

# EMPLOYMENT DISCRIMINATION AGAINST DOMESTIC VIOLENCE SURVIVORS: STRENGTHENING THE DISPARATE IMPACT THEORY

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## ABSTRACT

Domestic violence is a growing problem in the United States, and the issues survivors face do not end at home. This Article argues that the disparate impact theory, used in interpreting sex discrimination under Title VII, can and should be used to provide protections for survivors of domestic violence in the workplace. In order to achieve this improvement and increase the use of the disparate impact theory, a clear interpretation must be made. The Equal Employment Opportunity Commission (EEOC) could provide guidance, or the disparate impact theory could be added to the Code of Federal Regulations interpreting sex discrimination under Title VII. This Article begins by providing a background for how domestic violence affects a survivor's work experience as well as a background of sex discrimination theories under Title VII in Parts II and III respectively. Part IV addresses how to use the disparate impact theory to protect working domestic violence survivors, and Part V introduces my proposal to change Title VII's interpretation. Part VI applies Title VII to women employees who are also survivors by outlining limitations of Title VII and offering a comparison to discrimination under the Fair Housing Act. Finally, Part VII outlines how the changes I have suggested may be implemented to improve use of disparate impact theory to protect survivors.

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## I. INTRODUCTION

One in three women experience physical violence by an intimate partner, and nearly one in ten women are raped by an intimate partner in her lifetime.<sup>1</sup> Domestic violence and sexual assault significantly affect women in the United States.<sup>2</sup> In 2012, in North Dakota, 4,624 new victims received services from crisis centers across the state, and ninety-four percent of these victims were women.<sup>3</sup> Domestic violence is “a pattern of behavior in which one intimate partner uses physical violence and/or sexual or economic abuse to control the other partner in the relationship.”<sup>4</sup> Domestic violence

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1. NAT’L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 39 (2010) [hereinafter CDC SURVEY]. It is recognized that men are also survivors of domestic violence, but this Article will focus on women due to the disproportionate number of women who are victimized. *See id.*

2. The same survey reported that about one in ten men in the United States have experienced rape, physical violence, and/or stalking by an intimate partner. *Id.*

3. *Facts About Domestic Violence in North Dakota*, N.D. COUNCIL ON ABUSED WOMEN’S SERVS., [http://www.ndcaws.org/facts/domestic\\_violence/domestic\\_violence\\_stats.html](http://www.ndcaws.org/facts/domestic_violence/domestic_violence_stats.html) (last visited April 25, 2013) (finding at least seventy-five percent of victims served were physically abused and weapons were used in at least eleven percent of the cases identified).

4. JULIE GOLDSCHIED & ROBIN RUNGE, AM. BAR ASS’N COMM’N ON DOMESTIC VIOLENCE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER’S GUIDE 2 (2009).

is not solely defined by physical abuse, but also by patterns of behavior that could include threats, intimidation, and other controlling acts.<sup>5</sup>

Domestic violence exists in the workplace and can take many forms. Approximately, two-thirds of employed survivors<sup>6</sup> reported her abuser harassed her at work,<sup>7</sup> and up to half of those women also reported she lost a job due at least in part due to domestic violence.<sup>8</sup> Over half of employed survivors also reported they missed work because of the abuse, and forty-seven percent stated they were directly prevented from going to work by their abuser.<sup>9</sup> Maintaining employment is crucial to a survivor of domestic violence. If she is trying to escape the violence, she will need income to afford relocation. She may also need regular income to pay for medical expenses. She may need to go to court to testify against her abuser who has been charged, or to obtain a protection order for her safety. Some women may be fired simply because the employer learns she is a survivor of domestic violence and fears “the potential drama” that domestic violence may bring to the workplace.<sup>10</sup> This example would constitute employment discrimination under Title VII.<sup>11</sup> The disparate impact theory is an employment discrimination doctrine used for members of a protected class to assert a claim of discrimination, based on a facially neutral policy that adversely affects the class as a whole.<sup>12</sup> This Article will examine how the disparate impact theory in sex discrimination should be used to protect domestic violence survivors from discrimination in the workplace.

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5. *Id.*

6. The author uses the term “survivor” to describe women who have experienced or are currently experiencing domestic violence as opposed to “victim.” While working as a crisis-line advocate in North Dakota, the author learned in her training that “survivor” is a term preferred by most women who have experienced violence or are enduring violence in their lives, as well as the advocates, counselors, and volunteers who work with them. The term “victim” is only used in this paper where it is taken directly from another cited article or statutory text.

7. GOLDSCHIED & RUNGE, *supra* note 4, at 3-4.

8. U.S. GEN. ACCOUNTING OFFICE, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-9 (1998), available at <http://www.gao.gov/archive/1999/he99012.pdf>.

9. GOLDSCHIED & RUNGE, *supra* note 4, at 4 (citing Judith McFarlane et al., *Indicators of Intimate Partner Violence in Women’s Employment*, 48 AM. ASSOC. OCCUPATIONAL HEALTH NURSES J. 217 (2000)).

10. *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic Violence, Sexual Assault or Stalking*, EEOC, [http://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm) (last visited Apr. 13, 2013).

11. *Id.*

12. *See infra* note 73.

## II. TITLE VII: PROHIBITION OF SEX DISCRIMINATION IN EMPLOYMENT

Title VII of the Civil Rights Act was enacted in 1964 and amended in 1991 to prohibit discrimination in employment against protected classes: race, national origin, color, sex, and religion.<sup>13</sup> Because of the disproportionate number of women who are survivors of domestic violence, discrimination against a survivor of domestic violence in the workplace constitutes sex discrimination under Title VII.<sup>14</sup> Terminating a woman because she is a victim of domestic violence is, in essence, terminating her because of her sex.

Title VII of the Civil Rights Act of 1964 created the EEOC, which is charged with enforcing federal employment discrimination laws. The congressional purpose of Title VII is to provide equal employment opportunities.<sup>15</sup> Considering the impact that domestic violence has on women's lives, specifically in the workplace, preventing discrimination against survivors of domestic violence seems to support the Congressional goals of Title VII.<sup>16</sup> Why is it that this goal has not been met and survivors of domestic violence are not being protected from discrimination in the workplace? The answer is arguably because the disparate impact theory, the most applicable legal theory to employment discrimination against domestic violence survivors, is not thoroughly developed in case law or supporting federal regulations. Fifty-two percent of women survivors are terminated for reasons attributable in some way to domestic abuse.<sup>17</sup> The larger pattern of inferior treatment and sex discrimination is obvious. Congress clearly intended to protect survivors of domestic violence under Title VII, even if it is not facially apparent in the statute.<sup>18</sup>

In 1979, Congress adopted federal regulations interpreting Title VII, which were to provide guidance regarding the implementation of Title VII and are found in the Code of Federal Regulations ("the regulations").<sup>19</sup>

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13. 42 U.S.C. § 2000e-2 (2006).

14. *See id.*; Julie Goldschieid, *Domestic Violence as a Form of Discrimination*, in *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE* 389, 391 (2d ed. 2004).

15. 29 C.F.R. § 1608.1(a) (2012).

16. *Id.* § 1608.1(b).

17. U.S. GEN. ACCOUNTING OFFICE, *supra* note 8, at 19.

18. This intent was recently made more apparent in October 2012, when the EEOC published a fact sheet on their website outlining how Title VII applies to employees who have experienced domestic violence or dating violence, sexual assault, or stalking, complete with examples. EEOC, *supra* note 10.

19. 29 C.F.R. § 1608.1(a).

These regulations are subject to amendment through proposed rules.<sup>20</sup> The EEOC<sup>21</sup> also uses guidelines to interpret theories of workplace discrimination.<sup>22</sup> Courts, lawyers, and administrative agencies use the guidelines in order to locate appropriate legal doctrines, and the regulations clarify the application of law to fact as well. Federal regulations are regularly cited by courts but are persuasive authority and not binding.<sup>23</sup> Many causes of action under Title VII are described by these regulations and guidelines, and these may be used to protect survivors of domestic violence in the workplace.<sup>24</sup> Unfortunately, sexual harassment is the only form of sex discrimination described by the regulations used to interpret Title VII. Additionally, the disparate impact theory is not mentioned. In order for Title VII to effectively protect domestic violence survivors from discrimination in the workplace, regulations and guidelines interpreting the disparate impact theory should be added.

The subsections that follow will outline sexual harassment, disparate treatment, and disparate impact analyses and explain whether they apply to the scenarios described in Part III: when the abuser and survivor work together, when the abuser is harassing the survivor at her workplace (in person or through other means), or when the abuse has an indirect impact on the survivor's workplace.

#### A. SEXUAL HARASSMENT

In restricted circumstances, a domestic violence survivor may seek recourse through a claim of sexual harassment.<sup>25</sup> This limited theory provides an opportunity for women who are attacked by third parties.<sup>26</sup> In

20. See, e.g., Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70, 921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

21. The EEOC is the federal agency charged with enforcement of Title VII; see 29 C.F.R. §1608.1.

22. 29 C.F.R. § 1608.1(a).

23. See, e.g., Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 515 (1986).

24. See Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 177-90 (2003) (describing theories of sex discrimination).

25. EEOC, *supra* note 10.

26. In *Meritor Savings Bank v. Vinson*, the United States Supreme Court first recognized sexual harassment as a prohibited form of sex discrimination in the workplace. 106 S. Ct. 2399, 2411 (1996). In this case, Ms. Vinson brought action against her supervisor and the bank that she worked for, claiming that sexual advances by her supervisor created a hostile work environment. *Id.* at 2402. Sexual harassment claims are divided into two types: quid pro quo harassment and hostile work environment. 29 C.F.R. § 1604.11(a)(3) (2012). The details of these theories are complicated and beyond the scope of this article. See Calaf, *supra* note 24, at 177; see also Kristen L. Mix, *A Sexual Harassment Primer*, 29 COLO. LAW 33, 34 (Oct. 2000). See generally B.

some instances, this third party could be the woman's intimate partner who is also a co-worker or supervisor. In other cases, sexual harassment could occur where an employee's supervisor learns she has recently been subject to abuse, sees her as vulnerable, and when he makes sexual advances, she refuses and he terminates her employment.<sup>27</sup>

The North Dakota Human Rights Act (ND Human Rights Act) prohibits sex discrimination, among other protected classes.<sup>28</sup> In North Dakota, a survivor of domestic violence who meets jurisdictional requirements would file her action for sex discrimination against her employer with the North Dakota Department of Labor, Human Rights Division.<sup>29</sup> The North Dakota Supreme Court has stated, when interpreting the ND Human Rights Act, they will look to federal interpretations of Title VII for guidance.<sup>30</sup> This court also concluded that sexual harassment is an actionable form of sex discrimination under the ND Human Rights Act.<sup>31</sup> In this case, a male employee claimed his female supervisor sexually harassed him, as defined under the ND Human Rights Act, when she purportedly sent him cards, notes, and e-mails of a sexual nature, discussed sexual topics at work, bumped into him in the office, and once rubbed his back.<sup>32</sup> While the court found Opp did not have an actionable sexual harassment claim,<sup>33</sup> they did conclude that sexual harassment constituted sex discrimination under the ND Human Rights Act.<sup>34</sup>

Sexual harassment theories do act to protect domestic violence victims who are being harassed or assaulted by the abuser, who are also co-workers or supervisors at work, but it does not protect the survivor in situations where abuse is not taking place at work.<sup>35</sup> The sexual harassment theory

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Glenn George, *Theory & Practice: Employer Liability for Sexual Harassment*, 13 WM. & MARY J. WOMEN & L. 727, 728 (2007).

27. EEOC, *supra* note 10.

28. N.D. CENT. CODE § 14-02.4-01 (2009). The North Dakota Human Rights Act, codified in Title 14 of the North Dakota Century Code, covers discrimination in the areas of employment, public accommodations, housing, state and local government services, and credit transactions.

29. The EEOC works with Fair Employment Practice Agencies (FEPAs) to manage charges of discrimination. The North Dakota Department of Labor was designated as a FEPA in 1987. See *Discrimination in Employment*, ND.GOV, <http://www.nd.gov/labor/humanrights/employment.html> (last visited Apr. 12, 2013).

30. Opp v. One Source Mgmt., Inc., 1999 ND 52, ¶ 12, 591 N.W.2d 101, 105. The North Dakota Supreme Court addressed sexual harassment for the first time in this case. *Id.*

31. *Id.* ¶ 13, 591 N.W.2d at 106.

32. *Id.* ¶ 5, 591 N.W.2d at 104.

33. *Id.* ¶ 16, 591 N.W.2d at 107.

34. *Id.* ¶ 14, 591 N.W.2d at 106.

35. While further discussion of sexual harassment theories is beyond the scope of this paper, it is important to note that employers have been found liable under Title VII for cases where a female employee is harassed by customers of a business and the employer fails to take action to

does not apply to any of the three factual scenarios in Part III of this Article. As of this writing, the sexual harassment theory has not been applied in a factual scenario involving a survivor of domestic violence in North Dakota.

## B. DISPARATE TREATMENT

With regard to domestic violence survivors, disparate treatment would apply only when an employer intentionally treats a survivor of domestic violence different from other employees. This happens, for example, when a survivor is fired while her abuser is retained.<sup>36</sup> In order for a plaintiff to succeed under this theory, she must first be able to prove the employer intended to treat her differently from a male in a similar situation.<sup>37</sup> This is a difficult and high burden to meet, as it falls squarely under the *McDonnell Douglas* burden-shifting model.<sup>38</sup> Additionally, the disparate treatment theory is only applicable to a limited number of domestic violence survivors.<sup>39</sup> The two instances in which this theory may apply are: (1) situations where battered women seek a privilege extended to their male co-workers; or (2) where the same corporation employs both intimate partners and treats them differently upon learning about their abusive relationship.<sup>40</sup> Even if a domestic violence survivor is successful in proving a case for disparate treatment, the employer has a strong defense in justifying sex discrimination if they have a “bona fide occupational qualification.”<sup>41</sup> This means if the employer can prove that he or she acted out of necessity to the business, it is a full defense.<sup>42</sup> A common justification used by employers is the employee would have been fired anyway, and the abuse at work was simply the “straw that broke the camel’s back.”<sup>43</sup>

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protect them. *See, e.g.,* Lockhard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998) (employer may be held liable for harassing conduct of its customers).

36. *See supra* Part III.A.

37. *Id.*

38. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the burden-shifting model used to analyze disparate treatment cases). Under the burden-shifting model, the complainant in a Title VII trial must carry the initial burden of establishing their prima facie case of discrimination. *Id.* The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for his or her adverse employment action. *Id.*

39. Calaf, *supra* note 24, at 182.

40. *Id.* at 183 (referring to Rohde v. K. O. Steel Castings, Inc., 649 F.2d 317, 319 (5th Cir. 1981) and RAP, Inc. v. D.C. Comm’n on Rights, 485 A.2d 173, 178 (D.C. 1984)).

41. 42 U.S.C. §2000e-2(e)(1) (2006).

42. *Id.*

43. Rohde v. K. O. Steel Castings, Inc., 649 F.2d 317, 323 (5th Cir. 1981); *see also* Fisher v. Flynn, 598 F.2d 663, 655 (1st Cir. 1979), Whiteside v. Gill, 580 F.2d 134, 138 (5th Cir. 1978). In *Rohde*, K.O. executives testified that the incident between Linda and her abuser was “the straw that broke the camel’s back” and “the crowning blow” that caused a termination that was bound to happen eventually. *Rohde*, 649 F.2d at 323.

The disparate treatment theory has been successfully used in litigation. For example, in *Rohde v. K. O. Steel Castings, Inc.*,<sup>44</sup> Linda Rohde was successful in her Title VII claim where she experienced an altercation with her co-worker boyfriend.<sup>45</sup> First, Linda was able to prove she was treated different when she was fired and her abuser was retained.<sup>46</sup> Second, Linda's employer was unable to meet the burden of proving that Rohde would have been fired anyway, absent the discrimination as required by the *McDonnell Douglas* burden-shifting model.<sup>47</sup> Because of this, the burden did not shift back to Linda, and the court found her case was strong enough to undermine her employer's justification for firing her.<sup>48</sup>

While North Dakota courts have not addressed a factual scenario involving disparate treatment of a domestic violence survivor, disparate treatment sex discrimination in employment has been litigated. Following federal precedent, North Dakota courts have held disparate treatment sex discrimination has occurred when: (1) the plaintiff is a member of a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff's work performance was satisfactory to the employer; and (4) the plaintiff can show that they were treated adversely because of their protected status.<sup>49</sup> After this prima facie case has been met, the burden would shift to the employer to prove a legitimate, nondiscriminatory reason for the employment action.<sup>50</sup>

In order for a survivor of domestic violence to apply the disparate treatment theory, the survivor must be working with her batterer and intentionally treated differently than her batterer when an adverse employment action is taken against her.<sup>51</sup> The disparate treatment theory only reaches one of the three scenarios discussed in Part III of this Article.<sup>52</sup> Because the disparate treatment theory has a limited reach for survivors of

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44. 649 F.2d 317 (5th Cir. 1981).

45. *Rohde*, 649 F.2d at 323.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Miller v. Medcenter One*, 1997 ND 231, ¶ 13, 571 N.W.2d 358, 361; *see also* *Schuhmacher v. North Dakota Hosp. Ass'n*, 528 N.W.2d 374, 378 (N.D. 1995) (discussing the prima facie elements of intentional discrimination); *Schweigert v. Provident Life Ins. Co.*, 503 N.W.2d 225 (N.D. 1993).

50. *Schweigert*, 503 N.W.2d at 227 (analyzing the *McDonnell Douglas* burden-shifting model under North Dakota law).

51. *Miller*, ¶ 13, 571 N.W.2d at 361.

52. Referring to situations where the batterer and the survivor work together and the abuse takes place in the workplace, leading the employer to take action against the female victim and not the male batterer employee.



domestic violence, the disparate treatment impact theory is essential to ensure fair treatment of women in the workplace, as Title VII mandates.

### C. DISPARATE IMPACT

The final theory that should apply to survivors of domestic violence, and the focus of this paper, is the disparate impact theory. Disparate impact occurs when an employer has a facially neutral policy or takes an adverse employment action against a member of a protected class, and that action impacts the class as a whole.<sup>53</sup> Disparate impact does not require a survivor of domestic violence to prove her employer acted with discriminatory intent.<sup>54</sup> “Instead, she can bring a claim by demonstrating that a specific employment practice or policy induces a statistically significant disparity between female and male employees and that a causal relationship exists between the employment practice in question and the resulting disparity.”<sup>55</sup> This theory is essential for domestic violence survivors because it covers more factual scenarios than sexual harassment or disparate treatment, as will be shown through factual scenarios laid out in Part III.

As of this writing, there has been no application of the disparate impact theory to sex discrimination law in North Dakota. This does not mean it cannot be applied. Hypothetically, if a survivor who lived in North Dakota was fired because she missed work due to her fear that her abusive partner would find her there,<sup>56</sup> she could apply the disparate impact theory under the ND Human Rights Act because the ND Human Rights Act prohibits sex discrimination in employment.<sup>57</sup> The survivor would need to prove she is a member of a protected class, and her employer’s practice of firing her had a statistically significant impact on her class as a whole. The first element is met because she is a woman. The second element is proven by: (1) citing statistics that show domestic violence survivors are disproportionately women; and (2) that she was fired because of her status as a domestic violence survivor.<sup>58</sup> A full discussion of how this theory can help domestic violence survivors follows in Part IV.

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53. 42 U.S.C. §2000e-2(k)(1)(A) (2006).

54. Calaf, *supra* note 24, at 176.

55. *Id.* at 186-87 (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (explaining the requirement that an employment practice caused a statistical disparity)).

56. *See* Part II.C.

57. N.D. CENT. CODE § 14-02.4-01 (2009).

58. *See infra* note 85 (case citing the elements required to prove disparate impact).

### III. DOMESTIC VIOLENCE AND THE WORKPLACE

If a victim of domestic violence is employed, that violence may affect her work. It is common for employed domestic violence survivors to be fired by employers due to “absences, workplace disruptions, performance problems—or simple prejudice against victims.”<sup>59</sup> Between twenty-four and fifty-two percent of domestic violence victims in three studies reported they lost a job due, at least in part, to domestic violence.<sup>60</sup> A survivor who is terminated or treated adversely by her employer due to the impact of domestic violence or sexual assault may have a cause of action under the disparate impact theory in employment discrimination law.<sup>61</sup> These negative job consequences of domestic violence have a disproportionate impact on female employees because the vast majority of victims of domestic violence are women.<sup>62</sup> There are three distinct ways that domestic violence can impact a survivor’s employment: (1) when the batterer and the survivor work together, the abuse takes place in the workplace, leading the employer to take action against the female victim and not the male batterer employee; (2) when the perpetrator of the domestic violence harasses and stalks the survivor at work, and that negatively impacts her work performance and causes a perceived safety risk to the workplace, and the employer fires the female survivor of domestic violence as a result; and (3) when there is no direct contact by the perpetrator with the employed survivor’s workplace, but the abuse she is experiencing at home detrimentally impacts her ability to get to work and maintain her work performance and she is fired.<sup>63</sup> These impacts can manifest in many different factual scenarios. The following true vignettes demonstrate the impact domestic violence has on survivors in the workplace.

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59. See Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 677 (2008).

60. U.S. GEN. ACCOUNTING OFFICE, *supra* note 8, at 19.

61. Julie Goldscheid, *Disparate Impact’s Impact: The Gender Violence Lens*, 90 OR. L. REV. 33, 34 (2011).

62. CDC SURVEY, *supra* note 1, at 39.

63. See Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 293-97 (2006) (describing disparate treatment, disparate impact, and sexual harassment theories and how they apply to scenarios involving female victims of domestic violence). Being fired is only one example of an adverse employment action that could result from any of the three listed ways that domestic violence can impact a survivor’s employment.

## A. WORKING WITH THE ABUSIVE PARTNER

Kim (pseudonym) and her husband worked for the same large computer company.<sup>64</sup> Kim's husband physically assaulted her both at home and at work.<sup>65</sup> She reported the abuse to a supervisor, obtained a restraining order against her husband, which included the workplace, and hoped her employer would enforce it.<sup>66</sup> After a few weeks, Kim's husband assaulted her at work again, so she called the police and he was arrested.<sup>67</sup> Kim thought her employer would take disciplinary action against her husband, but after two days nothing was done. Instead, Kim was terminated for "crying in the lobby," and her husband was able to retain his job.<sup>68</sup>

Situations like this are all too common and effectively re-victimize the survivor.<sup>69</sup> In this scenario, the discriminatory act takes place when the employer becomes "fed up" with the survivor's "outbursts" at work, and apparent inability to complete her job-related tasks; the employer takes action and fires her, while retaining her abuser. This is sex discrimination as defined under Title VII because the employment action is effectively *treating* women differently from men.<sup>70</sup> The employer is victimizing the survivor by firing her, and allowing her abuser, the cause of her outbursts and inability to function in the workplace, to remain employed.

## B. WHEN THE ABUSIVE PARTNER IS NOT A CO-WORKER

In many cases a survivor of domestic violence does not work with her abuser, but the effects of the violence she is facing at home carry into the workplace. Cindy (pseudonym) lives with her boyfriend, and one night at home he rapes her.<sup>71</sup> Cindy finds she is experiencing trauma-related anxiety attacks and begins seeing a rape counselor.<sup>72</sup> Her rapist begins to stalk her at work through harassing phone calls; he is angry because she

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64. *Id.* at 276 (citing ROBIN R. RUNGE & MARCELLENE E. HEARN, EMPLOYMENT RIGHTS ADVOCACY FOR DOMESTIC VIOLENCE VICTIMS, DOMESTIC VIOLENCE REPORT 17-18, 26-29 (Dec/Jan 2000)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Porter, *supra* note 63, at 280.

70. *See, e.g.,* Rohde v. K.O. Steel Castings, Inc., 649 F.2d 317, 323 (5th Cir. 1981) (holding female employee established a prima facie case for employment discrimination under Title VII when she was terminated after an altercation with a male coworker with whom she had a relationship, while the male coworker was retained).

71. Robin R. Runge, *Employment Rights of Sexual Assault Victims*, 40 CLEARINGHOUSE REV. 299, 299 (2006).

72. *Id.*

reported the rape and agreed to assist in the prosecution.<sup>73</sup> She does not want to tell her employer about what happened because she is embarrassed, but her anxiety attacks and his phone calls are causing her to breakdown at work, affecting her ability to do her job.<sup>74</sup> More than anything, Cindy probably wanted to remain safe at work and keep her job.<sup>75</sup> Instead, if she tells her employer that she is a domestic violence survivor, she may have her hours cut back, be overlooked for promotions, or even terminated.<sup>76</sup>

### C. INDIRECT IMPACT ON THE SURVIVOR'S EMPLOYMENT

Mary (pseudonym) had a job as a counselor for people living with autism and she loved it.<sup>77</sup> She did not work with her partner. She was unhappy in her relationship, and when she attempted to end it, her partner beat her so badly she was hospitalized.<sup>78</sup>

A year after the breakup, Mary's ex-partner repeatedly threatened to kill her, harassed her, and stalked her while she pursued prosecution for the assault. Terrified, she obtained a civil protection order against her ex-partner and had it renewed several times. As a result of this continual harassment, Mary often had difficulty sleeping at night, anxiety-ridden and fearful of how her ex-partner might harm her.<sup>79</sup>

Throughout the process of obtaining judicial restraining orders and attending domestic violence counseling sessions, Mary missed four days of work.<sup>80</sup> One weekend, Mary's ex-partner showed up at her home with a gun and threatened to kill her. Mary fled to a friend's house in another city, and on Monday, when she was leaving her friend's house to go to work, she saw her ex-partner waiting for her outside.<sup>81</sup> Afraid of another attack, Mary called the police and missed work that day.<sup>82</sup> "Her employer fired her two days later, citing her poor attendance record."<sup>83</sup> Mary's story depicts the manifestation of domestic violence in the workplace only through the survivor herself, as the abuser had no direct contact with the workplace.

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73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

77. Robin R. Runge, *Double Jeopardy: Victims of Domestic Violence Face Twice the Abuse*, 25 HUM. RTS. 19, 19 (1998).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

#### IV. USING THE DISPARATE IMPACT THEORY TO PROTECT WORKING DOMESTIC VIOLENCE SURVIVORS

Facially neutral employment policies or actions can have a “disparate impact” on an employee that is a member of a class protected by Title VII.<sup>84</sup> In *Griggs v. Duke Power Co.*,<sup>85</sup> the United States Supreme Court provided guidance on how a plaintiff is to prove discrimination under the disparate impact theory. In *Griggs*, a class of African-American employees brought suit against their employer because they were required to have obtained a high school education or pass a standardized general intelligence test as a condition of employment or to transfer jobs, where neither related to job performance. In cases like this where disparate impact is alleged, the plaintiff employees need to prove: (1) they are a member of a protected class under Title VII; and (2) the employer’s neutral policy or practice has an adverse impact on the class as a whole.<sup>86</sup> Statistical evidence is often required to prove the second part of a disparate impact claim.<sup>87</sup> For example, in *Griggs*, the employees proved the employer’s policy of requiring a high school diploma for higher paid jobs had an adverse impact on African-Americans because they were disproportionately less educated than white employees, due to long-standing inferior educations received in segregated schools.<sup>88</sup> Similarly, using existing statistical evidence that shows domestic violence survivors are primarily women can be used to support the disparate impact theory in employment discrimination.

Being terminated for missing work to heal from injuries inflicted by an abuser is one example of how a survivor of abuse may lose her job due to domestic violence. At first glance, this action may seem like an employer is simply exercising the legal right to terminate an at-will employee. However, it can be persuasively argued that an employer is discriminating against the female employee when the employer systemically fires the employee because of her status as a survivor. In general, it is legal for an employer to fire an at-will employee who is a woman, for missing too much work or for poor job performance. However, the employer violates Title VII when the employer takes adverse action, (i.e., termination), against a woman because of her status as a survivor of domestic violence.

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84. See 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

85. 401 U.S. 424 (1971).

86. See, e.g., *id.* at 429-30.

87. *Id.* at 430.

88. *Id.*

The disparate impact theory is less frequently used in employment discrimination law than some suggest it should be.<sup>89</sup> Critics state the theory was a mistake in the first place and ask why changes need to be made at all.<sup>90</sup> For example, Michael Selmi, a harsh critic of the disparate impact theory, asserts it is more difficult to prove than intentional discrimination, because the business necessity part of the test is difficult to satisfy.<sup>91</sup> Without being able to prove your employer's action is not necessary for his or her business, the court's decision on this is entirely subjective, leaving the court able to make "normative judgments regarding the merits of the challenged practice."<sup>92</sup> While it is true that courts may be reluctant to classify an action as discriminatory, I would argue it is even less likely for courts to find intentional discrimination. By creating a place in the regulations to explain the discriminatory effect that unintentional acts are having, employers may have the opportunity to correct behavior that has been hurting a protected class of people. The fact that employers have an easy time satisfying the burden of proving a business necessity should not preclude a plaintiff from challenging a discriminatory practice.

As with the discriminatory effect standard proposed under the FHA, Title VII could easily outline the required business necessity burden. I agree with Selmi when he states, absent a "smoking gun" convincing courts that discrimination exists may be difficult for the plaintiff, let alone trying to draw an inference from a seemingly neutral act.<sup>93</sup> However, I disagree with Selmi that this is reason enough to give up on disparate impact, classify it as a mistake, and try to expand the definition of intent instead.<sup>94</sup>

Expanding the definition of intentional discrimination will not protect domestic violence survivors in the workplace because it will not address the impact that unintentional discrimination has on these women. Because the vast majority of domestic violence survivors are women, discriminating against a domestic violence survivor is sex discrimination.<sup>95</sup> Most employers are not likely intentionally discriminating against women, but the end result is the same. I would argue the best way to protect these women is to clarify and strengthen the discriminatory effects standard for finding sex discrimination under Title VII.

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89. *Id.*; Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 985-88 (2005) (arguing for the revival of the disparate impact theory).

90. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 753-55 (2006).

91. *Id.* at 706, 769.

92. *Id.* at 769.

93. *Id.* at 768.

94. *Id.*

95. CDC SURVEY, *supra* note 1, at 39.

Domestic violence is a nationwide problem.<sup>96</sup> If this nation wants to move toward ending violence against women, the discriminatory acts that victimize survivors of domestic violence need to stop. Wrongfully terminating a woman, who is a survivor of domestic violence, could prevent her from fleeing her abuser, the very thing that society is constantly criticizing her for not doing.<sup>97</sup>

## V. CHANGES IN TITLE VII INTERPRETATION

Title VII's federal regulations do not properly describe how the disparate impact theory can be used to shield the protected classes from unintentional discrimination in the workplace. In order to increase protections for survivors of domestic violence, I propose two changes. First, the regulations need to not only mention, but also describe, the disparate impact theory and how it can be used to protect survivors of domestic violence from workplace discrimination. Second, cases in which a domestic violence survivor does not work with her abuser, but is fired or otherwise adversely treated for reasons that are attributable to the abuse, should be added as examples in the federal regulations. It would be extremely influential for the EEOC to consider proposing a rule that would add the discriminatory effects standard or disparate impact theory to the regulations as well. Specifically, it would make the most difference to domestic violence survivors and women as a class if guidelines were added to the sex discrimination section.

Changes in the interpretation of Title VII would allow lawyers to understand how discrimination against domestic violence survivors can be argued under the disparate impact theory. Clearer guidelines or regulations would also allow domestic violence survivors to file charges of discrimination with the EEOC (or at the local level, with the North Dakota Department of Labor) without the assistance of an attorney—a cost that many cannot afford. As Selmi pointed out, it was the EEOC, and not the courts, that originally came up with the disparate impact theory as an alternative approach to cases of employment discrimination.<sup>98</sup>

While it is true today that a woman in this situation could bring a charge of sex discrimination to the EEOC, without clarification in the regulations it would be unlikely for a favorable result to be achieved. One

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96. *Id.*

97. See Robin H. Thompson, *Domestic Violence and Its Effects on the Workplace*, in AM. BAR ASS'N, *THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE* 364, 367 (2d ed. 2004) (stating that maintaining steady employment is central to a victim's security and ability to be independent from an abuser).

98. Selmi, *supra* note 90, at 715.

factor that may deter women from filing claims of sex discrimination is a lack of understanding of the law.<sup>99</sup> The same holds true for attorneys who represent these women. This is not only because it is rarely used but also because it is undeveloped in case law. Changing the regulations could also increase private rights of action on behalf of domestic violence victims who are discriminated against. “By making explicit the ways in which domestic and sexual violence continue to be a site of sex discrimination, employment law can more effectively address impermissible discrimination, promote retention of valued employees, and help domestic and sexual violence survivors attain safety and economic security.”<sup>100</sup> One of the best ways to make this explicit is through significant changes in the federal regulations interpreting sex discrimination under Title VII.

#### VI. APPLICATION OF TITLE VII TO FEMALE EMPLOYEES WHO ARE SURVIVORS OF DOMESTIC VIOLENCE

Employment discrimination against survivors of domestic violence is not being addressed by the only applicable theory: disparate impact. Women, like Mary or Cindy, are terminated for reasons that are completely the fault of their abusive partner. Title VII states employers cannot discriminate against someone on the basis of sex.<sup>101</sup> Due to the proportion of women who are domestic violence survivors, when an employer fires her for missing work, for medical treatment, to attend court, or other domestic violence related issues, the employer is effectively firing her for being a victim.<sup>102</sup> Disparate impact is the most applicable theory to seek recourse against the employer’s discriminatory acts but as it stands it is not being used. The problem is that advocates, lawyers, and administrative agents either do not know how to apply the theory, or they do not know it is the appropriate legal tool in the first place—there needs to be more guidance regarding the disparate impact theory as an appropriate doctrine for addressing discrimination and regulations to clarify how to apply the disparate impact theory.

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99. Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61, 84 (2008).

100. *Id.* at 123.

101. 42 U.S.C. § 2000e-2 (2006).

102. Mary’s situation is one where there is no direct contact by the perpetrator with the employed survivor’s workplace, but the abuse she is experiencing at home detrimentally impacts her ability to attend work and maintain her work performance and she is fired.



## A. DISPARATE IMPACT'S LACK OF INFLUENCE

Despite the fact that the disparate impact theory would cover a breadth of discriminatory situations in the workplace, very few survivors use the doctrine in court or file charges of sex discrimination with the EEOC.<sup>103</sup> Women who do not work with their batterers, who are not harassed by their abusers in the workplace, or who do not work for an organization that practices overt discrimination against battered women, can only sue under the disparate impact theory.<sup>104</sup> The low number of employment discrimination claims filed by domestic violence survivors may be attributable to factors such as a victim's reluctance to self-identify, lack of understanding of employment rights, and her lawyer's failure to recognize a domestic violence victim may have suffered employment discrimination based on her sex in the first place.<sup>105</sup> In addition to these barriers, the evidentiary requirements for the disparate impact theory are still difficult to meet, even though proof of discriminatory intent is not required.<sup>106</sup> "Even in the context of domestic violence, a plaintiff would still have to rely on statistics to demonstrate that . . . a facially neutral practice of terminating any employee injured in a domestic violence incident impacts more women than men."<sup>107</sup> These statistics are relatively easy to find but may be a reason why the theory is underused. The above reasons also expose a crack in existing employment discrimination law where survivors of domestic violence may fall through.

The disparate impact theory has the capacity to reach and protect many domestic violence survivors because it protects against common situations of implicit discrimination. These situations include, but are not limited to, Mary's situation, where she experiences domestic violence at work through the affects it has on her daily life and not because she is being assaulted *at* work. When a facially neutral policy, such as firing a domestic violence survivor because of her status as a survivor, is upheld, so is discrimination against women.

## B. LIMITATIONS OF TITLE VII

In 1991, Congress amended Title VII to include "disparate impact" for the first time.<sup>108</sup> The statute states an unlawful employment practice based

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103. Calaf, *supra* note 24, at 186.

104. *Id.*

105. Goldscheid, *supra* note 99, at 84.

106. 42 U.S.C. § 2000e-2(k)(1)(A).

107. Calaf, *supra* note 24, at 187.

108. See Civil Rights Acts of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (1991) (current version at 42 U.S.C. § 20003-2(k)(1)A) (2006)).

on *disparate impact* is established under this title in two circumstances.<sup>109</sup> First, the complaining party needs to demonstrate that the respondent used a particular employment practice that caused a disparate impact on the basis of their membership in a protected class.<sup>110</sup> Alternatively, the complaining party could make a successful disparate impact claim by identifying an adequate, alternative employment practice and the employer refusing to adopt such a practice.<sup>111</sup> Title VII itself is not the problem; rather, the interpretation of the disparate impact theory within Title VII is lacking.

As previously mentioned, there are no North Dakota examples of the disparate impact theory being used in sex discrimination under the ND Human Rights Act, let alone one where it was applied to a situation in which a survivor of domestic violence was discriminated against. Critics may argue this absence of case law is proof the theory is not needed; however, it is more likely because lawyers do not know how to identify and apply the disparate impact theory for their clients in the first place. Again, this does not mean that the ND Human Rights Act is the problem. Rather, the problem lies in the interpretation of the Act.

With regard to the disparate impact theory, simply looking to the statutory text of Title VII will not always give you a clear answer.<sup>112</sup> “The relevant analysis of Title VII’s disparate impact provisions would accordingly focus on the statutory language that creates liability for disparate impact . . . . [L]iability for disparate impact in employment practices was engineered by the EEOC and the courts before it was ever clearly approved by Congress.”<sup>113</sup> Title VII does not instruct how courts should apply the theory in sex discrimination. In 2010, the United States Supreme Court decided *Lewis v. City of Chicago*,<sup>114</sup> holding it was not the court’s job to assess various legal approaches and choose the best one.<sup>115</sup> In his opinion, Justice Scalia stated:

Our charge is to give effect to the law Congress enacted. By enacting § 2000e–2(k)(1)(A)(i), Congress allowed claims to be

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109. 42 U.S.C. § 2000e-2(k)(1)(A) (emphasis added).

110. *Id.* Protected classes include race, color, religion, *sex*, or national origin. The respondent must also fail to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. *Id.* (emphasis added).

111. *Id.*

112. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506 (2003).

113. *Id.*

114. 130 S. Ct. 2191 (2010).

115. *Lewis*, 130 S. Ct. at 2200. Lewis alleged the City’s practice of selecting only applicants who scored an eighty-nine or above on a written test for firefighters had a disparate impact on African American employees. *Id.*

brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past. If that effect was unintended, it is a problem for Congress, not one that federal courts can fix.<sup>116</sup>

The EEOC guidelines interpret the theories posed in Title VII that may be used in employment discrimination. Although not binding, courts often look to the administrative agencies charged with enforcing the laws for direction. The problem is if you look up "sex discrimination" in Chapter XIV of Title 29 of the regulations you will not see disparate impact or disparate treatment described there.<sup>117</sup> As a matter of fact, the only theory of sex discrimination fully described in this section is sexual harassment.<sup>118</sup> Sexual harassment is only one of three ways a domestic violence survivor may bring an action of sex discrimination against her employer;<sup>119</sup> therefore, the regulations seem to fall short. In fact, the regulations contained in Part 1604 describing sex discrimination do not describe disparate treatment or impact theories. I propose that Part 1604 of the regulations should outline how each of these theories may be used in sex discrimination cases, and offer examples of each.<sup>120</sup> Discrimination against domestic violence survivors in the workplace could be a featured example used to explain how survivors are being discriminated against and how it is in fact sex discrimination. It follows that if these proposals were implemented at the federal level, North Dakota courts could look to them for guidance as well.<sup>121</sup>

### C. DISPARATE IMPACT IN HOUSING LAW: A COMPARISON

Successful arguments under the disparate impact theory have been made in a housing context where domestic violence survivors find themselves adversely treated by landlords.<sup>122</sup> For example, one domestic

116. *Id.*

117. 29 C.F.R. §§ 1600-1691 (2012).

118. *Id.* § 1604.

119. Calaf, *supra* note 24, at 177.

120. The EEOC fact sheet published on their website is a great place to start for examples of disparate treatment against domestic violence survivors that are recognized by the EEOC as forms of sex discrimination. EEOC, *supra* note 10.

121. *See Schweigert v. Provident Life Ins. Co.*, 503 N.W.2d 255, 257 (N.D. 1993) (stating that the North Dakota Supreme Court looks to federal interpretations of Title VII where state case law is lacking).

122. *See, e.g.*, Memorandum from Sara K. Pratt, Deputy Assistant Sec'y for Enforcement and Programs of U.S. Dep't of Hous. and Urban Dev. to the Directors of the Office of Fair Hous. and Equal Opportunity (Feb. 9, 2011) (discussing *Alvera v. Creekside Vill. Apts.*, No. 10-99-0538-8; *see also Bouley v. Young-Sabourin*, 394 F. Supp. 2d 675, 675 (D. Vt. 2005). *See*

violence survivor brought a claim under the Fair Housing Act (FHA) challenging her eviction under her landlord's zero-violence policy using the disparate impact theory.<sup>123</sup> An unlawful termination in the employment law context may be considered analogous to an unlawful eviction in housing.<sup>124</sup> For example, Tiffani Alvera favorably settled her case when her landlord wrongfully evicted her after obtaining a protection order against her abusive husband.<sup>125</sup> For Tiffani, this was a discriminatory event that had a disparate impact on her sex.<sup>126</sup> The same approach should apply in discriminatory decisions made in employment discrimination cases.

The United States Department of Housing and Urban Development (HUD)<sup>127</sup> recently proposed regulations interpreting the FHA that would improve use of the disparate impact theory in housing law.<sup>128</sup> The rule known as, "Implementation of the Fair Housing Act's Discriminatory Effects Standard" proposed on November 16, 2011, would establish uniform standards in determining discriminatory acts under the FHA.<sup>129</sup>

Under this rule, liability is determined by a burden-shifting approach. The plaintiff or complainant must first bear the burden of proving its prima facie case of either disparate impact or perpetuation of segregation, after which the burden shifts to the defendant or respondent to prove that the challenged practice has a necessary and manifest relationship to one or more of the defendant's or respondent's legitimate, nondiscriminatory interests.<sup>130</sup>

The interpretation of the FHA and Title VII are frequently compared to each other in the courts<sup>131</sup> and the same burden-shifting approach is mentioned in the statutory text of Title VII.<sup>132</sup> "HUD's proposal is

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*generally* Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U.J. GENDER SOC. POL'Y & L. 377 (2003).

123. See Memorandum from Sara K. Pratt, *supra* note 122, at 10.

124. Brief for the American Civil Liberties Union, et al. as Amici Curiae Supporting Respondents at 22-34, *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010).

125. Memorandum from Sara K. Pratt, *supra* note 122, at 121.

126. *Id.*

127. HUD is the federal agency charged with enforcement of Title VI of the Civil Rights Act.

128. At the time of this writing, the proposed rule was not in effect. As of February 15, 2013, the Implementation of the Fair Housing Act's Discriminatory Effects Standard became a final rule and took effect on March 18, 2013. 78 F.R. 11459, 24 C.F.R. 100, *available at* <https://federalregister.gov/a/2013-03375> (last accessed April 26, 2013).

129. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70,921 (proposed Nov. 16 2011) (to be codified at 24 C.F.R. pt. 100).

130. *Id.* at 70, 923-24.

131. See, e.g., *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935-41 (2d Cir. 1988) (using Title VII precedent to analyze disparate treatment in a FHA case); *id.* at 935 (citing cases that have noted the persuasive parallel between Title VII and Title VIII).

132. 42 U.S.C. § 2000e-2(k)(1)(A) (2006).

consistent with the discriminatory effects standard confirmed by Congress in the 1991 amendments to Title VII.”<sup>133</sup> The United States Supreme Court held Title VII reaches employment practices that have a discriminatory effect in cases such as *Griggs*,<sup>134</sup> yet the regulations interpreting Title VII are not as clear as those proposed to further interpret discriminatory effects under the FHA. The Court in *Griggs* also asserted “[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”<sup>135</sup> *Griggs* was a monumental case in employment discrimination law because it established use of the disparate impact theory.

The intended place for the proposed rule in Title 24 of the regulations is Part 100, “Discriminatory Conduct Under the Fair Housing Act.”<sup>136</sup> The function of this section is to describe prohibited conduct under the FHA.<sup>137</sup> It also serves as a guide, not unlike the function of Chapter XIV of Title 29 as it relates to prohibited practices under Title VII.<sup>138</sup> The proposed rule would add a subpart to 24 C.F.R. 100 that describes how liability might be established under the FHA using a discriminatory effect standard.<sup>139</sup> This standard is essentially another way of describing the disparate impact theory. The new section not only defines the standard, but it goes on to describe the necessary burdens that a complainant would have to meet.<sup>140</sup> In relevant part, the new section, 100.500 describes the discriminatory effect standard as follows:

Liability may be established under this subpart based on a housing practice’s *discriminatory effect*, as defined in § 100.500(a), even if the housing practice is not motivated by a prohibited intent. The housing practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The burdens of proof for establishing a violation under this subpart are set forth in § 100.500(c).<sup>141</sup>

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133. *See id.* § 2000-e-2(k).

134. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

135. *Id.* at 429-30.

136. 24 C.F.R. pt. 100.

137. 42 U.S.C. § 3601.

138. 29 C.F.R. ch. XIV.

139. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70,865, 70,926 (Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100), *see also supra* note 128.

140. *Id.*

141. *Id.*

Furthermore, the rule defines *discriminatory effect* as a housing practice that:

[A]ctually or predictably: (1) [R]esults in a disparate impact on a group of persons on the basis of race, color, religion, sex, handicap, familial status, or national origin; or (2) [H]as the effect of creating, perpetuating, or increasing segregated housing patterns on the basis of race, color, religion, sex, handicap, familial status, or national origin.<sup>142</sup>

The above description and definition of this theory will make a significant difference in assisting domestic violence survivors in bringing housing discrimination claims.<sup>143</sup> I would anticipate the same important difference could be made in the employment law arena if the EEOC were to propose a similar rule amending the guidelines on sex discrimination.

Critics of the discriminatory effect standard may argue the theory poses too much of a burden on landlords and will open the floodgates for discrimination claims against companies who are trying to maintain their businesses. However, the proposed rule accounts for businesses that have a justifiable reason for the conduct in question. As in Title VII cases, in claims of housing discrimination the burden shifts from the complainant or plaintiff to the respondent or defendant to prove they have a “legitimate, nondiscriminatory” interest in supporting the challenged practice.<sup>144</sup> This means the landlord, or apartment management company, has a business necessity defense which may be used to prove the action was legitimate. Employers would also have a chance to prove the adverse employment action taken has a legitimate, nondiscriminatory purpose in maintaining the business.

## VII. IMPLEMENTING CHANGES AND STRENGTHENING DISPARATE IMPACT

The federal regulations do not sufficiently describe the disparate impact theory and how it can be used to shield the protected classes from unintentional discrimination in the workplace. I have proposed changes that would clarify the interpretation of Title VII in a way that uses it as Congress intended: to protect against sex discrimination and thus protect survivors of domestic violence in the workplace as well. First, the

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142. *Id.*

143. *See generally* Brief for the American Civil Liberties Union, et al. as Amici Curiae Supporting Respondents at 22-34, *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010).

144. Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. at 70,924.

regulations interpreting Title VII need to not only mention, but also describe the disparate impact theory in a way similar to the rule proposed by HUD in interpreting the FHA. This would clarify the standard for determining an employment act that has a discriminatory effect. Housing and employment law have often been compared in discrimination cases,<sup>145</sup> and I see no reason why the standards used to interpret disparate impact under the FHA cannot be transferrable to Title VII. Second, cases in which a domestic violence survivor does not work with her abuser, but is fired or otherwise adversely treated for reasons that are attributable to the abuse, should be added as examples in the regulations.

The only theory of sex discrimination under Title VII currently described in the regulations that could be used to protect a survivor of domestic violence is sexual harassment, a narrow theory applicable only to instances where the survivor's violent partner is a co-worker abusing her at the workplace.<sup>146</sup> Employment decisions that have a disparate impact on domestic violence survivors also have a disparate impact on women as a class due to domestic violence predominantly impacting women.<sup>147</sup> Claims brought under this theory should be analyzed as affecting women as a whole class, rather than a single survivor in her workplace.<sup>148</sup> Analyzing claims this way would bring to light the importance of the disparate impact theory by showing the larger impact it can have on protecting women. In order to achieve this goal, it would be beneficial to first add the disparate impact theory as an example of sex-based discrimination after section 1604.11 on sexual harassment. The section could be added as 1604.12 and be titled "discriminatory effect prohibited" or "proving sex discrimination under the disparate impact theory" and describe how a plaintiff may make a claim of discrimination under this standard. Ideally, this new section would also include subsections of examples of workplace discrimination against domestic violence survivors.

HUD has already done much of the work in their recent proposal for the FHA regulations that the EEOC would have to do in order to propose an additional rule in their Title VII regulations. I anticipate that a proposal to expand the regulations for discrimination based on sex found in part 1604 would look very similar to those proposed as "Subpart G" for the FHA

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145. See generally *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988).

146. See *supra* text accompanying note 35.

147. GOLDSCHIED & RUNGE, *supra* note 4, at 62.

148. See *id.* (describing the importance of analyzing "single decision" cases under the disparate impact theory; this analysis is important but beyond the scope of this writing).

regulations.<sup>149</sup> Specific examples of prohibited acts of discrimination to be analyzed under the disparate impact theory or “discriminatory effects standard” as it is described in HUD’s proposed rule should be added to the Title VII regulations.<sup>150</sup> This could be incorporated through describing a scenario where an employment action taken against a domestic violence survivor would lead to a disparate impact on women as a class. For example, if a domestic violence survivor is terminated after disclosing to her employer she is a survivor of violence and needs a day off to obtain a protection order, and she is subsequently fired for this request or for the employer’s stated fear of her bringing violence into the workplace, that would be a scenario that represents unlawful discrimination under Title VII using the disparate impact theory. Essentially, these cases would include instances where a domestic violence survivor is terminated for a reason that is attributable to her status as a survivor and not to particular employment policies that would naturally be subject to disparate impact review.<sup>151</sup>

### VIII. CONCLUSION

In order to move toward ending violence against women, the discriminatory acts that doubly victimize survivors of domestic violence need to stop. By wrongfully terminating a woman who is a domestic violence survivor, employers could be precluding her from fleeing her abuser. The disparate impact theory is important in the protection of survivors and should not only be maintained, but also strengthened. Interpretation of Title VII should be clarified to include a breakdown of the disparate impact theory and explanation of the class-wide discrimination caused by discriminating against a survivor of domestic violence. Adding the disparate impact theory to the guidelines on discrimination based on sex in the Code of Federal Regulations would ultimately work toward ending violence against women at both state and national levels, through protecting survivors from acts of discrimination in the workplace.

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149. As of this writing, the FHA regulations I have mentioned have not yet been enacted.

150. *See generally* Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. at 70,921.

151. GOLDSCHIED & RUNGE, *supra* note 4, at 48.