

**WHEN THE CUSTOMER IS KING:  
EMPLOYMENT DISCRIMINATION AS CUSTOMER SERVICE**

*Lu-in Wang* \*

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*Employers profit from giving customers opportunities to discriminate against service workers. Employment discrimination law should not, but in many ways does, allow them to get away with it. Employers are driven by self-interest to please customers, whose satisfaction is critical to business success and survival. Pleasing customers often involves cultivating and catering to their discriminatory expectations with respect to customer service—including facilitating customers' direct discrimination against workers.*

*Current doctrine allows employers to escape responsibility for customers' discrimination against workers because it takes an overly narrow view of the employment relationship. The doctrine focuses on the formal lines of authority that run between two parties: the employer and employee. In fact, the structure of service work relationships is triangular and not dyadic. Because of the characteristics of service work and the importance of customer satisfaction to the employer's bottom line, customers play a powerful role in determining the terms, conditions, and privileges of employment.*

*This article argues that the law should acknowledge and hold employers accountable for the ways in which they facilitate, and benefit from, customers' discrimination against service workers. To do so, employment discrimination law needs a model of employer liability to reach discrimination that originates beyond the employer-employee dyad, in recognition of both the triangular structure of, and the power of the customer in, interactive service work.*

INTRODUCTION

**S**ERVICE jobs are known as “bad jobs,”<sup>1</sup> with good reason. Firms are driven to maximize profit by maximizing customer satisfaction, and workers endure all manner of difficult conditions in the name of pleasing customers.<sup>2</sup> So that firms can minimize costs and offer rock-bottom pric-

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<sup>1</sup> See, e.g., ZEYNEP TON, THE GOOD JOBS STRATEGY: HOW THE SMARTEST COMPANIES INVEST IN EMPLOYEES TO LOWER COSTS & BOOST PROFITS, 3–5 (2014) (describing “the bad jobs problem” in the retail industry). Service jobs are common in a variety of industries, but this article draws primarily from the rich body of research on service work in the retail and hospitality (mainly restaurant) industries.

es, workers suffer low pay, wage theft, and part-time work that force many onto public assistance.<sup>3</sup> So that stores can stay open 24/7 with “just in time” staffing, workers cope with unpredictable, punishing schedules that harm their health and safety and keep them from attending to important responsibilities such as child care.<sup>4</sup> So that customers will be content in a culture that regards them as “kings” who are always right, workers bear their bullying and harassment.<sup>5</sup> The list goes on. These tough conditions affect millions of workers, for service work dominates the modern economy, and more than half of all employees in the United States work in service occupations.<sup>6</sup>

But if service jobs are generally bad for the millions of workers who hold them, they are especially bad for women and people of color. Women, Blacks, and Latinos are overrepresented in service occupations<sup>7</sup> but have worse economic outcomes and experience worse conditions than

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<sup>2</sup> See *infra* Part II.A.

<sup>3</sup> See, e.g., TON, *supra* note 1, at 4; Steven Greenhouse, *A Part-Time Life, as Hours Shrink and Shift*, N. Y. TIMES, Oct. 27, 2012, <http://www.nytimes.com/2012/10/28/business/a-part-time-life-as-hours-shrink-and-shift-for-american-workers.html>.

<sup>4</sup> See, e.g., TON, *supra* note 1, at 138–42; Steven Greenhouse, *In Service Sector, No Rest for the Working*, N. Y. TIMES, Feb. 22, 2015, at 1, 3; Greenhouse, *A Part-Time Life*, *supra* note 3.

<sup>5</sup> See *infra* Part II.C.

<sup>6</sup> See generally KARL ALBRECHT & RON ZEMKE, SERVICE AMERICA! DOING BUSINESS IN THE NEW ECONOMY 1–2 (special authors’ ed. 2004); Stephen Henry Lopez, *Workers, Managers and Customers: Triangles of Power in Work Communities*, 37 WORK AND OCCUPATIONS 251, 252 (2010). In May 2014, the jobs of retail salesperson and cashier accounted for the “largest” employment, making up nearly 6% of all U.S. employment, and the ten largest occupations, or 21% of total employment, were mostly service jobs. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES NEWS RELEASE (March 25, 2015), <http://www.bls.gov/news.release/ocwage.htm> (listing as the “10 largest occupations”: retail salespersons and cashiers; combined food preparation and serving workers, including fast food; general office clerks; registered nurses; customer service representatives; and waiters and waitresses). At that time, the industry sectors with the largest employment in the U.S. were “health care and social assistance and retail trade.” *Id.*

<sup>7</sup> The Bureau of Labor Statistics reports that, in 2014, women were 46.9% of total employed persons age 16 years and over and 56.7% of those employed in service occupations; Blacks were 11.4% of the total employed and 16.2% of those employed in service occupations; and Hispanics or Latinos were 16.1% of the total employed and 23.4% of those employed in service occupations. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, 2014 HOUSEHOLD DATA ANNUAL AVERAGES, TABLE 11, EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY, <http://www.bls.gov/cps/cpsaat11.pdf>.

other service workers. Persistent job segregation by industry segment and position limits women and people of color to the lowest status, lowest paying jobs,<sup>8</sup> and even within the same jobs they are paid less than their male or white counterparts.<sup>9</sup> Women and people of color also disproportionately bear the hardships of unpredictable schedules and insufficient hours<sup>10</sup> and are often targets for discriminatory harassment from customers.<sup>11</sup>

That bad jobs are even worse for women and people of color is not surprising. In addition to promoting bad employment practices more broadly, employers' drive to satisfy customers promotes discrimination against service workers. As in life generally, people have racist, sexist, and other discriminatory preferences as consumers.<sup>12</sup> Direct discrimina-

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<sup>8</sup> See, e.g., RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., BLACKS IN THE RESTAURANT INDUSTRY BRIEF 2 (Jan. 31, 2012), <http://rocunited.org/roc-releases-blacks-in-the-industry/> [hereinafter ROC, BLACKS IN THE RESTAURANT INDUSTRY] (discussing job segregation by race in the restaurant industry); RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., TIPPED OVER THE EDGE: GENDER INEQUITY IN THE RESTAURANT INDUSTRY 2, 18–19 (Feb. 13, 2012), <http://rocunited.org/tipped-over-the-edge-gender-inequity-in-the-restaurant-industry/> [hereinafter ROC, TIPPED OVER THE EDGE] (discussing job segregation by gender in the restaurant industry); CATHERINE REUTSCHLIN & DEDRICK ASANTE-MUHAMMAD, THE RETAIL RACE DIVIDE: HOW THE RETAIL INDUSTRY IS PERPETUATING RACIAL INEQUALITY IN THE 21<sup>ST</sup> CENTURY 4, 18–20 (June 2, 2015), <http://www.demos.org/publication/retail-race-divide-how-retail-industry-perpetuating-racial-inequality-21st-century> (discussing job segregation by race in the retail industry).

<sup>9</sup> See ROC, TIPPED OVER THE EDGE, *supra* note 8, at 2, 17–18 (discussing gender pay gap among restaurant servers); REUTSCHLIN & ASANTE-MUHAMMAD, *supra* note 8, at 5, 21–22 (discussing “racial wage divide” within retail job categories); Catherine Ruetschlin & Robert Hiltonsmith, *Making Retail Jobs Good Jobs for Women* 1–2 (Apr. 14, 2015), <http://www.demos.org/publication/making-retail-jobs-good-jobs-women> (discussing gender pay gap among retail salespersons). See also Zachary W. Brewster & Michael Lynn, *Black-White Earnings Gap Among Restaurant Servers: A Replication, Extension, and Exploration of Consumer Racial Discrimination in Tipping*, 84 SOC. INQUIRY 545 (2014).

<sup>10</sup> See ROC, TIPPED OVER THE EDGE, *supra* note 8, at 4, 27–28 (discussing impact of “lack of schedule control” on female restaurant workers); REUTSCHLIN & ASANTE-MUHAMMAD, *supra* note 8, at 5, 23–25 (discussing “scheduling disparity” and burden of just-in-time scheduling on Black and Latino retail workers); Ruetschlin & Hiltonsmith, *supra* note 9, at 2–3 (discussing the “particularly heavy burden for female workers” of variable and unpredictable schedules in the retail industry).

<sup>11</sup> See *infra* Part II.D.

<sup>12</sup> See generally Katharine T. Bartlett & Mitu Gulati, *Discrimination by Customers* (Nov. 10, 2015), [http://scholarship.law.duke.edu/faculty\\_scholarship/3394](http://scholarship.law.duke.edu/faculty_scholarship/3394) (citing examples and studies); Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q.J. ECON. 835 (1998).

tion by customers is recognized as a serious problem, but it is not unlawful,<sup>13</sup> nor is it likely to be eliminated by market forces.<sup>14</sup> At the same time, employment discrimination law has long held that the desire to satisfy customers' discriminatory preferences does not allow the employer itself to discriminate in the terms, conditions, or privileges of employment.<sup>15</sup> Nevertheless, employers are driven by self-interest to please customers, whose satisfaction is critical to business success and survival.<sup>16</sup> Pleasing customers often involves taking account of and catering to their discriminatory expectations with respect to customer service, including facilitating customers' direct discrimination against workers. As a result, much of the discrimination that service workers face on the job not only benefits, but also may be promoted by, their employers, yet it is not actionable.

To put it plainly, employers profit from giving customers opportunities to discriminate against service workers. This point is not new. It has been argued persuasively and documented thoroughly by legal scholars and social scientists who have examined a wide range of ways in which employers benefit from customer discrimination against workers.<sup>17</sup> Perhaps the most recognizable example is the experience of women in the hospitality industry,<sup>18</sup> whose appearance and conduct are regulated by management to present them as attractive and sexually available, and who are expected to endure persistent sexual harassment from customers—including threats of violence and rape—as part of the job. But while it may be especially vivid and appalling, this example is just one of many. As the article will demonstrate, the discriminatory preferences of customers are a powerful influence on employers in the context of interactive service work. The desire to satisfy customers encourages employers to adopt an array of problematic practices that incorporate, reinforce, and even cultivate group-based stereotypes and preferences, all in the name of customer service.

Employment discrimination law should not allow employers to profit from customer discrimination against workers. But in many ways it does, by allowing employers to distance themselves from a wide range

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<sup>13</sup> See Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1656, 1663 (2005); Bartlett & Gulati, *supra* note 12, at 4.

<sup>14</sup> See Matthew Parrett, *Customer Discrimination in Restaurants: Dining Frequency Matters*, 32 J. LAB. RES. 87, 88 (2011) (distinguishing discrimination by employers and co-workers and stating that "customer discrimination typically cannot be eliminated by market forces"), *citing* L. Kahn, *Customer Discrimination and Affirmative Action*, 29 ECON. INQUIRY 555 (1991).

<sup>15</sup> See, e.g., *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> See *infra* Part II.D.

<sup>18</sup> This example is discussed further in Part II.D., *infra*.

of discrimination that service workers suffer on a regular basis. Current liability standards focus narrowly on the formal lines of authority that run between the employer and employee. That narrow view overlooks the realities of the service work environment, in which customers are “kings” who strongly influence, and sometimes even participate in determining, the terms, conditions, and privileges of employment.<sup>19</sup> As a result, the dyadic legal model accepts employers’ rhetoric casting practices that facilitate discrimination against workers as simply “good customer service.” The traditional model thereby fails to acknowledge the extent to which employers act in their own self-interest when they defer to, assume, and shape the discriminatory expectations of customers in structuring the work environment.

Employment discrimination law should take a broader view of the employment relationship in interactive service work, to incorporate the full set of parties and to account for the influence on the employer’s practices of its profit-motivated drive to satisfy customers. To support this argument, the article draws on the sociology of service work to explain how the triangular structure of relationships combines with the culture of “customer sovereignty”<sup>20</sup> to promote some familiar, often unlawful, discriminatory employment practices. It then introduces another common practice that may be both less well known to readers and harder to hold employers liable for: the use of customer feedback to monitor and evaluate workers, or “management by customers.”<sup>21</sup> Through this practice, employers have drawn the customer directly into the management of employees, leaving workers vulnerable to customer discrimination that is processed through management decisions. The article argues that employment discrimination law should and can hold employers liable when they base employment decisions on discriminatory customer feedback. More broadly, it argues that employment discrimination law needs a model of employer liability that accounts for the power of the customer in interactive service work and the ways in which employers promote discrimination in employment as a form of customer service.

#### I. THE SERVICE TRIANGLE: BEYOND THE EMPLOYER-EMPLOYEE DYAD

Employment discrimination law<sup>22</sup> is based on a dyadic model of the employment relationship that focuses on interactions between the em-

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<sup>19</sup> See *infra* Parts II and III.

<sup>20</sup> Marek Korczynski, *Understanding the Contradictory Lived Experience of Service Work: The Customer-Oriented Bureaucracy*, in *SERVICE WORK: CRITICAL PERSPECTIVES* 73, 78 (Marek Korczynski & Cameron Lynne Macdonald eds., 2009).

<sup>21</sup> Linda Fuller & Vicki Smith, *Consumers’ Reports: Management by Customers in a Changing Economy*, 5 *WORK, EMP. & SOC’Y* 1–2 (1991).

<sup>22</sup> This discussion focuses primarily on Title VII of the Civil Rights Act of 1964, 42 USC § 2000e *et seq.*, which is widely regarded as the most important

ployer and employee. Violations are defined as decisions or actions of the employer that harm the employee,<sup>23</sup> the employer is the party that is liable for violations,<sup>24</sup> and generally only an employee can make a claim.<sup>25</sup> Accordingly, determinations of liability often turn on such questions as whether the requisite employment relationship existed between the plaintiff and defendant,<sup>26</sup> or whether the source of discrimination was a decision or action of an agent of the employer-defendant.<sup>27</sup> But for many workers a third party, the customer, plays a crucial role in determining the terms, conditions, and privileges of employment. In fact, the customer sometimes has an effect on the worker that is greater than that of the employer who formally sets those terms, conditions, and privileges.<sup>28</sup> In these settings, the relationship structure that dictates how the

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federal employment discrimination statute and has been the model for other federal and many state employment discrimination statutes.

<sup>23</sup> See, e.g., 42 U.S.C. § 2000e-2(a) (defining unlawful employer practices). Employment agencies and labor organizations also can be liable under Title VII for a narrower and less frequently litigated set of practices. See 42 U.S.C. § 2000e-2(b) (defining unlawful employment agency practices) and (c) (defining unlawful labor organization practices).

<sup>24</sup> See 42 U.S.C. § 2000e(b) (defining employer) and § 2000e-2(a) (defining unlawful employer practices). Individual employees generally cannot be held personally liable under Title VII. See, e.g., *Fantini v. Salem State Coll.*, 557 F.3d 22, 28–31 (1st Cir. 2009) (collecting, discussing, and agreeing with cases finding no individual employee liability under Title VII).

<sup>25</sup> Title VII permits “a person claiming to be aggrieved” to file a charge with the EEOC and to file a civil action if the EEOC declines to sue. 42 U.S.C. § 2000e-5(b), (f)(1). A “person claiming to be aggrieved” typically is, but need not be, the direct target of the unlawful employment practice, but he or she must be “within the ‘zone of interests’ sought to be protected by [Title VII].” *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (holding that plaintiff who was fired as the defendant’s means of retaliating against his fiancé was “a person aggrieved with standing to sue” under Title VII; noting that plaintiff “was an employee of NAS” and that “injuring him was the employer’s intended means of harming” his fiancé). For fuller discussion of who may file a charge or sue under Title VII, see generally 4 LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 78.01 (2d ed. 2015).

<sup>26</sup> The defendant will not be liable under Title VII if, for example, the plaintiff was not its employee but instead an independent contractor. See, e.g., *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486 (8th Cir. 2003).

<sup>27</sup> For example, disparate treatment liability attaches only if the employer or its agent discriminated in making the decision in question or can be held responsible for having done so under a “cat’s paw” theory. See *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). Disparate impact liability applies only if the employer “uses” a “particular employment practice that causes disparate impact.” 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>28</sup> See Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1184 (2015) (making this point with respect to intimate service work in particular).

work is assigned, organized, managed, and rewarded, as well as who is hired to do it, is more a triangle that includes the employer, the worker, and the customer.<sup>29</sup> This organizational structure is especially prominent in service work and is often referred to as the “service triangle.”<sup>30</sup> For the vast numbers of service employees who work on the “front line,”<sup>31</sup> interacting directly with customers or “working on people,”<sup>32</sup> the effect of the service triangle is especially strong, influencing almost every aspect of their work lives, as will be explored below.<sup>33</sup> In particular, customers’ discriminatory expectations and preferences can be a powerful influence on the terms, conditions, and privileges of service work. As we will see, those biases can determine who is hired, what jobs they are assigned, the standard of performance expected of them, and how they are treated on the job.<sup>34</sup>

Of course, employers have long catered to customers’ expressed or assumed desires, including their discriminatory preferences. In early cases under Title VII, employers openly justified facially discriminatory policies and practices by pointing to customers’ preference to be served by workers of a particular gender or race.<sup>35</sup> The premier case addressing this argument, *Diaz v. Pan American World Airways, Inc.*, involved an airline’s policy of hiring only women as flight cabin attendants, known in those days as stewardesses.<sup>36</sup> To support this policy, the defendant re-

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<sup>29</sup> See, e.g., Ulla Forseth, *Gender Matters? Exploring How Gender is Negotiated in Service Encounters*, 12 GENDER, WORK & ORG. 440, 442 (2005); Lopez, *supra* note 6, at 255.

<sup>30</sup> See, e.g., Lopez, *supra* note 6, at 255.

<sup>31</sup> Holly J. McCammon & Larry J. Griffin, *Workers and Their Customers and Clients: An Editorial Introduction*, 27 WORK & OCCUPATIONS 278, 279 (2000).

<sup>32</sup> Marek Korczynski & Cameron Lynne Macdonald, *Critical Perspectives on Service Work: An Introduction*, in SERVICE WORK: CRITICAL PERSPECTIVES 1, 3 (Marek Korczynski & Cameron Lynne Macdonald eds. 2009). Paradigmatic examples are retail and hospitality work, and this article draws largely from research on those industries, but jobs that involve working on people are common in a variety of industries. See, e.g., McCammon & Griffin, *supra* note 31, at 280.

<sup>33</sup> See *infra* Part II. Customers also influence the work of service employees who have minimal contact with them, such as hotel housekeepers and “back of the house” restaurant workers. See generally Rachel Sherman, *Beyond Interaction: Customer Influence on Housekeeping and Room Service Work in Hotels*, 25 WORK, EMP. & SOC’Y 19 (2011).

<sup>34</sup> See *infra* Part II.D.

<sup>35</sup> See, e.g., *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179 (7th Cir. 1982); *Knight v. Nassau Cty. Civil Serv. Comm’n*, 649 F.2d 157 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971).

<sup>36</sup> *Diaz*, 442 F.2d 385, *rev’g Diaz v. Pan Am. World Airways, Inc.*, 311 F. Supp. 559 (S.D. Fla. 1970). At that time, no U.S. air carrier hired men as flight attendants, “except for limited situations in which the attendant had special as-



lied on both its own and independent surveys showing that passengers “overwhelmingly preferred” to be served by female flight attendants.<sup>37</sup> The court flatly rejected this justification for sex as a bona fide occupational qualification (BFOQ),<sup>38</sup> minimizing the “non-mechanical” part of a flight attendant’s job that today would be called “emotional labor.”<sup>39</sup> The court held that the “*essence* of the business operation would [not] be undermined” by hiring male flight attendants because the “primary function of an airline is to transport passengers safely from one point to another”—work that both men and women could perform.<sup>40</sup>

More broadly, and while acknowledging the “public’s expectation of finding one sex in a particular role,” the *Diaz* court declared the incompatibility of the employer’s argument with the goals of Title VII: “[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.”<sup>41</sup> (Furthermore, to allow discrimination on this basis would be perverse, “because it would create a marketing advantage for the employer who discriminates.”<sup>42</sup>)

But far from being overcome, customers’ prejudices continue to thrive, both driving employers’ practices and providing them with marketing advantages. Employers are far less likely to openly justify dis-

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signed duties which were thought to be consistent with male attributes.” *Diaz*, 311 F. Supp. at 564.

<sup>37</sup> See *Diaz*, 311 F. Supp. at 564–66 (describing evidence in support of passenger preference for “female stewardesses,” including the expert testimony of a psychiatrist explaining it).

<sup>38</sup> 42 U.S.C. § 2000e-2(e) (creating exception for hiring and employing on the basis of “religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”; not applicable to race or color). The parties had stipulated that Pan Am’s policy of hiring only women violated Title VII “unless being a female [was], in respect of the position for which [the male] plaintiff applied,” a BFOQ. *Diaz*, 311 F. Supp. at 560.

<sup>39</sup> These non-mechanical aspects of the job included “providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible, within the limitations imposed by aircraft operations.” *Diaz*, 442 F.2d at 387. “Emotional labor” is a major driver of discrimination in interactive service work and is discussed in *infra* Part II.B.

<sup>40</sup> *Diaz*, 442 F.2d at 388 (emphasis in original). The court went on to indicate that the defendant could “take into consideration the ability of *individuals* to perform the non-mechanical functions of the job,” (emphasis in original), *id.*, and to state that “customer preference may be taken into account only when it is based on the company’s inability to perform the primary function or service it offers.” *Id.* at 389.

<sup>41</sup> *Id.*

<sup>42</sup> Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1270 (2007).

criminatory employment decisions by citing customer preference,<sup>43</sup> but it is no secret that employers continue to cater to customers' discriminatory preferences through various questionable employment practices. A number of legal scholars have pointed out (and Part II.D. will briefly review) the ways in which employers facilitate, cultivate, and profit from customers' discrimination against, including discriminatory harassment of, service workers, as well as how they escape responsibility for that discrimination even as they benefit from it.<sup>44</sup>

It is hard enough to establish a claim of employment discrimination when an employer discriminates directly against a worker.<sup>45</sup> When the person who discriminates against her in the workplace is someone outside the formal lines of authority, the employee faces even greater challenges in holding the employer accountable. Current doctrine adheres to a consistently dyadic and increasingly narrow model of employer liability that fails to account adequately for the influence of customers and the realities of the service work environment. The law draws a sharp line between whose discrimination counts as the employer's own, for which it is strictly or vicariously liable, and whose discrimination the employer can distance itself from, being held responsible only if the discrimination can be attributed to its own wrongdoing. That line follows the formal chain of command, treating the discrimination of only a narrow category of actors with relatively high positions in the chain as that of the employer. To hold the employer liable for discrimination by persons lower in or outside of the chain requires the worker to prove that the employer was at least negligent in allowing the discrimination to occur.

Without question, Title VII treats a tangible employment action taken by a supervisor as the act of the employer, for which it is strictly or

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<sup>43</sup> Such a justification might be raised where privacy concerns of customers (such as patients or inmates) are implicated or the employer operates a sexualized business, but its validity in such cases is unclear. *See, e.g.*, *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) (rejecting nursing home's argument that its policy of honoring the racial preferences of residents in assigning healthcare providers was justified to avoid violating residents' "rights to choose providers, to privacy, and to bodily autonomy," *id.* at 910, 913–15, but distinguishing cases allowing sex discrimination in healthcare settings under the BFOQ provision, *id.* at 913). *See also* Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147 (2004); MICHAEL J. ZIMMER ET AL., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 167–68 (8th ed. 2013).

<sup>44</sup> *See, e.g.*, Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13 (2007); McGinley, *supra* note 42; Schoenbaum, *supra* note 28, at 1190–96.

<sup>45</sup> *See, e.g.*, Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 55 (2001).

vicariously liable.<sup>46</sup> In the interest of “simplicity and administrability,”<sup>47</sup> however, the Supreme Court in its *Ellerth/Faragher/Vance* trio of decisions on employer liability has confined the definition of supervisor to a narrow, “unitary category” of those employees whom the employer has empowered to take tangible employment actions, such as “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>48</sup> The Court, in *Staub v. Proctor Hospital*, recognized that sometimes the employer can be found to have discriminated even when the ultimate decision maker had no “discriminatory animus” but was influenced by someone else who did, under a “cat’s paw” theory.<sup>49</sup> But *Staub*’s seeming expansion of the employer’s liability beyond the discrimination of the ultimate decision maker is limited by its terms to discrimination by those who occupy the narrow category of supervisor within the employer-employee dyad, when that “supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action, and . . . that act is a proximate cause of the ultimate employment action[.]”<sup>50</sup> The Court “express[ed] no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment

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<sup>46</sup> *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439 (2013); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762–63 and 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998). In addition, some individuals’ “high rank in the company” makes them the “alter ego” of the employer, providing a basis for vicarious liability. See *Ellerth*, 524 U.S. at 758.

<sup>47</sup> *Vance*, 133 S.Ct. at 2462 (Ginsburg, J., dissenting).

<sup>48</sup> *Vance*, 133 S.Ct. at 2443 (quoting *Ellerth*, 524 U.S. at 761). See also *Faragher*, 524 U.S. at 807–08. *Vance* rejected a broader, “nebulous” definition of supervisor that had been advocated by the EEOC and “substantially adopted by several courts of appeals.” 133 S.Ct. at 2443.

<sup>49</sup> *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). In a “cat’s paw” situation, the plaintiff seeks to hold the employer liable for discrimination where the ultimate or *de facto* decision maker was not motivated by bias but was influenced by another who was, such as a subordinate who provided information on which the decision was based. *Staub* involved a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits discrimination in employment on the basis of a person’s military service or obligation, but the Court noted its similarity to Title VII in incorporating a “motivating factor” causation standard. *Id.* at 417.

<sup>50</sup> *Id.* at 422 (emphasis in the original; footnote omitted). While *Staub* might at first glance appear to have broadened the concept of the employer’s discriminatory intent by taking into account the bias of someone other than the ultimate decision maker, the decision actually may have narrowed it. Charles A. Sullivan has argued that the Court’s incorporation of proximate cause into the antidiscrimination context actually adds to the plaintiff’s burden of proof and restricts the employer’s liability. See Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).

decision.”<sup>51</sup> In addition, because its analysis focused on agency law, it is unlikely that the Court’s reasoning would extend to discrimination by customers. As we will see, however, tangible employment decisions regularly are informed by customers’ evaluations of workers, creating the risk that those decisions will incorporate discrimination by customers.<sup>52</sup>

When workplace discrimination creates a hostile work environment but does not result in a tangible employment action,<sup>53</sup> the employer’s liability is likewise defined by the formal lines of authority. Again the employer is vicariously liable for harassment by a supervisor, although it might avoid liability through an affirmative defense.<sup>54</sup> With respect to harassment by a co-worker or a third party such as a customer, however, the employer is liable only if the plaintiff can prove, at a minimum, that the employer was negligent “in controlling work conditions,”<sup>55</sup> meaning that “it knew or should have known about the conduct and failed to stop it.”<sup>56</sup>

The negligence standard is “employer-friendly”<sup>57</sup> in that it places the burden on the plaintiff to prove that the employer engaged in wrongdoing that renders it liable for the discriminatory harassment.<sup>58</sup> The negligence standard applies to the employer’s liability for harassment by customers because, again, customers are not agents of the employer; accordingly, the employer is held responsible only for its own conduct with respect to the harassment.<sup>59</sup> Although co-workers are, at least for some purposes, agents of the employer, the Court has justified the negli-

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<sup>51</sup> *Staub*, 562 U.S. at 422 n.4.

<sup>52</sup> *See infra* Part III.

<sup>53</sup> *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 53-54 (1998) (distinguishing between discriminatory harassment that results in a tangible employment action and that which does not).

<sup>54</sup> *Id.* at 764–65 (providing affirmative defense to vicarious liability for supervisor harassment that does not result in a tangible employment action, comprising two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise”); *Faragher*, 524 U.S. at 807–08 (same).

<sup>55</sup> *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439 (2013).

<sup>56</sup> *Ellerth*, 524 U.S. at 759 (describing employer negligence with respect to sexual harassment). *See also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (describing an employer’s “combined knowledge and inaction” with respect to hostile environment harassment as “demonstrable negligence, or as the employer’s adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer’s policy”).

<sup>57</sup> *Vance*, 133 S.Ct. at 2463 (Ginsburg, J., dissenting).

<sup>58</sup> *Id.* at 2450–51.

<sup>59</sup> *See generally* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1380–82 (2009).

gence standard for employer liability with respect to their harassment by pointing out that harassing co-workers do not act in the interest of the employer.<sup>60</sup> Furthermore, because co-workers do not wield the power of supervisors to “cause ‘direct economic harm’ by taking a tangible employment action,”<sup>61</sup> targets are free to “walk away or tell the offender where to go.”<sup>62</sup>

But harassment by customers often cannot be so neatly set apart from the employer’s interest, and workers often are far less able to oppose or report harassment from customers than from co-workers. As we will see, harassment, including discriminatory harassment, of service workers by customers actually can serve the employer’s interests by playing into the customer-centric culture they cultivate.<sup>63</sup> Some employers, especially in hospitality industries, go so far as to package and present their women workers for sexual harassment as part of their marketing strategy<sup>64</sup> thereby making those workers’ “acquiescence to sexual harassment by [customers] a prerequisite of [their] employment.”<sup>65</sup> Submitting to abuse by customers is often regarded as part of a service worker’s job because customers, unlike co-workers, hold a special, “sovereign” status in the service culture.<sup>66</sup> Consequently, workers are not as free to tell a customer to “buzz off” as they might a co-worker<sup>67</sup> and are unlikely to report harassment by customers to management for fear of being penalized.<sup>68</sup>

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<sup>60</sup> See *Ellerth*, 524 U.S. at 756–57 (also making this point with respect to supervisors in distinguishing harassment from other situations in which agency principles would impose vicarious liability on an employer for an employee’s misconduct).

<sup>61</sup> *Vance*, 133 S.Ct. at 2448.

<sup>62</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 (1998). Accordingly, the “aided by agency relation” rationale for holding employers vicariously liable for supervisors’ actions does not apply. *Vance*, 133 S.Ct. at 2441–43 and 2448.

<sup>63</sup> See *infra* Part II.C, II.D.

<sup>64</sup> See *infra* Part II.D.

<sup>65</sup> *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 609–10 (S.D.N.Y. 1981). The court in that case found the defendant employers violated Title VII by requiring the plaintiff, a female lobby attendant, to wear a “short, revealing, and sexually provocative” uniform that subjected her to sexual harassment. *Id.* at 607–11 (also rejecting BFOQ justification).

<sup>66</sup> See *infra* Part II.A, II.C.

<sup>67</sup> *Vance*, 133 S.Ct. at 2456 (Ginsburg, J., dissenting).

<sup>68</sup> In some cases, the dynamics described here might support a finding of employer negligence, but the burden would be on the employee to establish that negligence. As Justice Ginsburg pointed out in her dissenting opinion in *Vance*, the burden of proving the employer’s negligence is a “steep[] substantive and procedural hill to climb.” 133 S.Ct. at 2464. In the case of co-worker harassment, for example, the plaintiff will not be able to show that the employer had actual or constructive notice of the harassment “if no complaint makes its way up to management.” *Id.* As we will see in Part II.C and II.D, *infra*, the same often will be the case with harassment by customers, because employees are

By separating the employer from discrimination that originates outside the formal lines of authority within the employer-employee dyad, the prevailing legal model of the employment relationship fails to account for the complexities of service work. In particular, that model overlooks the degree to which, and the ways in which, employers' drive to satisfy customers has shaped organizational structure and the work environment. A rich body of social science literature has revealed the harmful effects on workers of employers' unrelenting focus on customer satisfaction.<sup>69</sup> That literature has also demonstrated how employers frame practices that serve their own interests, but harm workers by facilitating customers' discrimination against them, as simply "good customer service."

The following part draws on this important research to demonstrate that customer preference is a powerful influence on employers, encouraging them to engage in a range of familiar practices that incorporate, reinforce, and even shape customers' group-based stereotypes and preferences. With that background, Part III will introduce another common practice with which employment discrimination law has not yet grappled, the use of customer feedback to monitor and evaluate employees.

## II. THE CUSTOMER AS KING, THE WORKER AS THE SERVICE, AND EMPLOYMENT DISCRIMINATION AS CUSTOMER SERVICE

Firms profit from giving customers opportunities to discriminate against service workers. To understand why and how, we must first understand the nature and characteristics of service work, the importance of customer satisfaction in driving firms' profit-focused decision making, and the resulting importance of the (real or assumed) personal characteristics of individual service workers to their employment experiences and outcomes. As we will see, when the customer is "king" and the worker is

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discouraged and sometimes penalized for complaining about customer abuse. On the other hand, when the employer itself creates and profits from an environment that encourages customer harassment, such as a sexualized environment that promotes sexual harassment of workers by customers, Ann McGinley has argued that the employer should be treated as having "constructive knowledge that harassment by customers is likely to occur" and have a "duty to take extra efforts to prevent" it. McGinley, *supra* note 42, at 1275-77.

<sup>69</sup> In the 1990s, sociologists who study work were called to turn their focus from the outdated, "industrial paradigm" of manufacturing to the study of service work. McCammon & Griffin, *supra* note 31, at 279 (pointing out that service work "is increasingly commonplace in today's workplace"). Since then, a substantial literature has developed on the sociology of service work. See Marek Korczynski, *The Mystery Customer: Continuing Absences in the Sociology of Service Work*, 43 SOC. 952-54 (2009) (discussing the "sudden elevation to centre stage" of the sociology of service work since the 1990s); Lopez, *supra* note 6, at 252 (describing the increase in sociological service work literature between 2000 and 2010).

the “service,” discrimination in employment can come to be seen as customer service.

As a product, interactive service that involves “working on people” differs from a commodity in several ways that affect the customer’s experience of the product and the firm’s management of the worker in producing it. A service is produced on the spot, usually in the customer’s presence, and often with the customer’s participation but out of the direct control of management. For the customer, “the product is a state of mind.”<sup>70</sup> That is, instead of or along with a tangible good the customer gets an experience, and the value of the product to the customer depends on his or her subjective expectations and assessment of that experience.<sup>71</sup>

#### A. *The Customer as King*

Customers exert great influence on interactive service work<sup>72</sup> for two simple reasons: firms are driven by self-interest to maximize customers’ satisfaction, and customers participate directly with the worker in creating the product.

Service quality—or more precisely, customers’ perceptions of service quality<sup>73</sup>—is an important basis on which firms compete.<sup>74</sup> “The customer is king”<sup>75</sup> because satisfied customers bring significant benefits to a firm,<sup>76</sup> while dissatisfied customers can threaten its survival.<sup>77</sup> The

<sup>70</sup> ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6 (2012).

<sup>71</sup> See generally ALBRECHT & ZEMKE, *supra* note 6, at 36–37; Korczynski & Macdonald, *supra* note 32, at 3; Dennis Nickson et al., *The Importance of Attitude and Appearance in the Service Encounter in Retail and Hospitality*, 15 *MANAGING SERV. QUALITY: INT’L J.* 195, 196 (2005); A. Parasuraman et al., *A Conceptual Model of Service Quality and Its Implications for Future Research*, 49 *J. MARKETING* 41, 42 and 46 (1985).

<sup>72</sup> See, e.g., Marek Korczynski, *The Customer in the Sociology of Work: Different Ways of Going Beyond the Management-Worker Dyad*, 27 *WORK, EMP. & SOC’Y* 1, 2 (2013); Lopez, *supra* note 6, at 255.

<sup>73</sup> See ALBRECHT & ZEMKE, *supra* note 6, at 48 (“It is not enough just to give good service; the customer must *perceive* the fact that he or she is getting good service.”) (emphasis in original).

<sup>74</sup> See Korczynski, *The Customer-Oriented Bureaucracy*, *supra* note 20, at 78.

<sup>75</sup> ALBRECHT & ZEMKE, *supra* note 6, at 48. Service work organizations can be understood as “customer-oriented bureaucracies,” organized and managed both to achieve efficiency and—potentially conflicting with that goal—to attend to “the non-rational aspects of customers, towards customers’ sense of emotions, individuality and power.” Korczynski, *The Customer-Oriented Bureaucracy*, *supra* note 20, at 78. Thus, firms offer “an *enchanted myth of sovereignty*” to create in the customer “a sense of relational superiority over the server, and a sense of being in charge.” *Id.* (emphasis in original).

<sup>76</sup> See Lisa Troyer et al., *Who’s the Boss? A Role-Theoretic Analysis of Customer Work*, 27 *WORK & OCCUPATIONS* 406, 406 (2000).

benefits include higher revenues, lower costs, and greater profits and investor value, because satisfied customers are more likely both to return as customers and to accept price increases.<sup>78</sup> Customer loyalty is so important that “[c]ompanies can boost profit by almost 100% by retaining just 5% more of their customers.”<sup>79</sup> Loyal customers also serve as “free advertising” for the firm when they share their positive views with other potential customers.<sup>80</sup> And of course, the converse is also true; dissatisfied customers are more likely to “defect,” with potentially disastrous effects on a firm’s economic health and even survival.<sup>81</sup> Customer satisfaction with service might even be growing in importance for some firms, such as brick-and-mortar stores that need to distinguish themselves from more convenient online retailers.<sup>82</sup>

The customer also influences interactive service work because she participates along with the worker in creating the service,<sup>83</sup> and the customer’s contribution can be as important as the worker’s to the success of (meaning the customer’s satisfaction with) the outcome. The bank customer requests specific services or transactions and must provide the teller with relevant and accurate information to process them; the restaurant diner chooses the food and drink to consume, sometimes in consultation with the server; the shopper informs the salesperson of particular needs and wishes; and the hairstylist’s client identifies the “look” desired and gives feedback to the stylist on its execution.<sup>84</sup> In fact, to exert control over service interactions by “routinizing” them, some service firms essentially train their customers as well as their employees. At McDonald’s, for example, customers have learned “their parts”—how to order and receive their food, and to clean up after themselves.<sup>85</sup> This participation makes the customer simultaneously and paradoxically both a “par-

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<sup>77</sup> See Fuller & Smith, *supra* note 21, at 2.

<sup>78</sup> See generally TON, *supra* note 1, at 68–71, 173, 185–90 (2014); Frederick F. Reichheld & W. Earl Sasser, Jr., *Zero Defections: Quality Comes to Services*, HARV. BUS. REV. 105, 105–06 (Sept.–Oct. 1990); Markus Groth et al., *Customer Reactions to Emotional Labor: The Roles of Employee Acting Strategies and Customer Detection Accuracy*, 52 ACAD. MGMT. J. 958, 969 (2009).

<sup>79</sup> Reichheld & Sasser, Jr., *supra* note 78, at 105–06 (“[T]he longer a company keeps a customer, the more money it stands to make.”).

<sup>80</sup> See TON, *supra* note 1, at 190; Michael Lynn & Michael Sturman, *Is the Customer Always Right? The Potential for Racial Bias in Customer Evaluations of Employee Performance*, 41 J. APPLIED SOC. PSYCHOL. 2312, 2312 (2011).

<sup>81</sup> Reichheld & Sasser, *supra* note 78, at 105.

<sup>82</sup> See TON, *supra* note 1, at 187.

<sup>83</sup> McCammon & Griffin, *supra* note 31, at 280.

<sup>84</sup> See generally *id.* See also Parasuraman et al., *supra* note 71, at 42.

<sup>85</sup> Robin Leidner, *Rethinking Questions of Control: Lessons from McDonald’s*, in WORKING SERV. SOC’Y 29, 36 (Cameron Lynne Macdonald & Carmen Sirianni eds. 1996).



tial employee”<sup>86</sup> of the firm and, because his or her satisfaction is paramount, a second “boss” to the worker.<sup>87</sup>

Together, the importance of customer satisfaction and the customer’s participation in service work put great pressure on the interaction between customer and worker. That encounter determines the success or failure of the service organization. It is “the moment of truth,”<sup>88</sup> because in the eyes of the customer that interaction *is* the service,<sup>89</sup> and in the eyes of management it is the point at which profits are made.<sup>90</sup> In practical, if not formal terms, the customer plays a role within the firm. The worker must respond to the customer’s needs and interests as well as those of his or her supervisor.<sup>91</sup> The participation and importance of the customer therefore define service work and shape its performance.<sup>92</sup> They also heighten the importance to that work of the personal characteristics and performance of the individual service worker—or, more precisely, the customer’s *perception* of the personal characteristics and performance of the individual service worker. In turn, the worker’s employment situation and outcomes may turn on the employer’s deference to or assumptions about those customer perceptions, as well as how the employer itself shapes and cultivates customers’ expectations.

### B. *The Worker as the Service*

As customers and their satisfaction with service have become more critical to firms’ success, firms have placed increasing emphasis on individual, front-line service workers. These workers may be the only representatives of the firm to deal directly with customers and often embody the firm for customers.<sup>93</sup> Although the customer also plays an active role in the service encounter, the employee is the party who bears responsibility for its success or failure.<sup>94</sup> To take a point made above<sup>95</sup> one step

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<sup>86</sup> See generally Peter K. Mills & James H. Morris, *Clients as “Partial” Employees of Service Organizations: Role Development in Client Participation*, 11 ACAD. MGMT. REV. 726 (1986).

<sup>87</sup> See Troyer et al., *supra* note 76, at 407.

<sup>88</sup> ALBRECHT & ZEMKE, *supra* note 6, at 31.

<sup>89</sup> See Mary Jo Bitner et al., *The Service Encounter: Diagnosing Favorable and Unfavorable Incidents*, 54 J. MARKETING 71, 71 (Jan. 1990).

<sup>90</sup> See Fuller & Smith, *supra* note 21, at 10 (The managers they interviewed for their study reported that the customer/worker interaction was “precisely . . . the point where they understood profits to be created.”).

<sup>91</sup> See Troyer et al., *supra* note 76, at 407.

<sup>92</sup> See, e.g., Korczynski & Macdonald, *supra* note 32, at 3; Cameron Lynne Macdonald & Carmen Sirianni, *The Service Society and the Changing Experience of Work*, in WORKING SERV. SOC’Y 1, 5 (Cameron Lynne Macdonald & Carmen Sirianni eds., 1996).

<sup>93</sup> See McCammon & Griffin, *supra* note 31, at 279.

<sup>94</sup> Cf. Cameron Lynne Macdonald & David Merrill, *Intersectionality in the Emotional Proletariat: A New Lens on Employment Discrimination in Service Work*, in SERV. WORK: CRITICAL PERSP. 113, 125 (Marek Korczynski & Camer-

further, not only does the customer view the service *encounter* as the service, but the customer may view the service *worker* as the service.<sup>96</sup> Employers take this view, too. As Donald Porter, Director of Customer Service Quality Assurance for the famously customer-pleasing British Airways, put it in addressing employees, “[y]ou really are the moment of truth.”<sup>97</sup>

Customers today want more from a service encounter than efficient, accurate performance. They want a personal connection.<sup>98</sup> To build those relationships, however brief and transient they may be, and to evoke in customers the feelings they desire, service workers must perform “emotional labor.”<sup>99</sup> That is, they must manage both their own feelings and how they display their feelings to others through their faces and bodies, all in an effort to produce the right state of mind and mood in the customer.<sup>100</sup> At the same time, members of this “emotional proletariat” must convey authenticity, bringing their own personalities and identities into the service encounter.<sup>101</sup> Readers may recognize the abilities that emotional labor calls on as “soft skills.”<sup>102</sup>

Emotional labor is integrated into and is as important as a service employee’s physical and mental work. The emotional displays of service workers influence not just customers’ moods, but also their evaluations of service quality and their loyalty to the firm.<sup>103</sup> Moreover, customers’ wants and needs can vary widely from person to person, and even the

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on Lynne Macdonald eds., 2009) (“Although interpersonal interactions are managed *jointly* by the customer and provider, employers . . . ‘genuinely view interaction and motivation as skills’ that inhere in the incumbent alone.”), *quoting* PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 45 (2001) (emphasis in Macdonald & Merrill).

<sup>95</sup> See text accompanying notes 88–90.

<sup>96</sup> See Macdonald & Merrill, *supra* note 94, at 126.

<sup>97</sup> ALBRECHT & ZEMKE, *supra* note 6, at 32 (emphasis in original).

<sup>98</sup> TON, *supra* note 1, at 187 (“People want relationships—not just transactions.”).

<sup>99</sup> Sociologist Arlie Hochschild named this kind of work in her groundbreaking book, ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 7 (1st ed., 1983).

<sup>100</sup> As Hochschild describes emotional labor, it means “the management of feeling to create a publicly observable facial and bodily display” that creates and sustains “the outward countenance that produces the proper state of mind in others.” *Id.* at 7.

<sup>101</sup> Macdonald & Sirianni, *supra* note 92, at 3–4. See also TON, *supra* note 1, at 106; Markus Groth et al., *supra* note 78, at 967–69 (2009).

<sup>102</sup> See, e.g., PHILIP MOSS & CHRIS TILLY, *STORIES EMPLOYERS TELL: RACE, SKILL, AND HIRING IN AMERICA* 44 (2001) (defining soft skills as “skills, abilities, and traits that pertain to personality, attitude, and behavior rather than to formal or technical knowledge,” comprising clusters of skills related to “interaction” and “motivation”); Nickson et al., *supra* note 71, at 196.

<sup>103</sup> See generally Groth et al., *supra* note 78, at 959–62 (describing findings of recent service management research on these points).

same customer's desires might differ from one transaction to the next. This variability adds to the challenge of performing emotional labor. To provide each customer with what he or she desires, the worker must recognize the customer's wishes and adjust his or her own behavior accordingly.<sup>104</sup> For this to happen, the worker must possess the judgment and skill, and the employer must afford her the discretion, to make these adjustments.<sup>105</sup>

Furthermore, because service workers often are expected to "embody the product,"<sup>106</sup> the soft skills required in many service jobs "roll up both attitude and appearance."<sup>107</sup> In other words, service workers must do "aesthetic" as well as emotional labor.<sup>108</sup> They must both act *and* "look the part" to meet customers' expectations and preferences regarding what kind of person performs the service in question. Even how pleasingly workers move their bodies can be construed as part of the service experience and be a factor in customer satisfaction. In 2014, the luxury hotel brand JW Marriott Hotels & Resorts, with its "brand partner" The Joffrey Ballet, introduced a series of video tutorials for its employees called "Poise & Grace" that teach workers how to carry themselves, navigate tight hotel spaces, and interact with and present items to guests. Management asserts that this training will bring "a superior level of service" to guests by "inspir[ing] associates to develop and bring natural confidence, poise and grace to the guest experience."<sup>109</sup>

So influential is employee presentation in attracting and retaining customers that employers craft it to *create* customers' expectations, using it to signal the kind of service to expect and convey the firm's

<sup>104</sup> See Fuller & Smith, *supra* note 21, at 2.

<sup>105</sup> In other words, management must empower the worker to deliver the service as she deems appropriate. See TON, *supra* note 1, at 106–08. This situation is "scary" for management, *id.* at 110, and we will explore its implications in Part III, *infra*.

<sup>106</sup> Nickson et al., *supra* note 71, at 196.

<sup>107</sup> *Id.*

<sup>108</sup> See Chris Warhurst & Dennis Nickson, *Employee Experience of Aesthetic Labor in Retail and Hospitality*, 21 WORK, EMP. & SOC'Y 103, 107 (2007) (stating, "Aesthetic labor is the employment of workers with desired corporeal dispositions.").

<sup>109</sup> MARRIOTT NEWS CENTER, *JW Marriott Hotels & Resorts Brings Poise & Grace to Service Culture with The Joffrey Ballet* (Aug. 28, 2014), <http://news.marriott.com/2014/08/jw-marriott-hotels-resorts-brings-poise-grace-to-service-culture-with-the-joffrey-ballet.html> (as Mitzi Gaskins, vice president and global brand manager of the hotel chain, stated, "Poise and posture are globally recognized cultural cues that reflect the care and dedication our associates provide in every service interaction."). See also Cheryl V. Jackson, *Can Joffrey Ballet Dancers Boost J.W. Marriott's Bottom Line?*, CHICAGO TRIBUNE (Aug. 27, 2014), <http://www.chicagotribune.com/business/ct-ballet-training-0828-biz-20140827-story.html>.

“brand.”<sup>110</sup> For example, the upscale, teen-focused clothing retailer Abercrombie & Fitch refers to its sales floor employees as “models” and requires them to adhere to a strict dress and grooming code to convey the store’s “classic East Coast collegiate,” “‘preppy’ and ‘casual’” image.<sup>111</sup>

It may be obvious that aesthetic labor is essential in high fashion retail and upscale hospitality environments, where service employees must model the firm’s image and sometimes also must mirror the firm’s desired clientele.<sup>112</sup> But it is not just in posh or prestigious workplaces that employees must display the right markers; service work across the spectrum involves aesthetic labor.<sup>113</sup> In a big box store that sells home improvement items to “do-it-yourself” homeowners, for example, customers seek out salespersons who they feel can be trusted to steer them to the right products, and those workers tend to be older men who look like they have experience working in construction trades or on their own home improvement projects.<sup>114</sup> In that setting as well, workers are the service and embody the firm, which customers see as having a “masculine image,” like “Bob the Builder, John Wayne or Clint Eastwood.”<sup>115</sup>

### C. *The Culture of Customer Sovereignty and Harassment of Workers*

Perhaps the most important influence on service employees’ work environment is how customers treat them, because most of service workers’ regular job-related interaction is with customers. Service workers often spend more time with, are in closer physical proximity to, and communicate more directly with customers than with managers or co-

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<sup>110</sup> See generally AVERY & CRAIN, *supra* note 44; Macdonald & Merrill, *supra* note 94, at 122–126. Cf. Michael R. Solomon, *Packaging the Service Provider*, 5 SERV. INDUSTRIES J. 65 (1985) (comparing the physical presentation of service workers to the packaging of tangible products).

<sup>111</sup> EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1111–13 (10th Cir. 2013) (quoting employer’s brief), *reversed and remanded*, 135 S.Ct. 2028 (2015).

<sup>112</sup> See generally Dennis Nickson & Chris Warhurst, *Opening Pandora’s Box: Aesthetic Labour and Hospitality*, in HOSPITALITY: A SOCIAL LENS 155 (Conrad Lashley et al. eds., 2007); Lynne Pettinger, *Gendered Work Meets Gendered Goods: Selling and Service in Clothing Retail*, 12 GENDER, WORK & ORG. 460, 468 (2005); Christine L. Williams & Catherine Connell, “*Looking Good and Sounding Right*”: *Aesthetic Labor and Social Inequality in the Retail Industry*, 37 WORK & OCCUPATIONS 349 (2010).

<sup>113</sup> See Macdonald & Merrill, *supra* note 94, at 123; Nickson et al., *supra* note 71, at 198, 201.

<sup>114</sup> See Carley Foster, *Gendered Retailing: A Study of Customer Perceptions of Front-line Staff in the DIY Sector*, 32 INT’L J. OF RETAIL & DISTRIBUTION MGMT. 442 (2004) (reporting on study of two B&Q Warehouse stores in the United Kingdom, a retailer that resembles Home Depot in the United States).

<sup>115</sup> *Id.* at 444.

workers.<sup>116</sup> For many service employees, customers' influence on their work environments is "instantaneous, continuous, and simultaneous with work performance."<sup>117</sup> In particular, frontline service workers are in an "exposed position"<sup>118</sup> when something goes wrong. As intermediaries between the firm and the customer, they serve as "shock absorbers" for irate customers,<sup>119</sup> because dissatisfied customers tend to direct their anger at the person with whom they are dealing, rather than the firm.<sup>120</sup>

Abusive behavior or bullying by customers is for many service workers a routine experience. It occurs frequently and is common across a range of service settings.<sup>121</sup> The key features of interactive service work that were described above have created an environment in which aggression and harassment by customers is deeply entrenched.<sup>122</sup> Firms' intense focus on pleasing customers promotes a norm of "customer sovereignty"<sup>123</sup> under which not only is the customer's satisfaction paramount, but the customer is always right.<sup>124</sup> This norm establishes a power imbalance between the customer, whose behavior is subject to few constraints, and the worker, whose role is to serve and please and whose behavior is, accordingly, severely constrained.<sup>125</sup>

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<sup>116</sup> See, e.g., Anat Rafaeli, *When Cashiers Meet Customers: An Analysis of the Role of Supermarket Cashiers*, 32 ACAD. OF MGMT. J. 245, 256–259 (1989).

<sup>117</sup> Rafaeli, *supra* note 116, at 266.

<sup>118</sup> Forseth, *supra* note 29, at 442.

<sup>119</sup> HOCHSCHILD, *supra* note 70, at 175.

<sup>120</sup> See Forseth, *supra* note 29, at 449.

<sup>121</sup> See generally Marek Korczynski & Claire Evans, *Customer Abuse to Service Workers: An Analysis of its Social Creation Within the Service Economy*, 27 WORK, EMP. & SOC'Y 768, 779 (2013) (reporting on a study of 30 book length ethnographies of service work across service contexts and in a range of countries); Dana Yagil, *When the Customer is Wrong: A Review of Research on Aggression and Sexual Harassment in Service Encounters*, 13 AGGRESSIVE & VIOLENT BEHAV. 141 (2008) (reviewing research on customer aggression and sexual harassment in a variety of service contexts and countries). See also, e.g., Alicia A. Grandey et al., *The Customer is Not Always Right: Customer Aggression and Emotion Regulation of Service Employees*, 25 J. ORG. BEHAV. 397 (2004) (reporting on a study of call center workers in which respondents reported that customer verbal aggression occurred on average 10 times per day).

<sup>122</sup> See generally, e.g., Victoria Bishop & Helge Hoel, *The Customer is Always Right? Exploring the Concept of Customer Bullying in the British Employment Service*, 8 J. CONSUMER CULTURE 341, 342–343 (2008) (discussing the "customer is king" concept that developed in the United States and "is now widespread in organizations throughout contemporary capitalist economies" and how it contributes to an environment in which customer bullying of service workers "is often normalized and seen as legitimate"); Korczynski & Evans, *supra* note 121, at 780–81 (similar); Yagil, *supra* note 121, at 142 (similar).

<sup>123</sup> Korczynski, *Customer-Oriented Bureaucracy*, *supra* note 20, at 78.

<sup>124</sup> Yagil, *supra* note 121, at 143.

<sup>125</sup> See Grandey et al., *supra* note 121, at 399; Korczynski & Evans, *supra* note 121, at 769.

Customers may both feel a sense of entitlement to behave aggressively and believe, correctly, that they can get away with it.<sup>126</sup> The friendly, accommodating demeanor of the worker encourages the customer to feel free to act as he pleases.<sup>127</sup> In addition, the risks of bad behavior for the customer are very low, given that the typical service encounter is brief and the customer is often anonymous and will not be held accountable for his conduct.<sup>128</sup> The service employee, on the other hand, is required by her role both to facilitate customers' feeling comfortable and unconstrained and to placate or pacify the customer who becomes abusive.<sup>129</sup> Self-interest also limits the worker's options for responding because failing to appease the customer might result in a complaint that could negatively affect her work evaluation or even reduce her compensation directly.<sup>130</sup>

Management in turn confers "social legitimacy and a sense of inevitability"<sup>131</sup> on abusive behavior by tolerating it in the name of pleasing customers. Employers may refrain from challenging customers who bully workers or remind workers that their role is to accept such treatment because the customer is always right.<sup>132</sup> Management and co-workers alike may even blame the targeted worker for having invited the abuse by failing to provide good customer service.<sup>133</sup> Indeed, the constant focus on customer satisfaction can contribute to bullied workers' themselves accepting abuse from customers as a normal part of the job, even if they would not accept similar behavior from anyone else.<sup>134</sup>

#### D. Employment Discrimination as Customer Service

Collectively, the demands of emotional and aesthetic labor make the personal characteristics of individual service workers—including their "age, gender, ethnicity and appearance"<sup>135</sup>—a key element of the service product.<sup>136</sup> Not surprisingly, the importance of a service worker's personal characteristics to how customers perceive the service he or she de-

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<sup>126</sup> See Yagil, *supra* note 121, at 144–46; see also Korczynski & Evans, *supra* note 122, at 778 (providing examples).

<sup>127</sup> See Yagil, *supra* note 121, at 146.

<sup>128</sup> See *id.* at 144.

<sup>129</sup> See, e.g., Grandey et al., *supra* note 121, at 399.

<sup>130</sup> See Yagil, *supra* note 121, at 145 (discussing workers' dependence on customers when rewards, such as tips, are related to customer satisfaction).

<sup>131</sup> *Id.* at 150.

<sup>132</sup> See Korczynski & Evans, *supra* note 121, at 780–81.

<sup>133</sup> See Bishop & Hoel, *supra* note 122, at 359.

<sup>134</sup> See *id.* at 354–56 (noting that workers generally did not even identify abusive behavior from customers as bullying, although they did consider similar behavior by management to be bullying); Yagil, *supra* note 121, at 150.

<sup>135</sup> Forseth, *supra* note 29, at 441.

<sup>136</sup> See, e.g., Macdonald & Sirianni, *supra* note 92, at 4; Forseth, *supra* note 29, at 443; Nickson et al., *supra* note 71, at 197.

livers has enormous implications for group-based discrimination in employment, because aesthetic and emotional labor “naturalize[] differences that stem from social inequality.”<sup>137</sup> The demand that service workers “inhabit the job” determines “who will be asked to fill what jobs, how they are expected to perform, and how they will respond to these demands,”<sup>138</sup> as well as how they will be managed and treated on the job. Firms’ desire to satisfy and even to shape customers’ expectations and preferences can lead them to adopt hiring and management practices that incorporate and reinforce group-based stereotypes and preferences. In addition, the culture of “customer sovereignty” that firms nurture encourages customers to act on their group-based expectations and preferences, and thereby contribute to discriminatory harassment by customers and other forms of workplace discrimination.

The remainder of this part reviews some of the ways in which the profit-driven focus on customer satisfaction leads employers to cultivate and cater to customers’ discriminatory preferences. Many of these tactics may already be well known to readers and are, at least in theory, actionable employment practices.<sup>139</sup> Part III introduces another common practice that may be less familiar as a source of discrimination in employment but also presents serious cause for concern. This practice, the use of customer evaluations to manage service employees, integrates the customer even more closely into the employment relationship and has been aptly labeled “management by customers.”<sup>140</sup>

In general, the desire to please customers and the focus on aesthetic and emotional labor lead employers to seek, select, assign, and manage service workers based on discriminatory stereotypes.<sup>141</sup> Because interactive service work emphasizes “attitude and appearance,” employers tend to focus more on workers’ soft, social and aesthetic skills, and less on their hard, technical skills. That is, employers seek workers who “look good” and “sound right”;<sup>142</sup> they are less interested in “what people can

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<sup>137</sup> Williams & Connell, *supra* note 112, at 372.

<sup>138</sup> Macdonald & Sirianni, *supra* note 92, at 4. Although discussion of this point is beyond the scope of this article, workers themselves might contribute to these dynamics based on their own group-related preferences and sense of identity. See Macdonald & Merrill, *supra* note 94, at 126–129.

<sup>139</sup> See generally U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROHIBITED EMPLOYMENT POLICIES/PRACTICES, <http://www.eeoc.gov/laws/practices/>. The practices noted here are common employment practices or policies that are unlawful when they involve discrimination on a prohibited basis. A full discussion of the practices noted in this Part is beyond the scope of this article.

<sup>140</sup> Fuller & Smith, *supra* note 21, at 3.

<sup>141</sup> See generally, e.g., Macdonald & Merrill, *supra* note 94, at 114–16, 122–26.

<sup>142</sup> Nickson et al., *supra* note 71, at 198.

do” and more in “what they are like.”<sup>143</sup> Consequently, in hiring for and managing service workers, employers may be influenced by assumptions regarding customer preferences for the type of person they want to interact with and look at. These assumptions often align with group-based stereotypes about who can perform successfully on the job.<sup>144</sup> As the *Diaz* court recognized long ago, employers are prone to conflate workers’ “ability” with customers’ stereotype-based preferences.<sup>145</sup>

Furthermore, and as noted above,<sup>146</sup> employers do not just passively react to customers’ preferences. They actively shape customers’ expectations in crafting and presenting their corporate “brands.” Service workers must embody these brands, which are developed through “market surveys of consumer tastes and preferences” that “reflect[] contemporary stereotyped assumptions about gender, sexuality, social class, and power,”<sup>147</sup> among others. As Dianne Avery and Marion Crain have pointed out, “[w]here corporate branding attempts to capitalize on these stereotypes, the employer realizes a profit by perpetuating the stereotypes.”<sup>148</sup> And as Christine L. Williams and Catherine Connell have noted, the logic of sorting workers by how well they match the brand recasts job segregation as “a legitimate business practice that benefits consumers.”<sup>149</sup>

Accordingly, employers adopt recruitment, selection, and assignment practices that exclude qualified individuals from learning about, seeking, or being chosen for particular service positions on the basis of discriminatory preferences. They may recruit through advertisements that signal a desire for young, white, female applicants who fit their brand image and thereby discourage members of other groups from applying.<sup>150</sup> Employers also may recruit through informal methods such as word-of-mouth or referrals from their existing employees, who are likely to bring in friends or relatives who likewise fit the mold.<sup>151</sup> Some upscale fashion

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<sup>143</sup> *Id.* at 200. Employers prefer to recruit and select employees based on soft skills and then train them on technical skills. *Id.* at 202–05. *See also* Avery & Crain, *supra* note 44, at 26 (describing practices at Disney).

<sup>144</sup> *See* Macdonald & Merrill, *supra* note 94, at 122, 130.

<sup>145</sup> *See Diaz*, 442 F.2d at 389 (pointing out that, “[o]f course, Pan Am argues that the customers’ preferences are not based on ‘stereotyped thinking,’ but the ability of women stewardesses to better provide the non-mechanical aspects of the job”).

<sup>146</sup> *See supra* Part II.B.

<sup>147</sup> Avery & Crain, *supra* note 44, at 91.

<sup>148</sup> *Id.*

<sup>149</sup> Williams & Connell, *supra* note 112, at 366.

<sup>150</sup> *See* Nickson et al., *supra* note 71, at 200.

<sup>151</sup> *See id.*; Warhurst & Nickson, *supra* note 108, at 109–10. The dangers that such informal recruitment methods present are discussed in MOSS & TILLY, *supra* note 102, at 226–29 (2001), and JOHN D. SKRENTNY, AFTER CIVIL RIGHTS: RACIAL REALISM IN THE NEW AMERICAN WORKPLACE 242–44 and 252–58 (2014) (also pointing out how difficult such methods are to challenge under employment discrimination law).



retailers recruit their sales staff directly from regular shoppers at their stores. This method both ensures that their workers will appreciate and embody the brand and further entrenches job segregation by race, gender, class, and age.<sup>152</sup>

Employers who hire for emotional and aesthetic skills rely heavily on interviewing to make their choices so they can assess candidates' presentation and interpersonal skills,<sup>153</sup> which can translate into discriminatory reasons to reject or move them forward in the process.<sup>154</sup> In addition, discriminatory assumptions and preferences often determine not only who is hired but also what work they are assigned to do. They may sort workers into more visible, appealing, and often more lucrative work in the "front of the house," such as sales or tipped restaurant service, or into dirtier, lower status, and lower-paying work in the "back of the house," such as stocking shelves, bussing tables, and cleaning.<sup>155</sup> Employers who have recruited and hired for the right image then mold employees further, regulating workers' appearance and behavior in ways that again enable them to benefit from perpetuating stereotypes.<sup>156</sup> They may, for example, adopt dress and grooming codes that burden more heavily or exclude altogether members of particular racial or religious groups, as we saw in the recent Supreme Court case involving Abercrombie & Fitch's "Look Policy."<sup>157</sup>

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<sup>152</sup> See Williams & Connell, *supra* note 112, at 358, 365–67.

<sup>153</sup> See MOSS & TILLY, *supra* note 102, at 229–36; Nickson et al., *supra* note 71, at 200–01; Warhurst & Nickson, *supra* note 108, at 110–11.

<sup>154</sup> See, e.g., EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1112–14 (10th Cir. 2013) (quoting employer's brief), *reversed and remanded*, 135 S.Ct. 2028 (2015) (describing retailer's interviewing process, in which the plaintiff's score for "appearance" was lowered based on her hijab, after which she was not hired). In addition, assessments made based on interviews are highly subjective and susceptible to unconscious bias. See MOSS & TILLY, *supra* note 102, at 229–34.

<sup>155</sup> See, e.g., Alexander v. Casino Queen, Inc., 739 F.3d 972, 980 (7th Cir. 2014) (in race discrimination case, discussing effect of floor assignments on compensation of cocktail waitresses due to the differences in tips across areas of the casino); Danielle Dirks & Stephen K. Rice, *Dining While Black: Racial Rituals and the Black American Restaurant Experience*, in RACE AND ETHNICITY: ACROSS TIME, SPACE, AND DISCIPLINE 255, 263 (Rodney D. Coates ed., 2004) (stating that "front of the house" positions "tend[] to be filled by white Americans, while back of the house positions, especially those that [are] of lesser status and lower paying like dishwashers or 'busboys' [are] filled by people of color."); RUETSCHLIN & ASANTE-MUHAMMED, *supra* note 9, at 18–20 (describing occupational segregation in retail industry); CHRISTINE L. WILLIAMS, *INSIDE TOYLAND: WORKING, SHOPPING, AND SOCIAL INEQUALITY* 51–66 (2006) (describing race and gender segregation of jobs in retail stores).

<sup>156</sup> See Warhurst & Nickson, *supra* note 108, at 112–113.

<sup>157</sup> See *Abercrombie & Fitch*, 135 S. Ct. 2028 (2015) (religious discrimination challenge to retail store's "Look Policy," designed to convey its "classic East Coast collegiate" image); Margaret Talbot, *Abercrombie's Legal Defeat—*

Employers also shape their employees in ways that invite discrimination directly from customers. Regulation of employees' appearance and behavior based on sex, in particular, provides an especially egregious example of how employers capitalize on stereotypes and profit from customer discrimination, as they set up workers to be targets for sexual harassment.<sup>158</sup>

As a preliminary point, it is no surprise that customer mistreatment of workers<sup>159</sup> often takes the form of discriminatory harassment, given the salience of employees' personal characteristics in interactive service work. A worker's social group membership can influence customers' expectations of what behavior is appropriate for the worker or how he or she should perform the work, as well as what kind of treatment is appropriate for the customer to direct toward the worker.<sup>160</sup> Women and people of color generally have less of a "status shield" against abuse.<sup>161</sup> Customers may expect more solicitous behavior from them, feel more entitled to be rude or abusive toward them, and expect them to be more accommodating or accepting of that abuse. During episodes of bullying, customers sometimes refer explicitly to the worker's race, gender, or age, use sexist or racist epithets, or reduce the worker to a derogatory stereotype.<sup>162</sup>

But beyond just tolerating discriminatory harassment of workers, employers often cultivate and profit from it through their direction of employees' aesthetic and emotional labor. Courts have recognized and condemned this practice, even as they generally defer to employers' "prerogative" to adopt "reasonable" or "appropriately" sex-differentiated dress and grooming codes.<sup>163</sup> Nevertheless, it continues to be standard

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*And Its Cultural Failure*, THE NEW YORKER (June 5, 2015) <http://www.newyorker.com/news/daily-comment/abercrombie-fitch-samantha-elauf-discrimination-supreme-court>; see also, e.g., *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding against race discrimination challenge a grooming policy that banned braided hairstyles); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010).

<sup>158</sup> For discussion of this example, see *infra* notes 165–76 and accompanying text.

<sup>159</sup> See *supra* Part II.C.

<sup>160</sup> See generally, e.g., HOCHSCHILD, *supra* note 70, at 171–174; Forseth, *supra* note 29, at 443–44 and 452–55; Elaine J. Hall, *Smiling, Deferring, and Flirting: Doing Gender by Giving "Good Service,"* 20 WORK & OCCUPATIONS 452 (1993); Korczynski & Evans, *supra* note 121, at 778.

<sup>161</sup> See HOCHSCHILD, *supra* note 70, at 174–81; Korczynski & Evans, *supra* note 121, at 772.

<sup>162</sup> See, e.g., Forseth, *supra* note 29, at 452–55 (providing examples); Korczynski & Evans, *supra* note 121, at 778 (providing examples); McGinley, *supra* note 42, at 1235 (providing examples).

<sup>163</sup> See, e.g., *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109 and 1111–13 (9th Cir. 2006) (en banc) (stating, "Grooming standards that ap-

operating procedure, especially in the hospitality industry. Legal scholars such as Dianne Avery and Ann McGinley have documented the prevalence of sexualized appearance and conduct requirements, as well as employers' expectations that women play into or at least put up with the highly sexualized environments that employers create.<sup>164</sup>

McGinley has reported in appalling detail both the extreme and persistent sexual harassment that women workers suffer in the casino gaming industry and the extent to which management fosters that mistreatment.<sup>165</sup> Women dealers and other female employees<sup>166</sup> regularly endure customers' misogynistic verbal abuse, threats of violence, and physical battery, sometimes accompanied by racial slurs.<sup>167</sup> Management acquiesces in and encourages that behavior by requiring women (but not men) to wear make-up and tight, sexy clothing,<sup>168</sup> retaliating against women who fail to present themselves as "compliant, sexual object[s]";<sup>169</sup> overlooking sexual harassment that occurs "in full view of management";<sup>170</sup> and emphasizing sex in advertising and promoting the casino as a place for "male customers to indulge in their fantasies."<sup>171</sup>

But even in less explicitly sexualized businesses, such as restaurants, management aims to present customers with attractive, apparently sexually available (women) workers, requiring servers to wear revealing, sexually provocative uniforms and to flirt with customers.<sup>172</sup> Manage-

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propriately differentiate between the genders are not facially discriminatory." and distinguishing the make-up requirement in question from a requirement that "is intended to be sexually provocative, and tending to stereotype women as sex objects"); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 608-09 (S.D.N.Y. 1981) ("The Court does not question an employer's prerogative to impose reasonable grooming and dress requirements on its employees, even where different requirements are set for male and female employees, when those requirements have a negligible effect on employment opportunities and present no distinct employment disadvantages." But finding that defendant employers violated Title VII by requiring plaintiff to wear sexually provocative uniform "when they knew that the wearing of this uniform on the job subjected her to sexual harassment.").

<sup>164</sup> See Avery & Crain, *supra* note 44; McGinley, *supra* note 42.

<sup>165</sup> McGinley, *supra* note 42 (reporting on case study of the Hard Rock Hotel and Casino in Las Vegas, Nevada).

<sup>166</sup> McGinley's study focused on blackjack dealers but also gathered information on the experiences of other workers, including cocktail waitresses. See *id.* at 1235 n. 22.

<sup>167</sup> See, e.g., *id.* at 1234-38, 1241, 1246-48, and 1255-57.

<sup>168</sup> *Id.* at 1239-40.

<sup>169</sup> *Id.* at 1238.

<sup>170</sup> *Id.* at 1236.

<sup>171</sup> *Id.* at 1240-46.

<sup>172</sup> See generally RESTAURANT OPPORTUNITIES CENTERS UNITED ET AL., THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (Oct. 7, 2014), <http://rocunited.org/new-report-the-glass-floor-sexual-harassment-in-the-restaurant-industry/>.

ment reinforces the power of customers to sexually harass workers with impunity through the policy that “the customer is always right and the server’s responsibility is to please the customer.”<sup>173</sup> Given these management practices, it is unsurprising that 80% of women who currently or formerly worked in restaurants reported in a 2014 study that they experienced some form of sexual harassment from customers, many on at least a monthly or at least a weekly basis.<sup>174</sup>

Avery has argued that “[t]he burdens of the sexing up and dumbing down of women’s work do not just fall on women[.]”<sup>175</sup> Those burdens extend to adolescent female workers who have entered the pipeline of sexualized work and to older men and women who are excluded from high paying jobs because they fail to meet the stereotype of “who is qualified to do the job.”<sup>176</sup> Avery’s point applies more broadly, as well. As we will see next, when customer satisfaction aligns with discriminatory stereotypes and customer service incorporates discrimination in employment, the burdens fall on workers whose performance is evaluated and managed by those standards.

### III. MANAGEMENT BY CUSTOMERS

This Part examines another common practice through which customer preferences influence the terms, conditions, and privileges of employment and can lead to discriminatory outcomes for workers: the use of customer evaluations to manage service employees. This practice integrates the customer even more closely into the employment relationship and has been aptly named “management by customers.”<sup>177</sup> Management by customers in some ways presents a hybrid of the issues discussed in Part II.D. Like the hiring and management practices that employers have adopted to guide their own treatment of and decision making with regard to employees, it grows out of firms’ desire to please customers and the importance to customer satisfaction of the interaction

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<sup>173</sup> *Id.* at 28.

<sup>174</sup> *Id.* at 13. The restaurant industry is “the single largest source of sexual harassment claims in the US,” accounting for 37% of sexual harassment claims to the Equal Employment Opportunity Commission despite the fact that only 7% of American women work in restaurants. *Id.* at 1. Sexual harassment has become so normalized in restaurants that workers report experiencing more frequent sexual harassment from owners, supervisors, and co-workers than from guests. But while customers may engage in sexual harassment less frequently than bosses and co-workers, female servers felt most uncomfortable when it came from customers. *Id.* at 23–27.

<sup>175</sup> Avery & Crain, *supra* note 44, at 325 (noting that women “sometimes seek and desire many service jobs for their high tips, flexible hours, and even life style”).

<sup>176</sup> *Id.* at 325–27.

<sup>177</sup> Fuller & Smith, *supra* note 21, at 3 (also calling this practice “consumer control”).

between customer and worker. Like discriminatory harassment by customers, it can become a vehicle through which customers themselves act on biased expectations and preferences, because management by customers depends heavily on the customer's interaction with and reaction to the individual employee. Unlike either of those examples, however, this practice draws the customer directly into the management of the worker. At the same time, management by customers may be especially difficult to challenge under existing doctrine, with its focus on formal lines of power within the employer-employee dyad.

#### A. *The Customer as Second Boss*

Recall that, in addition to having the emotional and aesthetic skills to interact successfully with customers, service workers must possess the judgment and be afforded the autonomy to tailor their performance to individual customers' needs and wishes.<sup>178</sup> Consequently, management must empower service workers to make spontaneous decisions about what would please individual customers as they encounter them, and then tailor their service delivery accordingly.<sup>179</sup> Granting workers this freedom is essential to the firm's achieving its goal of customer satisfaction, but doing so creates a dilemma for management, because the firm loses a large degree of control over the worker.<sup>180</sup> Further reducing the firm's control is its inability to monitor employee performance directly, because the customer and worker interact so closely and often out of sight of management.

A common and, it appears, increasingly important way of managing workers in this environment is to enlist the assistance of customers by soliciting, and incorporating into management decisions, customer feedback on workers' performance.<sup>181</sup> Customer feedback takes many forms, and employers use it in a range of ways. Perhaps the most direct, and in some ways the crudest, example of management by customers is the widespread reliance on tipping to compensate restaurant servers—that is, restaurateurs' decision to rely on customers to evaluate and pay their employees through gratuities.<sup>182</sup> Another well-known example, though

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<sup>178</sup> See *supra* Part II.B.

<sup>179</sup> See, e.g., TON, *supra* note 1, at 106–08.

<sup>180</sup> See *id.* at 110 (stating that “empowerment means lack of managerial control, which many executives and managers find scary”); Fuller & Smith, *supra* note 21, at 2–3 (discussing this “control dilemma”).

<sup>181</sup> See generally, e.g., Fuller & Smith, *supra* note 21, at 2–3; Lynn & Sturman, *supra* note 80, at 2313.

<sup>182</sup> See generally, e.g., Ofer H. Azar, *Why Pay Extra? Tipping and the Importance of Social Norms and Feelings in Economic Theory*, 36 J. SOCIO-ECON. 250, 255 (2007) (describing this practice as “reward tipping”). By choosing to compensate their employees through tips, employers have essentially delegated to customers the tasks of both evaluating and rewarding their servers. Lu-in

not strictly from the world of interactive service work,<sup>183</sup> is the use of student evaluations of teaching to inform decisions whether to retain, promote, and tenure college and university faculty.<sup>184</sup> Although full examination of these two examples is beyond the scope of this article, it is worth noting that both tips<sup>185</sup> and student evaluations<sup>186</sup> have been found to exhibit race and gender bias. The same is true of customer evaluations of service workers generally.

The solicitation and use of customer feedback to manage employees is commonplace in a variety of service settings. Firms seek customer

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Wang, *At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction*, 21 VA. J. SOC. POL'Y & L. 103, 109 (2014).

<sup>183</sup> Teaching does, however, share some of the characteristics of service work, including requiring emotional and aesthetic labor, and some of the same dynamics play out in the classroom as in service settings. See, e.g., Marcia L. Bellas, *Emotional Labor in Academia: The Case of Professors*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 96 (1999); McCammon & Griffin, *supra* note 31, at 285–87 (providing examples).

<sup>184</sup> This practice is questionable at the outset because student evaluations purportedly are used to assess teaching effectiveness, but critics have pointed out that they really function more as measures of customer satisfaction that, as commonly implemented, do not accurately measure the quality of teaching. See, e.g., Dan Berrett, *Scholars Take Aim at Student Evaluations' 'Air of Objectivity,'* CHRON. OF HIGHER EDUC. (Sept. 18, 2014) <http://chronicle.com/article/Scholars-Take-Aim-at-Student/148859/> (quoting Philip B. Stark as stating, “We’re confusing consumer satisfaction with product value.”), discussing Philip B. Stark & Richard Freishtat, *An Evaluation of Course Evaluations*, <http://www.stat.berkeley.edu/~stark/Preprints/evaluations14.pdf> (draft of Sept. 26, 2014); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN’S L. REV. 235, 270–75 (discussing studies examining correlation between student evaluations of teaching and student learning). Nevertheless, the results of student opinion surveys can play a substantial role in high stakes employment decisions in academic institutions, where the averaging and comparing of faculty members’ numerical scores on student evaluations often serves for many purposes as the primary measure of a candidate’s effectiveness in a core area of faculty responsibility. See, e.g., Lillian MacNell et al., *What’s in a Name: Exposing Gender Bias in Student Ratings of Teaching*, 40 INNOVATIVE HIGHER EDUC. 291, 292–93 (2015); McCammon & Griffin, *supra* note 31, at 286; Merritt, *supra* note 184, at 237–38; Stark & Freishtat, *supra* note 184, at 3.

<sup>185</sup> See, e.g., Brewster & Lynn, *supra* note 9; Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, 38 J. APPLIED SOC. PSYCHOL. 1045, 1054 (2008); Michael Lynn & Tony Simons, *Predictors of Male and Female Servers’ Average Tip Earnings*, 30 J. APPLIED SOC. PSYCHOL. 241 (2000); Wang, *supra* note 182, at 129–39 (discussing studies).

<sup>186</sup> See, e.g., MacNell et al., *supra* note 184 (reporting on study finding gender bias in student evaluations of teaching in online course); Merritt, *supra* note 184, at 253–70 (describing research demonstrating race, gender, and other social bias in student evaluations of teaching, deriving from the “powerful link between student ratings and a small set of nonverbal behaviors.” *Id.* at 238).

evaluations through numerous avenues, such as those ubiquitous comment cards or computer tablets<sup>187</sup> we find on restaurant tables and in hotel rooms, online surveys to which we are directed after a transaction, or paid, undercover “mystery shopper” services.<sup>188</sup> A given firm may employ multiple methods of gathering customer feedback.<sup>189</sup>

Firms use customer feedback in various ways, including to manage individual employees. In their detailed study of fifteen firms in a wide range of industries,<sup>190</sup> Linda Fuller and Vicki Smith learned that the firms made extensive use of customer evaluations to monitor, evaluate, and discipline individual service workers. Every company they studied used customer feedback mechanisms that requested individual employees’ names or information from which employees’ identities could be determined. The companies sought and received detailed information about individual employees’ attitudes and behavior, including customers’ subjective impressions on such matters as the employee’s appearance and whether the employee was concerned, cheerful, gracious, or quick and efficient. This detailed, individualized information was then “funneled into employees’ personnel files and often used in bureaucratic systems of evaluation and discipline.”<sup>191</sup> For example, one company made “acceptable customer service ratings” a condition of employment and used customer feedback in periodic performance reviews to determine

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<sup>187</sup> See Stacey Vanek Smith, *Computer Tablets Take Over Part of Restaurant Server’s Job*, NAT’L PUB. RADIO, MORNING EDITION (May 29, 2015), <http://www.npr.org/2015/05/29/410470091/computer-tablets-take-over-part-of-restaurant-servers-job> (describing restaurant customers’ use of computer tablets to rate their servers).

<sup>188</sup> Mystery or secret shoppers are hired by a business to pose as customers and provide information on their experience. See generally MSPA North America, *About Mystery Shopping*, <http://www.mysteryshop.org/about-ms>; Fed. Trade Comm’n, Consumer Information, *Mystery Shopper Scams*, <http://www.consumer.ftc.gov/articles/0053-mystery-shopper-scams>.

<sup>189</sup> In their study of the use of customer feedback in the late 1980s, Fuller and Smith found that every firm they studied used multiple mechanisms, and the average number of distinct mechanisms used was five. Those mechanisms fell into three categories: 1) “company-instigated,” where the company “actively recruited customer feedback,” such as through surveys or focus groups; 2) “company-encouraged,” such as comment cards and toll-free numbers provided where the customer and worker interacted; and 3) “customer-initiated,” procedures for handling unsolicited communications from customers. Fuller & Smith, *supra* note 21, at 5–6.

<sup>190</sup> Fuller and Smith studied fifteen firms in three large metropolitan areas who were involved in the automobile, supermarket, hospital, child care, banking, hotel, restaurant, insurance, and liquor industries, and their data covered a range of service roles from the “fairly routinized” (cashiers in the supermarket and retail liquor industries) to the comparatively nonstandardized, requiring greater degrees of employee discretion (automobile sales, nurses, insurance agents).” *Id.* at 4–5.

<sup>191</sup> *Id.* at 7.

“raises, promotions, and the like.”<sup>192</sup> A union official reported that customer reviews of supermarket employees were used to initiate disciplinary actions and to support “temporary suspensions and on-the-spot terminations.”<sup>193</sup> In addition, many firms tie incentives and rewards, such as compensation and bonuses, to employees’ customer satisfaction measures.<sup>194</sup>

But while management may value this source of information, customer evaluations of service employees are highly problematic because they introduce the danger of discrimination into the employment decisions they inform. Customer feedback gives the appearance of objectivity, because comment cards and surveys often ask customers to rate employees using numerical scales.<sup>195</sup> That appearance is misleading, however, because the forms and surveys generally seek customers’ opinions on or interpretations of inherently and highly subjective matters such as employees’ appearance, attitude, responsiveness, reliability, or even their demonstration of empathy.<sup>196</sup> Other features of customer feedback that undermine its validity as a measure of employee performance are small sample sizes, low response rates, and the tendency of such feedback to be biased towards extreme evaluations because customers are more likely to respond if they are either very displeased or very pleased.<sup>197</sup>

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<sup>192</sup> *Id.* at 8; see also, e.g., Dave Ulrich & Wayne Brockbank, *Focusing on Customers*, HR MAG., June 2005, at 62, 64–65 (reporting that one retail chain used customer feedback on such matters as employees’ responsiveness, reliability, and demonstration of empathy to create an “index of overall customer satisfaction” and a “monthly customer experience score for each employee” that “became part of the formal performance review system”).

<sup>193</sup> Fuller & Smith, *supra* note 21, at 8.

<sup>194</sup> See, e.g., John R. Hauser et al., *Customer Satisfaction Incentives*, 13 MARKETING SCI. 327, 328 (1994); David R. Heckman et al., *An Examination of Whether and How Racial and Gender Biases Influence Customer Satisfaction*, 53 ACAD. OF MGMT. J. 238 (2010); Douglas M. Lambert et al., *What Information Can Relationship Marketers Obtain from Customer Evaluations of Salespeople?*, 26 INDUS. MARKETING MGMT. 177 (1997); Ulrich & Brockbank, *supra* note 192, at 66.

<sup>195</sup> See, e.g., Stark & Freishtat, *supra* note 184, at 3; Ulrich & Brockbank, *supra* note 192, at 64–65. Cf. Fuller & Smith, *supra* note 21, at 8 and 11–12 (discussing managers’ use of quantitative scores derived from customer evaluations).

<sup>196</sup> See, e.g., Fuller & Smith, *supra* note 21, at 7; Ulrich & Brockbank, *supra* note 192, at 64. See also Lambert et al., *supra* note 194, at 180 (explaining why “[c]ustomers’ evaluations of salespeople are expected to reflect a [*sic*] subjective criteria”).

<sup>197</sup> See generally, e.g., Fuller & Smith, *supra* note 21, at 12; Stark & Freishtat, *supra* note 184, at 4–5. Fuller and Smith also reported that a union official they interviewed “was familiar with cases in which customers had registered phony complaints against workers, occasionally in response to material



Moreover, customer feedback is highly susceptible to being distorted by social group-based stereotypes and bias.<sup>198</sup> This susceptibility is not surprising, given the kind of information that customer evaluations seek and the typical conditions under which they are administered. Several recent studies have found evidence that race and gender bias do in fact influence customer satisfaction ratings.<sup>199</sup>

First, as noted above, customer feedback surveys typically seek subjective opinions on the employee's performance and are likely to elicit judgments or ratings that are more reflective of the respondent's feelings about or interpretation of the service encounter than the employee's objective performance.<sup>200</sup> In seeking such information, moreover, these questionnaires "may even facilitate the expression of [race and gender] biases"<sup>201</sup> to the extent that customers have different (that is, higher or stereotype influenced) expectations of who (that is, which groups' members) should perform particular roles or how members of particular groups should perform those roles. For example, customers might expect or prefer to see women or men in certain occupations because they consider them to be better suited to those roles and therefore be inclined to evaluate a worker whose gender is congruent with the job more positively than one whose gender is incongruent.<sup>202</sup> Customers might also prefer to be served by a worker whose gender is the same as or different from their own,<sup>203</sup> or might have a same-race bias.<sup>204</sup> Customers might interpret a worker's abilities or performance through a stereotype-skewed lens. For example, a customer might be skeptical of the quantitative skills of a Black or female financial services representative and downgrade that employee's performance accordingly. Customers who have inconsistent expectations of how workers from different groups should behave, such as expecting greater deference or displays of caring or con-

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incentives businesses offered customers who provided feedback"). Fuller & Smith, *supra* note 21, at 12.

<sup>198</sup> See Heckman et al., *supra* note 194, at 256.

<sup>199</sup> See *infra* notes 213–220 and accompanying text.

<sup>200</sup> See, e.g., Fuller & Smith, *supra* note 21, at 12 (discussing the "murkiness" of customer feedback, which may depend on such matters as "how a customer interprets . . . a mannerism [or] tone of voice"); Heckman et al., *supra* note 194, at 241 (pointing out that the kinds of questions that are typically asked "do not solicit recall of specific employee . . . behaviors, and so they may provide more information about the state of mind of the rater than about the actual performance of the ratee[.]").

<sup>201</sup> Heckman et al., *supra* note 194, at 241.

<sup>202</sup> See Dan Moshavi, *He Said, She Said: Gender Bias and Customer Satisfaction With Phone-Based Service Encounters*, 34 J. APPLIED SOC. PSYCHOL. 162, 163–163 (2004) (describing "employee-gender/job-congruency bias").

<sup>203</sup> *Id.* at 163 (describing the possibilities of a "gender matching bias" and an "opposite gender matching bias").

<sup>204</sup> See Lynn & Sturman, *supra* note 80, at 2318.

cern from women or racial minorities than from white men, might mark down workers who do not meet that expectation.<sup>205</sup>

Certainly performance ratings by individuals within the firm, such as supervisors or co-workers, can reflect stereotypes and biases as well.<sup>206</sup> Customer ratings present greater cause for concern, however, because customers are not subject to the constraints that apply to individuals within the firm that might limit the influence or expression of bias. Supervisors are expected and should be motivated to give objective, justifiable evaluations because that is one of their job duties, they know their assessments will be used to inform management decisions, and their names will be attached to their comments. Customers, on the other hand, have no need to feel accountable for their evaluations, because they have no responsibility to the firm and are usually anonymous. Customers therefore are not likely to be motivated to do the hard work of overcoming their biases.<sup>207</sup>

Nor are customers typically given guidance on how to properly evaluate employees, let alone how to reduce the effect of bias on their ratings.<sup>208</sup> Instead, customer evaluations are often completed quickly, spontaneously, and in an environment where the customer is reminded that his or her satisfaction is paramount.<sup>209</sup> Such an environment emphasizes the greater power and status of the customer as compared to the worker. It not only frees customers from constraints in expressing their opinions, but also creates favorable conditions for the influence of stereotypes and the manifestation of bias.<sup>210</sup> Furthermore, to ask the customer to rate the worker based on the customer's satisfaction with that worker's performance creates an almost textbook "normatively ambiguous" situation. First, there is no clear right or wrong way to respond when one's own satisfaction is the question, especially when one is treated as "sovereign." Second, a negative rating can easily be justified on the basis of some factor other than race or gender: the worker's performance did not satisfy the customer.<sup>211</sup> In such ambiguous situations it is hard for both the actor and observers to see that the actor is discriminating, and nu-

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<sup>205</sup> See, e.g., Heckman et al., *supra* note 194 at 241; McCammon & Griffin, *supra* note 31, at 287.

<sup>206</sup> See, e.g., Joseph M. Stauffer & M. Ronald Buckley, *The Existence and Nature of Racial Bias in Supervisory Ratings*, 90 J. APPLIED PSYCHOL. 586 (2005).

<sup>207</sup> See Heckman et al., *supra* note 194, at 240–241.

<sup>208</sup> See *id.* at 241.

<sup>209</sup> See *supra* Part II.A. and C.

<sup>210</sup> See generally, e.g., Wang, *supra* note 182, at 129.

<sup>211</sup> See generally, e.g., Lynn & Sturman, *supra* note 80, at 2314; Wang, *supra* note 182, at 127–128.

merous studies have found that discrimination is most likely to appear under those circumstances.<sup>212</sup>

A handful of recent studies have found evidence of both race and gender bias in customer evaluations of service workers. A pair of studies using a “full-cycle” design (incorporating both field and laboratory settings) found evidence of race and gender bias in customer satisfaction after controlling for objective measures of employee performance.<sup>213</sup> Specifically, a field study of customer satisfaction ratings of physicians found that such ratings were positively related to objective performance measures only for white or male physicians, but not for nonwhite or female physicians. This finding suggests that “bias against nonwhite and female employees may creep into satisfaction judgments.”<sup>214</sup> A separate laboratory study of customer satisfaction ratings of bookstore employees found that “raters were significantly less satisfied with women employees than with their equally performing white male counterparts.”<sup>215</sup> In addition, raters who had high levels of implicit bias “were significantly more likely to report lower satisfaction with [a] nonwhite male’s performance than with [a] white male’s” when their performances were equal.<sup>216</sup>

A study of restaurant customers found evidence of a same-race bias in customers’ ratings of service quality, as customers tended to rate serv-

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<sup>212</sup> See generally, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *PSYCHOL. SCI.* 319 (2000); LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 38–42 (2006).

<sup>213</sup> These studies were two of a set of three in a “full-cycle” research design that used both field and laboratory studies to test and revalidate findings from the two settings. Heckman et al., *supra* note 194, at 239 (describing “full-cycle” research design and its benefits). In addition to testing customer bias in rating individual employees, the researchers tested customer bias in rating organizations and found race and gender bias affected those ratings as well. *Id.* at 256 (further noting that the studies “found evidence for the operation of racial biases regardless of whether the nonwhite employees were predominantly Asian . . . , African American . . . , or Latino”).

<sup>214</sup> *Id.* at 248. Indeed, patient ratings for male or white physicians rose along with objective measures of their performance, but patient satisfaction ratings for female and nonwhite physicians actually declined as objective measures of their performance rose. See *id.*, fig. 2.

<sup>215</sup> *Id.* at 251. In this study, subjects rated “employees” after viewing videos of different versions of scripted interactions between a customer and an employee. In the videos, the employees’ behavior was equivalent across conditions but their race and gender varied: “participants were randomly assigned to view either the white male employee . . . , white female employee . . . , or black male employee[.]” *Id.* at 249.

<sup>216</sup> *Id.* at 252. Subjects were given two Implicit Attitude Tests as part of the study. *Id.* at 250.

ers of their same race more favorably than servers of a different race.<sup>217</sup> Other studies have found evidence of gender bias in customer feedback. One study of customer evaluations of phone-based interactions with customer service representatives found that customers were more satisfied with service from a member of the opposite gender, suggesting that the worker's "doing gender" (such as flirting) in those encounters might influence customer satisfaction.<sup>218</sup> A nonacademic study of the customer satisfaction ratings of client service representatives at WordStream, an internet marketing firm, also found gender bias in favor of men that was not related to their objective performance or experience.<sup>219</sup> The gender

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<sup>217</sup> Lynn & Sturman, *supra* note 80, at 2317. This study analyzed the same data set that, in a separate analysis, revealed that restaurant customers tipped black servers significantly less than white servers and that those differences were not attributable to differences in the quality of service provided. See Lynn et al., *supra* note 185, at 1054 (reporting that tips averaged 17.5% of the bill for black servers versus 20.7% for white servers or 14.6% for black servers versus 19.4% for white servers, depending on the size of the dining party). These results were replicated in a later study. See Brewster & Lynn, *supra* note 9, at 557 (stating that, not only were the racial differences in tips not attributable to "inter-racial differences in service skills," but "[t]o the contrary, we found that to the degree that there are inter-racial differences in serving skills, black servers in this study are perceived to provide better service relative to that provided by their white co-workers.").

<sup>218</sup> Moshavi, *supra* note 202. While this study therefore found evidence of an opposite-gender matching bias, it found moderate evidence of a congruency bias. *Id.* at 164, 169 (noting, however, that this result might indicate that the job "is a weak gender-typed occupation").

<sup>219</sup> Bryce Covert, *Female Client Reps Get Lower Scores Despite Better Performance And Experience*, May 22, 2014, <http://thinkprogress.org/economy/2014/05/22/3440725/wordstream-women-scores/>. All of the men received above average scores, and all of the women received below average scores. Larry Kim, the founder of WordStream who performed the analysis, commented, "In fact, the lowest scoring male rep rated higher than the highest scoring female rep!" He also pointed out that women's objective performance was higher than men's based on grading of their account performance, and women received "lower scores across all levels of experience such that the least experienced man got a higher score than the most experienced woman." Kim "calculated that his female marketers are undervalued by 21%, similar to the 19.7% gender pay gap for the industry." *Id.*

Similarly, a study of gender differences in tipping found that, among less frequent patrons of a restaurant, female servers received smaller tips than male servers for comparably rated service, except when they were rated as providing service of exceptional quality. This result indicates that "female servers are being held to a very high standard. If this standard is not met, female servers are treated unfavorably in comparison to male servers who produce the same level of service quality. In other words, to achieve equality, female servers have to perform exceptionally well." Matthew Parrett, *Customer Discrimination in Restaurants: Dining Frequency Matters*, 32 J. LABOR RES. 87, 98 (2011). This difference appeared only among less frequent patrons, who presumably would be

differences were most pronounced for “mediocre accounts,” which suggests that “male client service managers more often than not received the benefit of the doubt . . . whereas female client service managers were less likely to get a pass.”<sup>220</sup>

Given the emphasis employers place on customer satisfaction and service workers’ soft skills, it is easy to see why they rely on customer evaluations to make management decisions, even about individual employees.<sup>221</sup> The issues discussed above, however, call into question employers’ reliance on customer ratings in making compensation and other employment decisions. In addition to being flawed generally, customer evaluations of service workers might very well be biased by workers’ legally protected personal characteristics or social group membership, thereby introducing not just arbitrary but also unlawful discriminatory factors into the employment decisions that they inform. For an individual employee, being underrated consistently because of her social group membership could have serious negative effects on her career that compound over time.<sup>222</sup> In the aggregate, the widespread and uncritical use of customer feedback to make employment decisions could adversely affect the job outcomes of women and people of color more broadly.<sup>223</sup> Further, customer evaluations that incorporate group-based biases can reinforce employers’ preferences for workers from favored groups, making for a literal “feedback” loop.<sup>224</sup>

### B. *Holding Employers Accountable*

While the use of customer feedback to manage employees appears to be both widespread and problematic, it is not one that employment discrimination law has yet addressed.<sup>225</sup> The practice also would be difficult

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less careful not to discriminate in their tips, *see id.* at 95 and 98, and was driven by male customers, *see id.* at 100.

<sup>220</sup> Covert, *supra* note 219 (quoting Larry Kim). *Cf.* MacNell et al., *supra* note 184, at 300–01 (describing findings of gender bias in student evaluations of online teaching). This situation resembles studies of racial bias in simulated employment and college admissions decisions, where researchers found that subjects were more likely to treat white and black applicants similarly when their qualifications were consistently strong or weak but to favor white candidates when qualifications were “mixed” or ambiguous. *See* Dovidio & Gaertner, *supra* note 212.

<sup>221</sup> *See* Lynn & Sturman, *supra* note 80, at 2319 (making a similar point).

<sup>222</sup> *See* Covert, *supra* note 219 (quoting Larry Kim as making this point).

<sup>223</sup> *See* Heckman et al., *supra* note 194, at 257; Lynn & Sturman, *supra* note 80, at 2318–19.

<sup>224</sup> *Cf.* Heckman et al., *supra* note 194, at 239, 257.

<sup>225</sup> *See* Zatz, *supra* note 59, at 1416–17 (presenting a hypothetical situation in which an employer uses a customer feedback form to solicit information on customer satisfaction with individual employees and terminates an employee based on negative ratings, perhaps when a customer has stated a racist reason for her dissatisfaction in her comments, and noting that “[n]o published decision

to challenge under current Title VII doctrine. First, it does not present a straightforward case of disparate treatment, in which the employer bases a decision directly on customers' preference for having members of a particular group perform certain work. In such a case, the employer itself acts with discriminatory intent and, as we have seen, cannot avoid liability under Title VII by pointing to customer preference as a justification.<sup>226</sup> Using customer evaluations to inform management decisions, however, in effect "launder[s] out" the employer's discriminatory intent by giving it a reason to take action based on customers' discriminatory preferences without taking into account the employee's race or other protected status.<sup>227</sup> As we also have seen, the "cat's paw" theory of liability does not seem to accommodate this situation, at least as formulated by the Supreme Court in *Staub v. Proctor Hospital*, which appears to limit the theory to situations involving supervisors with discriminatory intent.<sup>228</sup> Given the susceptibility of customer evaluations to "systematic and predictable racial and gender biases,"<sup>229</sup> management by customers might be subject to challenge under a disparate impact theory.<sup>230</sup> On the other hand, such a claim is difficult to establish and would not necessarily provide relief to an individual employee even if she could trace her own adverse employment outcome to discriminatory customer evaluations.<sup>231</sup>

Noah Zatz has argued persuasively, however, that an employer could be found liable under Title VII if it were to base an employment decision, such as a termination, on negative customer feedback in which a

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is precisely on point"). My own research likewise has found no reported case addressing this practice directly.

<sup>226</sup> See, e.g., *id.* at 1416.

<sup>227</sup> *Id.* at 1416–17.

<sup>228</sup> See *supra* Part I.

<sup>229</sup> Heckman et al., *supra* note 194, at 256.

<sup>230</sup> See Lynn & Sturman, *supra* note 80, at 2318–19 (suggesting this possibility).

<sup>231</sup> The disparate impact provision of Title VII prohibits facially neutral practices with a disparate impact on members of a protected group. 42 U.S.C. § 2000e-2(k). To support a prima facie case, plaintiffs must present a demanding statistical showing. See generally ZIMMER ET AL., *supra* note 43, at 236–38 (describing the quantitative showing required to prove that an employment practice causes a disparate impact). The employer might respond with a business necessity defense, 42 U.S.C. § 2000e-2(k)(1)(A)(i), arguing that its use of customer feedback is justified because it is job related and consistent with business necessity given the importance of customer satisfaction to the profitability and survival of the business. The plaintiff might be able to rebut that defense by identifying a less discriminatory alternative that could achieve the employer's purpose. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C). See Heckman et al., *supra* note 194, at 258 (suggesting "practical steps" that organizations can take "to minimize the potential adverse impact of customer biases [in customer ratings] on nonwhite and female employees' careers").

customer “articulated a racist reason for her extreme dissatisfaction with the employee.”<sup>232</sup> More broadly, Zatz has proposed a promising theory of employment discrimination law that would broaden its focus beyond the employer-employee dyad to take account of the influence and role of third parties such as customers as well as provide a remedy for harms to individual employees without requiring a claim of disparate impact.<sup>233</sup>

Zatz’s theory draws on commonalities between the traditional disparate treatment model, under which an employer is liable for an adverse employment action that results from its own discriminatory intent, and the doctrine under which an employer can be liable for discriminatory harassment of its employee by a third party, including a customer.<sup>234</sup> Zatz points out that the latter doctrine is a form of non-accommodation liability,<sup>235</sup> similar to the non-accommodation theory that is well-recognized under the Americans with Disabilities Act (ADA)<sup>236</sup> but not associated with Title VII except in cases of religious discrimination.<sup>237</sup> He synthesizes these existing models into a new theory of employment discrimination law based on “membership causation”—meaning “workplace harm caused by an individual employee’s membership in a protected class”<sup>238</sup>—and employer responsibility.<sup>239</sup>

Under this theory, an employment discrimination claim would comprise three elements:

- (1) The employee suffered an employment-related harm (whether a tangible employment action or a hostile work environment);
- (2) The employee suffered that harm because of her membership in a protected class (membership causation); and

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<sup>232</sup> Zatz, *supra* note 59, at 1417–22 (analogizing to cases in which employment agencies, third-party vendors, and unions have been found to violate Title VII where a third party acted with discriminatory intent, the defendant had notice of the third party’s conduct, and the defendant did nothing to prevent or remedy the harm to the plaintiff).

<sup>233</sup> See generally *id.*; see also Noah Zatz, *MCLE Self-Study: Putting Intent in Its Place: A New Direction for Title VII*, 28 CAL. LAB. & EMP. L. REV. 8 (July 2014).

<sup>234</sup> See Zatz, *supra* note 59, at 1406–14.

<sup>235</sup> See *id.* at 1386–06.

<sup>236</sup> *E.g.*, 42 U.S.C. § 12112(b)(5) (defining discrimination to include employers’ failure to make reasonable accommodations).

<sup>237</sup> See 42 U.S.C. § 2000e(j)).

<sup>238</sup> Zatz, *supra* note 59, at 1357. Notably, and unlike a disparate impact model, the claim proposed by Zatz would not require group harm. See *id.* at 1394–99, 1414.

<sup>239</sup> See *id.* at 1416.

- (3) There is a basis for holding the employer responsible.<sup>240</sup>

The theory could apply in a range of scenarios.<sup>241</sup> Most important for our purposes, the source of “membership causation” (element 2) need not be limited to the employer (“internal causation”), but could be an actor outside of the organization (“external causation”), such as a customer.<sup>242</sup> Accordingly, Zatz’s model extends beyond the employer-employee dyad to encompass the triangular structure of, and an important source of discrimination in, service work.

The more difficult element to establish would be the third: that “there is a basis for holding the employer responsible” for decisions that incorporate discriminatory customer feedback. In disparate treatment claims, the basis for employer responsibility is its discriminatory intent.<sup>243</sup> In non-accommodation claims, it is the employer’s notice of the employee’s physical or mental limitations combined with its ability to make reasonable accommodations that do not impose an undue hardship.<sup>244</sup> In third-party harasser claims, it is the employer’s negligence in failing to take reasonable corrective or preventive action.<sup>245</sup> Zatz argues that an employer who bases an employment decision on negative customer feedback that states racist reasoning could be held responsible because that feedback would put the employer “on notice that following its neutral rule means terminating an employee because of her race,” a result that the employer could take reasonable steps to avoid by disregarding that complaint.<sup>246</sup>

The argument for holding the employer responsible for decisions that incorporate discriminatory customer feedback is even stronger when we consider the ways in which relying on customer feedback to manage workers serves the employer’s interest while exposing employees to discrimination by customers. With respect to customer sexual harassment of workers, Ann McGinley has argued that employers who create and profit from a sexualized environment should be treated as having “constructive knowledge that harassment by customers is likely to occur” and therefore have “a duty to take extra efforts to prevent sexual harassment.”<sup>247</sup> To be sure, the use of customer feedback in managing employees does not operate as directly or crudely to enable employers to profit from customer discrimination against workers. Nevertheless, employers should have a duty to prevent employment decisions based on discriminatory

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<sup>240</sup> *Id.* at 1413.

<sup>241</sup> *See id.* at 1415–31.

<sup>242</sup> *See id.* at 1377–80, 1389–1403, and 1414 (discussing external causation).

<sup>243</sup> *Id.* at 1408–10.

<sup>244</sup> *Id.* at 1411–12.

<sup>245</sup> *Id.* at 1411.

<sup>246</sup> *Id.* at 1417.

<sup>247</sup> McGinley, *supra* note 42, at 1275–77.



customer feedback, because “management by customers” enables employers to delegate important responsibilities to customers while simultaneously increasing their power over employees and distancing themselves from discriminatory feedback, all in the name of customer service.

By relying on customer feedback to manage their workers, employers have delegated to those third parties functions that traditionally have been the responsibility of the employer, including evaluating and even determining the compensation of its workers.<sup>248</sup> The Supreme Court has noted that an employer’s delegation of power or responsibility can be a basis for extending its vicarious liability.<sup>249</sup> Because the Court was addressing liability based on agency principles in those cases, however, its comments referred to delegation within the confines of the employer-employee dyad. Still, a direct liability model could accommodate consideration of an employer’s delegation of responsibilities to an outsider who discriminates. Indeed, the basis for holding the employer responsible for discrimination in this context is arguably stronger than in the case of third-party harassment. The employer who adopts management by

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<sup>248</sup> See Fuller & Smith, *supra* note 21, at 11 (stating, “Managers now have formally designated accomplices in controlling workers, insofar as they exploit customers for their observations about how service is delivered.”); Hauser et al., *supra* note 194, at 328 (stating that, in some firms, “employee compensation is tied directly to customer satisfaction”); Ulrich & Brockbank, *supra* note 192, at 66 (stating, “Some companies are giving targeted customers a voice in allocating rewards to employees based on their quality of customer service.”); cf. Wang, *supra* note 182, at 109 (stating that “tipping . . . delegat[es] to the customer the function of assessing and rewarding the service received”).

<sup>249</sup> In *Vance*, the Court rejected the petitioner’s argument that limiting an employer’s vicarious liability to harassment by a supervisor as narrowly defined by the Court would enable employers to insulate themselves from liability “by empowering only a handful of employees to take tangible employment actions.” The Court stated, in part:

If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. [Citation omitted.] Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

*Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2452 (2013).

In *Staub*, the “cat’s paw” case, the Court pointed out that a supervisor’s biased report could still be a causal factor in an adverse employment decision if the ultimate decisionmaker’s independent investigation “relies on facts provided by the biased supervisor,” because “then the employer (either directly or through the ultimate decisionmaker) will have effectively delegated the factfinding portion of the investigation to the biased supervisor.” *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011) (noting further that the biased supervisor and ultimate decisionmaker both would have acted as agents of the employer).

customers does so both to serve its own interests and to inform tangible employment actions, and both of those factors have figured prominently in the Court's analyses of employer liability.<sup>250</sup>

Relying on customer feedback to inform employment decisions serves the employer's interest in many ways. Ironically, while it appears to lessen the power of the employer by spreading it to customers and clients, the practice actually "strengthens employers' hold over the workplace"<sup>251</sup> and individual employees. First, the practice enables management to claim and wield the power of customers as well as its own, giving management another source of information to use in managing the worker while also legitimizing the exercise of management power. It does the latter by casting management as an agent of the customer, whose satisfaction is the goal of the transaction and whose own assessment of that transaction is the basis for evaluation of the worker. In fact, the customer is acting in the service of management, becoming an "additional boss" to the worker or a "formally designated accomplice[] in controlling workers, insofar as [management] exploit[s] customers for their observations about how service is delivered."<sup>252</sup> As Fuller and Smith explain, management by customers enables the employer to supplement "managerial power . . . with customer power; conflicts between employers and employees may thus be reconstituted as conflicts between employees and customers."<sup>253</sup>

Further, the practice does not just strengthen management power; it also extends its reach. Because customers (whether real or paid, "mystery" shoppers)<sup>254</sup> might evaluate their performance at any time, workers "may always feel someone is looking over their shoulder,"<sup>255</sup> and the power of the employer becomes "a constant yet elusive presence . . . a continuous, though invisible, check on service workers' interactions with the public."<sup>256</sup>

Finally, the use of customer feedback to manage workers enhances the appearance of legitimacy of management decisions, because it cloaks those decisions in "a mantle of objective, rigorously accumulated and analyzed data."<sup>257</sup> As we have seen, customer feedback often appears to

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<sup>250</sup> The Court has pointed out that agency law would hold an employer liable for acts committed by an employee with a purpose to serve the employer. *See Ellerth*, 524 U.S. at 755–57; *Faragher v. City of Boca Raton*, 524 U.S. 775, 793–97 (1998). The Court also has emphasized the "official" character of tangible employment actions in tying the employer's vicarious liability to a supervisor's authority to take them. *See Vance*, 133 S.Ct. at 2442, 2448; *Ellerth*, 524 U.S. at 762; *Faragher*, 524 U.S. at 790.

<sup>251</sup> Fuller & Smith, *supra* note 21, at 10.

<sup>252</sup> *Id.* at 11.

<sup>253</sup> *Id.* (emphasis in original).

<sup>254</sup> *See supra* note 188.

<sup>255</sup> Fuller & Smith, *supra* note 21, at 11.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

be objective because it is solicited in the form of numerical scores or ratings that employers convert to quantitative measures of performance, such as a monthly “customer experience score”<sup>258</sup> or a “P/N ratio”<sup>259</sup> for each employee. On the other hand, we also have seen that customer evaluations hardly warrant that characterization, because they often instead reflect subjective, arbitrary, even discriminatory preferences and expectations,<sup>260</sup> and therefore provide a distorted or biased picture of an employee’s performance.<sup>261</sup>

Under these circumstances, it is reasonable to place a burden on employers to “disrupt” the chain of external (customer) causation of workplace harm<sup>262</sup> by disregarding discriminatory customer feedback, and to hold an employer liable for failing to do so.<sup>263</sup> Employers seek to benefit from gathering and acting upon particularized comments on individual employees.<sup>264</sup> Certainly an employer could scan customers’ written feedback for explicitly discriminatory comments without undue burden and disregard reviews that contain them. Even purely numerical ratings can provide employers with sufficient data to detect, and counteract, bias in customer feedback by comparing customer ratings to other forms of performance review.<sup>265</sup> Employers who enlist customers to help manage their workers have a duty to use the information they solicit not just to improve their own bottom lines, but also to prevent employment decisions based on discriminatory customer feedback.<sup>266</sup>

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<sup>258</sup> See Ulrich & Brockbank, *supra* note 192, at 64–65 (reporting on one retail chain’s use of customer feedback on matters such as employees’ responsiveness, reliability, and demonstration of empathy).

<sup>259</sup> Fuller & Smith, *supra* note 21, at 12 (defining the “P/N ratio” as “the ratio of positive to negative marks customers gave on comment cards”).

<sup>260</sup> See *supra* Part III.A.

<sup>261</sup> See *id.*

<sup>262</sup> See Zatz, *supra* note 59, at 1394 (describing ADA accommodation jurisprudence).

<sup>263</sup> See *id.* at 1417.

<sup>264</sup> As Zatz has pointed out in the similar context of customer feedback in the “gig economy,” it is the firm that decides “how to structure, elicit, and act upon customer feedback.” Noah Zatz, *Beyond Misclassification: Gig Economy Discrimination Outside Employment Law* (Jan. 19, 2016), <http://onlabor.org/2016/01/19/beyond-misclassification-gig-economy-discrimination-outside-employment-law/> [hereinafter Zatz, *Beyond Misclassification*].

<sup>265</sup> See Covert, *supra* note 219 (describing the analysis performed by Larry Kim at WordStream); Zatz, *Beyond Misclassification*, *supra* note 264 (stating that firms’ “voracious appetite for data gathering and analysis” provide “ample opportunities to analyze, and adjust for, various forms of bias in [workers’] ratings, as well as to identify and discount customers whose patterns of ratings suggest bias”).

<sup>266</sup> Even if courts were to recognize an employment discrimination claim based on management by customers, additional challenges would remain, some of which are common to employment discrimination claims generally. For ex-

## CONCLUSION

Employment discrimination law needs a model of employer liability to reach discrimination that originates beyond the employer-employee dyad. The traditional model fails to acknowledge the workplace realities of the dominant sector of our economy and its culture of customer sovereignty. That culture results in especially “bad jobs” for women and people of color, because it enables employers to profit by facilitating customers’ discrimination against service workers. The law should account for the power of the customer in interactive service work and unmask discrimination in employment that masquerades as customer service.

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ample, establishing “membership causation” could be difficult even if customer evaluations are “susceptible to systematic and predictable racial and gender biases” that appear in the aggregate. Heckman et al., *supra* note 194, at 256. A customer who discriminates in rating a worker might not express a racist or sexist reason on a comment card and may instead merely assign a score to the employee’s performance without comment or with an apparently nondiscriminatory comment. In such a case, the employer would not necessarily be on notice of the customer discrimination, so it would be difficult to hold the employer liable for an employment-related harm that resulted from it. *See* Schoenbaum, *supra* note 28, at 1238 (making a similar point with respect to employer notice of customers’ “more subtle” discriminatory preferences in context of intimate service work). In addition, customers, like employers themselves, do not necessarily intend to act on stereotyped expectations and might not even be aware of their own biases. These difficulties raise the issue of implicit bias, which has long troubled employment discrimination law. *See generally, e.g.*, Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-Discrimination Law*, 26 GEO. MASON CIV. RTS. L.J. 1 (2015); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006). Accordingly, management by customers provides another example to support calls for new doctrinal approaches that take account of structural and contextual factors that promote discrimination in employment. *See, e.g.*, Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); C. Elizabeth Hirsh, *Beyond Treatment and Impact: A Context-Oriented Approach to Employment Discrimination*, 58 AM. BEHAV. SCIENTIST 256 (2014).