin, Tae-Yeol

Given the broad consensus around the existence of groupthink, many organizations in the business and government sectors have embraced this research and advocate for more diversity to avoid groupthink. Thus, the legal system would not be alone in recognizing this research. In the business context, leaders of many organizations are concerned about the impact of groupthink in the boardroom. Business School Professors Kenneth Merchant and Katharina Pick observed that boardrooms are particularly susceptible to groupthink: "Most [boardrooms] have the antecedent conditions that are necessary and sufficient to create groupthink according to one or more of the groupthink researchers. Board members almost invariably have common social identifications. Many of them come from their similar social backgrounds, their identification as professional board members, and their identification with the group with which they are serving."[154] As many boards are quite homogenous in makeup, Merchant and Pick suspect that boards are susceptible to the impact of groupthink, harming their ability to make smart business decisions.

Various industries, particularly in the financial sector, have focused on issues concerning groupthink. Some regulators recently have proposed changes to address these concerns.[155]

D. The Ripeness for Sociological and Psychological Evidence in Horizontal Decision-Making Cases: Motivating Factor Through Groupthink

Courts should recognize research on groupthink as a legitimate tool in determining whether a defendant would have made the same decision regardless of illegal animus on the part of one or more decision makers. Groupthink concepts provide a meaningful framework to understand the impact of a single dominant committee member who harbors animus can

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Kim, Jeong-Yeon Lee & Lin Bian, *Cognitive Team Diversity and Individual Team Member Creativity: A Cross-Level Interaction*, 55 ACAD. OF MGMT. J. 197, 197 (2012). *See also* C. Chet Miller, Linda M. Burke & William H. Glick, *Cognitive Diversity Among Upper-Echelon Executives: Implications for Strategic Decision Processes*, 19 STRAT. MGMT. J., 39, 39–40 (1998).

[154] KENNETH A. MERCHANT & KATHARINA PICK, BLIND SPOTS, BIASES AND OTHER PATHOLOGIES IN THE BOARDROOM, 57 (2010).

[155] In December 2020, the Nasdaq stock exchange filed a proposal with the U.S. Securities and Exchange Commission to adopt new listing standards related to board diversity. As the proposal states, "Nasdaq is concerned that boards lacking diversity can inadvertently suffer from 'groupthink,' which is 'a dysfunctional mode of group decision-making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members.' The catastrophic financial consequences of groupthink became evident in the 2008 global financial crisis. . . ." NASDAQ STOCK MARKET, *Form 19b-4: A Proposal to Advance Board Diversity and Enhance Transparency of Diversity Statistics Through New Proposed Listing Requirements* (Dec. 1, 2020), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf [https://perma.cc/MJS3-UB9N] (citing Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 496 (1999)). *See also* GROUP OF THIRTY, BANKING CONDUCT AND CULTURE: A PERMANENT MINDSET CHANGE 11 (2018), https://group30.org/images/uploads/publications/aaG30_Culture2018.pdf [https://perma.cc/5SM7-VK75].

have on an employment decision.[156] Plaintiffs currently lack the tools to prove that the presence of one biased decision maker is a motivating factor and that, as per § 706(g)(2)(B), the defendant would not have made the same decision regardless. Thus, allowing plaintiffs to rely on the concepts of groupthink may enhance their ability to sustain an award for monetary damages and will align more with scientific understandings of group behavior. Likewise, evidence presented by a defendant that policies and procedures are in place that were reasonably designed to rebut a finding of groupthink could be admissible to evidence that an employment decision would have, in fact, been made regardless of one decision maker's animus.

Given the threat of groupthink in homogenous groups, after a plaintiff has provided compelling evidence of discriminatory animus by one or more decision makers, judges should permit them to show that such animus disproves or makes less credible a defendant's claim that it would have made the same decision. This preserves a plaintiff's ability to win monetary damages in addition to attorney's fees. Discriminatory animus can be a motivating factor under § 703(m) if one decision maker harbors clear animus towards the applicant. Then, a defendant can prove it would have made the same decision under § 706(g)(2)(B) with evidence that refutes groupthink, while a plaintiff can provide evidence that the structural dynamic of the group was such to allow groupthink. Evidence of groupthink based on the makeup, structure, and dynamic of the committee could provide clarity on whether the discriminatory animus was, in fact, a but-for factor in the adverse employment decision. Applying the motivating factor test and the "but-for" rebuttal in this manner would potentially animate § 703(m) and provide meaningful opportunity for not just limited relief but also financial redress as intended by Congress.

Defendants could dispute claims of groupthink through evidence of policies and practices that are designed to have the effect of suppressing groupthink and encouraging healthy dissent. Defendants could provide evidence that antecedent conditions of groupthink were, in fact, not present at the committee. Understanding the proper roles of § 703(m) and § 706(g)(2)(B) could have salutary effects on the structure and makeup of employment committees.

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[156] Some may argue that the courts should resist the use of evidence rooted in social science, but history provides examples of cases in which courts have noted these concepts. *See e.g.* Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 494 n.11 (1954) (citing K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (1950)); Weiand v. State, 732 So. 2d 1044 (Fla. 1999) (ruling that battered person syndrome could be used to support a claim of self-defense in a murder trial).

E. Permitting Evidence of Groupthink in Motivating Factor Analysis Will Not Uncontrollably Open the Floodgates to Litigation Under Title VII

While this Note contends that courts should apply § 703(m)'s motivating factor test and the but-for rebuttal of § 706(g)(2)(B) in horizontal decision-making cases using a new standard—a decision maker's animus spread through groupthink—critics could raise concerns about the possibility of burdensome litigation. They may fear that allowing evidence of groupthink into a Title VII analysis would result in excessive litigation that would overwhelm an already strained judicial system.[157] This Note's recommendations certainly may increase the number of cases that reach a jury if in fact the requirement of a motivating factor is demonstrated through a single committee member's animus and the plaintiff can establish that there are genuine issues of fact concerning a defendant's affirmative defense. In doing so, however, plaintiffs with compelling evidence of discrimination by at least one member of a decision-making committee will finally get in front of a jury. Thus, some increase in jury trials may be necessary in order to properly realize Congressional intent.

Notably, this Note does not advocate for a change in the standard for establishing discriminatory animus on the part of any individual actor. Clear evidence of discriminatory animus is and would remain necessary for a Title VII claim brought under § 703(m). Rather, this Note suggests a way to demonstrate that discriminatory animus was a § 703(m) motivating factor in horizontal decision-making and was the but-for cause under § 706(g)(2)(B). It advocates that courts should admit evidence of groupthink in circumstances in which fewer than all decision makers are alleged to harbor animus.

Judges will continue to require both evidence of a decision maker's animus to prove liability and then will require equally convincing evidence of groupthink for monetary damages. Each Title VII discrimination claim is heavily fact dependent, and judges are experienced in assessing evidence in the context of summary judgment motions under Federal Rule of Civil Procedure 56.[158] Plaintiffs will continue to bear the burden of providing evidence of discriminatory animus and evidence that such animus was a motivating factor in the adverse action decided by the committee. Once discriminatory intent on the part of at least one actor is established, evidence of groupthink may be necessary to rebut a defendant's claim that discrimination was not the but-for cause of an adverse employment decision.

This Note aligns with the standard that a plaintiff with insufficient proof of discriminatory animus by a decision maker and no clear evidence that such animus influenced others cannot make a successful Title VII claim.

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[157] U.S. District Courts heard 376,762 cases in 2019. *See* UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2019 (2019).

[158] FED. R. CIV. P. 56.

Conclusion

As the famous idiom goes "one bad apple spoils the bunch." So, too, in certain circumstances, may the animus of one committee member impact a decision-making process. This Note proposes evidentiary analyses that will be more focused and appropriately targeted in Title VII horizontal decision-making cases. By using groupthink in Title VII cases brought under § 703(m), courts will be able to better assess the merits of the arguments on both sides, specifically around the § 706(g)(2)(B) question of whether an employer would have made the same decision regardless of illegal considerations of an employees' characteristic. Further, this Note's recommendation would encourage employers to put in place practices and procedures that are reasonably designed to enhance the diversity of their decision-making bodies in order to protect against Title VII § 703(m) claims. Such a collateral consequence cannot be overstated, as the workforce is becoming more diverse, and that trend will likely continue.[159] If courts adopt this new evidentiary practice, the promise of § 703(m) may finally be realized, as more plaintiffs may achieve redress, both monetary and nominal, in Title VII lawsuits.

[159] *See* U.S. Bureau of Lab. Stat., Labor Force Statistics from the Current Population Survey (2020); U.S. Bureau of Lab. Stat., *Labor Force Projections to 2024*, Monthly Lab. Rev. (Dec.2015), https://www.bls.gov/opub/mlr/2015/article/labor-force-projections-to-2024.htm [https://perma.cc/D7HQ-L8VE].