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Erasing Workers' Identities: Comment on Blanck, Hyseni, and Altunkol Wise's National Study of the Legal Profession

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I. INTRODUCTION

"Bring your whole self to work" remains a common mantra of supporters of workplace diversity, equity, and inclusion ("DEI").[1] For example, disability rights advocates have long contended that hiding or downplaying one's disability from one's colleagues at work "create[s] an invisible layer of additional work for the individual" in being accepted at the job and negatively affects productivity.[2] LGBTQ+ rights advocates have raised similar points, noting that hiding or downplaying one's sexual orientation or gender identity from one's colleagues hinders internal advancement of LGBTQ+ workers.[3] As recently as 2019, however, a Deloitte study found that sixty-one percent of workers hid or downplayed one or more of their identities from their colleagues at work.[4]

What incentivizes workers to hide or downplay their identities? In a new study assessing workplace discrimination and bias reported by lawyers with a disability and LGBTQ+ lawyers,[5] Peter Blanck, Fitore Hyseni, and Fatma Altunkol Wise offer an explanation. Specifically, this study classifies lawyers with certain disabilities and LGBTQ+ lawyers as having less obvious identities than lawyers of color and female

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[1]*See, e.g.*, Sumreen Ahmad, *Bring Your Whole Self to Work*, Chief Talent Dev. Officer Mag. (June 15, 2018), https://www.td.org/magazines/ctdo-magazine/bring-your-whole-self-to-work [https://perma.cc/86GH-YZLD].

[2]Nancy Doyle, *Bring Your Whole Self to Work! Hiding Disability at Work Is Damaging to Productivity*, Forbes (Dec. 3, 2019, 12:01 PM), https://www.forbes.com/sites/drnancydoyle/2019/12/03/bring-your-whole-self-to-work-hiding-disability-at-work-is-damaging-to-productivity/.

[3]Barbara Harvey, *The Surprising Reasons Most LGBT+ People Are Not Out at Work*, Accenture: Accenture Res. (July 2, 2020), https://www.accenture.com/us-en/blogs/accenture-research/the-surprising-reasons-most-lgbt-people-are-not-out-at-work [https://perma.cc/D6XJ-XNQZ].

[4]Deloitte, Uncovering Talent: A New Model of Inclusion 3 (2019), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-deloitte-uncovering-talent-a-new-model-of-inclusion.pdf [https://perma.cc/8DVB-VKHS]. The study refers only to "covering," but uses that term to encompass what scholars call both covering and passing. *See infra* note 9 & accompanying text for explanations of these terms.

[5]Peter Blanck, Fitore Hyseni & Fatma Altunkol Wise, *Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 47 Am. J.L. & Med. 9 (2021).

lawyers.[6] In other words, not all impairments are observable, societal limitations resulting from known impairments may not be recognized, and sexual orientations and gender identities may not be apparent; by contrast, race and sex are more likely to be evident. Having classified identities in this way, the study then concludes that "the degree of identity 'visibility,' whether for disability or LGBQ individuals, is associated with … likelihood of stigma and discrimination at the time of disclosure and subsequently."[7] The study then offers empirical evidence of at least one reason why workers hide or downplay their identities at work: to minimize discrimination.[8]

In this Comment, we situate this evidence within employment discrimination scholarship more broadly. We also offer some preliminary thoughts on additional methodologies for future studies addressing workplace discrimination and bias that we believe would further highlight the incentives for workers to hide or downplay their identities, as well as expose some of the more pernicious harms marginalized workers face when their identities are hidden or downplayed.

II. CONTEXT AND LEGAL ANALYSIS

Professor Kenji Yoshino's seminal scholarship addressing erased identities contended that the classical antidiscrimination model incorporated "three assimilationist demands of conversion, passing, and covering."[9] Conversion means changing an identity to match majoritarian norms, passing means hiding an identity entirely, and covering means downplaying a known identity.[10] In the wake of Yoshino's work, scholars explicitly articulated both passing and covering in the workplace as one way workers "hide their true selves in order to avoid discrimination and harm."[11] This point is demonstrated through empirical data in the instant study vis-à-vis lawyers with a disability and LGBTQ+ lawyers.

The study declined, however, to offer respondents the opportunity to disclose whether an identity was known to their colleagues.[12] Incorporating such a variable into this analysis would likely demonstrate that workers who reveal their disability status, sexual orientation, and gender identities suffer more discrimination than workers who do not reveal these identities so as to comport with majoritarian norms. Coupling such an analysis with self-reported quantification of harm—e.g., on a scale of 1-5, rate how much the discrimination harmed you—as opposed to simply qualitatively asking whether the discrimination was overt or subtle, could elucidate how significantly workers are incentivized to pass and cover. Quantifying harm would reveal how much discrimination can worsen when workers with a disability and LGBTQ+ workers bring their whole selves to work. Indeed, the study recognizes that "[s]ubtle forms of discrimination often may be as harmful as, or even more harmful than, overt forms of discrimination."[13] We recommend this line

[6] *Id.* at 23.

[7] There were insufficient responses from transgender lawyers to reach this conclusion vis-à-vis gender identity. *Id.* at 49.

[8] *Id.* at 48.

[9] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 773 (2002) [hereinafter *Covering I*]; *see also* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

[10] *Covering I, supra* note 9, at 772.

[11] Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 225 (2008).

[12] Blanck et al., *supra* note 5, at 22-23.

[13] *Id.* at 17 (citing Lilia M. Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACAD. MGMT. REV. 55, 71 (2008); Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMP. RESPS. & RTS. J. 153 (1990)).

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of inquiry for future studies by Blanck et al., whose work we admire, or other researchers who may wish to follow their lead.

Next, we turn to a legal analysis. Under Title I of the Americans with Disabilities Act of 1990 ("ADA"), an employee can argue that she or he was *intentionally* subjected to an adverse employment action because of her or his disability ("disparate treatment") or that she or he was *unintentionally* subjected to an adverse employment action via a facially neutral employment policy or practice that adversely affected employees with a disability ("disparate impact").[14] Title VII of the Civil Rights Act of 1964 ("Title VII") offers the same dual means of proving discrimination.[15] Both avenues require employees to have suffered an adverse employment action, which is an action that constitutes a change in the terms and conditions of employment:

> Employment antidiscrimination statutes … are not civility codes that subject employers to liability for innocuous differences. Petty slights, the imposition of minor annoyances, and impoliteness are not actionable forms of discrimination under Title VII because the law is not intended to reach every bigoted act or gesture that a worker might encounter in the workplace.[16]

Despite having both avenues available to them, employees almost exclusively target employers with allegations of disparate treatment for a few reasons. Foremost, as one of us has previously argued, courts' "conspicuous refusal to accept group claims on the basis of common, though socially imposed, identities has similarly restricted the efficacy of group-based ADA employment discrimination claims."[17] Put another way, when considering the adverse effects of an employment policy or practice on employees with a disability, courts often consider effects on employees with the same disability as the plaintiff instead of embracing a pandisability theory that considers effects on employees with any disability, all of whom share "commonality of class interest, as both unwillfully receiving and wishing to eradicate a particular form of group-based stigma and subordination."[18] Courts may find similar difficulty aggregating the impact of policies and procedures on all LGBTQ+ employees—i.e., embracing queer theory where all LGBTQ+ employees share a commonality of interest—considering instead only the effects on employees who share the same sexual orientation or gender identity as the plaintiff. As such, we fear that, just as disability-based disparate impact claims have struggled for several decades to gain traction, sexual orientation- and gender identity-based disparate impact claims may face a similar fate now that federal law recognizes the viability of these claims. Moreover, since Justice Scalia's concurrence in *Ricci v. DeStefano* questioned the constitutionality of disparate impact theory on the whole[19]

[14]Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003).

[15]Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (discrimination against homosexual or transgender employees is covered under Title VII); Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (explaining disparate treatment and disparate impact under Title VII).

[16]Anthony Michael Kreis, *Defensive Glass Ceilings*, 88 Geo. Wash. L. Rev. 147, 165–66 (2020) (quotations and citations omitted).

[17]Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 Duke L.J. 861, 878 (2006); *see also* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 Fordham L. Rev. 2313, 2319 (2006).

[18]Stein & Waterstone, *supra* note 17, at 901.

[19]*See DeStefano*, 557 U.S. at 594 (Scalia, J., concurring).

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and the majority opinion in *Wal-Mart Stores, Inc. v. Dukes* undermined its vitality,[20] scholars have grown weary of disparate impact theory generally.[21]

The Blanck et al. study provides valuable evidence of disparate treatment that will be of great value to social scientists seeking to understand the causes and consequences of workplace discrimination; DEI professionals seeking support for their efforts; lawyers, both current and would-be, seeking information on what to expect in their careers; and legal employers seeking to make their workplaces more diverse, equitable, and inclusive. That being said, many of the subtle experiences of discrimination reported by respondents, though deserving of attention and redress, would likely fail to state a claim under employment discrimination law due to the "petty slights" doctrine.[22] To that end, the study can also be a proxy, imperfect for all the reasons it acknowledges,[23] but probative nonetheless, for discerning viable legal claims involving overt discrimination.

The study declines to offer, however, an explicit window into employment policies or practices that cause disparate impact against lawyers with a disability and LGBTQ+ lawyers.[24] Future studies should afford respondents the opportunity to expose these policies or practices by potentially even listing examples. Here are a few:

- Policies or practices that expect office "face time" or that require employees to work a significant number of hours to secure a bonus—i.e., not offering bonuses to part-time lawyers who work beyond their scheduled hours—may disparately impact lawyers with certain disabilities.
- Parental leave policies and disability plans that exclude leave for non-legal guardians or provide more generous leaves only for birth parents may disparately impact LGBTQ+ lawyers who may have adopted a new child, may not be the child's legal guardian, or may not have given birth to the child.
- Soliciting employees' sex as male or female for the purposes of employee benefits may disparately impact non-binary employees who cannot accurately identify their sex and potentially may be denied employee benefits.
- Designating bathrooms to be used by employees according to the sex they were assigned at birth, mandating single-stall bathroom use for transgender employees, or adopting medical plans that reject medically necessary care for transgender employees based on transphobic presumptions—for example, denying

[20] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011).

[21] *E.g.*, Ann C. McGinley, Ricci v. Destefano*: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 Nev. L.J. 626, 629 (2012); Natalie Bucciarelli Pedersen, *The Hazards of* Dukes*: The Substantive Consequences of a Procedural Decision*, 44 U. Tol. L. Rev. 123, 132–34 (2012); Charles A. Sullivan, Ricci v. Destefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 Nw. U. L. Rev. 411, 415 (2010); Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 Lewis & Clark L. Rev. 409, 450 (2012).

[22] U.S. Equal Emp't Opportunity Comm'n, *Policy Guidance on Current Issues of Sexual Harassment*, EEOC Notice No. 915-050 (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [https://perma.cc/ZY5H-AGYC] ("Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive.") (quoting Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984)); *see also* Stein & Waterstone, *supra* note 17, at 910-21. For example, consider the exclusionary nature of a training video without closed captioning for a lawyer with hearing loss or colleagues asking a lesbian lawyer wearing a wedding ring what her husband does for work.

[23] Blanck et al., *supra* note 5, at 54.

[24] *See id.*

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gynecological care for a transman—may disparately impact transgender employees.

Studies asking employers to self-report such policies and practices already exist; for example, the American Association of People with Disabilities and Disability:IN's Disability Equality Index[25] and the Human Rights Campaign Foundation's Corporate Equality Index.[26] Asking employees to report such policies and practices in a future study would be useful as well. Not only would doing so shine a welcome light on the prevalence of discriminatory employment policies and practices for social scientists, DEI professionals, lawyers, and lawyers' employers, but such empirical evidence could actually lay the predicate for disparate impact lawsuits. Indeed, the Supreme Court confirmed that statistics can demonstrate a prima facie case of disparate impact, but only if they come from the relevant labor market.[27] Accordingly, lawyers seeking to challenge employment policies and practices that adversely affect them based on their disability status, sexual orientation, or gender identity could benefit from studies providing hard-and-fast data about the widespread discriminatory effects of such policies and practices.

III. CONCLUSION

This study provides timely insights into why employees erase their identities at work, either by passing or covering. When identities are erased, employees may be minimizing their risk of suffering overt discrimination, but employers likely are worse for it. We surmise that employers denied the life experiences of knowingly working with passing and covering employees with a disability and LGBTQ+ employees may lack the understanding necessary to avoid policies and practices that disparately impact such employees in the first place. After all, who better to know about the adverse effects of a bonus policy requiring two thousand billable hours per year but the associate with a psychosocial disability that precludes her from working full-time and achieving the bonus? Who better to expose the adverse effect of a paid parental leave policy for birth mothers than a gay partner who adopts a baby? Who better to eliminate the disparate impact caused by a medical plan confining coverage for prostate cancer treatments to male employees than a transwoman in-house counsel denied coverage to treat her prostate cancer?

In sum, we welcome this study as a useful spotlight on the discrimination and bias that lawyers from marginalized communities suffer at work. We hope future studies build on it and expose some of the systemic discrimination that too often undergirds lawyers' workplaces in the hopes of eradicating it and welcoming lawyers to bring their whole selves to work.

[25]Am. Assoc. of People with Disabilities (AAPD) & Disability:IN, Disability Equality Index (2020), https://disabilityin-bulk.s3.amazonaws.com/2020/2020+DEI+Report.pdf [https://perma.cc/R22Z-ANSD].

[26]Human Rights Campaign Found., Corporate Equality Index (2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/CEI-2020.pdf?mtime=20200713132437&focal=none [https://perma.cc/X4LH-D54F].

[27]Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650–55 (1989).

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