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Max Londberg

HIRING CRITERIA AND TITLE VII: HOW ONE MANIFESTATION OF EMPLOYER BIAS EVADES JUDICIAL SCRUTINY

Max Londberg[1]

I. INTRODUCTION

Writing in 1988, feminist and critical race scholar Kimberlé Williams Crenshaw described the Civil Rights Act of 1964 (commonly known as "Title VII") as contributing to the removal of "most formal barriers and symbolic manifestations of subordination."[2] But the Act and other reforms ultimately fell short, for a "challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained."[3] One such myth holds that merit alone guides hiring decisions. This myth conceals subordination by race and gender.

In 1964, Congress declared it unlawful for employers to "fail or refuse to hire . . . any individual because of such individual's race, color, religion, sex, or national origin."[4] Some were hopeful that Title VII's legal requirement to assess a job applicant free from discrimination would curb hiring bias.[5] But colorblind ideology has hindered the law's function.[6] Recent federal court decisions are continuing this trend by

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1. Blog Editor, *University of Cincinnati Law Review.* The author is most grateful to Marisa Moore, Danny O'Connor, Sean Meyer, Lisa Rosenof, and Paul Rando, for their insightful edits, and to Professor Sandra F. Sperino, whose instruction and mentorship inspired and enhanced this Comment.

2. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1348, 1378 (1988).

3. *Id.* at 1381.

4. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964).

5. *See* M.S. Handler, *N.A.A.C.P. Plans to Intensify Attack on Job Discrimination*, N.Y. TIMES, June 26, 1964, at 14, https://timesmachine.nytimes.com/timesmachine/1964/06/26/106980026.html?pageNumber=14 [https://perma.cc/Y9RS-5YXJ] (reporting that the NAACP planned to "charge a number of corporations and labor unions with discriminatory practices when the new civil rights bill goes into effect" and describing NAACP report that charged some union groups with fostering "virtually closed memberships" and General Motors Corporation with failing to provide equal-employment opportunities). *Cf.* Martin Luther King Jr., *In a Word—NOW*, N.Y. TIMES, Sept. 29, 1963, at T92, https://www.nytimes.com/1963/09/29/archives/in-a-wordnow.html?smid=url-share [https://perma.cc/3485-D964] (describing the civil rights bill amid discussion of deconstructing barriers "NOW" and writing: "NOW means jobs, F.E.P.C., training, leveling obstacles of discrimination . . ."). *But see* Stephen Tuck, *Powerless at Home, Dangerous Abroad: The Civil Rights Act According to Malcolm X*, 24 NEW LAB. F. 69, 70 (2015) (describing Malcolm X's disdain for the Civil Rights Act of 1964 and quoting him as saying, in a 1964 speech to Oxford students, "No matter how many bills pass, [B]lack people in that country, where I'm from, still our lives are not worth two cents.").

6. *See, e.g.*, Crenshaw, *supra* note 2, at 1344-45. Crenshaw criticizes colorblind ideology, as it would make:

preventing legal redress for a particular manifestation of implicit bias in hiring — a barrier that is contrary to Title VII. The barrier this Comment addresses is judicial oversight of bias that causes employers to alter hiring criteria, often in favor of white male applicants.[7] This oversight results in unchecked discrimination. This Comment calls for increased judicial scrutiny of this manifestation of racism.

This Comment will explore the issue through an analysis of relevant caselaw and social science literature. The next Section of this Comment reviews judicial decisions interpreting the purpose of Title VII, to demonstrate its broad reach. Section II also highlights a less-invoked subsection of Title VII that further supports its expansiveness. Section II then describes summary judgment in the Title VII context before introducing four federal cases, all of which involved inconsistent hiring criteria that diminished the strengths of marginalized candidates. In Section III, this Comment illustrates how, in the four cases, the employers' hiring criteria were inconsistent. This Section also reviews the social science literature demonstrating how inconsistent hiring criteria are a bellwether for bias. Ultimately, Section III argues that the broad scope of Title VII should preclude summary judgment for employers whose hiring criteria shift, to the detriment of an otherwise qualified, marginalized applicant and to the benefit of a majority applicant. Finally, Section IV concludes by reiterating the main arguments against constricting the scope of Title VII in the manner employed by certain federal courts.

II. BACKGROUND

This Section begins by surveying general hiring discrimination research before reviewing social science literature detailing the manner of discrimination that is the subject of this Comment: shifting hiring criteria to favor white applicants.[8] Part B describes the intended broad

> no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present. . . . Arguments that differences in economic status cannot be redressed, or [that they] are legitimate because they reflect cultural rather than racial inferiority, would have to be rejected; cultural disadvantages themselves would be seen as the consequence of historical discrimination. One could not look at outcomes as a fair measure of merit since one would recognize that not everyone had been given an equal start.

Id.

7. *See generally* Julie E. Phelan, Corinne A. Moss-Racusin, & Laurie A. Rudman, *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 PSYCH. WOMEN Q. 406 (2008); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474 (2005).

8. The author agrees with the current guidance from the Associated Press to capitalize Black but not white, and thus follow that convention in this Comment. *See Explaining AP Style on Black and white,*

reach of Title VII, both via a common provision within the law as well as a less prominent provision. Part C reviews how summary judgment operates in disparate-treatment cases, and Part D notes several federal cases in which employers shifted their hiring criteria.

A. Hiring Discrimination

Hiring decisions have an enormous effect on workers, serving a "gatekeeping" function that blocks some but admits others to career opportunities, positions of power, and higher income brackets.[9] Women and racial minorities, by a process known as "allocative discrimination," are often channeled into different jobs with lesser pay than majority members.[10]

The hiring process — compared to other employment decisions like pay setting — is a stage of employment particularly vulnerable to discrimination.[11] A 2017 meta-analysis, which reviewed every hiring discrimination field experiment since 1989, described the point of hire, as compared to other stages of employment, as most conducive to concealing discrimination due to the relative scarcity of available objective information.[12] Considering more than 55,000 applications, the researchers determined white applicants were 36 percent more likely to receive a callback from employers than were Black applicants.[13] The study also found no change in the degree of discrimination that Black job seekers experienced over nearly three decades.[14] "African Americans remain

AP NEWS, https://apnews.com/article/archive-race-and-ethnicity-9105661462 [https://perma.cc/2X5Z-VC2V] (last visited Dec 18, 2022).

9. Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOCIO. REV. 999, 1000 (2012).

10. Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOCIO. 1479, 1480 (2008); *see also* Valentina Di Stasio & Edvard N. Larsen, *The Racialized and Gendered Workplace: Applying an Intersectional Lens to a Field Experiment on Hiring Discrimination in Five European Labor Markets*, 83 SOC. PSYCH. Q. 229, 229 (2020).

> We find that employers prefer hiring white women over men for female-typed jobs. By contrast, women of color do not have any advantage over men of the same race. Moreover, [B]lack and Middle Eastern men encounter the strongest racial discrimination in male-typed jobs, where it is possible that their stereotyped masculinity, made salient by the occupational context, is perceived as threatening.

Id.

11. Trond Petersen & Ishak Saporta, *The Opportunity Structure for Discrimination*, 109 AM. J. SOCIO. 852, 895-96 (2004) (describing hiring as "the point where discrimination is most feasible" in part because of a "frequent lack of a complainant to press charges").

12. Lincoln Quillian, Devah Pager, Ole Hexel, & Arnfinn H. Midtbøen, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 PROCS. NAT'L ACAD. SCIS. 10870, 10874 (2017).

13. *Id.* at 10871.

14. *Id.* at 10870.

substantially disadvantaged relative to equally qualified whites," researchers wrote, "and we see little indication of progress over time."[15]

A 2020 study revealed similar findings through an intersectional lens.[16] The study considered 19,000 job applications submitted to jobs with both high and low educational requirements.[17] Not only did the study find all racial and ethnic "outgroups" faced disadvantage, but minority women experienced "substantial ethnic and racial discrimination" compared to majority women, who were "strongly preferred in female-dominated occupations."[18] Majority women themselves are often overlooked in favor of male candidates for stereotypically male positions.[19]

Social science literature reveals one manner in which bias alters hiring decisions.[20] Hiring officials may list certain criteria for open positions, only to adjust those criteria as the hiring process progresses, disfavoring a marginalized candidate.[21] This allows hiring officials to falsely claim their decisions were based on merit.[22]

This bias often results in prioritizing white men over marginalized applicants.[23] This form of bias often surfaces in the following way: An employer, ABC Company, posts a job opening, emphasizing certain characteristics it desires in applicants. A marginalized applicant possesses the sought-after characteristics;[24] for example, she may have an advanced degree or certain experience purportedly sought by the employer. But as hiring progresses, ABC hiring officials subtly (often subconsciously) shift their emphasis among the desired characteristics or add wholly new desired characteristics. This diminishes the value of the marginalized candidate's strengths, allowing ABC to justify passing her over for the

15. *Id.* at 10874. The analysis found only a "modest" decline in discrimination against Latinx applicants. *See id.* at 10870.

16. Stasio & Larsen, *supra* note 10, at 231-32 (explaining that the intersectional perspective originated in Black feminist scholarship and states that social constructions such as race, gender, and other categories are best understood as relative to one another rather than independently) ("The common thread of much of this literature is the expectation that [B]lack women, who are marginalized members of both social dimensions, experience a double disadvantage that cannot be captured by gender or racial discrimination alone.").

17. *Id.* at 236.

18. *Id.* at 244.

19. Uhlmann & Cohen, *supra* note 7, at 477.

20. Phelan et al., *supra* note 7, at 407.

21. *Id.*

22. *See, e.g.*, Uhlmann & Cohen, *supra* note 7, at 474-75 ("By defining merit in a manner tailored to the idiosyncratic strengths of an applicant from the desired group, . . . decision makers can justify a discriminatory decision by appealing to ostensibly 'objective' criteria").

23. *See, e.g.*, Phelan et al., *supra* note 7, at 407.

24. The studies cited in this Comment focus on the experiences of women and racial minorities. Studies concerning inconsistent hiring criteria that center other marginalized groups, such as people who are disabled or who identify as LGBTQIA+, are not as prominent in the literature. Other marginalized groups are also likely to be subjected to this form of bias.

job in favor of a white male.

The key in identifying this form of discrimination does not lie in the employer-identified characteristics themselves but in the inconsistent weight employers ascribe to these characteristics.[25] The desired characteristics bend to the preferred majority candidate. For example, in a 2004 study, male undergraduates were asked to select the best applicant for a "stereotypically male job."[26] When applicant gender was not revealed, more than three-fourths of students selected the better-educated candidate over one with more job experience.[27] But when researchers revealed applicant genders, and the best-educated candidate was female, less than half of students selected her.[28]

B. Title VII Protection

The text of Title VII illustrates its broad reach.[29] Courts generally rely on Section 703(a)(1) when hearing claims.[30] But legal scholars such as Martha Chamallas and Sandra F. Sperino argue that a companion provision, Section 703(a)(2), provides further statutory protection against discrimination.[31] That provision makes it unlawful for an employer:

> 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.[32]

One form of Title VII violation is disparate treatment. Disparate

25. *Id.*

26. Michael I. Norton, Joseph A. Vandello, & John M. Darley, *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCH. 817, 820-21 (2004).

27. *Id.*

28. *Id.*

29. *See generally* Martha Chamallas, *Exploring the 'Entire Spectrum' of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1, 2 (1984) (describing Title VII, § 703(a)(1) as "broadly" outlawing discrimination "[o]n its face, . . . whether the discrimination is explicit or covert").

30. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973); City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

31. Chamallas, *supra* note 29, at 5 n.19 ("The broad sweep of the language of Section [703(a)(2)], particularly the prohibitions on segregation or classifications which adversely affect job opportunities, provides additional statutory support for an expansive conception of discrimination stemming from rules governing predominantly female jobs and occupations"). *Cf.* Sandra F. Sperino, *Harassment: A Separate Claim?*, 6 BELMONT L. REV. 121, 145 (2019) ("The language of Title VII's second operative provision [Section 703(a)(2)] provides for a more expansive view of harassing behavior" and "harassment litigants can argue for broader conceptions of discrimination under section (a)(2).").

32. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 241, 255 (1964) (emphasis added).

treatment arises when "members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants."[33] The Supreme Court, in *McDonnell Douglas Corp. v. Green*, laid a central framework for adjudicating disparate-treatment claims.[34] Though the case did not concern inconsistent hiring criteria, victims of such bias may rely on its framework in seeking legal redress.[35]

Percy Green, a Black mechanic and civil rights activist, sued McDonnell Douglas Corp. ("McDonnell Douglas"), an aerospace and aircraft manufacturer.[36] McDonnell Douglas avowed that it rejected Green's application to be rehired, after he was laid off, because he had previously engaged in a "stall-in."[37] Green asserted his rejection was motivated by racial discrimination.[38]

The Court held that plaintiffs carry the initial burden to establish a prima facie case of discrimination.[39] To do so, they must show that (1) they are a member of a protected class; (2) they applied to and were qualified for a position; (3) they were rejected; and (4) the employer hired someone else or continued to seek other applicants.[40] The burden of production then shifts to the defendant-employer, who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[41] In the third and oft-contested step, a plaintiff can seek to prove an employer's stated reason was pretext offered to conceal a discriminatory motive.[42] The Court held that Green, on remand, must have a "fair opportunity" to show McDonnell Douglas' asserted reason for not rehiring Green was pretextual.[43] Evidence could also be used to support that McDonnell Douglas discriminated against Green while he was employed or "followed a discriminatory policy toward [m]inority employees."[44]

33. 29 C.F.R. § 1607.11 (2022).

34. 411 U.S. 792, 802-03 (1973).

35. Stoe v. Barr, 960 F.3d 627, 639 (D.C. Cir. 2020).

36. *Id.* at 794.

37. *Id.* at 805 n.18 (describing the stall-in as tying up roads into the McDonnell Douglas facility as part of a protest against racial discrimination after Green was terminated by McDonnell Douglas). Green later applied to be rehired. *Id.*

38. *Id.* at 796.

39. *Id.* at 802.

40. *Id.*

41. *Id.*

42. *Id.* at 804.

43. *Id.* at 807.

44. *Id.* at 793. The Court also provided that Green could use as evidence McDonnell Douglas' actions during his prior employment, the company's reaction to his civil rights activities, and McDonnell Douglas' past practices with minority workers, potentially aided by statistical data. *Id.* at 804-05.

C. Summary Judgment in Disparate-Treatment Cases

At the summary judgment stage, a key inquiry in disparate-treatment cases is whether a plaintiff-applicant can present sufficient evidence to persuade a reasonable jury that the plaintiff's protected trait caused the contested employment action, through pretext or other evidence.[45] Employers often move for summary judgment. Courts may only grant such motions if the

> pleadings, depositions, answers to interrogatories, admissions, and affidavits filed pursuant to discovery show that, first, "there is no genuine issue as to any material fact," and, second, "the moving party is entitled to a judgment as a matter of law."[46]

In deciding whether to grant an employer's motion for summary judgment, judges do not determine if the evidence favors one party or the other but whether a "fair-minded jury *could* return a verdict for the [non-movant] . . . ."[47]

Circuit courts have developed similar standards for reviewing trial court decisions to grant summary judgment in employment discrimination cases.[48] To support the presence of pretext and thus defeat a motion for summary judgment, plaintiffs must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence."[49] The Third

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45. Stoe v. Barr, 960 F.3d 627, 640 (D.C. Cir. 2020).

46. *Stoe*, 960 F.3d at 638 (quoting Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006)).

47. *Id.* (emphasis added).

48. *See, e.g.*, Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993).

> Where direct "smoking gun" evidence of discrimination is unavailable, this court has found that the proper inquiry is "whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably *could* support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence *necessarily* leads to [the] conclusion that the employer did act for discriminatory reasons."

Id. (alteration in original) (emphasis in original) (citations omitted); *see also* Alvarez v. Royal Atl. Devs., Inc., 610 F.3d 1253, 1265 (11th Cir. 2010) ("To show pretext, Alvarez must demonstrate 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'"); Youssef v. Holder, 19 F. Supp. 3d 167, 196 (D.C. Cir. 2014).

> In sum, the Court finds that the alleged inferences that the LCB voting members drew or failed to draw do not rise to the level of showing "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence."

Youssef, 19 F. Supp. 3d at 196 (quoting Plotke v. White, 405 F.3d 1092, 1102 (10th Cir. 2005)).

49. *Youssef*, 19 F. Supp. 3d at 196 (quoting Plotke v. White, 405 F.3d 1092, 1102 (10th Cir. 2005)); *see also* Caldwell v. KHOU-TV, 850 F.3d 237, 242, 245 (5th Cir. 2017) (holding that a "plaintiff may show pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence") (quoting Jackson v. Cal-W. Packaging Corp., 602 F.3d

Circuit has held that the question is not "whether the evidence *necessarily* leads to [the] conclusion that the employer did act for discriminatory reasons" but whether it "*could* support an inference that the employer did not act for non-discriminatory reasons . . . ."[50]

Some circuit courts, in the late 1990s and early 2000s, required plaintiffs to show not just evidence of pretext but also evidence that "discrimination motivated the challenged employment action."[51] However, the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* overturned what had become known as "pretext-plus," thus removing any requirement that plaintiffs provide evidence beyond showing pretext.[52] *Reeves* allows a factfinder to infer discrimination simply from "the falsity of the employer's explanation."[53] The case also "emphasized the importance of jury fact finding" in discrimination cases.[54] Several circuit courts, contrary to the majority of circuits, continue to adhere to standards that may flout *Reeves*."[55]

D. Federal Courts Grapple With Inconsistent Hiring Criteria

In four cases considered by various circuit courts, female applicants alleging discrimination under Title VII argued their claims were supported by sufficient evidence to survive an employer motion for summary judgment. In all cases but one, the courts affirmed or granted summary judgment to employers. The respective hiring officials for the employers shifted criteria during the selection process in all cases. Each time, the shifting criteria worked against a female applicant and favored a male applicant.[56]

374, 378-79 (5th Cir. 2010)).

50. *Josey*, 996 F.2d at 638 (alteration in original) (emphasis in original) (citation omitted).

51. Edward Brunet, John Parry, & Martin Redish, *Title VII and Other Discrimination Claims: Issues of Intent and Credibility in a Civil Rights Summary Judgment Process Dominated by Burden Shifting*, *in* SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE § 9:11(c) (2021) (listing the First, Third, Fifth, and Tenth Circuits as adopting this "pretext-plus" standard).

52. *Id.* (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).

53. *Id.*

54. Evans v. City of Bishop, 238 F.3d 586, 592 (5th Cir. 2000).

55. Brunet et al., *supra* note 51, § 9:11(c) (listing four circuit courts with summary judgment standards that are "ambiguous or resistant to *Reeves*"). *See, e.g.*, Flowers v. Troup Cnty., Ga., Sch. Dist., 803 F.3d 1327, 1339 (11th Cir. 2015) ("The burden placed on Title VII plaintiffs to produce additional evidence suggesting discrimination after contradicting their employer's stated reasons is not great, but *neither is it nothing*.") (emphasis added).

56. *Id*. Three courts did not list the race of the winning applicant. Only one case listed the race of two candidates who were selected over the plaintiff. Both men were white. *See* Lewis v. Cablevision Sys. Corp., No. CIV08–2793, 2010 WL 1133872, at *8 (D.N.J Mar. 22, 2010).

1. Pittman v. Johnson & Johnson Vision Care, Inc.

In 2020, the Eleventh Circuit considered *Pittman v. Johnson & Johnson Vision Care, Inc.*, in which Johnson & Johnson ("J&J") shifted its hiring criteria, rejected a female applicant, and later faced an accusation of sex discrimination.[57] Mary Ann Pittman excelled in her job at a subsidiary of J&J.[58] She worked for the company for three decades, eventually rising to a senior director role in the company's supply-chain division.[59] Her supervisor, in 2014 and 2015, evaluated her performance, giving her marks of "exceeds" and "fully meets" for her business and leadership skills, respectively.[60] In 2015, her supervisor considered her prepared for a promotion to a vice presidency role.[61] However, at a succession meeting a few months before Pittman applied for a promotion, managers downgraded her readiness level, citing a lack of external experience.[62] They also claimed she lacked leadership and collaboration experience.[63]

When Pittman applied to the vice president vacancy in October 2015, hiring managers chose not to interview her.[64] The hiring managers interviewed three men instead, and selected one for the position.[65] When Pittman asked for an explanation of her rejection, a manager cited Pittman's lack of experience outside the division where she had long worked.[66] The candidate chosen for the role had "several years of outside experience."[67]

But external experience was not among the written criteria that managers had developed prior to interviews.[68] Posted criteria included a supply-chain background and an ability to work at the leadership-team level.[69] Though the Eleventh Circuit acknowledged external experience was not part of the written criteria, it decided that a jury could "at most" view this as "an additional, but undisclosed, reason for the decision."[70] The court held this failed to demonstrate that J&J's asserted reason for

57. Pittman v. Johnson & Johnson Vision Care, Inc., 815 F. App'x 436, 437 (11th Cir. 2020).
58. *Id.* at 437-38.
59. *Id.* at 437.
60. *Id.*at 438.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 439.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 442-43.

rejecting Pittman was pretextual, and no reasonable factfinder would find the company's rationale so "weak, implausible, inconsistent, incoherent or contradictory" as to be "unworthy of credence."[71] The Eleventh Circuit affirmed the trial court's award of summary judgment to J&J.[72]

2. Pribyl v. County of Wright

About a month after the *Pittman* decision, in July 2020, the Eighth Circuit decided *Pribyl v. County of Wright*.[73] In a sparse opinion, the court affirmed summary judgment for an employer, the Wright County Sheriff's Department in Minnesota ("Department").[74]

Amee Pribyl had more than 20 years of law enforcement experience and held bachelor's and master's degrees when she applied for a sergeant position.[75] The selection of a new sergeant proceeded in three stages. First, a software program ranked applicants based on screening information, including years as a deputy and highest education obtained.[76] The software program ranked Pribyl the highest among candidates, at 86.96 percent.[77] Next, a three-person panel conducted interviews with those who met minimum qualifications.[78] The panel then selected finalists for review by Sheriff Hagerty, who selected the candidate to be hired.[79]

But Pribyl was not among the five finalists selected by the panel.[80] The successful applicant, Drew Scherber, had an associate's degree and less experience in law enforcement than Pribyl.[81] He earned the lowest rank by the software program among applicants, at 52.17 percent.[82] The court described Pribyl's interview as unimpressive to the panelists.[83] She merely recited the Department's mission when asked how she would carry out the mission.[84] And when asked what barriers then hindered her work, she described the need to remove her duty belt to use the bathroom — a task men did not have to perform.[85]

71. *Id.* at 443.
72. *Id.*
73. 964 F.3d 793 (8th Cir. 2020).
74. *Id.* at 794.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 795.
80. *Id.*
81. *Id.* at 794.
82. *Id.*
83. *Id.* at 795.
84. *Id.*
85. *Id.*

After her rejection, Pribyl sued for sex discrimination under Title VII.[86] In its decision affirming the trial court's grant of summary judgment to the Department, the Eighth Circuit noted that Sheriff Hagerty stated in a deposition that he believed a woman would not likely return to work after giving birth.[87]

The Eighth Circuit considered whether the Department's reason for rejecting Pribyl — that she did not interview well — was pretextual.[88] It ruled the Department's justification was not pretext concealing a discriminatory rationale.[89] The court stated that objective criteria, such as Pribyl's superior education and experience, were amply considered in selecting interviewees.[90] But the court accepted that the Department used a subjective criterion — interview performance — to decide who would be named a finalist.[91] "[W]hen an employment decision relies on both subjective and objective criteria," the court wrote, "the use of subjective considerations does not give rise to an inference of discrimination."[92]

3. Stoe v. Barr

In *Stoe v. Barr*, the United States Court of Appeals for the District of Columbia Circuit described a white female applicant who, despite revolutionizing her workplace, lost out on a promotion for a role, the duties of which she had already been performing, to an applicant who had been her subordinate.[93] Debra Stoe served first as a social science analyst and later as a scientist for the Department of Justice ("DOJ").[94] She spearheaded new standards-development protocols at the National Institute of Justice ("NIJ"), the impact of which was characterized as "immeasurable" by her superiors.[95] She published nearly a dozen performance standards, including a wholly new standard that became the most-downloaded document on the NIJ's website.[96] According to Davis Hart, a division director hired in 2010 who became Stoe's supervisor, Stoe's work enhanced public safety, provided other federal agencies with guidance for compliance testing, and created "revolutionary

86. *Id.* at 794.
87. *Id.* at 795.
88. *Id.* at 796.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* (citing Wingate v. Gage Cnty. Sch. Dist., No. 34, 528 F.3d 1074, 1080 (8th Cir. 2008)).
93. 960 F.3d 627, 630, 633 (D.C. Cir. 2020).
94. *Id.* at 630.
95. *Id.*
96. *Id.*

transformation" at the NIJ.[97] Further, Stoe "demonstrated capabilities that the agency never before experienced," Hart stated in a 2012 internal memo.[98] In 2014, after about fifteen years with the DOJ, Stoe received a sterling performance review; she "exceeded expectations to an exceptional degree."[99] Midway through 2014, she asked a second supervisor, George Tillery, how she could improve.[100] Tillery told her, "[Y]ou cannot improve . . . . You can't improve on somebody [who] exceeds at everything."[101]

But Tillery and Stoe's relationship was not without conflict. Stoe described Tillery as prone to interrupting her during meetings, challenging her authority, taking credit for her ideas, and belittling her "in front of male colleagues."[102]Another female employee, who shared office space with Stoe, described Tillery as fostering a "male-dominated workplace culture that [was] hostile to women."[103] Tillery, in a deposition, admitted he had never promoted a woman to a rank higher than Stoe's.[104]

In 2010, Stoe applied for a division director position.[105] Tillery hired a male employee, Hart, over Stoe, citing Hart's superior "supervisory and operational experience in compliance testing and standards."[106] After the rejection, Stoe completed supervisory management training.[107] In 2014, she applied for the position again after it reopened.[108]

Stoe's second attempt to secure the promotion also failed, as Tillery selected another male, Mark Greene, over her.[109] Stoe later filed a lawsuit alleging sex discrimination under Title VII.[110] The District Court for the District of Columbia granted the DOJ's motion for summary judgment, and Stoe appealed.[111]

Stoe's discrimination claim arose under Section 717 of Title VII, which has been considered by circuit courts as functionally comparable to Section 703.[112] Section 717 protects federal-sector employees and

97. *Id.* at 630-31.
98. *Id*. at 630.
99. *Id.* at 631.
100. *Id.*
101. *Id.*
102. *Id.* at 632.
103. *Id.* (alteration in original).
104. *Id.*
105. *Id.*
106. *Id.* at 633.
107. *Id.*
108. *Id*.
109. *Id.* at 646.
110. *Id.* at 627.
111. *Id.*
112. *See* Bhella v. England, 91 F. App'x 835, 844 (4th Cir. 2004) ("Notwithstanding the differences

applicants from personnel actions made based on protected traits.[113] Stoe, who was 60 years old in 2014, also alleged age discrimination under Section 633 of the Age Discrimination in Employment Act ("ADEA").[114]

The D.C. Circuit highlighted examples of inconsistencies put forth by Tillery in his attempt to justify his decision to hire Greene.[115] First, Tillery had previously cited Hart's additional supervisory experience as justification for hiring him over Stoe.[116] But the court stated that by the time Stoe sought the director position in 2014, she had 80 hours of supervisory management training while Greene had none.[117] In addition, Stoe was already performing a "majority" of the division director's tasks, while Greene had never performed such work, worked under Stoe's guidance in the past, and "lacked supervisory experience."[118] After the rejection of Stoe's application, most of the work she had already been performing was reassigned to Greene.[119]

Second, despite Tillery's earlier emphasis on relevant experience in hiring Hart, Tillery diminished the import of such experience in his interview questions with Stoe.[120] In assessing Stoe and Greene, Tillery asked no questions involving relevant experience.[121] "This is critical," the D.C. Circuit wrote, "because Stoe had been performing many of the responsibilities of the Division Director position already."[122] The D.C. Circuit also wrote that the questions suggested "an attempt to distract from Stoe's superior qualifications."[123] Only one question focused on a "major responsibility" of the director role — a responsibility Stoe had already been performing for years — and Tillery asked no questions

in wording, sections [703] and [717] generally have been treated as comparable, with the standards governing private-sector claims applied to claims under section [717]."); Bundy v. Jackson, 641 F.2d 934, 942 (D.C. Cir. 1981) ("Despite the difference in language . . . we have held that Title VII places the same restrictions on federal . . . agencies as it does on private employers, . . . and so we may construe the latter provision in terms of the former.") (citation omitted). Congress amended the Civil Rights Act in 1972, adding § 717, to extend Title VII protections to federal employees. *Compare* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717(a), 86 Stat. 103, 111, *with* Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964).

113. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717(a), 86 Stat. 103, 111 ("All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.").

114. The ADEA is beyond the scope of this Comment. However, the parties and the D.C. Circuit in *Stoe v. Barr* considered Stoe's claims under Title VII and the ADEA as rising or falling together. *See* 960 F.3d at 640.

115. *Id.*

116. *Id.* at 633.

117. *Id.* at 641.

118. *Id.* at 634, 640.

119. *Id.* at 638.

120. *Id.* at 633, 645.

121. *Id.* at 645.

122. *Id.*

123. *Id.* at 644.

regarding other relevant experience.[124] The D.C. Circuit wrote that manipulating an interview process to "minimize a candidate's strengths . . . can be taken as pretextual to cover proscribed discrimination against the candidate."[125]

Finally, the court wrote that Tillery provided "shifting and false rationales" for rejecting Stoe.[126] For example, he stated no candidate would be selected who scored below a three (on a scale of one-five) on any single interview question.[127] However, no evidence corroborated this ostensible ground rule, and neither of the other two interviewers were aware of it.[128] Tillery also gave differing explanations for why he selected Greene, including that he had a better understanding of conformity assessment — even though all three interviewers ranked Stoe higher than Greene in this area.[129]

In its analysis, the D.C. Circuit reiterated that summary judgment may only be granted when a fair-minded jury could not find for a plaintiff.[130] It stated that "the weighing of the evidence[] and the drawing of legitimate inferences from the facts" is a function reserved for a jury, not a court.[131] The court remanded the case to the district level for trial.[132]

4. Lewis v. Cablevision Systems Corp

Finally, in 2010, the District Court for the District of New Jersey decided *Lewis v. Cablevision Systems Corp*.[133] Pamela Lewis, a Black woman, alleged race and sex discrimination in violation of Title VII after her previous employer did not select her for a business analyst position.[134] Lewis held a bachelor's degree in accounting.[135] She worked at Cablevision, in various customer service roles, for about a decade.[136] After being passed over for two accounting positions, she worked for eight months in city government as a grant accountant.[137]

124. *Id*. at 645.
125. *Id.*
126. *Id.* at 646.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 638.
131. *Id*. at 639 (quoting Anderson v. Liberty Lobby, Inc., 455 U.S. 252, 255 (1986)); *see also* Fed. R. Civ. P. 56.
132. *Id.* at 647.
133. No. CIV08–2793, 2010 WL 1133872 (D.N.J. Mar. 22, 2010).
134. *Id.* at *3.
135. *Id.* at *1.
136. *Id.*
137. *Id.* at *2.

Cablevision posted a business analyst position, and in July 2006, Lewis applied.[138] The posting listed the following criteria: a bachelor's degree in accounting or finance and at least three years of accounting or finance experience.[139] The commencement of a master's degree in a related discipline was listed as a "plus" but was not required per the job posting.[140] Some subjective attributes were required, including analytical skills, knowledge of Microsoft Excel and Access, and a willingness to learn.[141]

Lewis passed both the Excel and Access tests.[142] She advanced to the interview round, but the hiring official, Paul Crane, offered the position to a white male, who declined.[143] Crane then offered the position to another applicant, also a white male.[144] Crane stated in a deposition that he sought an applicant with a master's degree because he believed from personal experience that such education translated well to the job duties.[145]

However, Lewis pointed out that Crane's asserted preference for an applicant with a master's degree in Business Administration conflicted with the job posting.[146] The district court disagreed, even describing Crane's application of the hiring criteria throughout the process as "uniform."[147]

The district court ultimately granted Cablevision's motion for summary judgment regarding Lewis's Title VII claims.[148] The court held that Lewis failed to establish that she could satisfy the second prong of the prima facie case of discrimination, as she could not show she had multiple years of experience in accounting or finance — a posted requirement.[149] However, the court analyzed the case as if she had satisfied her prima facie burden, for the sake of argument.[150] Under its analysis, the court wrote that "Lewis has not raised *any evidence* that would allow a reasonable jury to find that Crane's reasons were

138. *Id.* at *3.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at *7.
147. *Id.*
148. *Id.* at *8.
149. *Id.* at *3, *6.
150. *Id.* at *7 ("Even assuming Lewis had successfully established the elements of a prima facie case of discriminatory failure to hire, she would not automatically prevail.").

inconsistent or otherwise unworthy of credence."[151] Though dicta, the court's analysis provided insight into how it views evidence of inconsistent hiring criteria.

III. DISCUSSION

Evidence of inconsistent hiring criteria in a Title VII claim should be viewed as an indicator of bias against applicants based on protected traits unless another cause is clear, such as employer error or carelessness. Part A of this Section offers a critique of the *Pittman*, *Pribyl*, *Stoe,* and *Lewis* cases, explaining how the courts overlooked or underemphasized inconsistent hiring criteria as evidence of bias. Discussion of these cases is interspersed with social science literature illustrating how inconsistent criteria hamper marginalized candidates and lead to adverse decisions based on their protected traits. Next, Part B argues that courts should recognize the importance of inconsistent hiring criteria evidence. When the evidence is present and when an employer selects an applicant outside the plaintiff's protected class, courts should rarely grant employer motions for summary judgment. Title VII's scope — and summary judgment standards — support this argument.

A. A Critique of Federal Courts Considering Inconsistent Hiring Criteria

In the four cases outlined in Section II(D), federal courts overlooked or underemphasized the importance of inconsistent hiring criteria. These errors resulted in improper constrictions placed on Title VII that trivializes this manifestation of implicit bias in hiring decisions.

Numerous empirical studies have demonstrated how implicit biases influence hiring decisions.[152] In these studies, participants diminished the strengths of marginalized applicants, including women and racial minorities, but do not do so when race and gender are concealed.[153] A 2008 study — finding evidence that shifting hiring criteria "reflects backlash toward agentic ('masterful') women" — encapsulated the issue succinctly: "[E]valuators may subtly shift the criteria they use to make hiring decisions to benefit" white men.[154]

In 2020, the Eleventh Circuit in *Pittman* misconstrued evidence of

151. *Id.* (emphasis added).

152. *See generally* Phelan et al., *supra* note 7; Uhlmann & Cohen, supra note 7; Norton et al., *supra* note 26.

153. *Id.*

154. Phelan et al., *supra* note 7, at 406-07.

inconsistent hiring criteria by downplaying its importance.[155] Pittman argued her rejection was based on "unwritten criteria."[156] Despite recognizing the inconsistency in J&J's purported hiring criteria, the Eleventh Circuit failed to recognize its significance in holding that the company's reliance on external experience was merely an "undisclosed" but non-discriminatory reason for its decision.[157] In doing so, the court failed to recognize that inconsistent hiring criteria can be a signal of hiring bias as proscribed by Title VII.

In the 2004 experiment described in Section II, gender had a demonstrable effect on participants' hiring decisions, undermining female applicants.[158] Participants in the experiment made biased decisions while maintaining the illusion of objectivity.[159] Researchers wrote that this cognitive dissonance — the fact that participants had to rationalize both their recognition of a certain criterion as more important than another *and* reject those outgroup candidates who possessed the desired criterion — results in casuistry, or "specious reasoning in the service of justifying questionable behavior."[160] People generally view themselves as impartial and unbiased, but they are also "motivated to arrive at a desired outcome, such as when self-interest leads people to see in-group members as more attractive choices . . . ."[161]

In *Pribyl*, the Eighth Circuit erred by affirming summary judgment to the Wright County Sheriff's Office. The court should have scrutinized the Department's strict reliance on interview performance by the panel in selecting finalists. The Department had at its disposal objective data, including candidates' time spent as a licensed deputy and educational background, that it collected during its screening process.[162] That these qualifications informed the Department's selection of interviewees indicates the Department valued experience and education credentials in candidates. Yet Pribyl, who ranked highest among all candidates based on the screening data, was not selected as a finalist because of her interview performance,[163] minimizing Pribyl's strengths.[164] This

155. Pittman v. Johnson & Johnson Vision Care, Inc., 815 F. App'x 436, 442 (11th Cir. 2020).

156. *Id.*

157. *Id.*

158. Norton et al., *supra* note 26, at 821-22. The study also found an "affirmative-action" effect, as students manipulated selection criteria to favor Black applicants in a hypothetical college admissions exercise. *See id.* at 822-24.

159. *Id.* at 817.

160. *Id.*

161. *Id.* at 818.

162. Pribyl v. County of Wright, 964 F.3d 793, 794 (8th Cir. 2020).

163. *Id.* at 796.

164. *Id.* ("Pribyl contends she met her burden because . . . evidence shows she was objectively more qualified than Scherber, but the *County ignored her objective qualifications and instead relied solely on the subjective panel interview* to make its decision . . . .") (emphasis added).

inconsistent hiring criteria derived from the Department's initial amplification of objective qualifications at the screening stage, only to later base its rejection on subjective interview performance.[165]

The Eighth Circuit stated that an employment decision relying on objective and subjective criteria does not create "an inference of discrimination."[166] This rule distorts the facts of the case. The objective criteria only winnowed the pool of applicants. The Department, at least for Pribyl, hung its rejection of her as a finalist not on any objective criteria but on an interview susceptible to subjective interpretation.[167] If the Department deemed the five finalists objectively superior to Pribyl in some way, the Eighth Circuit failed to mention it. Presumably, Pribyl held superior objective credentials than most, if not all, of the finalists, considering her education, experience, and screening score were all superior to the successful applicant's.[168]

A better rule would hold that subjective considerations are acceptable when used alongside objective ones, but that employers' seemingly strict reliance on subjective considerations alone when objective criteria are available is suspect. This is particularly true when doing so devalues the objective credentials of a marginalized candidate, and a majority candidate with lesser credentials is hired. At that point, a jury should be allowed to determine if the employers' proffered reason for rejection is true or if it conceals a discriminatory motive. As the Eastern District of New York stated, in an unrelated case, "the [employer's] purported reliance on the forty[-]minute interview, rather than on the easily accessible objective criteria, weighs in favor of a finding of pretext."[169]

In a 2005 experiment from the Department of Psychology at Yale University, researchers found both male and female evaluators inflated certain characteristics to benefit male applicants for a hypothetical role as police chief.[170] Both male and female evaluators "tended to construct criteria favorable to the male applicant . . . ."[171] For example, evaluators deemed formal education characteristics as "more important when the male applicant possessed them" but less important when a female did.[172] Similarly, traits such as "family oriented" and parenthood were

165. *Id.*

166. *Id*.

167. *Id.* at 795. Panelists explained their decision to reject Pribyl based on such things as an "odd" and "unresponsive" answer to a question. *Id.* The panelists also noted that Pribyl's answers were generally "very short and to the point." *Id.*

168. *Id.* at 794.

169. Holmes v. Brentwood Union Free Sch. Dist., No. CV-03-1084, 2006 WL 1581434 (E.D.N.Y May 25, 2006).

170. Uhlmann & Cohen, *supra* note 7, at 475.

171. *Id.*

172. *Id.*

considered important by the evaluators when the male applicant possessed them, but less so when he did not.[173] The researchers thus found that participants "construct criteria favorable to the male applicant."[174] Male evaluators exhibited this bias more than females.[175] Participants did not always recognize their biases at work. "Remarkably," researchers wrote, "perceiving one's judgments as objective and free of bias predicted greater gender bias.[176] Participants were, apparently, under an illusion of objectivity . . . . discriminating against women while convinced that their judgments were objective."[177]

In *Stoe*, the D.C. Circuit properly reversed the trial court's grant of an employer's motion for summary judgment.[178] However, given the evidence that the DOJ employed inconsistent hiring criteria when it rejected sterling candidate Debra Stoe, the court's analysis delved too deeply into the record in search of discrimination. Instead, for two distinct reasons, it should have held the presence of inconsistent hiring criteria alone satisfied the plaintiff's burden to show pretext.

First, the evidence of inconsistent hiring criteria was robust. When Stoe first applied for a director position in 2010, Tillery, the hiring supervisor, selected a male over her because of the male candidate's "supervisory and operational experience in compliance testing and standards . . . ."[179] But in 2014, in Stoe's second attempt to land the job, the male candidate lacked supervisory training, had no experience on a standards committee, had completed no responsibilities equivalent to those performed in the director role, and had not created entire standards development and conformity assessment programs.[180] Stoe had accomplished all of this, but Tillery selected the male candidate.[181] If Stoe had lost out previously to a candidate because she had less supervisory and relevant experience than the chosen candidate, one can fairly assume such qualities were deemed important in the selection of a suitable director. Yet in Stoe's second quest for the directorship, these qualities were undermined. Only one of five interview questions focused on Stoe's major strength — the director-level work she had already performed.[182] Tillery asked no questions about relevant experience.[183] In addition, after citing Stoe's lack of leadership

173. *Id.*
174. *Id.*
175. *Id.* at 476.
176. *Id.* at 477.
177. *Id.* (citations omitted).
178. Stoe v. Barr, 960 F.3d 627, 647 (D.C. Cir. 2020).
179. *Id.* at 633.
180. *Id.* at 640-41.
181. *Id.*
182. *Id.* at 644-45.
183. *Id.* at 645.

upon her rejection in 2010, Tillery overlooked Stoe's superior supervisory experience in 2014.[184] Devaluation of a marginalized candidate's strengths is a hallmark of the social science experiments that found consideration of applicant race or gender can generate inconsistent hiring criteria.

Second, though the D.C. Circuit stated that minimizing a candidate's strengths in this way "can be taken as pretextual to cover proscribed discrimination," the court still mined the record for more evidence of pretext, leaving an improper impression — that shifting hiring criteria is insufficient evidence for a plaintiff to reach a jury.[185] The court concluded that Stoe had established a genuine issue of material fact because she possessed superior qualifications over the male candidate *and* had established various flaws in the employer's explanation for rejecting her.[186] The court also cited Tillery's shifting rationales for rejecting Stoe in 2014, his selection of another female candidate to the final round of interviews to mask gender bias, and his manipulation of the interview process to elevate the male candidate as other flaws.[187]

This evidence rendered Stoe's discrimination claim more believable, but at the summary judgment stage, the evidence was gratuitous. Stoe had satisfied her burden of showing pretext simply by demonstrating Tillery's shifting criteria. Tillery justified hiring Greene by invoking his grasp of technology policy and better understanding of conformity assessment "potential."[188] The D.C. Circuit did not mention whether Tillery considered these qualifications the first time he rejected Stoe in 2010, missing an opportunity to further assess Tillery's inconsistencies in the purported hiring criteria invoked to reject Stoe.

The 2008 study cited earlier in this Section provided volunteers with two scripts that described hypothetical applicants, one of which better exhibited applicants' leadership and competence, the other their social skills.[189] The volunteers, aware of applicant gender, devalued traits in a manner that diminished women's likelihood of being hired.[190] For example, volunteers valued competence more than social skills, except when a woman lacked social skills.[191] When a woman lacked social skills, volunteers amplified the importance of social skills, thus inflating the

184. *Id.* at 641 ("DOJ tries to downplay Stoe's 80 hours of supervisory training, but that was 80 more hours than Greene had when he was selected to lead the division.").

185. *Id.* at 645.

186. *Id.* at 642.

187. *Id.* at 645-46.

188. *Id.* at 637.

189. Phelan et al., *supra* note 7, at 408.

190. *Id.* at 409-10.

191. *Id.* at 410

importance of female applicants' underdeveloped trait.[192] At the same time, volunteers diminished the importance of female competency.[193] This shifting criteria provide "means by which agentic women suffer employment discrimination."[194] Researchers described this bias as "backlash" toward successful women.[195]

The *Lewis* decision properly held that a Title VII plaintiff failed to meet her prima facie burden.[196] The position at Cablevision called for a minimum of three years of accounting experience, which Lewis lacked.[197] But the court analyzed Lewis' argument for pretext, assuming *arguendo* that she had satisfied her prima facie case.[198] The hiring manager sought a candidate with a specific master's degree, in conflict with the education level listed in the job posting (which described mere commencement of a master's degree "in a related discipline" as a "plus").[199] This shifting criterion may have undermined Lewis' own higher education, as she did not have a master's degree at the time she applied for the Cablevision position, though she obtained one less than a year later.[200]

The *Lewis* court framed the hiring official's preference for a candidate with a master's degree as a subjective business decision, immune from judicial review.[201] The court misconstrued the issue, however, by deeming the employer's proffered hiring criteria a matter of business judgment, rather than interrogating whether the criteria themselves were sufficiently inconsistent to indicate bias was at play. While the court found no evidence of inconsistency in the hiring process, the literature described in this Section shows that bias motivates inconsistent hiring criteria.[202] Though dicta, the court's opinion wrongly undervalues the importance of shifting criteria in proving pretext, and thus hampers future plaintiffs with legitimate Title VII claims.

A 2002 experiment found similar results as the previous studies, but in a racial context.[203] Though focused on college application decisions, the

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Lewis v. Cablevision Sys. Corp., No. CIV08–2793, 2010 WL 1133872, at *6 (D.N.J Mar. 22, 2010).

197. *Id.* at *2-*3.

198. *Id.* at *7. The court's analysis, *arguendo*, confuses the issues as it both assumes Lewis met her prima facie case, and thus was qualified for the position, while also invoking Lewis' deficient qualifications in deciding that "no reasonable jury could find that Lewis's work experience and background qualified her for the job." *Id.*

199. *Id.* at *3.

200. *Id.* at *1.

201. *Id.* at *7.

202. *Id.*

203. *See* Gordon Hodson, John F. Dovidio, & Samuel L. Gaertner, *Processes in Racial*

experiment is sufficiently analogous to hiring for inclusion in this Comment, given that college admissions boards and hiring officials share as their objective the selection of candidates from a pool based on applicant characteristics. The study manipulated two broad traits: high school performance (including GPA) and college board scores (SAT scores).[204] Generally, participants considered high school achievement as more important than college board scores.[205] However, when a Black applicant demonstrated high school success but poor board scores, participants "weighed college board scores more heavily . . . ."[206] The same inverse relationship occurred when Black applicants had high board scores but subpar high school success — participants inflated the importance of school achievement.[207] Researchers wrote that the experiment considered "how changing criteria for Black and [w]hite applicants may relate to discrimination."[208] Black applicants' strengths were diminished, and their weaknesses magnified by study participants.[209]

Like the 2005 experiment detailed above, researchers discussed how participants may be exhibiting "aversive racism" in ostensibly relying on qualifications for their biased decisions.[210] "[T]he aversive racism framework . . . proposes that [w]hites' bias against Blacks is most likely to be expressed when socially appropriate, normative responses are less clearly defined and negative responses can be justified on factors other than race."[211] A biased hirer, in other words, would likely not attribute their selection decision to bias but rather to the selection criteria that their very bias manipulated.[212]

The scholarship described in this Section illustrates the subtlety of this

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Discrimination: Differential Weighting of Conflicting Information, 28 PERSONALITY & SOC. PSYCH. BULL. 460, 468-69 (2002).

204. *Id.* at 465, 467.

205. *Id.* at 467.

206. *Id.* at 468.

207. *Id.*

208. *Id.* at 469.

209. *Id. But see* Norton et al., *supra* note 26, at 823-24 (describing experiment in which volunteers amplified academic success criterion when Black applicants possessed it, thus favoring Black applicants).

210. Hodson et al., *supra* note 203, at 461.

211. *Id.* at 469.

212. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 9 n.29 (2006). Bagenstos writes, in the context of implicit bias in termination and promotion decisions:

> "Aversive racism" theory posits that individuals who hold egalitarian views feel discomfort around minorities because of the cognitive dissonance between their sincere belief in equality and their unconscious biases. This discomfort, the theory goes, leads people (if unconsciously) to rationalize what are in fact biased decisions as being driven by some neutral motivation.

Id.

manifestation of implicit bias. Biased hiring officials who manipulate hiring criteria to favor white or male (or white and male) candidates may, due to cognitive dissonance, be under the illusion that they are acting fairly. But the studies show that this manipulation is borne of applicants' protected traits, such as their sex or race. Only when these attributes are revealed in these studies do evaluators' biased actions — such as diminishing female applicants' strengths — spring to life. Thus, because of their race or sex, marginalized applicants' chances at landing a job are diminished. Decision-making of this nature is precisely the type of conduct proscribed by Title VII.[213] Accordingly, courts must view inconsistent hiring criteria, and hiring officials who put forth non-discriminatory explanations for these inconsistencies, with closer skepticism.

B. Title VII and Summary Judgment Standards Demand Courts Better Check Inconsistent Hiring Criteria

The social science literature described in the previous Section establishes that shifting hiring criteria is a bellwether of bias that can lead to hiring decisions improperly based on a plaintiff's race and gender. The scope of Title VII should protect against this form of discrimination. In addition, summary judgment standards in Title VII cases allow only narrow grounds for employers to prevail. Taken together, inconsistent hiring criteria should defeat an employer's motion for summary judgment.

Title VII's protections are expansive.[214] Bias that infiltrates a hiring official's decision and segregates applicants into favored and disfavored categories must be prohibited. That implicit bias, rather than conscious bias, may motivate inconsistent hiring criteria should not be construed in such a way as to make it a valid defense to Title VII discrimination claims. Though some courts have been reluctant to penalize employers for unconscious bias,[215] the preferable view is to consider such biased actions, even those taken unconsciously, as proscribed by Title VII.[216]

213. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire . . . 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.").

214. 42 U.S.C. § 2000e-2 (1991). The law forbids employers from limiting, segregating, or classifying their "employees or *applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities* . . . because of such individual's race, color, religion, sex, or national origin." *Id.* (emphasis added).

215. *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1146-52 (1999) (arguing that while "there are no absolute statutory impediments to plaintiffs' recovery for unconscious forms of bias under current law, current doctrine and practice are stacked against recovery in many cases").

216. *See, e.g.*, Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind'*, 44 STAN. L. REV. 1,

Scholars Rebecca Hanner White and Linda Hamilton Krieger have asserted that Title VII and Supreme Court decisions should be read as "rejecting a requirement of conscious intent" in disparate-treatment cases.[217] They added that "*if an employee's race or sex played a role in the employer's decision*, then a disparate treatment claim should exist."[218] As the previous Section established, race and sex motivated biased hiring decisions resulting from inconsistent criteria. Thus, applicants eliminated from job contention based on inconsistent criteria should have a valid Title VII claim.

To judicially terminate a claim with evidence of inconsistent hiring criteria at the summary judgment stage not only insults Title VII but also improperly broadens summary judgment for employers. Courts must reserve the function of drawing inferences from the record to the jury.[219] Inconsistent hiring criteria creates a genuine issue as to whether an employer's proffered reason for rejecting a candidate was non-discriminatory or was instead pretextual, mandating the rejection of summary judgment.

A plaintiff who can show an employer's asserted non-discriminatory reason is "unworthy of credence" such that the said reason was clearly pretext for implicit biases can defeat summary judgment.[220] Plaintiffs show pretext by pointing to the "weaknesses, implausibilities,

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44-45 (1991). Gotanda writes that a view of racism that manifests only in the prejudices of certain individuals ignores institutional or structural racism:

> [T]he [U.S. Supreme] Court often invokes the metaphor of the "equal starting point" when analyzing social problems. This metaphor ignores historical-race and the cumulative disadvantages that are the starting point for so many Black citizens. The metaphor implies that if Blacks are under-represented in a particular employment situation, it must be a result of market forces. Any statistical correlation is either coincidental or beyond the control of the employer, and in any case unrelated to the employer's past practices. In short, color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded—unless it takes the form of individual, intended, and irrational prejudice.

Id. at 45-46. *Cf.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324-25 (1987).

> [T]he existing intent requirement's assignment of individualized fault or responsibility for the existence of racial discrimination distorts our perceptions about the causes of discrimination and leads us to think about racism in a way that advances the disease rather than combatting it. By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended.

Id.

217. Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision-Making*, 61 LA. L. REV. 495, 498-99 (2001).

218. *Id.* (emphasis added).

219. *See* FED. R. CIV. P. 56.

220. Youssef v. Holder, 19 F. Supp. 3d 167, 196 (D.C. Cir. 2014); Caldwell v. KHOU-TV, 850 F.3d 237, 242 (5th Cir. 2017).

inconsistencies, incoherencies, or contradictions" in hirers' proffered explanations for rejecting a candidate.[221] Inconsistent hiring criteria weaken and discredit an employer's proffered reason, especially given social science literature. When inconsistent hiring criteria are present, employer motions for summary judgment must fail.

IV. CONCLUSION

Evidence of inconsistent hiring criteria should be sufficient to defeat summary judgment motions from employers. This conclusion finds support in the broad scope of the text and interpretations of Title VII, in the narrow path to summary judgment for employers, and in the numerous studies describing how shifting criteria can be motivated by bias and diminish marginalized candidates' job prospects. In these complex cases, where even officials responsible for biased decisions may be under an illusion of objectivity, courts should defer to the jury function to weigh evidence and draw inferences.

After seeing their strengths downplayed or overlooked by employers because of race and gender, plaintiffs deserve judicial recognition of the merits of their Title VII claims. Doing so, in the words of Crenshaw, would be a step toward forcing whites, and particularly white men, to confront the myth that merit drives their success.

221. *Youssef*, 19 F. Supp. 3d at 196.