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Don't Discriminate against Distinct Or Highly Personal Harms: An Analysis of Section 717 of Title VII Pertaining to Preemption of Alternative Theories of Recovery by Federal Employees

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DON'T DISCRIMINATE AGAINST DISTINCT OR HIGHLY PERSONAL HARMS: AN ANALYSIS OF SECTION 717 OF TITLE VII PERTAINING TO PREEMPTION OF ALTERNATIVE THEORIES OF RECOVERY BY FEDERAL EMPLOYEES

A. INTRODUCTION

An outstanding issue within federal courts is whether a federal employee may bring suit sounding in both tort and Title VII. Central to this analysis is the judicial disposition of the courts regarding the meaning given to section 717 of Title VII of the Civil Rights Act of 1964 as the “exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination.”¹ Although preemptive limits were outlined in the 1976 Supreme Court decision, *Brown v. Gen. Servs. Admin.*,² courts are split as to who may be made a proper defendant, and whether causes of action falling outside of being solely discriminatory may be brought in conjunction with a Title VII claim.³ As recently as August 2012, when *Charlot v. Donley*⁴ was decided by a South Carolina District Court, a clear consensus does not exist.⁵ This note will present case law, academic writing, and policy arguments intending to resolve this uncertainty and define the reach of the *Brown* decision.

¹ See *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 829 (1976) (recognizing Title VII as “exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination.”); see also *infra* Part C(II)(c) (explaining differences among circuit and district courts in interpreting preemptive language of *Brown* decision); *infra* Part B (providing background about Title VII).

² 425 U.S. 820 (1976).

³ See *infra* Part C.II. (outlining split among courts). Causes of action may include, but are not limited to, intentional and negligent torts derived under state common law or authorized under the Federal Torts Claim Act (“FTCA”). See *infra* Parts C.II.a.-c. (providing cases and their causes of action).

⁴ No. 3:11-579-MBS-SVH, 2012 WL 3264568 (D. S.C. Aug. 9, 2012). In October of 2012, a Federal District Court in Mississippi heard a Title VII preemption case and held the opposite of *Charlot*. See *Stamper v. Shinseki*, No. Civ. 311cv546, 2012 WL 5286953, at *10 (S.D. Miss. Oct. 24, 2012) (holding Title VII preempted state law tort claims, including those against individual employees).

⁵ See *Charlot*, 2012 WL 3264568, at *4 (acknowledging split among circuits).

B. FACTS

In 1964 the United States Congress passed Title VII of the Civil Rights Act of 1964, making employment discrimination on the basis of race, color, religion, sex, or national origin illegal.⁶ The 1964 version of the law only acted upon private employment, and not federal employment.⁷ In 1972, Congress amended the Civil Rights Act of 1964 with the Equal Employment Opportunity Act of 1972 (“EEOA”).⁸ The amendment gave

⁶ Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e - 2000e-17 (1970)). Section 703 of Title VII states:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Acts of 1964, tit. VII, § 703 (codified as amended at 42 U.S.C. §§ 2000e-2(a)(1)-(a)(2) (1970)). Section 704 of Title VII states, “[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII].” Civil Rights Acts of 1964, tit. VII, § 704 (codified as amended at 42 U.S.C. § 2000e-3(a) (1970)).

⁷ See 42 U.S.C. § 2000e(b) (applying protections of Title VII only to private employees); see also *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 825 (1976) (noting at time of decision “Title VII did not protect federal employees”). Prior to the passage of 42 U.S.C. § 2000e-16, discrimination claims were handled intra-agency. *Brown*, 425 U.S. at 825. In some cases, an outside hearing examiner would be utilized; however, the examiner had no power to conduct an independent investigation and findings were seen purely as recommendations. *Id.* Dissatisfied employees did have an option for review first with the Board of Appeals and then review by the Civil Service Commission (“CSC”). *Id.* Despite such options, federal employees were skeptical “regarding the Commission’s record in obtaining just resolutions of complaints and adequate remedies . . . in turn, discourag[ing] persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impair[] any future hope of advancement.” *Id.* at 825-26 (quoting S. REP. NO. 92-415, at 14 (1971)); see also S. REP. NO. 92-415, p. 14 (1971). For those who were dissatisfied with a CSC decision, they could bring an action seeking to enjoin unconstitutional conduct; however, these actions often provided scant relief. *Brown*, 425 U.S. at 826 (explaining minimal likelihood of recovering backpay or compensatory relief).

⁸ 42 U.S.C. § 2000e-16 (1972). Legislative adoption of Title VII § 717 waived sovereign immunity of the Federal Government from suits by employees. *Id.*; see Major Gilligan, Litigation Division Note, *Federal Agency “Joint Employer” Liability: Employment Discrimination Claims by Independent Contractor Employees*, 1999-DEC ARMY LAW. 54, 55 (1999). Title VII § 717 states:

All personnel actions affecting employees or applicants for employment . . . in military departments . . . in executive agencies . . . in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Co-

federal employees an opportunity to pursue discrimination claims against their federal employers after exhausting administrative remedies.⁹

Title VII litigation has evolved to present varying claims under the heading of employment discrimination.¹⁰ Such claims include, but are not limited to: disparate treatment or intentional discrimination claims, where a protected class is factored into an employment decision, and harassment based discrimination, including sexual harassment and hostile work environment claims, herein described as “decision-based” and “harassment-based” discrimination claims, respectively.¹¹ An understanding of these concepts affords the opportunity to distinguish the *Brown* decision from the most recent developments in Title VII litigation within *Charlot*.¹²

A “decision-based” discrimination action includes the more common disparate treatment and disparate impact claims.¹³ In a disparate treatment violation, the employer would have taken an employment action because of a protected characteristic.¹⁴ Disparate impact suits involve an employer’s consideration of a “facially neutral criterion,” which has a disproportionate impact on a protected class.¹⁵ These two types of claims make up a majority of Title VII litigation.¹⁶

Beyond “decision-based” discrimination, “harassment-based” discrimination makes up a second class of Title VII claims.¹⁷ These Title VII claims include “unwanted sexual advances, requests for sexual favors or

lumbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on *race, color, religion, sex, or national origin*.

42 U.S.C.A. § 2000e-16 (emphasis added); See also Sandra Fluke & Karen Hu, *Employment Discrimination Against LGBTW Persons*, 12 GEO. J. GENDER & L. 613, 624 (2011) (noting only applicant, current, or former federal employee may bring Title VII claim).

⁹ See 42 U.S.C. § 2000e-16(c); *Brown*, 425 U.S. at 832; see also *infra* notes 122-127 and accompanying text (discussing administrative remedies).

¹⁰ See U.S. DEPT. OF JUSTICE, *Employment Section Overview*, <http://www.justice.gov/crt/about/emp/overview.php> (last visited Jan. 27, 2013).

¹¹ See *id.* (presenting various Title VII claims).

¹² See *infra* Part C(II) (analyzing differences between varying Title VII claims pertaining to *Brown*).

¹³ See *Employment Section Overview*, *Employment Section Overview*, *supra* note 10 (outlining commonality of claims).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See UNITED STATES DEPT. OF JUSTICE, *Employment Section Overview*, <http://www.justice.gov/crt/about/emp/overview.php> (last visited Jan. 27, 2013) [hereinafter *Employment Section Overview*] (discussing commonality of claims).

¹⁷ See *Employment Section Overview* (outlining basics of “harassment-based” claims).

conduct that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive or hostile work environment.”¹⁸ Prior to 1980, the EEOC, the administrative gate-keeping agency for Title VII claims, did not issue guidelines pertaining to sexual harassment claims.¹⁹

C. HISTORY

In 1976, *Brown* held that Title VII is “an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination.”²⁰ Courts have since struggled to interpret Title VII in the context of federal employment discrimination preemption.²¹ To effectively understand these differences, the inquiry must begin with the preemption question as first developed in *Brown*.²²

I. *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976)

An effective understanding of the preemption question requires examination of the reasoning behind the Supreme Court’s 1976 *Brown* decision.²³ The *Brown* Court considered a Title VII challenge by a black man, Clarence Brown, claiming his employer, the General Services Administration (“GSA”), opted not to promote him on two occasions because of his race.²⁴ Brown brought suit against the GSA under section 717 of Title VII

¹⁸ *Employment Section Overview*. These claims may be further divided into “quid pro quo” or “hostile work environment,” however this falls outside the necessary purview of this note. See *Enforcement Guide*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, 2 (Mar. 19, 1990), <http://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf> (discussing types of “harassment-based” claims).

¹⁹ UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, N-915-050, ENFORCEMENT GUIDANCE: POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990), available at <http://www.eeoc.gov/eeoc/publications/upload/currentissues.pdf> (indicating year when EEOC implemented sexual harassment guidelines).

²⁰ *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 829 (1976).

²¹ See *infra* Part C(II) (outlining opposing perspectives among courts).

²² See *infra* Part C.I. (outlining *Brown* viewpoint of preemption).

²³ See *infra* Part C.II.a.-c. (discussing circuit split stemming from *Brown* decision).

²⁴ See *Brown*, 425 U.S. at 822-24 (explaining background of *Brown* case). Brown, classified as a GS-7, had been employed by the GSA since 1957. *Id.* at 822. Brown received a promotion in 1966, and in 1970 was considered, along with two white colleagues, for another promotion to a GS-9 position. *Id.* Although all three men were equally qualified, a white man was chosen. *Id.* Brown subsequently filed a complaint with the GSA’s Equal Employment Opportunity Office (“EEOO”). *Id.* Brown dropped his claim after being informed another GS-9 position would soon become available, however, after being considered against two more white men, he was denied his second opportunity for promotion. *Id.* Following the second decision, Brown again appealed to the GSA’s EEOO, who found Brown’s failure to be “fully cooperative” during his employment motivated the decision not to promote him, as opposed to any race-based animus on the part of

and under the Civil Rights Act of 1866, as amended at 42 U.S.C. § 1981.²⁵

The *Brown* Court looked to the legislative history, completeness of the statute, inapplicability of *Johnson v. Railway Express Agency*,²⁶ and comparable case law involving alternative forms of recovery, before holding that Title VII was the “exclusive judicial remedy for claims of discrimination in federal employment.”²⁷ The *Brown* Court reasoned that legislative history supported preemption of Brown’s alternative discrimination-based claims because Congress concluded that prior to the passage of the Equal Employment Opportunity Act federal employees had no effective judicial remedy.²⁸ In explaining the completeness of the statutory design, the *Brown* court looked to the clear and concise definitions of who was covered by the statute provided in section 717(a), complimentary administrative and judicial means to “eradicate federal employment discrimination” in sections 717(b) and (c), coverage of “venue, the appointment of attorneys, attorneys’ fees, and the scope of relief” under section 717(d), as well as a

GSA. *Id.* Brown then filed his lawsuit. *Id.*; see also *infra* note 25 and accompanying text (discussing the grounds for Brown’s lawsuit and Supreme Court holding).

²⁵ *Brown*, 425 U.S. at 823-24; see also Civil Rights Act of 1964, tit. VII, § 717 (as codified at 42 U.S.C. § 2000e-16) (providing remedy for employment discrimination by federal employers); 42 U.S.C. § 1981 (providing remedy for violation of equal rights under the law). 42 U.S.C. § 1981 provides for the right to make and enforce contracts, which implies the right to be free of illegal employment discrimination. See 42 U.S.C. § 1981 (explaining right to make and enforce contracts); see also *Brown*, 425 U.S. at 833-34 (explaining inapplicability of § 1981 to federal employment discrimination); *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (explaining § 1981 “affords a federal remedy against discrimination in private employment on the basis of race”); *infra* note 27 and accompanying text (detailing *Brown* court’s rejection of § 1981). Brown also sought federal jurisdiction through claims under 28 U.S.C. § 1331, providing general federal-question jurisdiction, and under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. See *Brown*, 425 U.S. at 823-24 (detailing remaining causes of action).

²⁶ 421 U.S. 454 (1975).

²⁷ See *Brown*, 425 U.S. at 824-35 (explaining legislative history, completeness of statute, and comparable case law). Brown filed his suit forty-two days after his appeal had been decided, which fell outside the thirty-day requirement by section 717 of Title VII, and gave rise to the question of subject matter jurisdiction if Title VII preempted all other remedies for federal employment discrimination. See *id.* at 823-24 (presenting time table and motion to dismiss for lack of subject-matter jurisdiction); see also 42 U.S.C. § 2000e-16(c). Since *Brown*, § 2000e-16(c) has been amended to extend the thirty-day timeframe to ninety days. See 42 U.S.C. § 2000e-16(c); see also Civil Rights Act of 1991, Pub. L. No. 102-166, § 114(1), 105 Stat. 1071 (1991) (increasing time to file suit from thirty to ninety days).

²⁸ See *Brown*, 425 U.S. at 828-29 (recognizing inference of preemptive nature of Title VII via legislative history). “Senator Williams, sponsor and floor manager of the bill, stated that it provides, for the first time . . . for the right of an individual to take his complaint to court.” *Id.* at 828 (internal quotations omitted) (citing 118 CONG. REC. 4922 (1972)). “Senator Cranston, coauthor of the amendment relating to federal employment, asserted that it would, (f)or [sic] the first time, permit Federal employees to sue the Federal Government in discrimination cases . . .” *Id.* (internal quotations omitted) (citing 118 CONG. REC. 4929 (1972)). The *Brown* court goes on to state that regardless of whether the assumption was true or not, the statements go to show congressional intent to create an exclusive, preemptive statute. *Id.* at 828-29.

concluding statement in section 717(e) pitting primary responsibility for preventing discrimination on the federal employer.²⁹ The Court rejected Brown's argument that *Johnson* supported utilizing pre-existing remedies for federal employment discrimination because *Johnson* dealt with private employment and did not involve sovereign immunity.³⁰ The argument was further rejected because Title VII of the Civil Rights Act of 1964, protecting only private employees and addressed in *Johnson*, contained legislative intent to supplement existing laws, as opposed to the EEOA, which did not.³¹ The *Brown* court also looked to case law in recognizing that specific statutes preempt general statutes, and placed great weight upon *Preiser v. Rodriguez*,³² where the court, while addressing a civil rights statutory suit brought in conjunction with a habeas corpus action, held that "although . . . [the] civil rights statute was, by its terms, literally applicable, . . . challenges . . . lie only under habeas corpus, the 'more specific act.'"³³ The *Brown*

²⁹ See *Brown*, 425 U.S. at 829-33 (presenting courts argument pertaining to completeness of statute). The *Brown* court places special emphasis on § 717(c), which permits an employee to seek relief in court, but only after pursuing administrative avenues of relief, and within 30 days of receiving the administrative agencies final decision or 180 days after a CSC appeal. *Id.* at 832. The *Brown* court states that § 717 "does not contemplate merely judicial relief . . . it provides for a careful blend of administrative and judicial enforcement powers" and if Brown's other avenues of relief were preempted, the requirement to exhaust administrative remedies and time limits "would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible." *Id.* at 833. The argument is summarized by the court's statement that "[t]he balance, completeness, and structural integrity of [§] 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by [§] 717(c) was designed merely to supplement other putative judicial relief." *Brown*, 425 U.S. at 832.

³⁰ See *id.* at 833 (stating no issue of sovereign immunity in *Johnson* case).

³¹ See *id.* (rejecting *Johnson*'s applicability); see also *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975) ("[Civil Rights Act of 1964] manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.") (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974)); H.R. REP. NO. 92-238, at 19 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2154 ("[R]emedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. 1981, and that the two procedures augment each other and are not mutually exclusive.").

³² 411 U.S. 475 (1973).

³³ See *Brown*, 425 U.S. at 834-35 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973)) (discussing specifically drawn statutes against general statutes). The *Preiser* court explained that reliance upon the general civil rights statute would not require the same exhaustion of state remedies as a habeas corpus petition, and would thus undermine the strong policy requiring exhaustion of these remedies. 411 U.S. at 488-90. The viewpoint espoused in *Preiser* was given great deference by the *Brown* court given its relativity to its impression of the completeness of section 717 of Title VII. See *Brown*, 425 U.S. at 834-35 (supporting *Preiser* holding); see also *supra* note 29 and accompanying text (discussing statutory completeness of § 717). One case that the *Brown* court approvingly cited was *U.S. v. Demko*. See *Brown*, 425 U.S. at 834 (citing *United States v. Demko*, 385 U.S. 149 (1966)) (citing *Demko* for its similarity to "right to proceed under facially applicable tort recovery statutes."). In *Demko*, a federal prisoner was injured and filed suit under 18 U.S.C. § 4126, a statute enacted in 1934, twelve years prior to the FTCA. 385 U.S. at 149-52.

decision leaves open the question of whether actions to remedy behavior that may be more than discriminatory fall within the purview of Title VII's preemptive reach.³⁴

II. *Disposition of the Courts*

Since the *Brown* decision, courts have been divided as to whether Title VII preempts tort claims arising out of the same-facts as a Title VII employment discrimination suit.³⁵ The Ninth Circuit has applied the “highly personal harm” test, recognizing that a highly personal violation goes beyond the meaning of discrimination.³⁶ The Fifth and Eighth Circuits have come to the opposite conclusion by holding that claims arising out of the same facts supporting the Title VII claim are preempted.³⁷ District

The statute provided federal prisoners with their only opportunity to recover damages of any kind. *Id.*; see also 18 U.S.C. §§ 4126(c), (c)(4) (1948) (“[T]he Government, is authorized . . . in paying . . . compensation to inmates employed in any industry, or performing outstanding services in institutional operations, and compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution in which the inmates are confined.”). After succeeding under § 4126 the prisoner filed a claim under the FTCA, which the *Demko* court held was preempted by § 4126. 385 U.S. at 149-52. The court reasoned that nothing in the FTCA gave any indication it was meant to add to recovery of prisoners protected by § 4126, nor would such a finding be rational, as prisoners would be given greater rights than government employees seeking recovery under the Federal Employees Compensation Act (“FECA”). *Id.* at 152; see also FECA, 5 U.S.C. § 751 (1916) (current version at 5 U.S.C. § 8102) (allowing federal employees to recover for death or disability resulting from personal injury while working). *But cf.* *United States v. Muniz*, 374 U.S. 150, 150-52 (1963) (holding prisoners not protected by prison compensation law, not barred from seeking relief under FTCA). The Supreme Court examined a similar question in *Johansen v. United States*, where seamen were injured while performing their work related duties. 343 U.S. 427, 428 (1952). The seamen brought suit under the Public Vessels Act of 1925, which provided consent by the Government to be sued for personal injuries of a non-government individual caused by negligent maintenance or operation of a public vessel of the United States. *Johansen*, 343 U.S. at 428, 431. Although it is unclear from the decision whether the seamen sought remedy under FECA, the statutory remedy was held to be applicable to the seamen. See *Id.* at 439 (recognizing FECA applies to all federal employees). The *Johansen* court further held that FECA is the exclusive remedy for civilian seamen, reasoning “had Congress intended to give a crew member on a public vessel a right of recovery for damages against the Government beyond the rights granted other Government employees on the same vessel under other plans for compensation, we think that this advantage would have been specifically provided.” *Id.* at 440.

³⁴ See *infra* Part C.II. and Part D. (presenting and analyzing case law pertaining to Title VII's preemptive reach as interpreted in *Brown*).

³⁵ See *infra* Part C.II.a.-b. (presenting cases representing split among circuits regarding Title VII's preemptive reach).

³⁶ See *infra* Part C(II)(a) (explaining development of Ninth Circuit's “highly personal” harm approach).

³⁷ See *infra* Part C(II)(b) (explaining development of Fifth and Eighth Circuits' “same facts” approach).

courts are also split on the issue.³⁸

a. “Highly Personal” Harm (Ninth Circuit)

In *Otto v. Heckler*,³⁹ the Ninth Circuit became the first circuit to hold that an independent claim against a supervisor, in his individual capacity, may arise out of the same set of facts supporting a Title VII claim.⁴⁰ The Ninth Circuit revisited this topic again in *Brock v. United States*,⁴¹ however, the contest in *Brock* focused on employer liability as opposed to individual liability.⁴² In *Brock*, the court considered whether Title VII barred a Federal Tort Claims Act (“FTCA”) action against the plaintiff’s employer for actions including repeated sexual comments, unwanted touching, and forcible rape.⁴³ The *Brock* court held that the complaint described

³⁸ See *infra* Part C.II. (outlining opinions of district courts pertaining to Title VII’s preemptive reach).

³⁹ 781 F.2d 754 (9th Cir. 1986), *amended by*, 802 F.2d 337 (9th Cir. 1986).

⁴⁰ See *Otto*, 781 F.2d at 756-57 (“[T]orts which constitute highly personal violation[s] beyond the meaning of discrimination [are] separately actionable.”) (internal quotations omitted). In *Otto*, Mari Otto, an employee of the Inglewood Social Security Administration (“SSA”), was supervised by Howard Jacobson. *Id.* at 755. Otto, alleging Jacobson had sexually harassed her, filed an Equal Employment Opportunity complaint, and soon thereafter attempted to add a retaliation complaint that was denied for reasons related to a pending class claim. *Id.* Following this denial Otto filed a judicial complaint against Jacobson, as both an individual and as a SSA manager, claiming Title VII violations, as well as state common-law tort claims of assault, invasion of privacy, intentional infliction of emotional distress, and defamation. *Id.* Central to these tort claims was Otto’s accusations that Jacobson would make defamatory remarks about her sexuality, follow her, telephone her, and place her in fear of sexual abuse. *Id.* at 757. After the district court dismissed all but the Title VII claims, the *Otto* court reversed the dismissal of the tort claims and remanded the case to “ascertain whether Jacobson acted within the perimeter of his authority.” *Id.*; see also *Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987)

(“Remedy for unconstitutional actions other than employment discrimination, even if arising from the same core of facts, is not barred by Title VII.”). A distinguishing component of this case is that it addressed claims against the supervisor in an individual capacity, but not the federal employer. See *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (“Brock’s case is distinguishable from *Otto* and *Arnold* because she is suing for negligent supervision under the FTCA, and because she is not suing McKinney directly.”).

⁴¹ 64 F.3d 1421 (9th Cir. 1995).

⁴² See *id.* at 1423-25 (outlining possibility of individual state tort liability and employer negligent supervision liability).

⁴³ See *Brock*, 64 F.3d at 1422 (outlining material facts of the case). Brock, an employee of the Forest Service, alleged that during field outings, where she was forced to share sleeping accommodations with her supervisor, he subjected her to unwanted physical contact, including “rubbing her back, touching her breasts, and raping her.” *Id.* After multiple incidents, Brock refused to work with McKinney and was reassigned. *Id.* McKinney still found opportunities to make sexual comments and unwanted contact until Brock transferred to another department and a filed an Equal Employment Opportunity Commission (“EEOC”) Title VII claim against McKinney and her employer. *Id.* Brock’s EEOC claim was eventually settled; however, she was tormented by offensive comments by her coworkers because of her willingness to bring the EEOC

conduct that was a “highly personal violation beyond the meaning of discrimination” and that the FTCA claim was separately actionable.⁴⁴ The Court also gave special consideration to the insensibility of a non-protected employee having access to an FTCA claim, while a protected employee would be denied the same legal remedy.⁴⁵

In 2001, the Ninth Circuit heard *Sommato v. United States*,⁴⁶ a case involving discrimination in the form of sexual harassment.⁴⁷ Despite its similarity to *Otto*, *Arnold*, and *Brock*, it was disposed of on procedural grounds, and the *Sommato* court only touched upon the highly personal harm standard in dicta.⁴⁸ Shelley Sommatino (“Sommatino”), a civilian employee at the Naval Postgraduate School in Monterey, California alleged a co-worker, Mr. Hollifield (“Hollifield”), engaged in sexually discrimina-

claim. *Id.* Brock then filed an administrative tort claim under the FTCA, alleging negligent supervision of McKinney and negligent supervision of her coworkers. *Id.* When the government failed to respond to Brock’s claim, she filed a negligence claim in district court, which was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and an appeal followed. *Id.*

⁴⁴ See *Brock*, 64 F.3d at 1424 (recognizing Brock’s negligent supervision claim not preempted by prior EEOC settlement). The *Brock* court relied upon the premise that “rape *can* be a form of sexual discrimination, but we cannot say to its victims that it is nothing more “ and that this reality was unchanged regardless of whether the plaintiff sought damages from the individual or through the employer. *Id.* at 1423. It was further stated that “as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee’s sex.” *Id.* The court reasoned that the capability to classify the major offense—murder or rape—as a minor offense—battery or employment discrimination—“does not change the nature or extent of ultimate harm.” *Id.* The *Brock* court combined this rationale with its holding in *Otto* to hold that where the harms suffered are more than just discrimination, the victim may bring a separate claim. *Id.* (citing *Otto*, 781 F.2d at 756-57). The *Brock* court made certain to recognize the harm suffered by Brock as involving something more than just garden-variety discrimination. Compare *Brock*, 64 F.3d at 1423 (highlighting rape as component of employment discrimination but not being solely remediable by Title VII), with *Nolan v. Cleland*, 686 F.2d 806, 813-15 (9th Cir. 1982) (noting failure to promote, retaliation for discrimination complaint, and constructive discharge are not separately actionable.); see also *Schroder v. Runyon*, 161 F.3d 18, 18 (10th Cir. 1998) (dismissing state-law retaliation claim brought in conjunction with Title VII claim); Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1463 (1986) (arguing pre-1991 interpretation failed to redress “severe . . . harm caused by sexual harassment” in workplace).

⁴⁵ See *Brock*, 64 F.3d at 1423 (explaining policy concerns appellate court affirmed the district court). The *Brock* court stated that Title VII would be “turned on its head” if the United States could escape negligent supervision liability when misconduct was *both* assaultive and discriminatory but not where it was *solely* assaultive. *Id.* (emphasis added).

⁴⁶ 255 F.3d 704 (9th Cir. 2001).

⁴⁷ *Id.* at 705-07 (outlining facts and claims of case).

⁴⁸ See *id.* at 707-08, 711-12 (outlining Sommatino’s failure to satisfy prerequisite administrative remedies and discussing Title VII claims). The *Sommato* court went on to compare the facts of the case to those in *Brock*, *Arnold*, and *Otto*, despite stating it did not have subject matter jurisdiction over the Title VII claims. *Id.* at 711-12 (citing *Brock*, 64 F.3d at 1423-24; *Arnold v. United States*, 816 F.2d 1306, 1312 (9th Cir. 1987); *Otto*, 781 F.2d at 758).

tory conduct and filed for relief under the FTCA and Title VII.⁴⁹ The *Sommatino* court concluded their opinion with dicta that Sommatino's allegations did not rise to the level of being a highly personal harm.⁵⁰ Circuit Judge Reinhardt, in his concurrence in part and dissent in part, disagreed with the majority as to whether the allegations rose to the level of being highly personal harm, citing the similarity of *Sommatino*'s facts to other Ninth Circuit cases.⁵¹

⁴⁹ See *Sommatino*, 255 F.3d at 705-07 (detailing case's facts and legal theories pleaded). Sommatino's non-Title VII theories alleged sexual harassment, intentional infliction of emotional distress ("IIED"), negligent supervision, and negligent infliction of emotional distress ("NIED") under the FTCA. *Id.* at 712-14. Sommatino alleged Hollifield "[m]ade sexually offensive remarks to her and other female employees, and would position himself close to her to ensure contact." *Id.* at 705. Sommatino further alleged Hollifield would "frequently brush[] his body against Sommatino's arms, legs, and hips . . . [and] often used loud, offensive, and vulgar language in the office." *Id.* Sommatino stated Hollifield would fake accidental meetings outside the office to engage her in private conversation. *Id.* at 706. Sommatino also included harms she alleges were suffered by co-workers within her complaint. *Sommatino*, 255 F.3d at 712. The court recanted the allegations as follows:

Sommatino alleged that she witnessed "inappropriate behavior" on the part of Hollifield toward a female co-employee. She alleged that Hollifield accosted a woman when he gave her a ride in his car. Sommatino alleged that the woman feared Hollifield and would never be alone with him, and to appease Hollifield, the woman started bringing him breakfast in the morning. Sommatino also alleged that Hollifield made forceful sexual advances upon a female co-worker, but no names or dates are alleged. Sommatino alleged that Hollifield threatened to kill this female employee if she reported him, but no additional specific allegations or supporting declarations are provided . . .

Sommatino, 255 F.3d at 712 n.6.

⁵⁰ See *Sommatino*, 255 F.3d at 711-12. The *Sommatino* court, although agreeing that Hollifield's actions were "highly offensive," explained

intentional touching and [Hollifield's] sexually suggestive and vulgar remarks are typical of the offensive workplace behavior giving rise to an action to remedy a hostile work environment . . . [and were] not of the order of magnitude of the personal violation of rape in *Brock*, the forced sexual assaults in *Arnold* (forced kissing, fondling, and blocking the door), and the following and phone calling at home in *Otto*.

Id. at 712. But see *id.* at 712-14 (Reinhart, J., concurring in part and dissenting in part) (disagreeing with majority about highly personal nature of harm). The majority opinion gave minimal credence to Sommatino's statements about harmed coworkers, holding comments made to others were not a component of the "order of magnitude of the conduct in this circuit's hostile working environment cases." *Id.* at 712 (citing *Kortan v. California Youth Auth.*, 217 F.3d 1104, 1110 (9th Cir.2000)). But see *id.* at 712-14 (Reinhardt, J., concurring in part and dissenting in part) (disagreeing with majority that harm to others played no role in harm to Sommatino).

⁵¹ *Sommatino*, 255 F.3d at 713 (Reinhardt, J., concurring in part and dissenting in part). Circuit Judge Reinhardt compared *Sommatino*'s facts to *Arnold*'s facts and stated Hollifield's "rubbing his arms against [the plaintiff's] breasts, brushing against her legs, arms and hips, and restraining her outside the workplace" was synonymous to the facts of *Arnold*, where a government employee "fondled [Arnold's] knees, blocked her exit from his office, and held the plaintiff close to his body, kissing and fondling her." *Id.* (citing *Arnold*, 816 F.2d at 1307). Cir-

Since *Brock*, numerous district courts have adopted the “highly personal harm” approach.⁵²

b. Same-Facts Preemption in the Fifth and Eighth Circuits

Despite having less popularity than the *Brock* “highly personal” harms test, two circuits support the same-facts test.⁵³ The Fifth Circuit, in *Pfau v. Reed*,⁵⁴ and the Eighth Circuit, in *Mathis v. Henderson*,⁵⁵ present reasonable arguments in favor of preemption.⁵⁶ The reasoning applied in these cases, although not as commonly applied as the *Brock* perspective, contributes to the ongoing development of Title VII federal-claim preemption.⁵⁷

i. *Pfau* (Fifth Circuit)

In *Pfau*, the Fifth Circuit advanced the most common argument in

circuit Judge Reinhardt concluded, based on the similarities to *Arnold*, that Hollifield’s actions satisfied the highly personal test of *Brock*. *Sommatino*, 255 F.3d at 713 (citing *Brock*, 64 F.3d at 1424). Circuit Judge Reinhardt also concluded that the fears of Sommatino, based on alleged actions by Hollifield to co-workers, was “sufficient for purposes of this appeal” *Sommatino*, 255 F.3d at 713. Following his analysis, Circuit Judge Reinhardt concluded that the majority opinion complicated the highly personal harm test, and courts would be better served to adopt a standardized test. *Id.* Circuit Judge Reinhardt proposed, “if the conduct rises to the level of an assault, it meets the standard for asserting [a FTCA] claim. If it does not, an FTCA claim may not be asserted.” *Id.* But see 28 U.S.C. § 2680(h) (2012) (“The provisions of [Tort Claims Procedure] . . . shall not apply to . . . [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights”); see also Jack W. Massey, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 TEX. L. REV. 1621, 1621-22 (2004) (discussing § 2680(h) exception to general waiver of sovereign immunity by federal government). Circuit Judge Reinhardt completed his opinion by considering the policy implications of his decision and stating that although the door may have been opened for duplicative sex discrimination cases, if not already “opened by *Brock*, *Otto*, and *Arnold* . . . [e]stablishing a principled rule governing FTCA claims arising out of sexual harassment might even reduce, rather than increase, the small number of such causes of action currently being filed.” *Sommatino*, 255 F.3d at 714.

⁵² See *infra* Part C(II)(c) (discussing district court interpretations).

⁵³ See *Charlot*, 2012 WL 3264568, at *4 (considering prominent tests); see also *infra* note 88 and accompanying text (discussing application of preemption tests); *infra* Part C(II)(c) (discussing same in greater detail).

⁵⁴ 125 F.3d 927 (5th Cir. 1997) *vacated on other grounds*, 525 U.S. 801 (1998) (advising reconsideration of summary judgment motion on vicarious liability of employer).

⁵⁵ 243 F.3d 446 (8th Cir. 2001).

⁵⁶ See *infra* Part C(II)(b)(i) (discussing *Pfau*); *infra* Part C(II)(b)(ii) (discussing *Mathis*).

⁵⁷ Cf. *Charlot v. Donley*, No. 3:11–579–MBS–SVH, 2012 WL 3264568, at *4 (D. S.C. Aug. 9, 2012) (considering same-facts test along with “highly personal harm” test).

favor of preemption and held that “when the same set of facts support a Title VII claim and a non-Title VII claim against a federal employer, Title VII preempts the non-Title VII claim.”⁵⁸ In *Pfau*, the court considered Pfau’s Title VII sexual harassment claim, a state common law IIED, and an FTCA claim against her supervisor, Pete Gonzales, and her employer, Defense Contract Audit Agency (“DCAA”).⁵⁹ Pfau claimed sexual harassment, discrimination, and retaliation as a result of reporting the sexual harassment.⁶⁰ The court relied upon a “not sufficiently distinct” standard and the existence of her pending Title VII claims to dismiss Pfau’s four arguments against preemption of her IIED claim.⁶¹

The first argument advanced and rejected by the court was that the elements that must be proven to establish a sexual harassment claim under Title VII are different from those necessary to establish an IIED claim.⁶² The *Pfau* court held that although two claims may feature “distinct legal

⁵⁸ *Pfau*, 125 F.3d at 933 *vacated on other grounds*, 525 U.S. 801 (1998) (advising reconsideration of summary judgment motion on vicarious liability of employer); *see also* *Jackson v. Widnall*, 99 F.3d 710, 716 (5th Cir. 1996) (stating in dicta that constitutional violations involving same facts as Title VII claim were preempted); *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir. 1992) (holding two claims on same set of facts “not sufficiently distinct to avoid the bar”); *William J. Kelly III & Brooke Duncan III, Labor Law*, 44 LOY. L. REV. 545, 560-61 (1998) (providing overview of *Pfau* case). Upon remand back to the Fifth Circuit, the court affirmed their Title VII preemption holding and vacated and remanded the case back to the district court to examine the summary judgment motion with respect to the Supreme Court’s holdings in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. *See Pfau* 167 F.3d at 229 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 810 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765-66 (1998)); *see also* Lisa A. May, *Labor and Employment Law*, 30 TEX. TECH L. REV. 811, 881 (1999) (discussing Fifth Circuit *Pfau* decision); Elizabeth Garrett, Arthur G. Lefrancois & Sven Erik Holmes, *Law and Economics*, 31 N.M. L. REV. 107, 123 n. 99 (2001) (discussing Supreme Court remand of *Pfau*).

⁵⁹ *See Pfau*, 125 F.3d at 931-32 (discussing procedural history).

⁶⁰ *Pfau*, 125 F.3d at 930-31 (discussing case’s facts). In support of her sexual harassment and discrimination claim, Pfau alleged that Gonzales called her and insisted upon visiting her at her apartment, Gonzales appeared at Pfau’s apartment and insisted they become “involved,” as well as Gonzales’ offer to accompany Pfau on her vacation by paying his own way. *Id.* at 931. In support of the retaliation claim, Pfau alleged that Gonzales engaged in acts of retaliation after she filed sexual harassment charges against him, including “sabotag[ing] work assignments to prevent completion, hindering performance, withdrawing assignments, invalidating [Pfau’s] audit findings, inappropriately discussing audit findings with contractor personnel, and subjecting her to harsh, inordinate, and unwarranted criticism of work assignments.” *Id.* Further allegations included claims that Gonzales denied her the training necessary to successfully advance to higher level assignments, assigned her to auditing projects that did not comport with her level of experience, placed her on a performance improvement plan, and ultimately terminated her as a result of her sexual harassment claims. *Id.* Prior to her termination, Pfau had been with the DCAA for 10 years. *Id.* at 930.

⁶¹ *See id.* at 931-32 (presenting “not sufficiently distinct” standard and discussing Pfau’s legal arguments); *see also infra* notes 63-73 and accompanying text (explaining Pfau’s arguments and reasons for rejection).

⁶² *Pfau*, 125 F.3d at 931-33 (detailing Pfau’s legal argument).

elements,” where the same facts could be used to establish both claims, the non-Title VII claim was preempted.⁶³ Where the same set of facts could establish each claim, the *Pfau* court held that Pfau’s two claims were “not sufficiently distinct.”⁶⁴

The second argument advanced and rejected by the court was that Title VII and IIED claims serve different purposes.⁶⁵ The court disposed of this argument under the “same-facts” standard applied to Pfau’s first argument, and largely ignored the merits of the policy argument.⁶⁶ The *Pfau* court completed its reasoning by stating, “[u]nder the controlling case law in this circuit, the existence of multiple reasons for preventing a particular type of conduct is therefore irrelevant to the determination of preemption.”⁶⁷

The third argument advanced and rejected by the court was that Pfau advanced “types and instances of conduct” in support of her IIED claim differing from those supporting her Title VII claim.⁶⁸ The court held that the occurrence of some instances of the sexual harassment falling outside of business hours or away from the office did not mean they could not be applied to the Title VII claim.⁶⁹ The court concluded by reasoning that

⁶³ *Pfau*, 125 F.3d at 932-33 (rejecting Pfau’s first legal contention). The *Pfau* court analyzed the elements of sexual harassment and IIED. *Id.* The court first explained that a hostile environment discrimination claim requires, among other things, proof that the claimant suffered “unwelcome, harassing sexual conduct.” *Id.* at 933 (citing *Jones v. Flagship Int’l*, 793 F.2d 714, 719-20 (5th Cir. 1986)). The court then described an IIED claim as requiring proof that the claimant was subjected to “extreme and outrageous conduct.” *Id.* (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)). The court concluded that the occurrence of sexually harassing conduct could establish the existence of the extreme and outrageous conduct element for IIED from the same facts. *Pfau*, 125 F.3d at 933.

⁶⁴ See *Pfau*, 125 F.3d at 932-33.

⁶⁵ See *Pfau*, 125 F.3d at 932 (presenting Pfau’s second argument and court’s holding). Title VII’s purpose is to “[s]trike at the entire spectrum of disparate treatment of men and women in employment.” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (internal quotation omitted). IIED claims provide individuals with protection from, and remedies for, injuries to their psyches caused by conduct that is “utterly intolerable in a civilized community.” See *Twyman*, 855 S.W.2d at 621-22. The *Pfau* court considered the *Brock* court’s holding but expressly stated it would decline to adopt the Ninth Circuit’s decision. 125 F.3d at 933 n.2. The *Pfau* court supported this position by stating that *Brock* was “inconsistent with the jurisprudence of this circuit” and that the “factual predicate” being the same for the *Brock* plaintiff’s non-Title VII claims and her Title VII claims preempted non-Title VII liability. See *id.* (citing *Jackson*, 99 F.3d at 716; *Rowe*, 967 F.2d at 189) (explaining rejection of Ninth Circuit’s *Brock* decision).

⁶⁶ *Pfau*, 125 F.3d at 933 (citing same facts standard).

⁶⁷ *Pfau*, 125 F.3d at 933. It is notable that the *Pfau* court does not cite any cases supporting this assertion. *Id.*

⁶⁸ See *Pfau*, 125 F.3d at 932-33 (presenting Pfau’s third argument and court’s holding).

⁶⁹ *Pfau*, 125 F.3d at 933; see also *Meritor Savings Bank*, 477 U.S. at 66-67 (holding plaintiff who suffered sexual harassment during and after office hours stated Title VII claim). In *Meritor Savings Bank*, the Supreme Court held that a hostile work environment could be created by ac-

Pfau should not be permitted to avoid preemption by “picking and choosing” how to allocate facts amongst her Title VII and independent tort claims.⁷⁰

The fourth and final argument advanced and rejected by the court was that the IIED claim was cognizable under the FTCA and could not be preempted by Title VII.⁷¹ The court disposed of the argument by stating the more general FTCA was preempted by the more precisely drawn Title VII.⁷² The *Pfau* court supported the theory that Title VII was more precisely drawn by its quoting of the *Brown* court’s understanding of Title VII as the “exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination.”⁷³

ii. *Mathis v. Henderson* (Eighth Circuit)

In *Mathis*, the Eighth Circuit considered Title VII and collateral state tort claims filed against Mathis’s individual supervisor, Wayne Dick (“Dick”) and her employer, the United States Postal Service (“USPS”).⁷⁴ The *Mathis* court, applying the same-facts test, held that Mathis could not bring state tort claims against Dick in his individual capacity where she used the same decertified incidents to prove she was subjected to severe and pervasive harassment under the *Meritor/Harris* hostile work environ-

tions that occurred both during and after work hours. 477 U.S. at 60, 73.

⁷⁰ *Pfau*, 125 F.3d at 933.

⁷¹ *Pfau*, 125 F.3d at 932, 934.

⁷² *Pfau*, 125 F.3d at 934. The *Pfau* court relied on the *Brown* court’s recognition that “a precisely drawn, detailed statute pre-empts more general remedies” in holding that Title VII did not permit additional FTCA remedies. *Id.* (quoting *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976)). The *Pfau* court did not discuss whether the IIED claim would be valid under the FTCA. *See id.* at 934 (assuming IIED claim under FTCA valid without answering question).

⁷³ *Id.* at 934 (quoting *Brown*, 425 U.S. at 829) (inferring Title VII designed to reach every facet of employment discrimination).

⁷⁴ *See Mathis v. Henderson*, 243 F.3d 446, 447, 449-50 (8th Cir. 2001) (describing facts, Westfall certification under FTCA, and procedural history). Mathis brought a sexual harassment and retaliation claim under Title VII, an Age Discrimination in Employment Act claim, a breach of implied contract claim, and various state statutory and common law claims, including loss of consortium. *Id.* at 447. Under the Westfall Act, a provision modifying federal employer liability under the FTCA, the Attorney General may certify that the defendant was acting within the scope of employment and substitute the United States into the role of defendant. *See* 28 U.S.C. § 2679(d) (1994) (explaining certification). Despite certification, a plaintiff has the option of challenging the certification, which Mathis did. *See Mathis*, 243 F.3d at 447 (discussing Mathis’s challenge of Attorney General’s certification); *see also Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir.1996) (“Westfall certification does not conclusively establish that the United States should be substituted as party defendant.”). Rather than consider the Westfall issue, the appeals court focused upon the Title VII preemption issue. *Mathis*, 243 F.3d at 448-49 (noting Title VII preemption provides Dick immunity from suit).

ment test.⁷⁵ The court's rationale stated, "either supervisor Dick's extra-curricular conduct was part of a pattern of employment discrimination, that is, sexual harassment, within the meaning of Title VII, which then is her sole remedy, or it was the individual tortious action of Dick for which he is personally responsible."⁷⁶ The Court further reasoned that allowing this circumvention goes against *Brown's* preemption of any other means for rectifying that which falls under the heading of employment discrimination.⁷⁷

⁷⁵ See *Mathis*, 243 F.3d at 450-51 (holding preemption from using same facts for state tort and Title VII claims). Mathis's claim included three decertified, specific incidents, occurring in 1994 during or after the USPS quarterly staff meetings in different locations. See *id.* at 449 (outlining conduct plaintiff relied upon for Title VII and independent tort claims). The *Mathis* court explained the incidents as follows:

Mathis claims that some employees attended one of these meetings wearing what has been described as hats that were intended to resemble condoms, and then referred to themselves as "dick heads." Although Dick was not himself wearing one of the "hats," he was present and did not act, as supervisor, to stop the activity. On another occasion, according to Mathis, Dick and Mathis were among USPS employees who had stayed past the meeting (until 1:30 in the morning, in fact) drinking and playing poker. As Mathis started to leave, an inebriated Dick insisted upon knowing where she was going and told her in no uncertain terms to sit down. Following yet another meeting, in a hotel bar where a group of USPS employees including Dick and Mathis had gathered, Dick demanded that Mathis dance every dance with him.

Mathis, 243 F.3d at 499. The *Mathis* court couched its decision in the Supreme Court's requirement that conduct must be severe or pervasive to create a hostile working environment. See *Mathis*, 243 F.3d at 450 (holding decertified incidents cannot be used for both severe and pervasive element and state-law claims); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) ("[Conduct] must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982))); *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993) (clarifying *Meritor* as requiring conduct be objectively and subjectively severe or pervasive). When considering Dick's actions that were certified and dismissed on procedural grounds, the *Mathis* court concluded that Westfall's certified behavior fell under Title VII preemption as the "exclusive judicial remedy for claims of discrimination in federal employment." See *Mathis*, 243 F.3d at 449 (citing *Brown*, 425 U.S. at 835).

⁷⁶ *Mathis*, 243 F.3d at 451. The *Mathis* court stated that under *Brown* it could not, and outside of *Brown*, would not, give a plaintiff "carte blanche to creatively plead as many state-law causes of action as she believes she may sustain against her supervisor, in addition to her Title VII claim, when, at its core, her claim is for sexual harassment by a supervisor, for which the government already stands liable under Title VII and *Ellerth*." *Id.* at 451. The *Mathis* court reasoned that Mathis was not being denied her day in court, however, she would only be eligible to pursue the Title VII claim arising out of the incidents she would have used for the alternative claims. *Id.*

⁷⁷ *Id.* at 451 (quoting *Brown*, 425 U.S. at 833) ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

c. District Court

While most of the litigation surrounding Title VII preemption has occurred in the Fifth, Eighth, and Ninth Circuits, district courts have also contributed to the understanding of *Brown*'s preemptive reach.⁷⁸ The *Charlot* court's illustration of circumstances considered in other district courts, coupled with its approval of the "highly personal harm" approach, provides an accurate picture of the state of Title VII preemption throughout various district courts.⁷⁹ Similarly, the viewpoints espoused in *Kibbe v. Potter*,⁸⁰ *Roland v. Potter*,⁸¹ *Wallace v. Henderson*,⁸² and *Baqir v. Principi*⁸³ further contribute to the understanding of *Brown*.⁸⁴ These interpretations are essential in understanding how each rule impacts varying fact patterns regarding employment discrimination and concurrent tort claims.⁸⁵

In *Charlot v. Donley*,⁸⁶ Vera Shepard Charlot ("Charlot"), a civilian employee of the Department of the Air Force ("Air Force"), filed a Title VII and a state common law defamation tort claim against the Air Force, Honorable Michael B. Donley ("Donley"), Terry St. Peter ("St. Peter"), Dawn M. Moore ("Moore"), and Clayton D. Leishman ("Leishman").⁸⁷

⁷⁸ See *infra* note 88 and accompanying text (detailing differing viewpoints); see also *supra* Part C.II. (outlining circuit opinions).

⁷⁹ See *infra* note 88 and accompanying text (listing prominent district court cases); see also *supra* Part C.II.c. (providing further details from *Charlot* case).

⁸⁰ 196 F.Supp.2d 48 (D. Mass. 2002).

⁸¹ 366 F. Supp. 2d 1233 (S.D. Ga. 2005).

⁸² 138 F. Supp. 2d 980 (S.D. Ohio 2000).

⁸³ 288 F. Supp. 2d 706 (W.D.N.C. 2003).

⁸⁴ See *infra* notes 89-96, 101-105, 110-111 and accompanying text (applying Title VII).

⁸⁵ See *infra* notes 92-93, 100-101, 102-105 and accompanying text (presenting variety of fact patterns involving Title VII preemption analysis)

⁸⁶ No. 3:11-579-MBS-SVH, 2012 WL 3264568 (D. S.C. Aug. 9, 2012).

⁸⁷ *Charlot*, 2012 WL 3264568, at *1. Pre-trial motions were heard before a magistrate judge and were brought before the district court on appeal from the magistrate judge's ruling on a Rule 12(b)(1) subject matter question. See *id.* (explaining procedural history). Charlot's position as a civilian employee of the Air Force was Training Technician with the Defense Language Institute English Language Center ("DLIELC") at Fort Jackson, South Carolina. *Id.* The court explained the hierarchy of Charlot's supervisors listing Donley as Secretary of the Air Force, Leishman as Charlot's direct supervisor, and Moore as Leishman's immediate supervisor as well as Charlot's second line supervisor. *Id.* (discussing hierarchy of Charlot's superiors to help clarify factual discussion). The court held that the Title VII claims were only valid against the head of an agency, department, or unit and affirmed the dismissal of claims of Title VII violation against all defendants but Donley. *Id.* at *3. The court then examined Charlot's defamation claims against Leishman and Moore. See *id.* at *3-5 (analyzing whether Title VII preempted defamation claims against Leishman and Moore). Charlot's defamation claims against Leishman arose out of events in August 2009 and were outlined by the court as follows:

Leishman called the Military Police to remove Plaintiff from DLIELC offices . . . re-

The *Charlot* court outlined the split among circuits regarding Title VII preemption of alternative causes of action, and found the views of the Ninth Circuit in *Brock*, and its progeny, to be “persuasive.”⁸⁸ The *Charlot* court held that the scope of *Brown* did not extend to *Charlot*’s defamation cause of action, despite its origin from a similar set of facts as the discrimination claim.⁸⁹ The *Charlot* court reasoned that the defamation claim

sult[ing] in public embarrassment and reputational damage Leishman falsely told others that [Charlot] was a threat and that she had attempted to evade Military Police when they arrived to escort her from DLIELC offices Leishman then made additional false statements to . . . Moore in his proposal for a ten-day suspension of [Charlot] from DLIELC.

Id. at *2. *Charlot* also alleged More defamed her by referring to *Charlot* as “crazy” during Moore’s investigation of *Charlot*’s complaint. *Id.*

⁸⁸ See *Charlot*, 2012 WL 3264568, at *4-5 (outlining circuit split and recognizing Ninth Circuit approach as being persuasive). The *Charlot* court did mention *Pfau* and *Mathis*, but failed to discuss either case beyond inferring their wide-reaching preemption. See *id.* at *4 (referencing *Pfau* and *Mathis*). Greater consideration was given to the *Brock* line of reasoning; the *Charlot* court quoted the *Brock* court as stating, “Title VII is not the exclusive remedy for federal employees who suffer ‘highly personal’ wrongs, such as defamation, harassing phone calls, and physical abuse When the harms suffered involve something more than discrimination, the victim can bring a separate claim.” See *id.* at 4 (quoting *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995)) (highlighting court’s rationale). Great deference was also given to the opinion of a Massachusetts District Court, which held in favor of the highly personal harms test. See *Charlot*, 2012 WL 3264568, at *4 (citing *Kibbe v. Potter*, 196 F. Supp. 2d 48, 69 (D. Mass. 2002)). The *Kibbe* court held that the plaintiff’s claims of assault and IIED were highly personal actions and were not subject to Title VII preemption; it also noted that the First Circuit has interpreted Title VII as “supplementing, not supplanting, existing rights.” See *Charlot*, 2012 WL 3264568, at *4 (citing *Kibbe*, 196 F. Supp. 2d at 69-70). Although discussed in lesser detail than *Brock* and *Kibbe*, the *Charlot* court cites four other district court cases supporting the “highly personal harm” test. See *Charlot*, 2012 WL 3264568, at *4 (citing *Wallace v. Henderson*, 138 F. Supp. 2d 980, 986 (S.D. Ohio 2006); *Roland v. Potter*, 366 F. Supp. 2d 1233, 1236 (S.D. Ga. 2005); *Boyd v. O’Neil*, 273 F. Supp. 2d 92, 96 (D.D.C. 2003); *Stewart v. Thomas*, 539 F. Supp. 891, 896 (D.D.C. 1982)). The *Charlot* court also noted that the district courts of the Fourth Circuit are similarly split on the issue. See *Charlot*, 2012 WL 3264568, at *5 (noting split among Fourth Circuit district courts). Within the Fourth Circuit, the *Charlot* court cited two cases supporting the highly personal harm test, one case providing a blanket statement about Title VII and appearing to support the highly personal harm test, and the other case supporting the same-facts test. *Id.* at *5 (citing *Schoolcraft v. Wabtec Passenger Transit*, No. 7:11-0294-TMC, 2011 WL 5909943, at *2 (D.S.C. Nov. 28, 2011) (recognizing highly personal harm test in context of removal jurisdiction); *Beatty v. Thomas*, No. Civ.A. 2:05CV71, 2005 WL 1667745, at *7 (E.D. Va. June 13, 2005) (allegations of defamation not preempted by Title VII); *Baqir v. Principi*, 288 F. Supp. 2d 706, 709 (W.D.N.C. 2003) (supporting same-facts test); *Baird v. Haith*, 724 F. Supp. 367, 373 (D. Md. 1988) (“[A]lthough the reach of the *Brown* decision is broad, it cannot act to pre-empt causes of action which, while arising from the same set of facts, are completely distinct from discrimination.”)).

⁸⁹ See *Charlot*, 2012 WL 3264568, at *4-5 (holding defamation claims not preempted). In coming to this conclusion it is notable that the *Charlot* court distinguished this case’s inclusion of state-tort and Title VII claims from Fourth Circuit cases holding that the plaintiff’s tort claims for IIED or NEID, as authorized by the FTCA, were preempted by his Title VII discrimination claim. See *id.* at *3 (citing *Pueschel v. United States*, 369 F.3d 345, 354 (4th Cir. 2004)). The *Pueschel*

sought to remedy her reputation, which was a “highly personal harm distinct from the harm her Title VII claim seeks to address.”⁹⁰

In *Kibbe v. Potter*,⁹¹ a district court in Massachusetts considered the preemptive reach of *Brown* regarding a Title VII discrimination suit and the personal liability of a co-worker.⁹² The *Kibbe* court, although recognizing that the First Circuit had not considered the issue presented, gave credence to the Circuit’s understanding that Title VII seeks to supplement, but not supplant, existing rights.⁹³ The *Kibbe* court went on to support the rationale announced in *Wood v. United States*,⁹⁴ recognizing that Title VII and *Brown* consider sovereign immunity, and do not intend to “disturb” pre-existing avenues of relief against individuals in their personal capacity.⁹⁵ Ultimately the *Kibbe* court saw fit to support the “highly personal harms” test, rejecting the same-facts test advocated by Griffin.⁹⁶ Although stated in dicta, the *Kibbe* court noted that assault and IIED claims were distinct from a malicious interference with employment claim, which the court recognized as “akin” to Title VII.⁹⁷

Roland, like *Charlot*, considered both the same-facts and highly personal harms approach.⁹⁸ In *Roland*, the plaintiff, who was demoted after selling beauty products during work hours, brought Title VII race dis-

court reasoned that the IIED and NEID claims were preempted because the emotional distress was a direct result of the discrimination. *Id.*

⁹⁰ *Charlot*, 2012 WL 3264568, at *5.

⁹¹ , 196 F. Supp. 2d 48 (D. Mass. 2002).

⁹² *Kibbe*, 196 F. Supp. 2d at 68-69. The *Kibbe* court considered claims of three plaintiffs, one of whom alleged assault and all of whom alleged IIED, against the employer and a co-worker, Daniel Griffin (“Griffin”). *Id.* at 62. These common law claims were also considered in conjunction with Title VII sexual harassment and retaliation claims. *Id.* All claims alleged Griffin grabbed his crotch and his buttocks on numerous occasions in front of the female plaintiffs. *See id.* at 55-60 (outlining facts of case). The assault cause of action arose out of an interaction in the parking lot where Griffin allegedly swerved his car in the plaintiff’s direction. *See id.* at 60 (presenting background of assault claim).

⁹³ *Id.* at 69 (citing *Ramos v. Roche Products, Inc.*, 936 F.2d 43, 50 (1st Cir. 1991)).

⁹⁴ 760 F.Supp. 952 (D. Mass 1991). In *Wood* the court held that common law assault and battery claims against a co-worker survived Title VII preemption. *Id.* at 957.

⁹⁵ *See Kibbe*, 196 F. Supp. 2d at 69 (utilizing holding of *Wood* court in supporting its holding). The *Wood* court recognized that Title VII seeks to protect the federal government from unconsented suits, which invade the public treasury and mandate government action, and a suit against an individual would not qualify. *Wood*, 760 F. Supp. at 956.

⁹⁶ *See Kibbe*, 196 F. Supp. 2d at 69-70 (announcing position of court).

⁹⁷ *See Kibbe*, 196 F. Supp. 2d at 69 (noting difficulty regarding malicious interference with employment claim). The *Kibbe* court stated that because the malicious interference with employment claim would fail on the merits, it did not need to contemplate the close relationship of the claim to Title VII. *Id.*

⁹⁸ *See Roland v. Potter*, 366 F. Supp. 2d 1233, 1235-36 (S.D. Ga. 2005) (recognizing varying views on preemption).

crimination claims in conjunction with a state law IIED claim.⁹⁹ Despite the plaintiff's claims that the demotion was "'so insulting as to naturally humiliate, embarrass and frighten [her],' subjecting her to serious emotional distress," the court recognized that the IIED claim was wholly derivative of the Title VII claim.¹⁰⁰ Citing this similarity, the court appeared to support the same-facts test by stating that the plaintiff failed to assert facts pertaining to her state law claim that were different from her Title VII claim.¹⁰¹

While *Roland* did hold against the plaintiff's IIED claims, it gave great consideration to *Wallace*, a case that provides a very accurate depiction of the contrast between "highly personal harms" and claims preempted by Title VII.¹⁰² In *Wallace*, the plaintiff, who witnessed sexual harassment of a colleague and testified against the harassers fell victim to constant harassment.¹⁰³ The harassment included "threats to his life, threats to his employment, threats of serious injury to him, harassing language and gestures, and stalking."¹⁰⁴ The court noted that to preclude such claims would deprive a remedy for injuries not addressed by Title VII.¹⁰⁵ Ultimately the *Wallace* court established boundaries between IIED claims that arise from retaliation, which Title VII preempts, and claims for conduct outside of retaliation that caused distress, which are not preempted.¹⁰⁶

The *Baqir* case, which supports the same-facts test, presents facts that very much coincide with the theory behind the same-facts view.¹⁰⁷ In *Baqir* the plaintiff alleged numerous Title VII causes of action, including race-based and age-based disparate treatment, a hostile work environment claim, and retaliation.¹⁰⁸ The plaintiff further alleged breach of contract, wrongful discharge in violation of public policy, defamation, and blacklist-

⁹⁹ *Roland*, 366 F. Supp. 2d at 1235.

¹⁰⁰ *Id.* at 1236.

¹⁰¹ *See id.* at 1236 (appearing to analyze facts from perspective of same-facts test).

¹⁰² *See Roland*, 366 F.Supp.2d at 1236 (analyzing *Wallace*).

¹⁰³ *Wallace v. Henderson*, 138 F. Supp. 2d 980, 981 (S.D. Ohio 2006).

¹⁰⁴ *Id.*

¹⁰⁵ *Wallace*, 138 F. Supp. 2d at 986.

¹⁰⁶ *See id.* (establishing guidelines regarding preemption); *see also Brunetti v. Rubin*, 999 F.Supp. 1408, 1412 (D. Colo. 1998) (recognizing similar understanding as *Wallace* regarding differing means of harm).

¹⁰⁷ *See Baqir v. Principi*, 288 F. Supp. 2d 706, 708-09 (W.D.N.C. 2003) (noting policy behind Title VII).

¹⁰⁸ *See Baqir*, 288 F. Supp. 2d at 707 (listing causes of action). The basis of the defamation claim was the alleged reporting of false information to the National Practitioner Data Bank premised upon malicious intent and discriminatory motive. *Id.* at 709. The basis of the blacklisting claim was that the employer's written and spoken actions prevented the plaintiff from gaining employment with other prospective employers. *Id.*

ing.¹⁰⁹ The *Baqir* court, highlighting the policy argument of *Preiser*, dismissed the breach of contract and wrongful discharge claims without much independent analysis.¹¹⁰ The court went on to find that the facts supporting defamation and blacklisting, also supported the plaintiff's theory of Title VII retaliation, and subsequently dismissed both counts.¹¹¹

d. Why Bring a Tort Claim

Rules and complications of the Title VII claims against a federal employee make collateral tort claims an attractive option for attorneys seeking to recover to the fullest extent for their client.¹¹² One such rule is a cap on recovery via the Civil Rights Act of 1991 ("CRA91").¹¹³ Another consideration includes satisfying the aforementioned administrative requirements.¹¹⁴ Further consideration must also be given to statutes of limitations.¹¹⁵ Tort claims also have a different purpose than do Title VII claims, making them more attractive depending upon the circumstances.¹¹⁶

i. Civil Rights Act of 1991

In 1991, Congress passed the CRA91, authorizing compensatory damages in Title VII cases and punitive damages in non-federal employment Title VII cases, but capped recovery in relation to the size of the employer.¹¹⁷ Under the CRA91, compensatory damages could be awarded for

¹⁰⁹ *Baqir*, 288 F. Supp. 2d at 707 (listing causes of action). The basis of the blacklisting claim was that the employer's written and spoken actions prevented the plaintiff from gaining employment with other prospective employers. *Id.*

¹¹⁰ *See Baqir*, 288 F.Supp. 2d at 708 (dismissing claims based on "authorities cited above"). The *Preiser* court stated, "[t]he crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated by the simple expedient of putting a different label on [the] pleadings." *Id.* (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489-90) (internal quotations omitted).

¹¹¹ *Baqir*, 288 F. Supp. 2d at 709.

¹¹² *See infra* notes 117-120 and accompanying text (discussing requirements within CRA91); Part C.II.d.ii. and accompanying text (discussing administrative requirements); *see also infra* Part C.II.d.iv. and accompanying text (discussing purpose of Title VII and tort law).

¹¹³ *See infra* notes 117-120 and accompanying text (detailing recovery rules of CRA91).

¹¹⁴ *See infra* Part C(II)(D)(ii) and accompanying text (discussing administrative requirements).

¹¹⁵ *See infra* Part C(II)(D)(iii) and accompanying text (discussing statute of limitations issues).

¹¹⁶ *See infra* Part C(II)(D)(iv) and accompanying text (discussing purpose of Title VII and tort law).

¹¹⁷ *See* 42 U.S.C. § 1981a(b) (2012) (detailing compensation rules). The provisions of the CRA91 were applied to claims under sections 706 (private employer claims) and 717 (federal

“future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”¹¹⁸ At the lowest end of the spectrum, employers with “more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year “ would only be required to pay a combined maximum of \$50,000 in compensatory and punitive damages.¹¹⁹ At the highest end of the spectrum, employers with “more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year “ could be liable for up to, but not exceeding \$300,000 in combined compensatory and punitive damages.¹²⁰ Given the cap on Title VII claims, filing additional claims against the employer, or perhaps against an employee, becomes an attractive option.¹²¹

employer claims). 42 U.S.C. § 1981a(a)(1). Punitive damages could be awarded in actions against private employers, but not against a federal employer. 42 U.S.C. § 1981a(b)(1) (discussing punitive damage requirements). The CRA91 specifically noted compensatory and punitive caps did not include consideration of back pay, and also authorized jury trials. 42 U.S.C. §§ 1981a(b)(2), (c). In enacting the CRA91 Congress acted upon findings that

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991). In conjunction with these findings, the stated purposes of the CRA91 was the following:

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of “business necessity” and “job related” enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071.

¹¹⁸ 42 U.S.C. § 1981a(b)(3); see also Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2142-43 (2007) (providing further insight into compensatory damage rules).

¹¹⁹ See 42 U.S.C.A. § 1981a(b)(3)(A). It is essential to remember that a federal employer cannot be required to pay punitive damages. See *id.* at (b)(1) (detailing punitive damage requirements).

¹²⁰ 42 U.S.C. § 1981(b)(3)(D). Employers satisfying the twenty calendar week timeframe with 101 to 200 employees or 201 to 500 employees would be capped at \$100,000 and \$200,000, respectively. *Id.* at (3)(B)-(C).

¹²¹ See *supra* notes 44, 49, 60, 75-76, 87, 92, 99, 105, 111 and accompanying text (presenting cases where plaintiffs brought other claims in addition to Title VII claims).

ii. *Administrative Requirements*

Prior to bringing a Title VII lawsuit, a prospective plaintiff must first exhaust administrative remedies.¹²² Failing to exhaust administrative remedies will forfeit the plaintiff's right to sue under Title VII.¹²³ The process begins with an employee filing a timely charge of employment discrimination with the EEOC and against their employer.¹²⁴ The EEOC, after conducting its own investigation, may issue a right to sue letter to the employee.¹²⁵ After receiving the right to sue letter, the employee may then bring a Title VII action against her employer.¹²⁶ The same-facts and individuals depicted in the administrative claim must be depicted in the civil complaint to fall within the EEOC's right to sue.¹²⁷

iii. *Statute of Limitations Issues*

Title VII requires that an employee file a Title VII charge within 300 or 180 days of the alleged discriminatory practice.¹²⁸ Although later

¹²² See e.g., 42 U.S.C. § 2000e-5 *et seq.* (presenting administrative requirements); *Administrative requirements*, 3 EMP. DISCRIM. COORD. ANALYSIS OF FEDERAL LAW § 113:2 (2013) [hereinafter DISCRIM. COORD.] (explaining administrative requirements); Annotation, *Exhaustion of remedies under Title VII (Equal Employment Opportunity) of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) as prerequisite to maintenance of action under 42 U.S.C.A. § 1981 for employment discrimination*, 23 A.L.R. Fed. 895 (2014) [hereinafter *Exhaustion Annotation*] (discussing Title VII exhaustion issues); Dianne Avery, *VII. Exhaustion of Administrative Remedies in Litigating the Sexual Harassment Case*, 27 A.B.A. J. (2000).

¹²³ See National LAWYERS Guild, LABOR & EMPLOYMENT COMMITTEE, *Exhaustion of Administrative Remedies—Exhaustion of Remedies Under Title VII*, 2 EMP. & UNION MEMBER GUIDE TO LABOR LAW § 6:91 (2012).

¹²⁴ See e.g., *Exhaustion Annotation*, 23 A.L.R. Fed. 895, § 3 (detailing process of instituting claim); Avery, *supra* note 122 (same); DISCRIM. COORD., *supra* note 122 (same). Charges may also be filed by state or local agencies on behalf of the employee. 42 U.S.C. § 2000e-5(1). The timing requirements of these charges are discussed in the following section. See *infra* Part C.II.d.iii. (outlining timing requirements pertaining to statute of limitations issues).

¹²⁵ See 42 U.S.C. § 2000e-5(b); DISCRIM. COORD., *supra* note 122 (discussing administrative requirements, including right to sue letter). On some occasions, the EEOC will bring suit on behalf of the prospective plaintiff; however, in cases of federal employment discrimination, the EEOC will only issue a right to sue letter. See 42 U.S.C. § 2000e-5(f)(1).

¹²⁶ See generally, e.g., Farrell, *et al.*, 45C AM. JUR. 2D JOB DISCRIMINATION § 2009 (2013) (outlining practice of satisfying administrative requirements); DISCRIM. COORD., *supra* note 122; Avery, *supra* note 122.

¹²⁷ *Supra* Farrell, note 126.

¹²⁸ See 42 U.S.C. § 2000e-5(e)(1) (detailing statute of limitations); see also Avery, *supra* note 122 (defining timing requirement). In cases of discrimination through compensation, the Lilly Ledbetter Fair Pay Act of 2009 ("LLPA") loosened the 180 day requirement and provided that each of the following will trigger the time for filing a charge of discrimination: when a discriminatory compensation or other practice is adopted; when an individual becomes

corrected by the Lilly Ledbetter Fair Pay Act of 2007, the *Ledbetter v. Goodyear Tire & Rubber Co.*¹²⁹ statute of limitations case represents just how easily a legitimate wrong fell through the cracks of legal remedy.¹³⁰ In *Ledbetter*, Lilly Ledbetter, a Goodyear Tire & Rubber Company employee, was found to have missed her window to contest discriminatory pay issues, despite continually and unbeknownst to her, being paid less than male counterparts throughout the course of her employment.¹³¹ Even where discrimination is known, victims of discrimination may not always become aware of their legal rights within the 300 or 180 day window, and some may even fear reprisal for bringing claims.¹³² Particularly with sexual harassment, victims may initially be reluctant to bring claims due to social stigma and the intimate nature of their injuries.¹³³

iv. Tort and Policy

Where Title VII seeks to “remov[e] barriers historically favor[ing] one class of employees over another,” tort claims have an entirely different purpose: making a plaintiff-victim whole and deterring future conduct.¹³⁴

subject to a discriminatory compensation or other practice; or when an individual is affected by application of a discriminatory compensation or other practice, including each time wages, compensation, or other benefits is [sic] paid, resulting in whole or in part from such a decision or other practice.

Robin Shea, *Obama Signs Lilly Ledbetter Fair Pay Act: Goodbye Statute of Limitations*, CONSTANGY, BROOKS, & SMITH, LLP (Jan. 29, 2009) available at <http://www.constangy.com/assets/attachments/CB403%5B1%5D.pdf> (internal quotations omitted).

¹²⁹ 550 U.S. 618 (2007), *abrogated by* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

¹³⁰ See *Ledbetter*, 550 U.S. at 621 (rejecting Ledbetter’s claim as time barred); *cf. id.* at 645 (Ginsburg, J., dissenting) (noting “hidden” nature of discrimination against Lilly Ledbetter). Without the intention of minimizing pay-based harm, such a circumstance is even more harmful where the victim is subjected to sexual harassment, leaving severe emotional, and in some cases, physical harm. See Schoenheider, *supra* note 44, at 1463 (noting harm caused by sexual harassment in workplace).

¹³¹ See *Ledbetter*, 550 U.S. at 624-42 (explaining reasoning for rejecting Ledbetter’s claim as time barred).

¹³² See Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. REV. 1363, 1378 (1993) (outlining difficulty in bringing suit within 180 day window). Korn, while describing the 180 day limitations window as “unusually short,” acknowledges that victims may be “unsure of their right to file a complaint.” *Id.* Korn further describes some victims of sexual harassment as reluctant to file complaints. *Id.*

¹³³ See *id.* Korn goes on to contrast the 180-day limit with the torts of assault, battery, and IIED, which all are applicable in cases of sexual harassment and all have statutes of limitations of at least one year. *Id.*

¹³⁴ See Leta L. Fishman, *Preemption Revisited: Title VII and the State Tort Liability After International Union*, 66 ST. JOHN’S L. REV. 1047, 1055-58 (1993) (contrasting Title VII and tort);

Title VII seeks to rectify work-place harms, and following the CRA91's creation of compensatory damage capabilities, has improved in its capacity to do so.¹³⁵ Despite this improvement, and in consideration of the recovery cap, Title VII has failed to consider the intimate and often intangible harm resulting from discrimination.¹³⁶

D. ANALYSIS

The intersection of Title VII and tort law creates an interesting interplay of constitutional and statutory rights, judicial interpretation, and practical consequences.¹³⁷ In determining whether Title VII should be found to preempt tort claims, consideration must be given to what constitutes a "highly personal harm," factors distinguishing *Brown* and its progeny, the legislative intent behind Title VII, and the practical consequences of preempting tort claims via Title VII.¹³⁸ These elements, which are all relevant to the issue of Title VII tort claim preemption, can be effectively resolved to the benefit of the victim, and in a way that is consistent with a policy aimed at preventing workplace discrimination and harassment.¹³⁹

I. What is a "Highly Personal Harm?"

In looking at employment discrimination, there are two key components: harm experienced relative to the employment opportunity, and harm experienced in a personal capacity, independent of the working relationship.¹⁴⁰ By utilizing cases and examples debating the "highly personal harm" approach, it is possible to develop an accurate picture of the types of harms presented by and through acts also classified as employment discrimination.¹⁴¹ Examining this picture leads to the conclusion that the "same-facts" test fails to consider the intangible harms outside the protec-

Com. Litig. in New York State Courts, 4B N.Y. PRAC. § 87:7 (Robert L. Haig, 3d ed., 2010) (defining goals of tort law).

¹³⁵ Cf. *supra* note 118 and accompanying text (providing additional avenues of recovery under Title VII).

¹³⁶ See Martha Chamallas, *Shifting Sands of Federalism: Civil Rights and Tort Claims in the Employment Context*, 41 WAKE FOREST L. REV. 697, 717 (2006) ("Leaving harassment and discrimination out of tort law strikes me as a bad idea that artificially distorts the notion of outrageous conduct and minimizes the importance of civil rights to individuals.").

¹³⁷ See *supra* notes 40, 44, 60, 74 and accompanying text (demonstrating interplay).

¹³⁸ See *infra* Part D(I)-(IV) (presenting analysis supporting argument).

¹³⁹ Cf. *supra* notes 44-45 and accompanying text (considering role of Title VII).

¹⁴⁰ See *supra* notes 44-45 (referencing types of harm).

¹⁴¹ See *supra* notes 44-45, 51-51, 63, 76 and accompanying text (providing facts from various cases analyzing and classifying harm).

tion of Title VII, which may then be rectified through utilization of tort remedies.¹⁴²

Distinguishing Title VII harm and “highly personal harm” is a very fact-intensive process.¹⁴³ As discussed in *Sommatino*, *Pfau*, *Mathis*, *Kibbe*, and *Baqir*, courts applying either the same-facts or “highly personal harm” tests have long been critical of an employment discrimination claim masked in tort.¹⁴⁴ In same-facts standard jurisdictions, courts have interpreted any non-Title VII claim stemming out of discriminatory practices to be an extension of the Title VII employment-based discriminatory harm.¹⁴⁵ In “highly personal harm” jurisdictions, courts have framed the question in a way that looks at how the harm is connected to the workplace, and how it may impact more than just the workplace.¹⁴⁶ The “highly personal harm” approach involves the application of the same-facts standard; however, it goes one step further in carving out an exception to preemption where the harms may be more than just employment related.¹⁴⁷

A starting point for developing this understanding is the clear-cut employment-based harm case.¹⁴⁸ The classic example of such harm is exemplified in *Baqir*.¹⁴⁹ This case may then be compared with *Charlot* to develop a concept of what may constitute “highly personal harm.”¹⁵⁰

In *Baqir* the plaintiff alleged retaliation in violation of Title VII, as well as defamation and blacklisting.¹⁵¹ In dismissing these complaints the court focused on the necessity of the same-facts to prove the Title VII and

¹⁴² See *supra* note 44 and accompanying text (discussing alternative harms).

¹⁴³ See *supra* note 51 and accompanying text (examining facts in determining whether harm was “highly personal”).

¹⁴⁴ See *Mathis v. Henderson*, 243 F.3d 446, 451 (8th Cir. 2001); *Sommatino v. United States*, 255 F.3d 704, 711 (9th Cir. 2001); *Pfau v. Reed*, 125 F.3d 927, 933 (5th Cir. 1997); *Baqir v. Principi*, 288 F. Supp. 2d 706, 708 (W.D. N.C. 2003); *Kibbe v. Potter*, 196 F. Supp. 2d 48, 70 (D. Mass. 2002).

¹⁴⁵ See *supra* notes 61, 62-72, 76 & 111 and accompanying text (discussing same facts application).

¹⁴⁶ See *supra* notes 44 & 88 and accompanying text (discussing “highly personal harm” application).

¹⁴⁷ See *supra* notes 44 & 88 and accompany text (same).

¹⁴⁸ See *Baqir*, 288 F. Supp. 2d at 708 (providing example of clear employment-based harm case).

¹⁴⁹ Cf. *id.* See *supra* note 111 and accompanying text (outlining close proximity of Title VII to common law claims); See also *supra* note 44 (discussing *Nolan* case holding “allegations of discriminatory failure to promote, retaliation for discrimination complaint, and constructive discharge . . .” were nothing more than Title VII covered employment discrimination).

¹⁵⁰ See *supra* notes 89-90 and accompanying text (presenting facts distinguishable from *Baqir*).

¹⁵¹ See *supra* notes 108-109 and accompanying text (presenting causes of action).

common law claims.¹⁵² According to the facts as alleged, the harm suffered by the plaintiff involved allegedly false information reported to prospective employers.¹⁵³ The harm, as alleged, is mostly employment reputational harm.¹⁵⁴

In *Charlot* the plaintiff alleged defamation along with Title VII claims.¹⁵⁵ Charlot's allegations focused on Leishman's public classification of her as a "threat" and his statement that she had attempted to evade military police.¹⁵⁶ Leishman also made allegedly false statements to a superior when requesting a ten-day suspension.¹⁵⁷ Further, allegedly defamatory statements were made by Moore when he referred to Charlot as "crazy" during his investigation.¹⁵⁸ The harms in this circumstance appear to be a mixed-bag of employment reputational and personal reputational harm.¹⁵⁹

At first glance, it would appear that the harm to a reputation being a "highly personal harm distinct from the harm her Title VII claim seeks to address" would inherently include the harm suffered in *Baqir*; however, the cases are distinguishable.¹⁶⁰ In *Baqir*, the alleged harm from the defamation and blacklisting was purely employment-based, which is the type of harm for which Title VII provides redress.¹⁶¹ In contrast, Leishman outwardly making false statements to colleagues, friends, and anyone with an open ear, as occurred in *Charlot*, would stretch beyond employment reputation.¹⁶² Here the same-facts test would conclude that all common law claims would be preempted; however, from these facts, it is clear that there was more than just employment reputational harm.¹⁶³ This additional harm

¹⁵² See *Baqir*, 288 F. Supp. 2d 708 (outlining disposition of court).

¹⁵³ See *supra* note 108 (explaining facts advanced to support claims).

¹⁵⁴ Cf. *supra* note 111 and accompanying text (noting claim's similarities to Title VII). It is possible to argue that personal harm may result, however at the outset of the allegedly defamatory statements the main interest harmed is of an employment nature. Much like in cases of IIED, the circumstance by which the harm originates defines the nature of the harm. Compare *supra* notes 99-101 and accompanying text (discussing *Roland* case), with *supra* notes 103-106 (discussing *Wallace* case); see also *infra* note 174 (presenting origination of harm issues pertaining to IIED). Furthermore, the advent of CRA91's compensatory damage clause would appear to contemplate this very circumstance as it relates to harm originating in the employment context. Cf. *supra* note 117 and accompanying text (discussing compensatory damages in CRA91).

¹⁵⁵ See *Charlot*, 2012 WL 3264568, at *1 (presenting claims).

¹⁵⁶ See *id.* at *2 (discussing Leishman's actions).

¹⁵⁷ See *supra* note 87 and accompanying text (discussing Charlot's defamation claim).

¹⁵⁸ See *supra* note 87 and accompanying text (presenting Moore's statement).

¹⁵⁹ Cf. *supra* note 44 (discussing varying types of harm).

¹⁶⁰ See *supra* note 90 and accompanying text (outlining courts reasoning).

¹⁶¹ See *supra* note 6 and accompanying text (outlining purpose and goals of Title VII).

¹⁶² Cf. *supra* note 44 (discussing varying types of harm).

¹⁶³ See *supra* notes 61-72, 76 & 111 and accompanying text (discussing same facts applica-

would allow for collateral non-Title VII suits in jurisdictions applying the “highly personal” harm standard.¹⁶⁴

Leishman’s comments pertaining to the suspension, and Moore’s “crazy” classification, cause the facts of *Charlot* to grow closer to the facts of *Baqir*.¹⁶⁵ Where Leishman’s comments were only made to Moore, the case is identical to *Baqir*, as only employment opportunities were hindered.¹⁶⁶ Regarding the “crazy” comment, more facts would need to be known regarding who heard the comment, so as to develop a picture as to whether those outside an employment context were aware of these statements.¹⁶⁷ These matters help to draw the distinction that a false or unfavorable review or recommendation that adversely impacts an employment condition differs from an outward attack on a person’s character.¹⁶⁸ Such an attack on a person’s character would qualify as a “highly personal harm,” despite growing out of the same-facts as Title VII allegations.¹⁶⁹

Just as *Baqir* and *Charlot* can be broken down into different harms, sexual harassment in the workplace is susceptible to the same considerations.¹⁷⁰ In *Pfau*, the court considered Gonzales’s phone calls and insistence upon visiting the plaintiff’s apartment and an offer to accompany the plaintiff on vacation.¹⁷¹ In *Mathis*, the court considered claims that a supervisor wore hats with sexualized overtones during meetings and also demanded that the plaintiff be present during drinking and poker following one meeting.¹⁷² In both cases, the presented facts demonstrated that the actions undoubtedly altered the condition of each victim’s employment, but could not show much more.¹⁷³ Where such cases would stretch beyond

tion); *supra* note 44 (discussing varying types of harm).

¹⁶⁴ See *supra* notes 44 & 88 and accompanying text (discussing “highly personal harm” application).

¹⁶⁵ Compare *supra* note 87, with *supra* notes 107-108 and accompanying text (discussing facts of both cases).

¹⁶⁶ Compare *supra* note 87, with *supra* notes 107-108 and accompanying text (discussing facts of both cases); cf. *supra* note 44 (discussing varying types of harm).

¹⁶⁷ Cf. *supra* note 44 (discussing varying types of harm).

¹⁶⁸ See *supra* note 44 (distinguishing highly personal harms from other types of employment harms); see also *supra* note 89 and accompanying text (presenting *Charlot* court holding pertaining to defamation).

¹⁶⁹ See *supra* note 88 and accompanying text (presenting *Charlot* court’s holding as it pertained to defamation).

¹⁷⁰ Cf. *supra* note 44 (discussing varying types of harm); see also *supra* notes 149-169 and accompanying text (presenting concepts of different types of defamation harm).

¹⁷¹ See *supra* note 6060 (presenting actions of Gonzales).

¹⁷² See *Mathis v. Henderson*, 243 F.3d 446, 449-50 (8th Cir. 2001) (presenting boss’s actions in workplace).

¹⁷³ Compare *supra* note 60, with *supra* note 74 and accompanying text (discussing facts of both cases); see also *supra* note 44 and accompanying text (discussing various types of, degrees

basic employment discrimination is where the harm is not experienced as a result of diminished career opportunities, uncomfortable employment conditions, or other adverse employment consequences, but instead features an act that has the capacity to harm the individual outside the working conditions of the employee.¹⁷⁴

The Ninth Circuit line of cases dealt with facts such as these, and such facts serve to demonstrate the different bounds of sexual harassment, which dictate that occurrences that are more than just harm to working conditions be treated as such.¹⁷⁵ In *Otto*, the plaintiff alleged that her harasser followed her, telephoned her at home, and the plaintiff alleged that she lived in constant fear of sexual assault, both inside and outside of work.¹⁷⁶ In *Brock*, the plaintiff was actually raped by her boss; rape could be classified as an act of sexual discrimination, but is much more serious than sexual discrimination alone.¹⁷⁷ Similarly, in *Mathis*, although not contemplated by the court given its rejection of the “highly personal harm” standard, the boss’s act of demanding that the plaintiff dance every dance with him demonstrates a physical component beyond employment conditions.¹⁷⁸ The same can be said for Gonzales’s appearance at the plaintiff’s home, which brought about both a change in employment conditions and also a fear of sexual assault.¹⁷⁹

The key factor in determining what constitutes a “highly personal harm” is whether the propounded harm is directly derived from an impact on employment conditions or whether the harm is something further.¹⁸⁰

of, and remedies for harm).

¹⁷⁴ Cf. *supra* note 44 (discussing varying types of harm). There is room here to argue that IIED would thus fall within this category as being harm distinct from employment harm, however, the issue of IIED must focus on why the distress developed. Compare *supra* notes 99-101, and accompanying text (discussing *Roland* case), with *supra* notes 103-106 (discussing *Wallace* case). Distress resulting from adverse employment conditions or limited opportunities differs greatly from distress resulting from a harassing employee. Cf. *supra* note 44 (discussing varying types of harm). This distinction is explored in *Roland*, where the plaintiff’s source of her IIED claim was her demotion and nothing more, as opposed to *Wallace* where the source of the plaintiff’s IIED claim was from threats to the plaintiff’s life, threats to plaintiff’s employment, threats of serious injury, harassing language and gestures, and stalking. Compare *supra* notes 99-101 and accompanying text (discussing *Roland* case), with *supra* notes 103-106 (discussing *Wallace* case). The *Wallace* court supported this notion in noting that distress as a result of the retaliation (i.e. threats to employment) would be preempted, but not conduct outside retaliation under Title VII. See *supra* note 106 and accompanying text (outlining disposition of *Wallace* court).

¹⁷⁵ Cf. *supra* notes 40, 44 (presenting extreme instances of sexual harassment).

¹⁷⁶ See *Otto v. Heckler*, 781 F.2d 754, 755-56 (9th Cir. 1986) (outlining facts of case).

¹⁷⁷ See *supra* note 43 and accompanying text (presenting facts of *Brock*).

¹⁷⁸ Cf. *supra* note 44 (discussing varying types of harm); see also *supra* note 74 and accompanying text (discussing facts of *Mathis*).

¹⁷⁹ Cf. *supra* note 44 (discussing varying types of harm).

¹⁸⁰ See *supra* note 44 (distinguishing “highly personal harm” from other types of harm); see

The ability to classify a major offense, such as murder or rape, as a minor offense, such as battery or employment discrimination, does not alter the characteristics or extent of the harm.¹⁸¹ This same view can be applied to actions that contain employment-based discriminatory harm and further individualized, personal harm.¹⁸²

II. *The Factual Predicate – Distinguishing Brown*

The logical inconsistencies between the facts underlying the *Brown* decision and the facts within *Brock*, *Pfau*, *Mathis*, *Charlot*, and other cases presented within this note, give rise to the legitimacy of the “highly personal harm” approach, thereby distinguishing *Brown*.¹⁸³ In the context of a Title VII and § 1981 claim, *Brown* considered whether Brown’s skin color impacted a promotion opportunity.¹⁸⁴ In contrast, the *Brock* court considered a supervisor who raped an employee, *Pfau* considered a supervisor who showed up to an employee’s home, *Mathis* considered meetings and encounters with overt sexualized overtones, and *Charlot* considered statements outlining a public removal of a person from an office by military police.¹⁸⁵ The circumstances of the aforementioned cases gave rise to claims outside of “decision-based” discrimination, whether it be assault, battery, IIED, or defamation, whereas *Brown* only involved Title VII and § 1981 discrimination-centered harms.¹⁸⁶ Given these differences, it is possible to read *Brown*’s “exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination” as applying to “decision-based” discrimination, or employment based harms, but not “highly personal harms.”¹⁸⁷

also *supra* notes 6-8 and accompanying text (presenting goals of Title VII).

¹⁸¹ See *supra* note 44 and accompanying text (discussing various types of, degrees of, and remedies for harm).

¹⁸² See *id.*

¹⁸³ Compare *supra* note 24 and accompanying text (presenting facts of *Brown*), with *supra* notes 43, 60, 75, 87 and accompanying text (outlining facts of *Brock*, *Pfau*, *Mathis*, and *Charlot*).

¹⁸⁴ See *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 822-24 (1976) (outlining plaintiff’s claims).

¹⁸⁵ See *supra* notes 43, 60, 75, and 87 and accompanying text (outlining facts of *Brock*, *Pfau*, *Mathis*, and *Charlot*, respectively).

¹⁸⁶ See *supra* notes 24-25 and accompanying text (outlining facts of *Brown* and presenting statutes). Although not focused directly upon employment discrimination issues, § 1981 ensures “full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. § 1981.

¹⁸⁷ See *supra* notes 24-25 and accompanying text (presenting legal theory surrounding *Brown*); see also *supra* note 13 and accompanying text (presenting concept of decision-based discrimination); see also *Kibbe v. Potter*, 196 F. Supp. 2d 48, 68-69. (D. Mass. 2002) (demonstrating common law claim “akin” to Title VII claim).

III. Legislative Interpretation

Given the ambiguity that remains in the wake of the *Brown* decision, interpreting the legislative intent of Congress is the next logical step in the analysis of Title VII.¹⁸⁸ The starting point for this analysis draws upon the Supreme Court's legislative interpretation in *Brown*.¹⁸⁹ Following the *Brown* decision, the CRA91 can also be seen as altering the landscape of Title VII claims.¹⁹⁰ Ultimately, the CRA91, which would appear to create further specificity and a greater argument for preemption, features language and instances of policy suggesting supplementing, rather than supplanting tort claims.¹⁹¹

The key argument in *Brown*, focusing on previously unavailable and ineffective judicial remedies, gives credence to the application of Title VII preemption to matters of "decision-based" discrimination.¹⁹² At the time of *Brown*, the EEOC had not begun to issue guidelines pertaining to "harassment-based" Title VII claims, suggesting that such complaints were not yet realistically contemplated.¹⁹³ Given this reality, the understanding that prior to the EEOA federal employees lacked an effective judicial remedy for federal employment discrimination outlines the failure to consider "harassment-based" claims when defining Title VII's preemptive reach.¹⁹⁴

Although *Brown* has just been distinguished as not applying to the preemption of additional tort claims in "harassment-based" cases, the *Preiser* decision, drawn upon in *Brown*, outlines good Supreme Court jurisprudence that specific statutes preempt general statutes.¹⁹⁵ The specific versus general understanding also played a significant role in the *Pfau* court's decision to reject FTCA and Title VII concurrence.¹⁹⁶ To clear this

¹⁸⁸ See *supra* notes 27-33 and accompanying text (looking to legislative intent to determine how to apply Title VII).

¹⁸⁹ See *supra* notes 27-31 and accompanying text (presenting *Brown*'s interpretation of legislative intent).

¹⁹⁰ See *supra* notes 117-120 and accompanying text (presenting introduction of CRA91; amending Title VII).

¹⁹¹ See *supra* notes 117-120 and accompanying text (outlining increasing complexity of Title VII following CRA91 amendment); see also *infra* notes 203-207 and accompanying text (presenting information relevant to supplemental, non-preempting policy within CRA91).

¹⁹² See *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976) (discussing inadequate remedies); see also *supra* notes 10-11 (explaining application of Title VII to "decision-based" discrimination).

¹⁹³ See *supra* note 19 and accompanying text (noting date EEOC implemented sexual harassment guidelines).

¹⁹⁴ See *supra* note 2 and accompanying text (noting date of *Brown* decision); *supra* note 19 and accompanying text (noting issuing date of EEOC's guidelines).

¹⁹⁵ See *supra* notes 32-33 and accompanying text (discussing *Preiser*).

¹⁹⁶ See *Pfau v. Reed*, 125 F.3d 927, 932, 934 (5th Cir. 1997) (discussing specific versus gen-

hurdle, it is essential to look at the purposes of, and legislative intent behind, Title VII.¹⁹⁷

Title VII was enacted in 1964 to remove barriers historically favoring one class of employees over another.¹⁹⁸ With the passage of the EEOA, Title VII became more refined, and now includes complimentary administrative and judicial means to “eradicate federal employment discrimination,” coverage of “venue, the appointment of attorneys, attorneys’ fees, and the scope of relief,” and establishes primary responsibility for preventing discrimination on the federal employer.¹⁹⁹ Despite this fine-tuning, Congressional debate prior to the passage of the EEOA focused on the lack of an applicable and efficient judicial remedy for federal employees.²⁰⁰ Prior to the EEOA, employees may have avoided seeking judicial remedy for fear of antagonizing superiors, especially given the minimal likelihood they would actually recover any back pay or compensation.²⁰¹ These changes, coupled with the original intention of Title VII as removing barriers, and a lack of compensatory damage provisions, signify that Title VII in its pre-1991 form may have specificity regarding “discrimination-based” harms, but was not geared toward “harassment-based” harms.²⁰²

With the enactment of the CRA91, Title VII came to include compensatory damage rights, jury trial rights, and specific caps upon relief; becoming an even more specific and well-constructed statute carrying concepts beyond correcting “discrimination-based” harms.²⁰³ Despite these inclusions, the purposes surrounding the enactment of the CRA91 indicate that the CRA91 was aimed at providing “appropriate remedies for intentional discrimination and unlawful harassment in the workplace.”²⁰⁴ This language, substituting “appropriate” for “additional,” differs from the Congressional finding that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the work-

eral preemption).

¹⁹⁷ See *supra* notes 27-31 and accompanying text (looking to legislative intent to determine how to apply Title VII).

¹⁹⁸ See *supra* note 134 and accompanying text (presenting purpose of Title VII).

¹⁹⁹ See *supra* note 28 and accompanying text (outlining specificity of Title VII).

²⁰⁰ See *supra* note 7 and accompanying text (presenting lack of pre-Title VII judicial remedy for employment discrimination).

²⁰¹ See *supra* note 7 and accompanying text (discussing pitfalls of pre-Title VII employment discrimination law).

²⁰² See *supra* notes 117-120 and accompanying text (noting inclusion of additional rights under Title VII in 1991); *supra* note 134 and accompanying text (outlining purpose of Title VII).

²⁰³ See *supra* notes 117-120 and accompanying text (discussing CRA91).

²⁰⁴ See Civil Rights Act of 1991, Pub. La. No. 102-166, § 3, Stat. 1071 (1991) (explaining purposes of CRA91).

place”²⁰⁵ Coupling the term “appropriate remedies” with language under the limitations section of the compensatory damage clause— “Compensatory damages awarded *under this section* . . .,” (emphasis added) — gives reason to believe “appropriate remedies” modifies only damages under Title VII. Such an interpretation also respects the Congressional finding and policy goal of deterring discrimination and harassment in the workplace.²⁰⁶ Given this interpretation, credence can be given to the First Circuit interpretation that “Title VII is designed to supplement, not to supplant existing laws.”²⁰⁷

IV. Practical Implication

Applying *Brown* and specific versus general preemption to cases involving harms other than “decision-based” discrimination yields results contrary to common sense.²⁰⁸ Under the “same-facts” reading of Title VII, victims of employment discrimination could bring a Title VII action for conduct that is both assaultive and discriminatory, but not a FTCA, or state law, tort claim.²⁰⁹ This victim could then recover up to, but no greater than, the amounts established under the CRA91.²¹⁰ Inexplicably, if the same conduct was solely assaultive, the FTCA or state law tort claim would not be preempted and there would be no recovery cap, which is a result that the *Brock* court stated would turn Title VII on its head.²¹¹

Suppose a supervisor was to intentionally spill things on minority employees every time he walked by their desk, but did not do the same to white employees. This conduct, depending on damages and fulfillment of the appropriate elements, may qualify for any number of torts, including trespass to chattels, conversion, assault, or battery.²¹² Similarly, this con-

²⁰⁵ Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071; *see also supra* note 117 (providing language from Congressional finding).

²⁰⁶ *See supra* note 117 (“[A]dditional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.”); *see also* note 134 and accompanying text (outlining purpose of Title VII).

²⁰⁷ *See supra* note 93 and accompanying text (reviewing relevant First Circuit case law).

²⁰⁸ *See Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) (explaining potentially illogical result).

²⁰⁹ *See supra* note 45 and accompanying text (discussing issues with preemption).

²¹⁰ *See supra* note 45 and accompanying text (outlining means of recovery); *see also supra* notes 117-120 and accompanying text (explaining CRA91 recovery caps).

²¹¹ *See supra* note 45 and accompanying text (outlining preemption issues).

²¹² *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 13 (1965) (discussing battery); James D. Burlison, 10 MO. PRAC., PETITIONS § 7.0 (3d ed., 2013) (discussing conversion); Tracy Bateman Farrell, 104 N.Y. JUR. 2D TRESPASS § 8 (2012) (discussing trespass to chattels); Peter Nash Swisher, et. al, VA. PRAC. TORT AND PERSONAL INJURY LAW § 2:10 (2012) (discussing assault).

duct likely creates a hostile work environment.²¹³ Now assume this supervisor was to do the same to every minority non-employee who walked in the door, but not to white non-employees. Under *Brown* and the “same-facts” interpretation, the non-employee would be free to sue the supervisor or employer under any applicable tort theory.²¹⁴ The employee’s only remedy would be to sue under Title VII, despite the equally applicable circumstances toward the employee and non-employee.²¹⁵ Further complicating the issue, if the spilling were to occur only on one occasion and hypothetically ruined the employees’ \$1,000 suit, the employee would be free to sue the supervisor individually to recover appropriate damages.²¹⁶

E. CONCLUSION

Discriminatory conduct may fall under the guise of a boss speaking to an employee in sexualized overtones, or failing to promote based upon sex or race, however, discriminatory conduct may also cross the line to being assaultive, defamatory, or all-together incredibly violative of personal dignity. Reaching this conclusion would begin by analyzing the facts of each case. Where the actions may have originally qualified as preempted under the same-facts inquiry, suspicion would underlie the “highly personal harms” inquiry. This inquiry would intend on distinguishing employment harms from personal harms, as discussed in Part D(I). If it is determined that the harm is more than just employment harm, or is something that is at least in the realm of employment harm, then additional tort claims would be permissible. The role of “highly personal harms” torts is to act in conjunction with the supplementary, and non-supplanting, Title VII claims, to ensure that victims are not limited by the employment-based harm cap set forth in the CRA91. Instead, where a victim’s harm goes beyond employment-based harm, he should be free to recover damages arising from that harm, even if they exceed the compensatory cap.

In the spirit of further improving workplace conditions, and discouraging employment discrimination, utilizing the “highly personal harm” approach supplants the expansive view of preemption in *Brown*, provides remedies addressing the true nature of harm experienced by employees, and

²¹³ See John R. Paddock, Jr., 16A COLO. PRACTICE, EMP’T L. & PRACTICE HANDBOOK § 8.11 (2013) (defining elements of hostile work environment); see also *supra* notes 17-19 and accompanying text (outlining types of “harassment-based” discrimination).

²¹⁴ See *supra* note 45 and accompanying text (presenting reason of legitimate recovery).

²¹⁵ See *supra* notes 45, 58 and accompanying text (articulating limitation upon recovery).

²¹⁶ Cf. *supra* note 44, 58 and accompanying text (requiring Title VII component for preemption analysis).

bolsters the policy goals of Title VII, including supplementing existing laws. Title VII, enacted in 1964, and subsequently amended twice to further worker protections and interests, has served as a beacon of progress for employee rights. Utilizing the “highly personal harm” approach functions to assure employee-victims that they have the same right to statutory and common law protections and remedies as a non-employee victims, and acts to further improve workplace conditions, while also discouraging employment discrimination.

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