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Implications of *Smith v. City of Jackson* on Equal Pay Act Claims and Sex-Based Pay Discrimination Claims Under Title VII

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In *Smith v. City of Jackson*,¹ a plurality of the Supreme Court held that disparate impact claims are actionable under the Age Discrimination in Employment Act (ADEA). A noteworthy aspect of the plurality's reasoning is found in a footnote discussion of the Equal Pay Act:

We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), Congress barred recovery if a pay differential was based “on any other factor”—reasonable or unreasonable—“other than sex.” The fact that Congress provided that employees [*sic*] could use only *reasonable* factors in defending a suit under the ADEA is therefore instructive.²

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1. *Id.* 125 S. Ct. 1536 (2005).

2. *Smith*, 125 S. Ct. at 1544, n.11 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (emphasis in original). It is an interesting question whether this footnote discussion is nonbinding dictum. The Court has stated that “[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe v. Fla.*, 517 U.S. 44, 66 (1996). The holding in *Smith* was that the ADEA permits claims based on the disparate impact theory of discrimination. *Smith*, 125 S. Ct. at 1540. In reaching this holding, the Court considered the fact that the ADEA contains a “reasonable factor other than age” (RFOA) defense. *Id.* at 1543–44 (Stevens, J.) & 1551–52 (O'Connor, J., concurring in the judgment). The plurality determined that the RFOA confirms Congress's intent to permit disparate impact claims under the ADEA, because otherwise the RFOA would serve no purpose. *Id.* at 1543–44. Footnote 11 appears immediately after the plurality's discussion of the purpose of the RFOA:

It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was “reasonable.” Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion. *Id.* at 1544.

Footnote 11 reinforces the plurality's reasoning about the legislative purpose for the RFOA by providing contrasting text that Congress used to “prohibit all disparate impact claims.” *Id.* at 1544 n.11. Whether this discussion was strictly necessary to the plurality's conclusion may be questioned. Nonetheless, the footnote 11 contrast clearly supported a

The clear implications of this brief discussion are that disparate impact claims are not cognizable under the Equal Pay Act (EPA) and that the EPA's "any other factor other than sex" affirmative defense can be sustained by a factor that is "reasonable or unreasonable."³ There have been circuit splits on these very issues under the Equal Pay Act and, through the Bennett Amendment, under Title VII with respect to sex-based pay discrimination claims. Thus, the plurality's discussion of the

central aspect of the plurality's reasoning upon which the Court's holding was based. Because it was not merely a passing reference, the question of whether footnote 11 was strictly necessary to the plurality's reasoning may not be crucial to its precedential value, since the courts of appeals generally feel themselves bound even by the Court's "considered dicta." See, e.g., *Oyebanji v. Gonzales*, 418 F.3d 260, 264–65 (3d Cir. 2005); *Crowe v. J.P. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004); *United States v. Marlow*, 278 F.3d 581, 588 n.7 (6th Cir. 2002); *Batjac Prods., Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223, 1232 (9th Cir. 1998); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993); *McCoy v. Mass. Inst. of Tech.*, 950 F.3d 13, 19 (1st Cir. 1991); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989).

3. *Smith*, 125 S. Ct. at 1544, n.11. In a concurring opinion, Justice Scalia did not join in the part of the plurality's opinion quoted in the text above, but he wrote "I agree with all of the Court's reasoning" in that part. *Smith*, 125 S. Ct. at 1546. The Court has held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Marks v. United States*, 490 U.S. 188, 193 (1977)). Because Justice Scalia expressly agreed with the plurality's reasoning, there are five Justices who assent to a single rationale explaining the Court's holding. *Smith*, 125 S. Ct. at 1546.

Justice Scalia did not join in the plurality's opinion because he would defer to an EEOC regulation that, in his view, interpreted the ADEA as permitting disparate impact claims. *Id.* In the context of the EPA, the EEOC has issued regulations interpreting the EPA, but they do not address the issues discussed by the plurality in footnote 11 in *Smith*. See 29 C.F.R. §§ 1620.1–1620.34 (2005); 51 Fed. Reg. 29819–26 (Aug. 20, 1986).

As described in the text below, the EEOC has issued a compliance manual chapter that addresses these issues. EEOC Compliance Manual on "Compensation Discrimination," EEOC Directive No. 915.003 (Dec. 5, 2000). However, it is not clear that Justice Scalia would defer to the EEOC compliance manual. For one, as noted below, many of the implications of the plurality's footnote 11 involve Title VII and the Court has already determined on several occasions that EEOC interpretations of the substantive provisions of Title VII are not entitled to *Chevron*-level deference because Congress did not authorize the EEOC to promulgate rules or regulations pursuant to Title VII. See *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Moreover, the EEOC's compliance manual simply notes the circuit split on these issues and states the EEOC's view favoring one side of the split. EEOC Compliance Manual on "Compensation Discrimination," EEOC Directive No. 915.003 (Dec. 5, 2000), at §§ 10-III.B. n.34 & 10-IV.F.2. & nn.65–66. In his dissent in *Mead*, Justice Scalia noted concern over the prospect of an agency interpretation effectively overturning, through the administrative deference doctrine, a prior judicial interpretation of a statute. *United States v. Mead Corp.*, 533 U.S. 218, 248–49 (2001) (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency—or have allowed a lower court to render an interpretation of a statute subject to correction by an agency."); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (Scalia, J., dissenting) ("Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers.").

Equal Pay Act's "any other factor other than sex" defense has significant implications.⁴

This short comment examines four of these implications:

- (1) There has been a circuit split on whether the EPA's "any other factor" affirmative defense can be sustained by literally any factor or only by factors meeting a standard of reasonability. The plurality appears to have resolved this split in favor of the circuits that adopted the literal interpretation of "any other factor."⁵
- (2) All circuits that have addressed the issue have required the employer to establish that the asserted factor was the actual cause of the challenged pay disparity, and have afforded the plaintiff an opportunity to establish that the employer's asserted legitimate cause is a pretext for discrimination. Because the reasonableness of the factor has a significant bearing on both causation and pretext, it is unclear how the plurality's discussion modifies the doctrinal framework for determining these issues.
- (3) The Bennett Amendment of Title VII incorporates the EPA's affirmative defenses into Title VII with respect to sex-based pay discrimination claims. Therefore, the implications of the plurality's discussion carry over into Title VII as well. A major implication is that the disparate impact theory is ruled out as a basis for sex-based pay discrimination claims under Title VII.
- (4) Under the plurality's reasoning, the "any other factor" affirmative defense may present a headwind to class certification of sex-based pattern or practice pay discrimination claims under Title VII. Under the plurality's broad interpretation, the affirmative defense may be sustained by factors that are unique to each particular putative class member. Where the employer offers evidence of such unique factors, determinations about the affirmative defense will require individual mini-trials, making class treatment unmanageable.

I. "Any" Means Literally Any

The courts of appeals have been split on whether the "any other factor other than sex" defense of the Equal Pay Act (EPA) can be read

4. Justice White, joined by Chief Justice Rehnquist and Justice O'Connor, dissented from a denial of *certiorari* in *Randolph Central School District v. Aldrich*, in which the issue was "whether, under the federal Equal Pay Act, an employer seeking to establish the factor-other-than-sex defense must prove that the factor is supported by a legitimate business-related reason." *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965, 965 (1992). The dissent explained the significant differences of opinions among the circuits on this issue and the related issues under Title VII, but did not indicate the dissenters' view of the correct outcome. *Id.*

5. *Smith*, 125 S. Ct. at 1544, n.11 (quoting 29 U.S.C. § 206(d)(1)).

literally to mean *any* factor. Several courts of appeals have held, and the EEOC has agreed, that the “any other factor” defense is not to be read literally and must be constrained by a rule of reasonability: only factors other than sex that are reasonably related to legitimate business interests will sustain the defense.⁶ Other courts of appeals have favored a literal interpretation: “any” means any.⁷ Thus, footnote 11 of the *Smith* plurality opinion casts doubt on the continued validity of the holdings of those circuits that require the employer to offer a reasonable business purpose to establish the “any other factor other than sex” affirmative defense.⁸

6. See *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1078–79 (11th Cir. 2003) (“Because the evidence showed that the salary retention plan was justified by ‘special exigent circumstances connected with the business,’ and because there was no evidence which rebutted GE’s explanation, the district court did not err in submitting the matter to the jury or in denying Steger’s motion for judgment as a matter of law.”) (quoting *Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995)); *Belfi v. Prendergast*, 191 F.3d 129, 136 (2d Cir. 1999) (“Further, to successfully establish the ‘factor other than sex’ defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential.”); *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525–26 (2d Cir. 1992) (“Without a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned. . . . For these reasons, we hold that an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense.”); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988) (“[T]he ‘factor other than sex’ exception applies when the disparity results from unique characteristics of the same job; from an individual’s experience, training, or ability; or from special exigent circumstances connected with the business.”); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) (“The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.”); EEOC Compliance Manual on “Compensation Discrimination,” EEOC Directive No. 915.003 (Dec. 5, 2000), at § 10-IV.F.2. & nn.65–66 (“An employer asserting a ‘factor other than sex’ defense also must show that the factor is related to job requirements or otherwise is beneficial to the employer’s business. Moreover, the factor must be used reasonably in light of the employer’s stated business purpose as well as its other practices.”).

7. See *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1462 (7th Cir. 1994) (“We explained in *Fallon* that the EPA’s fourth affirmative defense ‘is a broad catch-all exception [that] embraces an almost limitless number of factors, so long as they do not involve sex.’ The factor need not be ‘related to the requirements of the particular position in question,’ nor must it even be business-related.”) (quoting *Fallon v. State of Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989) [internal citations omitted]); *cf.* *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2002) (noting in context of a sex-based pay discrimination claim under Title VII: “In conducting this examination, our concern is not related to the wisdom or reasonableness of the asserted defense. It is related solely to the issue of whether the asserted defense is based on a ‘factor other than sex.’”).

8. Since *Smith*, two courts of appeals have reaffirmed the circuit split on this issue, but neither court discussed or even referenced *Smith*. See *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) (“The disagreement between this circuit (plus the eighth) and those that required an ‘acceptable business reason’ is established, and we are not even slightly tempted to change sides.”); *Balmer v. HCA, Inc.*, 423 F.3d 606, 612 (6th Cir. 2005) (“The Equal Pay Act’s catch-all provision ‘does not include literally

II. Determining Causation and Pretext If the Factor Can Be Unreasonable?

In addition to the circuit split on whether “any factor” means literally any factor, *Smith* footnote 11 appears to cast doubt on several other, related aspects of this affirmative defense. Even in circuits that adopt the more literal reading of “any,” the reasonableness of the factor plays a significant role. For example, even in these “literal” circuits, if the employer is able to offer sufficient evidence that, if believed, would sustain the affirmative defense, the plaintiff then is afforded an opportunity to establish that the employer’s justification is a pretext for sex discrimination.⁹ Of course, one of the ways a plaintiff may establish pretext is to show that the factor was unreasonable under the circumstances.¹⁰

If, as the *Smith* footnote 11 suggests, the affirmative defense may be established even where the factor is unreasonable, the traditional pretext analysis that is part of the framework for assessing the affirmative defense must be substantially modified. Moreover, in many cases the evidence will support competing inferences about the actual cause of the pay disparity, and courts typically submit such questions to the jury for determination, if each of the inferences is at least reasonable.¹¹ If the justification itself can be unreasonable, one wonders how the court is to determine whether an inference from the evidence is reasonable and how the jury is to be instructed about determining whether the factor was the actual cause of the pay disparity. Perhaps the jury is to be instructed that the employer must prove that the factor is the actual cause of the pay disparity, but that the reasonableness of the factor cannot be considered in determining whether the employer has met its burden of proof on this issue.

any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason,” quoting *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

9. *Cf. Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 101 n.2 (8th Cir. 1981) (“Arguably, the education and experience requirements could be a pretext for sex discrimination, however, plaintiff introduced no evidence that this was Central Personnel’s intent when it established these criteria.”).

10. *See Kouba*, 691 F.2d at 876–77 (“Even with a business-related requirement, an employer might assert some business reason as a pretext for a discriminatory objective. . . . A pragmatic standard, which protects against abuse yet accommodates employer discretion, is that the employer must use the factor reasonably in light of the employer’s stated purpose as well as its other practices.”).

11. *See Lawrence v. CNF Trans.*, 340 F.3d 486, 494–95 (8th Cir. 2003) (“This court has recognized that experience with a company may constitute a factor in the salary calculation. Notwithstanding that consideration, we believe the jury was entitled to weigh this evidence against the size of the raises given [to the plaintiff’s comparators]” (citations omitted)); *Price v. Lockheed Space Operations Co.*, 856 F.2d 1503, 1506 (11th Cir. 1988) (“[T]he evidence *in toto* presents two competing inferences, that the appellees discriminated on the basis of sex, and that there existed a reason other than sex for the continuing wage disparity. It is the function of the jury as the traditional finder of facts, and not the court, to resolve the conflict between these competing inferences.”).

As significantly, some courts have ruled that a factor may not be the basis for the affirmative defense if the factor has a disparate impact based on sex.¹² However, the *Smith* plurality is straightforward in saying that disparate impact claims are not cognizable under the EPA, and that the “any other factor other than sex” language is precisely the text Congress used to “prohibit” disparate impact claims under the EPA.¹³

III. The Disparate Impact Theory Is Not Available for Sex-Based Pay Discrimination Claims Under Title VII

This discussion about footnote 11’s impact on EPA claims also has significant implications for sex-based Title VII compensation discrimination claims. The “Bennett Amendment,” contained in section 703(h) of Title VII, provides that “[i]t shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].”¹⁴ The Supreme Court has held that the Bennett Amendment incorporates the affirmative defenses of the EPA into Title VII.¹⁵ The Court in *Gunther* had expressed doubt as to whether sex-based, disparate impact pay discrimination claims are viable under Title VII in light of the Bennett Amendment and the EPA’s “any other factor” defense:

More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII’s prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing “not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963), U.S. Code Cong. & Admin. News 1963, p. 687. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of “other factors other than sex.”¹⁶

Running parallel to the EPA discussion above, several courts of appeals have held, and the EEOC has agreed, that the “any other fac-

12. *See Dey*, 28 F.3d at 1462 (“Because it is not our province to second-guess the employer’s business judgment, we ask only whether the factor is bona fide, whether it has been discriminatorily applied, and in some circumstances, whether it may have a discriminatory effect” (citations omitted; emphasis added)).

13. *Smith*, 125 S. Ct. at 1544 n.11.

14. 42 U.S.C. § 2000e-2(h) (2005).

15. *County of Washington v. Gunther*, 452 U.S. 161, 171 (1981).

16. *Id.* 452 U.S. at 170 [footnote omitted].

tor” defense applicable to Title VII through the Bennett Amendment does not foreclose sex-based, disparate impact pay discrimination claims under Title VII.¹⁷

Other courts of appeals have disagreed that sex-based disparate impact pay discrimination claims are viable under Title VII in light of the Bennett Amendment.¹⁸ Thus, a major implication of the Court’s discussion is that it precludes disparate impact theories as a basis for liability in sex-based pay discrimination claims under Title VII.¹⁹

If the *Smith* footnote 11 implies that the disparate impact theory is unavailable under Title VII with respect to sex-based pay discrimination claims, presumably this forecloses claims based on the “alternative employment practice” component of the disparate impact theory developed by the courts and codified by the Civil Rights Act of 1991.²⁰ Moreover, plaintiffs in disparate impact claims have been afforded an

17. See *Aldrich*, 963 F.2d at 528 (“In order to establish a valid claim under Title VII for sex-based wage discrimination, a plaintiff can demonstrate a disparate impact from use of a facially neutral employment practice . . .”); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (“In our circuit, however, the Bennett Amendment cannot constitute a blanket bar to all claims of wage discrimination based on disparate impact because the ‘factor other than sex’ defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.”); *Kouba*, 691 F.2d at 876 (“An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.”); EEOC Compliance Manual on “Compensation Discrimination,” EEOC Directive No. 915.003 (Dec. 5, 2000), at § 10-III.B. n. 34 (“Enforcement staff should be aware that questions have been raised regarding the availability of the disparate impact theory in sex-based compensation discrimination cases. . . . The Commission’s view is that the disparate impact method of proof is available for sex-based compensation discrimination under Title VII.”).

18. See, e.g., *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2002) (“In conducting this examination, our concern is not related to the wisdom or reasonableness of the asserted defense. It is related solely to the issue of whether the asserted defense is based on a ‘factor other than sex.’”); *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999) (reading *Gunther* as precluding disparate impact theory in EPA and sex-based Title VII pay discrimination cases); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1127 (7th Cir. 1987) (The Bennett Amendment “seems to imply, and the Supreme Court in [*Gunther*], assumed, that a disparate impact . . . is not a ground for challenging a practice that is within the scope of the amendment.”).

19. Compare *Carlson v. C.H. Robinson Worldwide, Inc.*, No. 02-3780, 2005 WL 758602, at *7, *16 (D. Minn. Mar. 31, 2005) (certifying class for sex-based pay discrimination claim under disparate impact theory), and *Hnot v. Willis Group Holdings Ltd.*, 228 F.R.D. 476, 486 (S.D.N.Y. 2005) (same), and *Anderson v. Boeing Co.*, 222 F.R.D. 521, 542 (N.D. Okla. 2004) (same), and *Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 2 (D.D.C. 2002) (same), with Defendant Rand Corporation’s Amended Reply Memorandum in Support of its Motion for Summary Judgment on Plaintiffs’ Class Claim of Pay Discrimination Under Title VII or, Alternatively, for Decertification of the Class, *Jarvaise v. Rand Corp.*, No. 1:96-CV-02680 (RWR/JMF), at 14–15 (D.D.C. filed June 15, 2004) (arguing that plaintiffs’ disparate impact pay discrimination claim under Title VII is precluded by the Bennett Amendment).

20. See, e.g., *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 831 (6th Cir. 2000) (in evaluating plaintiff’s sex-based disparate impact pay discrimination claim under Title VII, district court erred in not determining whether “there exists an alternative employment practice that would achieve the same business ends with a less discriminatory impact”).

opportunity to establish that the employer's asserted business justification was a pretext for discrimination.²¹ It is unclear what modifications must be made to this framework to accommodate the permissible reliance on unreasonable factors other than sex. Perhaps the jury is to be instructed that it must find that employer actually relied on the asserted "factor other than sex," but that it may not consider the reasonableness of the factor in making this determination. This may be an instruction that will be difficult for the jury to understand and implement. As Justice O'Connor noted in her concurrence in judgment in *Smith*, "[r]eliance on an unreasonable factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination."²²

IV. The Plurality's Discussion Suggests a Challenge to Class Certification of Sex-Based Pay Discrimination Claims Under Title VII

The plurality's broad interpretation of the "any other factor" defense suggests it will be more difficult to secure class certification of sex-based pay discrimination claims under Title VII. There are a host of factors—such as qualitative aspects of education and experience typically not included in statistical evidence of a pattern or practice of discrimination—that would sustain the affirmative defense if the factor need not meet any reasonableness standard. Where the employer intends to offer evidence of factors unique to particular employees, this may make it difficult for plaintiffs to establish that that "there are questions of law or fact common to the class" or that their "claims . . . are typical of the claims . . . of the class" as required by Rule 23(a) of the Federal Rules of Civil Procedure.²³ Moreover, determination of the merits of the "any other factor" defense where the employer offers evidence of factors unique to particular employees may require individual mini-trials, making the action unmanageable in a class format.

A. *Affirmative Defenses and Class Certification*

The "any other factor" affirmative defense has seldom been considered by the courts in the context of class certification. The only case

21. *Id.* (district court erred in not considering whether the plaintiff showed "that the employer's reason was a pretext for discrimination"); *Kouba*, 691 F.2d at 876 ("Even with a business-related requirement, an employer might assert some business reason for a discriminatory objective.")

22. *Smith*, 125 S. Ct. at 1552 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613–14 (1993) [emphasis in original]).

23. FED. R. CIV. P. 23(a)(2) & (3). Commonality and typicality are hotly contested in sex-based pay discrimination cases under Title VII. *See, e.g.*, *Grosz v. Boeing Co.*, 2005 WL 1515070, at *1 (9th Cir. June 28, 2005) (approving district court's denial of class certification based on plaintiffs' failure to demonstrate commonality and typicality); *Carlson*, 2005 WL 758602, at *8–10, *14–15 (rejecting employer's arguments that plaintiffs failed to establish commonality and typicality and certifying class of salaried employees).

available through Westlaw that addressed a challenge to class certification based on the Bennett Amendment did not involve the “any other factor” defense.²⁴ In *Radmanovich v. Combined Insurance Co.*, the plaintiffs alleged that the employer discriminated against its female employees with regard to hiring, promotions, and commission opportunities, and that the employer created, fostered, and permitted a sexually hostile work environment.²⁵ The plaintiffs sought certification of a class of “[a]ll women who . . . were sales agents or managers at some point during their employment with Combined.”²⁶ Combined Insurance argued in its memorandum in opposition to class certification that unique defenses precluded a finding that the representative plaintiffs’ claims were typical of the class claims. In particular, Combined argued that “the pay . . . claims of each class member would be subject to the defenses created by the Bennett Amendment, which specifies there is no violation of Title VII if an employer bases compensation on productivity (as Combined does with commissions).”²⁷ The court rejected this argument, explaining that “[t]ypicality under Rule 23(a) should be determined with reference to the company’s actions, not with respect to particularized defenses it might have against certain class members.”²⁸

In other contexts, the courts of appeals have considered affirmative defenses in determining whether to certify a class under Rule 23 of the Federal Rules of Civil Procedure.²⁹ The majority of circuits that have considered this issue have held that affirmative defenses should be taken into account when assessing class certification, but the fact that such defenses involve individualized inquiries does not categorically rule out certification.³⁰ As it did in *Radmanovich*, the majority rule

24. See *Radmanovich v. Combined Ins. Co.*, 216 F.R.D. 424, 438 n.6 (N.D. Ill. 2003).

25. *Id.* at 428.

26. *Id.* at 430.

27. Combined’s Memorandum in Opposition to Plaintiff’s Motion for Class Certification, at 8–9; *Radmanovich v. Combined Ins. Co.*, No. 01-C-9502 (N.D. Ill. filed June 5, 2003).

28. *Radmanovich*, 216 F.R.D. at 433 (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)).

29. See, e.g., *In re Monumental Life Ins. Co. Litig.*, 365 F.3d 408, 420–21 (5th Cir. 2004); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434, 438 (4th Cir. 2003); *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1260–61 (11th Cir. 2003) (unrelated holding affirmed in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005)); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 39–40 (1st Cir. 2003); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 138 (2d Cir. 2001).

30. See *In re Monumental Life Ins. Co. Litig.*, 365 F.3d at 421 (“Though individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants’ common scheme of fraudulent concealment.”); *Allapattah Servs.*, 333 F.3d at 1261 (“[T]he real question for the district court was whether the common issue of liability dominated over the individual issues raised by Exxon’s affirmative defenses. . . . [i]n similar situations numerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate.”); *Smilow*, 323 F.3d at 40 (“Courts traditionally have been

would appear to limit the effectiveness of the “any other factor” affirmative defense as a means of opposing class certification.

However, there are several reasons to believe that this line of authority does not preclude an argument against class certification based on the “any other factor” affirmative defense. First, most of the cases involved procedural defenses to liability, such as statutes of limitations.³¹ Second, several of the cases involved affirmative defenses, such as mitigation, which do not address liability, but affect only the scope of the remedy.³²

By contrast, the Bennett Amendment is a substantive provision of Title VII under which reliance on a factor that establishes the “any other factor” defense is positively declared *not* to be “an unlawful employment practice.”³³ This is an affirmative immunity from substantive liability, not a procedural immunity like a statute of limitations or a limit on the scope of relief like a mitigation defense. Indeed, the Supreme Court has held that section 703(h) of Title VII, which contains the Bennett Amendment, “delineates which employment practices are illegal and thereby prohibited and which are not.”³⁴ Thus, the “any other factor” defense is not the typical affirmative defense that excuses otherwise established liability. Rather, it is an express exemption from the statutory definition of the practices that constitute “unlawful employment practices.” This has significant implications for placement of the “any other factor” defense within the framework for pattern or practice cases under Title VII.

reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members.”); *In re Linerboard Antitrust Litig.*, 305 F.3d at 162 (“However, most courts have refused to deny class certification simply because there will be some individual questions raised during the proceedings.”); *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 138 (“Although a court must examine the relevant facts and both the claims and defenses in determining whether a putative class meets the requirements of Rule 23(b)(3), the fact that a defense ‘may raise and may affect different class members differently does not compel a finding that the individual issues predominate over common ones.’” (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000)). *But see Gunnells*, 348 F.3d at 438 (“[W]e have flatly held that ‘when defendants’ affirmative defenses . . . may depend on facts peculiar to each plaintiff’s case, class certification is erroneous.’” (quoting *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998)).

31. *See In re Monumental Life Ins. Co. Litig.*, 365 F.3d at 420–21 (statute of limitations defense); *Smilow*, 323 F.3d at 40 (waiver defense); *In re Linerboard Antitrust Litig.*, 305 F.3d at 162 (statute of limitations defense); *Waste Mgmt. Holdings, Inc.*, 208 F.3d at 295–96 (statute of limitations defense); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996) (release of claims defense).

32. *See In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 138 (mitigation of damages defense); *Allapattah Servs.*, 333 F.3d at 1261 (set-off claims characterized as affirmative defenses “which pertained primarily to the issues of damages rather than liability”).

33. 42 U.S.C. § 2000e-2(h) (2005).

34. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 759 (1976); *see also Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 346 (1977).

B. *The “Any Other Factor” Defense and the Teamster’s Framework for Pattern or Practice Cases Under Title VII*

As noted, courts have only infrequently entertained challenges to class certification based on the “any other factor” defense. Thus, there has been little discussion of where the “any other factor” defense is considered within the *Teamsters* framework for pattern or practice claims under Title VII.

Recall that the Supreme Court has said that pattern or practice cases typically will be tried in two phases.³⁵ First, there is a liability phase in which the plaintiffs must “establish by a preponderance of the evidence that . . . discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.”³⁶ During this liability phase, the plaintiffs attempt to establish a prima facie case of a pattern or practice of discrimination, typically by offering statistical evidence supported by anecdotal evidence of individual instances of discrimination.³⁷ If the plaintiff is able to establish a prima facie case, the burden of production shifts to the employer to meet the prima facie showing by demonstrating that the plaintiffs’ proof is either inaccurate or insignificant.³⁸ In this first phase, because the plaintiffs typically use statistical analyses as “proof of the expected result of a regularly followed discriminatory policy . . . the employer’s burden is to provide a nondiscriminatory explanation for the apparently discriminatory result.”³⁹ However, there are no “particular limits on the type of evidence the employer may use” to meet this burden of production.⁴⁰

If the plaintiff is successful in convincing the trier of fact that the employer has engaged in a pattern or practice of disparate treatment, then the court may enter an order for declaratory and/or injunctive relief.⁴¹ However, if the plaintiffs seek individual relief, then the action moves to the second phase under this *Teamsters* framework.⁴² The second phase of the pattern or practice action focuses on the remedy and the district court “must usually conduct additional proceedings . . . to determine the scope of individual relief.”⁴³ During this second, remedial phase, the burden rests on the employer to demonstrate that the challenged employment action with respect to the individual was based on legitimate, nondiscriminatory reasons.⁴⁴

35. *Teamsters*, 431 U.S. at 359–62.

36. *Id.* at 336.

37. *Id.* at 337–41, 361–62 n.20.

38. *Id.* at 360.

39. *Id.* at 360 n.46.

40. *Id.*

41. *Id.* at 361.

42. *Id.*

43. *Id.*

44. *Id.* at 362.

There is a surface appeal to placing the “any other factor” affirmative defense into phase two of the *Teamsters* framework, as the employer bears the burden of persuasion under the affirmative defense just as it bears the burden of demonstrating in phase two that the individual class members were not subject to the pattern or practice of discrimination found in phase one. However, the Court has held that section 703(h) is not directed toward the remedial aspects of Title VII.⁴⁵ Rather, as noted above, the Court has held that the “any other factor” defense is directed to the definition of what constitutes an “unlawful employment practice” under Title VII.⁴⁶ Moreover, it would appear altogether inappropriate to allow the pattern or practice *finding*—in contrast perhaps to evidence that the plaintiff used to establish a pattern or practice—to influence whether the employer has established the affirmative defense.⁴⁷ Allowing the pattern or practice *finding* to influence the determination about the “any other factor” affirmative defense seems particularly inappropriate where that finding is based largely on statistical evidence that omits the very types of factors, such as qualitative aspects of education or experience, that may establish the affirmative defense.

Indeed, in *Teamsters* itself, the Court did not allow the pattern or practice finding to influence its determination of the applicability of a provision of Section 703(h) that immunizes bona fide seniority systems from liability under Title VII. In particular, the Court determined that the plaintiffs’ statistical and anecdotal evidence was sufficient to sustain the district court’s conclusion that the employer engaged in a pattern or practice of disparate treatment against minority candidates for line driver positions.⁴⁸ Nonetheless, despite the pattern or practice finding, the Court determined that the employer’s seniority system was “entirely bona fide,” and rejected the Government’s contention that the seniority system could not be bona fide because it perpetuated the discriminatory effects of pre-Act discrimination.⁴⁹

Thus, from a doctrinal perspective, the “any other factor” defense is appropriately considered within phase one of the *Teamster*’s framework, notwithstanding the surface appeal of phase two placement,

45. *Franks*, 424 U.S. at 760.

46. *Id.*

47. *See Teamsters*, 431 U.S. at 362 (“[A]s is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial stage of the trial.”).

48. *Id.* at 336–43.

49. *Id.* at 353–55. It is also noteworthy that the Court considered and resolved the government’s challenge to the impact of the employer’s seniority system as part of the discussion of liability, and prior to turning to remedial issues. *Id.* Thus, the Court’s own ordering suggests that determinations under section 703(h) must take place within phase one of the *Teamster*’s framework. *Id.*

which derives from the fact that the employer bears the burden of persuasion to establish the “any other factor” defense.

C. *The “Any Other Factor” Defense and Class Certification in Recent Sex-Based Pay Discrimination Cases Under Title VII*

If individualized hearings are required to make determinations as to the “any other factor” defense, this presents a significant impediment to class certification. Even courts that are generally receptive to class certification in Title VII cases have appreciated that individual-specific “mini-trials” would make class treatment unmanageable. For example, in *Carlson v. C.H. Robinson Worldwide, Inc.*,⁵⁰ the plaintiffs sought class certification for a variety of discrimination claims, including a sex-based pay discrimination claim under Title VII. The district court certified a subclass consisting of “all females who have been employed on a full-time basis by [the employer] in a domestic branch office at any time during the liability period.”⁵¹ However, the court limited the certification to issues of liability and declaratory and injunctive relief under Rule 23(b)(2), deferring consideration of the plaintiffs’ motion to certify the subclass for monetary damages under Rule 23(b)(3) until after liability is determined.⁵² The court noted that the plaintiffs’ “request for lost wages, nominal damages and punitive damages necessitates a second, remedial phase of the litigation that is separate from resolution of their claim for injunctive relief.”⁵³ The court deferred its ruling on class certification of the remedial phase of the action because it was particularly troubled by the nature of the determinations required in that phase: “Importantly, these damages inquiries require individualized factual determinations whose manageability could overwhelm the litigation.”⁵⁴

Similarly, in *Beck v. Boeing*,⁵⁵ the district court certified a class action in which the plaintiffs alleged a pattern or practice of compensation and promotion discrimination. As to the liability phase of the action, the district court certified a class under Rule 23(b)(2).⁵⁶ The court rejected Boeing’s argument that the class would be unmanageable due to “an endless litany of fact-specific inquiries into the circumstances of each class member” and explained:

Nor do we find that certifying a class in this matter need result in a parade of countless individual plaintiffs explaining the circumstances of their complaints. Plaintiffs’ theory of the case is premised on their

50. 2005 WL 758602, at *8–10, *14–15 (D. Minn. Mar. 31, 2005).

51. *Id.*

52. *Id.*

53. *Id.* at *16.

54. *Id.*

55. 203 F.R.D. 459, 466 (W.D. Wash. 2001), *aff’d in pertinent part*, 60 Fed. Appx. 38, 39 (9th Cir. 2003).

56. *Id.* at 467.

ability to prove that, at the highest levels of the corporation, Boeing knew that systemic gender-based discrimination was occurring and did nothing (or did not do enough) to put an end to it. Liability will hinge on that proof and the punitive damages assessed against defendants (if any) will flow from that finding.⁵⁷

As to the damages phase of the action, the court considered class certification under Rule 23(b)(3).⁵⁸ The court noted that “[t]he spectre of ‘individualized hearings’ raises its head in two ways in the context of this litigation”: (1) “by the possibility of a defense rebuttal . . . wherein a defendant[] . . . bring[s] forth evidence showing non-discriminatory reasons for its actions” and (2) “by the possibility of demonstrating the defendant’s conduct in specific instances in pursuit of either back pay or punitive damages.”⁵⁹ Although the court downplayed these concerns—noting that the Ninth Circuit permits formula relief in pattern or practice cases to “avoid ‘a quagmire of hypothetical judgments’ or the strain of a multitude of separate fact-finding hearings”—and certified a class for punitive damages, the court nonetheless refused to certify the class for back pay under Rule 23(b)(3):

The Court is at a loss to fashion a method of arriving at [back pay] damages for the plaintiffs and class members without individualized hearings into the specific circumstances of each person’s employment and what the discrimination to which they have been subjected (if such is proven) has cost them over the time period allotted to the class. For this portion of the damages request, a class action is not the superior method by which to fairly and economically resolve the issue and that portion of plaintiffs’ lawsuit will not be certified as a class action.⁶⁰

The Ninth Circuit affirmed the district court’s decision to certify a class under Rule 23(b)(2) for liability purposes, but vacated the district court’s decision to certify a class for punitive damages under Rule 23(b)(3).⁶¹ However, the Ninth Circuit agreed with the district court that “Boeing cannot defeat class certification at the liability phase by arguing that it is entitled to introduce individualized evidence that each of its employment decisions was motivated by a legitimate non-discriminatory reason.”⁶²

In another prominent sex-based compensation discrimination case under Title VII, *Dukes v. Wal-Mart Stores, Inc.*,⁶³ Wal-Mart argued that

57. *Id.* at 466.

58. *Id.* at 467.

59. *Id.* [citations omitted].

60. *Id.*

61. *Beck*, 60 Fed. Appx. at 39–40.

62. *Id.* at 39.

63. 222 F.R.D. 137, 186–87 (N.D. Cal. 2004). The Ninth Circuit granted the parties’ cross-petitions for permission to appeal the district court’s June 22, 2004 order granting class certification. Oral arguments in the appeals (Nos. 04-80057, 04-16688) were heard on August 8, 2005. *Id.*

the action would be unmanageable in both the liability and remedy stages due to the massive size of the proposed class.⁶⁴ The district court agreed that manageability was an important consideration:

[T]he Court agrees that it must very carefully assess the manageability of issues presented by this unique case. While courts possess wide discretion to flexibly respond to manageability issues that may arise during the course of a class action, this court must be confident that such issues will not be of such a magnitude as to defy its ability to oversee this case in a responsible and reasonable manner.⁶⁵

With respect to liability, the court cited Wal-Mart's argument that "due process" would necessarily require 3,244 individual mini-trials, including testimony from 3,244 Store Managers, to determine whether each individual Wal-Mart store discriminated against class members employed by that store.⁶⁶ The court rejected this argument, explaining that "the evidence introduced during Stage I should properly focus on matters relevant to the class as a whole, such as statistical analysis and evidence of system-wide policies and practices."⁶⁷ The court concluded that Wal-Mart "is not . . . entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members."⁶⁸

As to remedy, Wal-Mart asserted an argument similar to the "any other factor" defense in an attempt to demonstrate that class treatment would be unmanageable. In particular, Wal-Mart argued that class certification was improper because the Civil Rights Act of 1991 limits the remedies available to a plaintiff where the employer demonstrates that it would have taken the same employment action in the absence of the impermissible motivating factor.⁶⁹ The court rejected this argument, reasoning that the employer is afforded such an opportunity only in "mixed motives" cases and that the plaintiffs in *Dukes* had opted to proceed only under a single-motive theory of discrimination.⁷⁰ Nonetheless, the court acknowledged that "holding individual hearings for the number of women potentially entitled to backpay in this case is impractical on its face . . ."⁷¹

Thus, courts certainly recognize that individualized assessments make the action unmanageable in a class format. Courts favorably disposed to class certification have avoided the manageability problem by ruling that individualized assessments are not required to determine

64. *Dukes*, 222 F.R.D. at 173. The parties estimated that the proposed class exceeds 1 million current and former female Wal-Mart employees. *Id.* at 144.

65. *Id.*

66. *Id.* at 173–74.

67. *Id.* at 174.

68. *Id.*

69. *Id.* at 186–87.

70. *Id.*

71. *Id.* at 176.

liability.⁷² However, these courts did not consider the “any other factor” affirmative defense under the Bennett Amendment of Title VII. As discussed above, there are compelling grounds for individualized assessments of the “any other factor” defense during the liability phase.⁷³ Where the employer raises the “any other factor” defense, and offers evidence of factors unique to particular employees, the court must entertain mini-trials to allow the jury to determine whether the employer’s evidence establishes the affirmative defense. Moreover, the “any other factor” affirmative defense does not depend on the nature of the plaintiff’s allegations, and, therefore, plaintiffs could not modify their claims to preclude the employer from offering individualized proof in support of this defense. It is to be seen whether the “any other factor” defense proves to be a successful basis for opposing class certification in sex-based pay discrimination claims under Title VII.

72. See *supra* text accompanying notes 49–67.

73. See *supra* text accompanying notes 45–49.